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

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

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

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FROM THE EDITOR

"Things gained through unjust fraud are never secure."
–Sophocles, Ancient Greek philosopher and playwright

We can all serve as a check on fraud, and the False Claims Act incentivizes all of us to combat fraud schemes that steal our tax dollars. Since the 1986 amendments to this law strengthened whistleblower incentives and protections, the law has been remarkably successful, bringing over $30 billion to the federal fisc. This number doesn't include an additional $10 billion in recoveries from associated state and criminal actions.

Whistleblowers have been critical to that success, as nearly 80% of all False Claims Act cases are initiated by whistleblowers. The significance of whistleblower contributions becomes more and more apparent each day, as evidenced by the recent, high-profile False Claims Act prosecutions of companies such as Bank of America and CitiMortgage for mortgage fraud, and GlaxoSmithKline and Abbott Laboratories for pharmaceuticals fraud—all cases initiated by whistleblowers.

The FCA model has been replicated at the state level, as more than half of the states have enacted false claims act laws to protect their tax dollars from fraud. The IRS, SEC, and CFTC have followed suit, creating programs that reward whistleblowers who expose tax fraud and fraud on our securities and commodities markets. And now the Department of Justice Office of Inspector General has announced the creation of a new Whistleblower Ombudsman position. Among other duties, the ombudsman will educate DOJ employees about the importance of whistleblowers and their protections from retaliation, and will monitor whistleblower complaints and investigations. DOJ's Whistleblower Ombudsman will act as a liaison to other federal agencies with whistleblower responsibilities, as well as to nongovernmental whistleblower organizations. DOJ's wealth of experience working with FCA whistleblowers should inform the development of this new ombudsman position, and I applaud DOJ for this step in recognizing the significant oversight role of whistleblowers.

Enjoy the July 2012 "Year in Review" issue!

All the best,
Cleveland Lawrence III

Recent False Claims Act & *Qui Tam* Decisions

JULY 1, 2011–JUNE 30, 2012

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

U.S. ex rel. Tessitore v. Infomedics, Inc., 2012 WL 826889 (D. Mass. Mar. 12, 2012)

A relator brought a *qui tam* action against the pharmaceutical marketing company she had formerly worked for (Infomedics), as well as a consumer healthcare company and its subsidiary (collectively, GSK) alleging violations of the FCA and the Anti-Kickback Statute (AKS). The relator alleged that GSK knowingly caused healthcare providers to submit false claims to the government and paid illegal kickbacks to physicians who participated in its "Initiative for Social Anxiety Assessment and Care Program" (ISAAC)—a program that was purportedly a study into social phobias, but, the relator alleged, was actually a marketing mechanism to encourage physicians, through monetary incentives, to prescribe one of GSK's drugs. GSK hired Infomedics to administer the ISAAC program and to serve as its intermediary with consumers. The relator alleged that GSK used continuing education classes it hosted, as well as other means, to promote its drug and to recruit physicians to use GSK-devised diagnostic tools to screen their patients. The relator claimed that the physicians were instructed to refer any positively-screened patients to an ISAAC survey, in exchange for compensation for each patient who completed the survey. The relator alleged that those physicians then prescribed the defendant's drug to their patients and subsequently submitted claims to the federal government healthcare programs seeking reimbursements, while failing to disclose the fact that the claims were based on improper kickbacks. In addition, the relator alleged that after GSK's drug received FDA approval, GSK created television and print ads touting the drug for off-label uses and hired Infomedics to host "800" telephone numbers for consumers to call to get more information about the drug. Infomedics allegedly created mailing lists of those who called the 800 numbers and sent out brochures and drug inserts to those individuals. However, according to the relator, GSK and Infomedics failed to comply with the industry practice of providing consumers with an alternate phone number for consumers to report adverse experiences associated with using GSK's drug. The relator had been employed as a supervisor of the defendants' call center, and she alleged that over 7% of the calls made to the call center were to report adverse experiences with the drug but that Infomedics never informed GSK of those calls and the nature of those calls was never reported to the FDA.

The defendants moved separately to dismiss the relator's claims, arguing that the relator failed to plead the fraud scheme with particularity, that she failed to state a claim under the False Claims Act, and that her *qui tam* complaint was barred by the FCA's first-to-file and public disclosure provisions.

Holding: The U.S. District Court for the District of Massachusetts granted the defendants' motions, holding that the relator failed to plead the fraud with particularity.

Pleading Fraud with Particularity

The court began by examining whether or not the relator's allegations of illegal kickbacks to physicians—and false claims submitted to the federal government as a result—were pled with particularity. The court found that the relator offered no factual support for her allegation that the defendants caused physicians to submit false claims to the federal government, even if her allegations of illegal kickbacks were true. The court noted that the relator failed to plead: (1) the identity of any physician who was alleged to have participated in the ISAAC program or who was improperly induced to prescribe GSK's drug; (2) the identity of any patient who completed the defendants' telephone survey or who was prescribed GSK's drug as a result of doing so; (3) any pharmacy or hospital that filled an improperly-induced prescription for GSK's drug; or (4) the date, location, content, or amount of any false claim submitted to any federal government healthcare program. Consequently, the court held that the relator failed to plead with particularity that the defendants provided illegal kickbacks and caused false claims to be submitted to the government.

The court then examined the relator's allegation that the defendants concealed reports of adverse experiences from the FDA. The relator had alleged the defendants were required by the FDA to investigate and report any adverse events associated with their drugs and to periodically submit new information that could affect the FDA's previous conclusions about the safety of the drugs, but failed to do so. She further argued that certifying compliance with the requirement to report adverse events was a mandatory condition precedent to obtaining FDA approval, and claimed that if GSK had informed the FDA that it did not intend to report adverse events, then the FDA would have never approved its applications for drug approval. As a result, the relator argued, GSK's alleged fraud in its drug applications caused all subsequent claims to the federal government for reimbursements related to that drug to be false. The court, though, held that the relator's theory of FCA liability lacked the requisite particularity, as the relator failed to plead the dates of any of GSK's drug applications to the FDA, failed to identify any individual who made the alleged false statements to the FDA or who were involved in the concealment scheme, and failed to provide sufficient information regarding internal GSK procedures on FDA submissions or the content of any such submissions to the FDA. Accordingly, the court held that the relator's complaint was devoid of allegations sufficient to establish that GSK knowingly made or caused false statements to the federal government. Alternatively, the relator argued that if GSK had timely reported to the FDA the instances of consumers experiencing adverse events, then the FDA would have ordered GSK to issue warnings that would have resulted in fewer drug sales and fewer claims to the federal government for reimbursement for GSK's drug. The court, however, held that this alternative argument also failed, since it was based on a presumption, without any factual support, that physicians would have prescribed GSK's drug less often. Accordingly, the court held that the relator neither connected the defendant's alleged concealment scheme to any false reimbursement claim, nor did she show that the defendants intended to defraud the government. Therefore, the court granted the defendants motions to dismiss the concealment allegations for failure to plead with particularity.

The relator's *qui tam* complaint was dismissed with prejudice to the relator, but without prejudice to the government.

U.S. ex rel. McDonough v. Symphony Diagnostic Servs., Inc., 2012 WL 628515 (S.D. Ohio. Feb. 27, 2012)

A relator brought a *qui tam* action on behalf of the U.S. government and seven U.S. states alleging that his former employer—a mobile diagnostic services provider—and its various affiliated centers knowingly submitted false claims to Medicare and Medicaid in which they falsely certified their compliance with a Corporate Integrity Agreement (CIA) and with the Stark Law and the Anti-Kickback Statute (AKS). Specifically, the relator alleged that the defendants engaged in an illegal kickback scheme by offering substantial discounts to skilled nursing home facilities (SNFs) that used the defendants' Medicaid-covered x-ray services, in exchange for patient referrals for which the defendants could bill public insurance programs directly—a practice called "swapping agreements." None of the government entities intervened in the relator's suit. The relator, who was an expert on mobile x-ray services and who had been employed as an assistant to one of the defendants' executives, also alleged retaliatory discharge. With respect to the retaliation claim, the relator alleged that he alerted the defendants' CEO and other executives of the kickback scheme, and that they admitted that the fraud was occurring but took no actions to stop it. He claimed that he was instructed not to take any action to stop the fraud either, and that he was eventually terminated from his job in retaliation for confronting the defendants. The defendants moved to dismiss the relator's claims for failure to state a claim and for failure to plead fraud with particularity.

Holding: The U.S. District Court for the Southern District of Ohio granted the defendants' motion in part; the relator's retaliation claim was dismissed but his fraud claim was not.

Failure to State a Claim

The court began by examining the sufficiency of the relator's fraud claim. The defendant argued that the relator failed to state a claim under the False Claims Act because his allegations could not prove the alleged AKS and Stark Law violations upon which his FCA claims were based. Specifically, the defendants argued that the relator failed to allege a fair market value for the x-ray services or the amount actually charged by the defendants and thus, could not allege any remuneration. The court, though, determined that the relator had pled sufficient facts to state a claim, as his complaint included allegations regarding the below-market rates the defendants charged to nursing homes involved in the alleged scheme—or alleged that the defendants did not bill for the services at all. The court held that such indirect remuneration schemes might violate the AKS and accordingly denied the defendants' motion to dismiss the fraud claims for failure to state a claim.

Failure to Plead Fraud with Particularity

The court then considered the defendants' argument that the relator failed to identify any specific fraudulent claims submitted to the government and therefore, failed to plead the alleged fraud scheme with particularity. The court rejected that argument, finding that the relator's allegations were drawn from his personal experiences and collectively supported a strong inference that the defendants submitted fraudulent claims. The court found that the relator provided specific examples of the SNFs involved, the nature of the alleged referral scheme, the degree of the alleged discounts provided, and the range of years of the alleged fraud. Moreover, the court found that the relator named multiple officers, including the defendants' CEO, who were allegedly involved in the scheme. Accordingly, the court held that the relator successfully pleaded the alleged fraud scheme with particularity. The defendants' motion to dismiss for failure to satisfy Rule 9(b) was denied.

Retaliation

Finally, the court analyzed the relator's retaliation claim, in which the relator alleged that the defendants terminated him because of actions he took in furtherance of his *qui tam* action. The defendants argued that the relator failed to put them on notice that he was pursuing an FCA claim and thus, they were unaware of any protected activity he might have been engaged in. The court agreed, stating that while the relator insisted that the defendants change their practices, he never put them on notice that he was contemplating a *qui tam* action. Consequently, the retaliation claim was dismissed.

U.S. ex rel. Mastej v. Health Mgmt. Assocs., Inc., 2012 WL 523623 (M.D. Fla. Feb. 16, 2012)

A relator brought a *qui tam* action against his former employer—a hospital—and the hospital's subsidiary, alleging that the defendants violated the False Claims Act by submitting claims based on violations of the Stark Act and the Anti-Kickback Statute (AKS). The relator alleged the defendants' FCA violations occurred during three schemes that occurred both during and after his employment. Specifically, he alleged that the defendants paid surgeons for patient referrals, gave improper remunerations to physicians, and contracted with a urology group to recruit only their physicians. The relator further alleged that the defendants false-

ly certified their compliance with Medicare guidelines. The defendants moved to dismiss the relator's complaint for failure to plead the alleged fraud with particularity. The government declined to intervene but filed a statement of interest.

Holding: The U.S. District Court for the Middle District of Florida granted the defendants' motion to dismiss, but also granted the relator leave to amend his complaint.

Pleading Fraud with Particularity

First, the court analyzed the relator's allegation that the defendants presented false claims to the government. The court found that the relator failed to identify a single claim for reimbursement based on patients referred, failed to identify any doctors who allegedly received illegal remunerations from the defendants, and failed to provide the names of any urologists who were allegedly illegally hired by the defendants. Further, the court found that the relator summarily concluded that the three fraud schemes he alleged actually led to the submission of any fraudulent claims. As a result, the court determined that the relator failed to plead his claims regarding the defendants' alleged presentment of false claims with particularity. The relator argued that his complaint satisfied Rule 9(b)'s pleading requirements because it included "indicia of reliability," based on his own specialized and personal experience, which indicated that the defendants presented false claims to the government. The court disagreed, and concluded that the relator did not plead any facts indicating any specific knowledge that false claims were submitted. Therefore, the court held the relator failed to satisfy Rule 9(b)'s particularity requirements and those claims were dismissed.

Next, the court analyzed the relator's claim that the defendants used false statements claims in support of their claims. The court determined that the relator failed to demonstrate that the defendants acted with the purpose of getting a false claim paid and held the relator only made conclusory allegations regarding this claim, without any factual support. Further, the court found that the relator did not provide the dates, amounts, or any other identifying details for any alleged payments based on these claims and that his complaint lacked indicia of reliability because the relator was not employed by the defendants when these claims for reimbursements were allegedly received by the government. Therefore, the court dismissed these claims as well.

Third, the court analyzed the relator's allegations that the defendants violated the FCA's "reverse false claims" provision. Again, the court found that the relator provided no specific allegations, and instead only plead conclusory claims. Specifically, the court found that the relator failed to allege any obligations the defendants owed to the government or any other information that would put the defendants on notice to the substance of his claims. Therefore, the court dismissed the reverse false claims allegations.

Finally, the court analyzed the relator's conspiracy claims and found that the relator's bare legal conclusions of conspiracy were wholly unsupported by specific factual allegations of any agreement or overt act in furtherance of a conspiracy. More specifically, the court found that the relator failed to identify any patients, claims, or physicians involved in the alleged conspiracy. Consequently, the court dismissed the relator's conspiracy claim.

The court dismissed the relator's claims without prejudice and gave the relator 21 days to file an amended complaint.

U.S. ex rel. Jamison v. McKesson Corp., 2012 WL 487998 (N.D. Miss. Feb. 14, 2012)

A relator brought a *qui tam* action against a nursing home chain (Beverly) and various medical supply and billing companies, alleging that the defendants engaged in a fraud scheme in which they provided various kickbacks to each other. The relator alleged that Beverly created a subsidiary, CSMS, to supply enteral nutrition, urological, and ostomy products. CSMS was also named as a defendant in the relator's suit. The relator alleged that CSMS received its own Medicare DME (durable medical equipment) supplier number, which enabled it to bill Medicare and receive reimbursements. Further, the relator alleged that when CSMS applied for its own Medicare DME number, it was required to certify that Medicare reimbursements were conditioned on its compliance with various laws and regulations, including the federal anti-kickback statute (AKS) and the Stark law. The relator alleged that CSMS and Beverly met with DME contract billing companies—also named as defendants—to discuss possible contracts. The relator alleged that defendant McKesson met with Beverly and CSMS to discuss billing services with its company, defendant MediNet, as well as its medical supply entity, MMS—a non-defendant. The relator alleged that Beverly and McKesson reached an agreement in which Beverly agreed that CSMS would use MediNet's contract billing services. The two companies also agreed that McKesson would reduce the price for its contract billing services if CSMS also agreed to use MMS to supply its general medical equipment. The relator alleged this agreement violated the AKS. The government intervened in the relator's suit, alleging that Beverly "dangled" the prospect of McKesson obtaining its DME supply business in order to induce MediNet to provide it with the lowest possible fees—even below fair market value—and also forced MediNet to reduce its prices on the billing contract. The defendants moved for summary judgment.

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

False Certifications of Compliance with the AKS

The court began by considering the plaintiffs' assertion that the defendants—by engaging in a kickbacks scheme—caused false healthcare claims to be submitted to the government. Beverly and CSMS argued that they did not violate the AKS and Stark

Law because there was no remuneration, as MediNet's participated in a competitive bidding process and that its bid was in line with fair market value. The government countered that MediNet's bid was below fair market value because, at best, MediNet broke even on the contract in an effort to fill the Beverly-affiliated string of nursing facilities' medical supply needs. The government noted that the company that had performed CSMS's billing services had been charging CSMS three times more than MediNet did. The court held that the government and Beverly/CSMS presented genuine issues of material fact regarding whether or not there was any illegal remuneration under the contract. Similarly, the court held that material issues of disputed fact existed regarding the knowledge and materiality elements of the defendants' FCA liability. As a result of these findings, the court held that a trial was necessary to determine whether Beverly/CSMS violated the AKS and presented false claims. The court rejected the defendants' argument that even if MediNet's prices were below fair market value, they were protected by an AKS' safe harbor provision. Instead, the court found that the safe harbor provision did not apply, since neither Beverly/CSMS no MediNet had a duty to disclose or report any discounts provided by MediNet—a prerequisite for the safe harbor provision. The court also rejected the defendants' argument that the government was barred by *res judicata* because CSMS's compliance with "Supplier Standards" had already been established in prior adjudications before the National Supplier Clearinghouse, in which the government's allegations of false claims based on violations of the supplier standards were dismissed because the claims were submitted in good faith. Instead, the court found that these prior adjudications were not "rendered by a court of competent jurisdiction," did not constitute a "final judgment on the merits," did not include any "findings of fact" regarding the AKS, and did not involve MediNet or McKesson. The court denied Beverly/CSMS's motion for summary judgment.

Piercing the Corporate Veil

Next, the court considered McKesson's argument that it was entitled to summary judgment because it was not a party to any of the transactions, was not a Medicare provider or supplier, did not submit any claims to Medicare, and did not directly own any MediNet shares. The government, though, argued that McKesson executives had knowledge of, provided input into, and approved MediNet's strategy for securing Beverly's business. Moreover, the government contended that Beverly and CSMS knew that they were dealing with McKesson and did not differentiate between McKesson, MediNet and MMS. The court decided not to pierce the corporate veil, as it found that there was a genuine issue of material fact as to the level of control and input McKesson had with respect to MediNet's contract with CSMS. Thus, the court denied McKesson's summary judgment motion.

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

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

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

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

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

The court began by analyzing SPI's motion to dismiss the relators' claims alleging that SPI caused physicians to present false claims to the government. The court began its analysis by considering SPI's argument that the relators' off-label promotion claims were not pled with particularity, as required by Federal Rule of Civil Procedure 9(b), and for failure to state a claim, pursuant to Rule 12(b)(6). SPI argued that the relators' off-label promotion claims did not identify any instance in which a physician wrote a prescription for a patient in a federal healthcare program as a result of an alleged off-label promotion scheme *and* in which a pharmacy submitted a claim to the government for any such off-label prescription. The relators countered that their complaint—which alleged a nationwide off-label promotion scheme involving multiple drugs—provided reliable indicia that false claims were submitted to the government healthcare programs. They asserted that they were not required to plead the who, what, when, where, how of those false claims, and that by pleading the who, what, when, where, how of the alleged scheme, their complaint satisfied Rule 9(b)'s pleading standard.

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

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

The court then analyzed the relators' allegation that SPI encouraged doctors to improperly use certain Medicare/Medicaid codes "for the sole purposes of evading formulary controls and sometimes concealing actual uses in order to obtain reimbursement for [the three drugs at issue]." In essence, the relators asserted that the codes use did not truly represent the patient's diagnoses, so as to conceal the off-label uses of the drugs at issue and ensure that the physicians' allegedly false Medicare/Medicaid claims for prescriptions would be approved by the government for reimbursement. While the court noted that the relators provided examples of physicians using the allegedly improper codes when writing prescriptions for Medicare/Medicaid patients, it observed that the relators failed to indicate why the codes used did not match the patients' respective diagnoses, which is the only way the relators' could establish that claims containing those codes were false. **Consequently, the court granted SPI's motion to dismiss the federal FCA claims relating to code manipulation, for failure to plead the alleged fraud with particularity.**

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

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

Failure to Plead Fraud with Particularity—Conspiracy

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

Failure to State a Claim—Making False Records/Statements

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

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

The court then examined the relators' off-label promotion claims, which SPI contended failed to satisfy the FCA's falsity and materiality elements. SPI contended that the relators' allegation that claims for off-label uses were not reimbursable under any circumstances was erroneous and conclusory, and that the government's decision regarding payment of such claims was not conditioned on whether or not the drugs were prescribed for off-label uses, but rather on whether or not the drugs were used for medically accepted uses; SPI argued that most off-label uses are medically accepted. The court found some support for SPI's position under federal law, and decided to separately evaluate the relators' claims regarding each of the drugs at issue.

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

Failure to State a Claim—Conspiracy

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

Retaliation

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

State FCA Claims

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

Next, the court considered SPI's motion to dismiss the relators' request to receive a percentage of any damages from the "common fund" shared by states that do not allow relators to sue on their behalf. The relators argued that, should their case succeed, states without *qui tam* provisions will receive a windfall due to the relators' efforts. The parties agreed that this request was not a "claim." The court stated that it was not inclined to dismiss the relators' request, but noted that "it appears at this point that Relators will not be entitled to common fund relief from the non-*qui tam* states, as these states are not parties to this litigation," and presumably, the court believed that it might not have subject matter jurisdiction over claims purportedly brought on behalf of those states.

Leave to Amend Complaint

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

Alter Ego Liability

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

As an initial matter, the court held that any of the relators' claims that were dismissed with respect to SPI would also be dismissed with regard to SAI and SNA. The court then held that since the relators pled a nationwide fraudulent scheme rather than specific individualized fraudulent statements, they were not required to link each corporate entity to each individual aspect of the alleged fraud scheme, and could properly plead the "who" element of the fraud scheme by plausibly alleging an alter ego relationship. The court determined that the relators did not link SAI and SNA to the fraud scheme, as their allegations regarding the specific involvement of the individual corporate defendants were scarce. The court also held that the relators failed to establish an alter ego relationship between SPI and SNA, since they failed to show that SNA totally dominated and controlled SPI, but instead merely established that the two companies were siblings. The court, though, found that the relators did plausibly allege that SPI was SAI's alter ego, as they alleged that SPI had been a wholly-owned subsidiary of SAI, that SAI's CEO and Finance Vice President served on SPI's board, that SAI provided insurance coverage to and was in charge of savings and pension plans for SPI employees, and that SAI set various policies for SPI's employees. As a result of these findings, the court dismissed the relators' claims against SNA, but refused to dismiss the claims against SAI. In a separate ruling, the court dismissed all state FCA claims against both SNA and SAI, holding that Georgia law applied to the state law claims, since SPI was a Georgia corporation, and since Georgia law requires insolvency as a prerequisite for corporate veil piercing, and there were no allegations that the defendants were insolvent.

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

See *U.S. ex rel. Banignan v. Organon USA Inc.*, 2012 WL 1997874 (D. Mass. June 1, 2012), at page 43.

See *U.S. ex rel. Nunnally v. West Calcasieu Cameron Hosp.*, 2012 WL 1866586 (W.D. La. May 21, 2012), at page 157.

See *U.S. ex rel. Bartz v. Ortho-McNeil Pharm., Inc.,* 2012 WL 695886 (D. Mass. Mar. 2, 2012), at page 58.

See *U.S. ex rel. Wilkins v. United Health Group, Inc.*, 2011 WL 6719139 (D.N.J. Dec. 20, 2011), at page 171.

B. What Constitutes a False Claim

U.S. v. DRC, Inc., 2012 WL 1379833 (D.D.C. Apr. 21, 2012)

The government brought an action under the False Claims Act, alleging that a construction company submitted false pre-qualification documents and false invoices under a contract financed by the United States Agency for International Development (USAID) to provide relief assistance in Honduras. Specifically, the government alleged that USAID collaborated with the Honduran Social Investment Fund (FHIS) to reconstruct water, sewer, and sanitation infrastructure in the wake of a hurricane, that the government contracted with the defendant to construct part of the project, and that the defendant subcontracted the work in violation of the terms of its contract with Honduras. The government argued that the defendant's invoices were false, since those invoices impliedly certified that the defendant had complied with its contractual obligations, when it had not. The defendant moved for partial summary judgment, arguing that its invoices were not false because the underlying contract permitted subcontracting and the invoices did not impliedly certify that any unapproved subcontracting had taken place. The defendants also argued that they lacked the requisite scienter to violate the FCA and that the government did not suffer actual damages as a result of the defendant's use of subcontractors.

Holding: The U.S. District Court for the District of Columbia granted the defendant's motion in part. The court held that the government failed to show that the defendant possessed the scienter required to give rise to FCA liability for claims for payment submitted between April 2001 and October 2001; the court otherwise denied the defendant's motion.

What Constitutes a False Claim

The court began by examining whether or not the defendant actually presented false claims. The defendant argued that the government could not allege FCA violations because it was not a party to the contract between the defendant and FHIS. The court, though, found that the defendant failed to cite any authority for the proposition that liability under the FCA is dependent on the existence of a contract between the claimant and the government. The court held that the only requirement for an FCA claim is that the defendant presented a false claim for payment. The court found that USAID disbursed funds directly to the defendant after receiving invoices that included certifications from both the defendant and FHIS. Therefore, the court held that the financing arrangement satisfied the requirement that the defendant submitted claims for payment to the government.

The court then examined whether or not the defendant's claims were false. The government argued that the claims were false because they included an implied false certification of the defendant's compliance with its contractual obligations not to use subcontractors. The court noted that the defendant did not dispute that it subcontracted work on the project without first obtaining written approval from USAID and determined that the defendant's claims would be considered false if the government could show that the contract required the defendant to first secure USAID's approval for subcontracting and if the government could show that the defendant knowingly withheld information of its non-compliance while submitting claims for payment. The defendant argued that, under the contract, it had unconditional authorization to subcontract work to local subcontractors because the mandatory clauses provided that, under a fixed-price construction contract, the prime contractor could procure locally produced goods and services under subcontracts. However, the court noted that the defendant took this position despite the fact that the contract also made clear that the defendant could not subcontract with third parties without obtaining a written consent of FHIS and USAID. The defendant argued that the mandatory clauses' general rule controlled, but the court concluded that the contract was not ambiguous in requiring the defendant to obtain permission before using subcontractors. Therefore, the court held that the contract did not give the defendant unconditional authority to subcontract, but required prior approval. The court held that the defendant's claims were false.

Finally, the court examined whether the defendant knew that those claims were false and whether those claims were material to the government's payment decisions. With respect to the knowledge issue, the government argued that the defendant understood that USAID's approval was important, as evidenced by the defendant's conduct during the pre-qualification stage of the contract, during which the defendant's executive vice president signed numerous documents representing that the defendant did not intend to subcontract. The defendant countered that it was forced to abandon its plans not to subcontract, once FHIS required work to begin within weeks of the execution of the contract. The court concluded that there was evidence showing that the defendant was forthcoming with its subcontracting plans, but there was also evidence demonstrating that the contract required prior written consent of both FHIS and USAID for any subcontracting. Consequently, the court held that, in general, the evidence presented was sufficient to raise a triable question of fact regarding whether the defendant knew that its claims were false. The court, though, found that during one period—from April 2001 to October 2001—a triable issue did not exist. The court found that in April 2001, a USAID officer told the defendant that it would not be required to seek prior approval from USAID for subcontracting. The court noted that the government did not dispute this fact. But the court found that after October 2001, the defendant was notified that prior USAID approval would be necessary for future subcontracting.

With respect to the materiality question, the court found that the defendant's invoices could be considered false under an implied false certification theory only if the defendant falsely certified compliance with a contractual term that was material to payment. The court determined that USAID's pre-approval of subcontractors could not be considered material *per se*, as no contractual provision expressly linked such pre-approval to the defendant's eligibility for payment. Further, the court found that the contract provided for five situations in which payment could be withheld, but the defendant's failure to obtain prior approval for subcontracting was not included among those situations. The court observed that the government needed to provide evidence that USAID, rather than FHIS, considered the defendant's securing of USAID approval important, that the defendant knew that it had violated the pre-approval requirement, and that the requirement was material to payment. The court held that there were triable issues regarding these facts.

Accordingly, the court granted the defendant's motion for summary judgment for the period between April 2001 and October 2001, but denied it in all other respects.

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

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

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

What Constitutes a False Claim?

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

The court then turned to the leases that the relators argued were invalidated by the defendant's alleged violation of surface drilling operations. The relators argued that the defendant violated an agreement not to conduct surface operations, which amounted to a trespass that invalidated the defendant's mineral rights. Since, according to the relators, the defendant's purported mineral rights were invalid, the defendant's claims to the government for royalty payments were false. The appellate court again disagreed with the relators, relying on a provision within the lease agreements that stated that no material breach of obligations would amount to a forfeiture or termination of the defendant's rights under the agreement. Thus, the court held that even if the defendant's actions technically constituted a trespass, those actions did not affect the defendant's mineral rights, and consequently, the defendant's claims to the government based on those mineral rights were not false.

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

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

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

The government brought an action under the False Claims Act against two individuals (Mays and Chisholm), alleging that the defendants invoiced and accepted federal grant payments for services not actually rendered in a town camera surveillance system installation. The government alleged Chisholm—the chief of the town's fire department—prepared a detailed grant application to the state, requesting funding for the purchase and installation of a camera surveillance system. The government asserted that Chisolm's grant application included a budgetary cost description that equaled the maximum possible grant amount, but did not

include any budgeted costs for labor, as the application stated that town residents would donate the labor required to install the cameras. The state approved Chisolm's grant application, which was funded by the federal government. The government further alleged that Chisholm submitted two invoices for reimbursement under the grant—one for equipment and one for labor, which was purportedly performed by Mays. The government alleged that the invoice for the labor was false, since Mays did not install the cameras. Furthermore, the government alleged that the town's actual expenses were less than the amount of the grant and that Chisholm attempted to ensure that the town would receive all of the remaining grant money for which it was eligible by submitting false invoices. The defendants moved for summary judgment, arguing that the government did not present any evidence that they knowingly committed fraud—they argued that Mays did begin installing the cameras and that he would also provide training, maintenance, and repair of the system as needed, until the grant funds were exhausted. The government countered that, by submitting the invoices, the defendants falsely affirmed that Mays had completed the work detailed on each invoice, since the invoices said nothing about future work to be performed. The U.S. District Court for the District of Maine determined that a genuine issue of material fact existed as to whether the defendants' conduct constituted fraud. As a result, the court denied the defendants' summary judgment motion.

U.S. ex rel. Rigsby v. State Farm Fire and Cas. Co., 2011 WL 4590761 (S.D. Miss. Sept. 30, 2011)

Two relators brought a *qui tam* action against several insurance and engineering companies, alleging that the defendants violated the False Claims Act and defrauded the National Flood Insurance Program (NFIP) after Hurricane Katrina by conspiring to illegally shift the insurance companies' responsibility to pay insurance claims for wind damage to the government, by mis-classifying wind damage as storm surge damage. As a result, the relator alleged, the defendants caused false claims to be presented to the NFIP. The United States declined to intervene in the relators' case. Eventually, the relators dismissed their claims against all but two of the defendants: insurer State Farm and engineering company Haag. Those two defendants moved for summary judgment, arguing that the relators failed to show that the flood claims at issue were actually false or that the defendants knew that they were false. Further, the defendants argued that the relators' reverse false claim allegation failed because that theory conflicted with the relator's other theory of liability—in essence, the defendants argued that their NFIP claims could not be both false claims and reverse false claims. The U.S. District Court for the Southern District of Mississippi granted the defendants' motion in part, dismissing the reverse false claim allegations, while allowing the relators to maintain their other FCA claims.

Direct FCA Claims

The relators' direct FCA claims alleged that, following the hurricane, State Farm paid one family—the McIntosh family—the full amount of their flood insurance policy ($250,000) and then sought reimbursement from the federal government under the NFIP. The relators contended that State Farm's claim to the NFIP was false, because the actual flood damage sustained by the McIntosh family was only about $130,000—far less than the $250,000 the family received. The defendants argued the relators failed to adequately support their overpayment allegation. They asserted that, since the McIntosh family's home had already been repaired, the relators' insurance claims adjustment and repair cost expert's report, which estimated the family's property damage at no more than $130,000 was irrelevant. The court, though, held the relators submitted sufficient evidence to create a genuine question of material fact regarding this issue and accordingly, denied the defendants' request for summary judgment on the basis that State Farm's claim was not actually false.

Next, the court considered the defendants argument that the relators failed to show that they acted with the requisite scienter to submit false claims. The defendants argued that State Farm's claim to the federal government could not have been knowingly false because the Federal Emergency Management Agency was aware of State Farm's claims adjusting practices, and State Farm believed in good faith that the McIntosh claim was not false. The relators countered that State Farm's adjustment of the McIntosh family's flood claim did not comply with FEMA regulations—a contention the defendants strongly objected to—and that FEMA's alleged knowledge of State Farm's claims adjusting practices did not automatically preclude a showing of the defendants' scienter, since State Farm withheld material information from FEMA. The court found that it was not clear whether the adjusting procedure used by State Farm was appropriate or otherwise permitted by FEMA. Further, the court found that, given the verbal nature of a number of FEMA's alleged approvals of State Farm's claims adjustment practices and the centrality of those alleged approvals to the parties' dispute, it could not ascertain whether the defendants had FEMA approval to use the allegedly improper claims adjustment procedure. Further, the court held that even if State Farm was allowed to use that procedure for calculating flood damage, genuine issues of material fact remained regarding whether or not the defendants possessed the requisite state of mind to violate the FCA. Consequently, the court denied the defendants' summary judgment motion with respect to the scienter element.

Reverse False Claim

Finally, the court turned its attention to the relators' reverse false claim allegation. As an initial matter, the court noted that the relators' themselves conceded that there was no reverse false claim, which warranted dismissal of that allegation. In addition, the defendants argued that summary judgment on any reverse false claim was required because the McIntosh claim submitted by State Farm could not represent both a direct false claim <u>and</u> a reverse false claim. The relators argued that because genuine issues of material fact existed as to whether the McIntosh claim was actually false, genuine issues of material fact also existed as to whether State Farm was liable under the reverse false claims provisions of the FCA. The court, though, determined that the relators failed to show that the defendants were under any statutory or regulatory obligation to repay money to the government that could give rise to a reverse false claim (as opposed to an obligation to merely reimburse the government for an overpayment on a direct claim. Accordingly, the court granted the defendants' motion for summary judgment with respect to the relators' reverse false claim allegation.

U.S. ex rel. Westmoreland v. Amgen, Inc., 2011 WL 4342721 (D. Mass. Sept. 15, 2011)

A relator brought a *qui tam* action against a biotechnology company (Amgen) and its affiliates (INN) and (ASD), alleging that the defendants knowingly caused health care providers to submit false Medicare claims and conspired to defraud the Medicare program. Specifically, the relator alleged that the defendants violated the Anti-Kickback Statute (AKS) by encouraging health care providers to submit claims for the value of the excess or "overfill" amount of drugs contained in their vials and failed to include that amount it in its average sales price (ASP). Further, the relators alleged that the defendants caused providers to submit false Medicare claims because the providers' claims included a false certification of compliance with the AKS—and such a certification was required pursuant to the Medicare Provider Agreement (PA) that Medicare participant must sign. The defendants moved for partial judgment on the pleadings, arguing that the PA was contrary to applicable Medicare statutes and regulations, which do not require such a certification of compliance with the AKS as a prerequisite for payment. The relator countered that the AKS itself makes clear that compliance is a prerequisite for payment under Medicare, and the U.S. government—which declined to intervene in the relator's case—filed a statement of interest in support of the relator's position. Both the relator and defendant Amgen filed cross-motions for partial summary judgment as to the alleged overfill allegations, with the relator arguing that claims that include inflated ASPs are patently false, and Amgen arguing that the applicable regulations make clear that overfill amounts are not to be considered for ASP purposes and that there was no evidence that Amgen intended to submit inflated ASPs. INN and ASD also moved for partial summary judgment, arguing that they were shielded from liability by the AKS's safe harbor provisions for group purchasing organizations (GPOs). The relator filed a cross-motion for partial summary judgment against these two defendants, arguing that the safe harbor was inapplicable to them. The U.S. District Court for the District of Massachusetts considered all of the parties' motions.

False Certification of Compliance with the AKS

The court began by analyzing the defendants' motion for partial judgment on the pleadings, in which they argued that the PA requirement of certifying compliance with the AKS was contrary to the Medicare regulations, which do not condition payment on compliance. Further, they argued that the Centers for Medicare and Medicaid Service's (CMS) adoption of a version of the PA that included the certification clause at issue was procedurally improper and outside the scope of the agency's authority. The court found that the defendants failed to identify how or why certification of compliance with the AKS as an implied precondition of payment was contrary to the Medicare statutes and regulations—instead, the court held that compliance with the AKS was a precondition for payment, even if it is not expressly stated. The court also held that the PA was adopted in accordance with the law, it represented a valid exercise of CMS's regulatory authority that was entitled to judicial deference, and the certification clause was consistent with the Medicare statutes and regulations as well as the purpose of the AKS. Accordingly, the court denied the defendants' motion with respect to the AKS allegations.

Average Sales Price

Next, the court analyzed the parties' cross motions for partial summary judgment on the relator's overfill allegations. The relator argued that, because CMS termed overfill as a free product, it was therefore a price concession that should have been deducted from the ASP determination. However, the court found that appropriate ASP calculations did not have to include overfill amounts and that because Amgen consistently followed this methodology, it did not fraudulently inflate ASPs; the court held that even if Amgen failed to comply with a reporting obligation, such failure could not have resulted in an artificially inflated ASP. As the court determined that the ASP Amgen submitted to CMS was not erroneous as a matter of law, it held that Amgen's intent or knowledge in making its ASP calculation was irrelevant. Thus, the court denied the relator's motion on the overfill allegations and granted Amgen, holding that the relator could not establish Amgen's liability or any damages to the government with respect to this claim.

AKS Safe Harbor Provision

The court then analyzed the parties' cross motions for partial summary judgment as to INN & ASD's assertion that the AKS's safe harbor provision for GPOs shielded them from liability for alleged false claims. The relator, however, argued that the safe harbor provision was inapplicable to INN, because INN failed to comply with certain safe harbor requirements. The relator alleged that INN had impermissibly close relationships with Amgen and ASD—INN and ASD formerly had an exclusive GPO-distributor relationship and share an accounting department and other key personnel and INN and Amgen had entered into a GPO agreement which made Amgen the primary source of INN's revenue. The relator argued that these relationships were inconsistent with the congressional intent in creating the GPO safe harbor, and also alleged that INN failed to comply with an AKS safe harbor provision requirement that it mail out annual disclosure letters disclosing these relationships and specifying the administrative fees it received from vendors. The defendant's disputed the relator's claims. The court determined that that the question of whether or not INN complied with its obligation to send annual disclosure letters to its members was an issue for the jury to decide. Accordingly, the court denied parties' motions for partial summary judgment.

The relator then argued that INN could not assert the safe harbor as an affirmative defense because, by allegedly conspiring with Amgen and ASD, it violated the fiduciary duty that it owed its members as their purchasing agent. The court agreed that statutory and regulatory compliance alone could not absolve INN of FCA liability, if INN's relationship with the other defendants revolved around a marketing scheme to induce providers to bill Medicare for overfill amounts, when the defendants knew, deliberately ignored, or recklessly disregarded whether or not such billing was allowable. The court held that INN's potential FCA liability was independent of any claim of exemption that it may have under the AKS.

Finally, the court considered ASD's argument that the safe harbor provision shielded it from FCA liability, because it complied with all the requirements for providing discounts to its providers, including Amgen. The relator countered, arguing that ASD did not keep sufficient records to show any manner by which its discounts to Amgen were allocated and funded. The court found that ASD's claim of safe harbor protection had no bearing on whether it independently or as part of a conspiracy with the other the defendants encouraged the submission of false Medicare claims. Further, the court observed that genuine disputes of fact remained as to whether ASD conspired with Amgen and INN to defraud the government by causing providers to seek reimbursement for overfill. As the court held that whether ASD actively marketed overfill to providers was a question for the jury to decide, it denied the parties' summary judgment motions with respect to ASD's liability.

U.S. ex rel. Yannacopoulos v. Gen. Dynamics, 2011 WL 3084932 (7th Cir. July 26, 2011)

A relator brought an action against two corporations (General Dynamics and Lockheed), alleging numerous violations of the FCA with respect to the sale of F-16 fighter jets to Greece—which used funds borrowed from the United States to make the purchases. The defendants moved for summary judgment and the U.S. District Court for the Northern District of Illinois granted the motion. The relator appealed that decision to the Seventh Circuit, alleging judicial error and asserting that the defendants made numerous false statements to the United States in order to obtain the funds for the sale to Greece. The Seventh Circuit affirmed the district court's decision.

First, the court analyzed the relator's claim that General Dynamics lied to the United States about its involvement in establishing and serving as majority shareholder in a venture capital company in Greece—the Hellenic Business Development and Investment Company (HBDIC). In addition, before releasing loan funds to Greece to finance the sale of the fighter jets, the U.S. Defense Security Assistance Agency (DSAA) required General Dynamics to execute a Contractor's Certification Agreement (CCA) regarding the fighter jets contract. The relator alleged that General Dynamics submitted invoices to the government for payment and that each invoice certified its compliance with the contract and the CCA. The relator alleged that these certifications were false because General Dynamics breached both the contract and the CCA when it improperly included various costs associated with its investment in HBDIC in the contract price, thereby passing on those costs to the United States, as lender to Greece. The appeals court, though, determined that these charges were not prohibited under the contract, and thus, no false certification occurred. With respect to the CCA, the relator argued numerous false certifications occurred. The court, however, found that these allegations were based on the relator's erroneous interpretation of the contract. Consequently, the appeals court held that General Dynamics did not falsely certify compliance with the CCA either. The court held that the grant of summary judgment in General Dynamics' favor was proper, with respect to the relator's claims related to HBDIC.

Second, the court analyzed the allegations that General Dynamics made misrepresentations regarding the "Economic Price Adjustment" (EPA) clause in the contract with Greece. Under the terms of the Greek sale, General Dynamics was to receive advance payments, which prompted the parties to include a draft EPA clause in the contract which allowed for reductions in the total contract price. But before the contract was finalized, the draft EPA language was removed from the contract, in exchange for General Dynamics' agreement to the fighter jets more quickly than originally contemplated. The relator asserted that General Dynamics was required to inform the United States of any changes to the EPA clause. He alleged that General Dynamics submitted invoices to the U.S. government for funds on Greece's, months before notifying the United States that the EPA clause had been removed from the contract. Those invoices, he alleged, included false certifications of General Dynamics' compliance with the terms of its agreement with the U.S. The appellate court, however, found that the parties had mutually agreed to delete the EPA clause, and that, after receiving and reviewing the contract, the U.S. government made no financial changes to account for the absence of the EPA clause. This led the court to conclude that the removal of the EPA clause was not material to the U.S. government's decision to finance the Greek sale, and that summary judgment in favor of General Dynamics on the EPA clause claim was also appropriate.

Third, the court analyzed the relator's claim that General Dynamics falsely certified its compliance with the CCA by failing to inform the U.S. government of requirements in the contract relating to the value of spare parts to be purchased. The relator alleged that this contract term was violated when Greece purchased spare parts from other suppliers, but that the parties informally agreed to disregard the violation—a violation the United States was never informed about. The relator argued that when General Dynamics subsequently submitted invoices to the United States that did not discuss the spare parts issue, it falsely certified its compliance with the CCA. But the circuit court found that the relator failed to offer evidence showing that General Dynamics knew that it invoices to the U.S. contained false information, since the requests for advance payments were based on estimates and thus, it was not possible for General Dynamics to know that its figures were inaccurate. Since the relator could not adequately show that General Dynamics had knowledge of false certifications, the Seventh Circuit held that summary judgment in General Dynamics' favor was also appropriate with regard to the relator's spare parts claim.

Next, the court analyzed the relator's claim that General Dynamics falsely certified its compliance with the CCA with respect to a depot program for materials and equipment to be used to repair and maintain the fighter jets. The relator argued GD falsely certified compliance with the CCA when it submitted invoices to the U.S. but failed to report an implicit understanding with Greece to disregard the timetable for the depot program. Again, the Seventh Circuit disagreed with the relator. The court observed that the applicable contract provision only provided the date by which Greece could decide to cancel the depot program and not incur any costs beyond those delineated in the contract. The court concluded that the relator's claim was based on an incorrect interpretation of the contract, and therefore failed as a matter of law. Accordingly, the court held summary judgment in the defendant's favor was appropriate on this issue.

Finally, the court analyzed the claims with respect to defendant Lockheed, which acquired one of General Dynamics' divisions and assumed all of the rights and obligations under the contract with Greece. Lockheed and Greece executed two modifications to that contract, and the relator alleged that both modifications were reverse false claims. The relator argued that the first modification led to an overpayment to General Dynamics (which was passed on to Lockheed), and that Lockheed then concealed its obligation to make a refund to the U.S. The circuit court, though, found that the relator failed to provide sufficient evidence to show any falsity with respect to the modification, that Lockheed had knowledge of any falsity, or that Greece did not actually agree to pay the price set forth, which would have negated any claim of an overpayment. As a result, the circuit court held that the first contract modification did not constitute a reverse false claim.

The relator argued that a second contract modification—which provided for a refund from Lockheed to Greece—was also false, in two aspects. First, he argued that the modification falsely represented that the defendants had refunded the entire amount at issue, when in fact, some of the funds had not yet been repaid. Second, he asserted that the modification did not truthfully reconcile the payments the defendants received with the amount of work that had been performed, thereby allowing Lockheed to secretly retain some advance payments for work that was never performed. With regard to the first issue, the circuit court concluded that the language of this modification did not state that the full amount of the refund had already been paid. Thus, the modification was not false in that respect. With regard to the second issue, the court held that the relator failed to demonstrate that the modification was false, since he did not allege that this modification did not reflect an actual agreement between Lockheed and Greece regarding the amount of the refund. Accordingly, the court held the relator failed to show that this second modifications was a reverse false claim either.

U.S. ex rel. Davis v. Prince, 2011 WL 2749188 (E.D. Va. July 13, 2011)

Two relators brought a *qui tam* action against five corporations and one individual (the sole owner of one of the corporate defendants), alleging that the defendants violated the False Claims Act by knowingly submitting false claims in connection with two governmental contracts—one contract with the Department of Homeland Security's Federal Protective Service to provide security services at disaster relief sites in the aftermath of Hurricane Katrina, and another contract with the Department of State to provide security services in Iraq and Afghanistan. With respect to the Katrina contract, the relators alleged that they worked as independent contractors on the Katrina contract ins several capacities and that one of the corporate defendants, BSC, submitted false invoices to the government and committed substantial billing fraud on that contract, by falsifying forms and inflating the services they provided and the number of hours they worked, by falsifying accounting records and paying employees and vendors for expenses that were not actually incurred and then billing the government for it, and by billing the government for worthless managerial services and failing to comply with contractual and legal obligations, such as ensuring that weapons were not distributed to felons or other persons disqualified from using them under the law.

The government declined to intervene in the relators' action and the defendants moved for summary judgment on the relators' claims regarding the Katrina contract, arguing that, even after discovery had ended, the relators could not support their allegations of fraud. The U.S. District Court for the Eastern District of Virginia agreed, noting that the relators failed to create an issue of disputed fact with respect to their allegations that the defendants knowingly submitted fraudulent invoices to the government. In fact, the court noted, at oral argument, the relators conceded that they had not met their burden with respect to the allegation that the defendants knowingly submitted falsified forms regarding the hours they worked and the services they provided to the government.

The court also determined that the relators failed to dispute the defendants' contention that they did not submit any accounting records to the government in support of alleged cost expenditures. Finally, the district court considered the relators' allegation that the defendants billed the government for worthless managerial services and failed to comply with contractual and statutory obligations. The defendants argued that they were not allowed to—and in fact, did not—bill for the types of services the relators alleged were fraudulent. The court, though, was not persuaded, noting that the Katrina contract included enough flexibility to allow the defendants to bill for the types of managerial services at issue, and that the defendants' contention that they were simply precluded from billing for those services was insufficient to support summary judgment. However, the court concluded that even if the defendants had billed the government for the managerial services, they could not be held liable under the False Claims Act, since the managerial services terms of the contract terms were vague. The court relied on the testimony of the government's contracting officer, who stated that the defendants were not responsible for monitoring weapons distribution, since the government was responsible for running background checks on the defendants' security guards, and since, due to exigent circumstances, the defendants were allowed to use security guards before the government had completed their background checks. The court concluded that while the defendants may not have provided the government with the necessary information to run background checks in a timely manner, such a failure amounted to no more than a breach of contract—not a violation of the False Claims Act. The court noted that, in their brief opposing the defendants' motion for summary judgment, the relators raised, for the first time, an argument that the defendants falsely certified their compliance with the Katrina contract's terms. The court recognized the false certification theory of FCA liability, but determined that since the relators' complaint did not allege this theory or the necessary facts in support of the theory, they could not raise it at the summary judgment stage.

Consequently, the court granted summary judgment in favor of the defendants on all of the relators' claims related to the Katrina contract.

See *U.S. v. Carell*, 2011 WL 6339839 (M.D. Tenn. Dec. 19, 2011), at page 151.

See *U.S. ex rel. Hobbs v. MedQuest Assocs., Inc.*, 2011 WL 3703762 (M.D. Tenn. Aug. 23, 2011), at page 137.

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

U.S. ex rel. Sandager v. Dell Marketing, L.P., 2012 WL 1453610 (D. Minn. Apr. 26, 2012)

A relator brought a *qui tam* action against his former employer—a computer equipment company—and 17 other, similar companies. The relator alleged that the defendants sold computer equipment to the federal government through the government's GSA Advantage! Program. In addition, the relator claimed that the defendants were required to meet certain criteria in order to sell to the government, and that one such criteria was that the defendants' products must comply with the Trade Agreements Act (TAA), such that any products offered for sale to the government must have been made or substantially transformed in the United States or in certain other designated countries. The relator alleged that the defendants violated the TAA by offering to sell computer products to the government that were not made in the United States or in other approved countries. The relator alleged that this conduct also violated the False Claims Act, since the defendants misrepresented and falsely certified that their products complied with the TAA. The government declined to intervene in the relator's suit. The defendants then separately moved to dismiss the complaint, arguing that the complaint was barred by the FCA's first-to-file provision and that the relator failed to plead the alleged fraud scheme with particularity.

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

First-to-File Bar

The court first examined the defendants' claim that that the relator's complaint was barred by the first-to-file rule. The defendants argued that they had already been subject to previous *qui tam* actions in which other relators alleged the same fraudulent conduct. The relator countered that those previous *qui tam* actions alleged fraud with respect to different products, and therefore did not preclude his *qui tam* action. The court, however, found that the government's investigation of the fraud allegations raised in the previous actions would have revealed the facts underlying the present relator's fraud case. The relator then argued that the first-to-file bar should not apply, because he filed his action while the previous *qui tam* suits were still under seal. The court rejected this argument, observing that once the government has been made sufficiently aware of fraud, little is gained by the filing of subsequent, duplicative claims. The court further noted that the relator filed an amended complaint after the prior-filed cases had been unsealed. Accordingly, the court held that the relator had knowledge of the previous suits before he finalized his allegations and claims and that his fraud claims were barred by the first-to-file rule. The defendants' motions to dismiss were granted and the relator's claims were dismissed with prejudice.

Pleading Fraud with Particularity

The court also considered the defendants' argument that the relator failed to plead the alleged fraud with particularity, as required by Federal Rule of Civil Procedure 9(b). The defendants argued that the relator's claims should be dismissed because he failed to adequately allege that any particular defendant violated the FCA, he failed to allege the details surrounding any alleged fraudulent sale to the government, he failed to allege that any sale of non-conforming products occurred, and he failed to provide any representative examples of the alleged fraud for any defendant. The court agreed and found that the relator failed to allege sufficient facts indicating that the defendants submitted false claims to the government. The court held that the relator's inability to allege any actual sales to the government demonstrated that his knowledge was secondhand and that granting him leave to further amend his complaint would be futile and would run counter to the FCA's underlying rationale. Therefore, the court granted the defendants' motions to dismiss and denied the relator's request for leave to amend his *qui tam* complaint.

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

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

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

First-to-File Bar

The defendants argued that the relator's case should be barred by other previously-filed *qui tam* cases—including yet another *qui tam* action the defendants discovered that was pending when the relator's third case was filed. The court focused its attention on the case that was still pending when the relator's present case was filed. First, the court addressed whether the claims in that case were related to the relator's claims for purposes of the first-to-file rule. The court found that, although the related action alleged fraud by the defendants at a different camp in Iraq, it still alleged that the defendants' fraudulent timekeeping and billing practices were common throughout the defendants' operations in Iraq and that such frauds were an "institutionalized" practice throughout defendant's corporate structure in Iraq and other countries. Thus, the court found that the claims alleged in the earlier-filed case were sufficient to put the government on notice of the essential allegations of a fraudulent scheme, which would allow the government to discover related fraud. Next, the court analyzed whether the earlier-filed case was still pending, for purposes of barring the relator's case under the first-to-file. It found that the earlier action was pending when the relator's complaint was filed, but was no longer pending, as it had been voluntarily dismissed. The court held that when determining whether a *qui tam* action is barred under the first-to-file rule it is necessary to look at the facts as they existed when the second related action was brought. Therefore, the court held that the relator's suit was barred by the earlier-filed case, which was both "related" and "pending" when the relator's suit was filed.

Statute of Limitations

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

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

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

A relator brought a *qui tam* action against his former employer—a student loan administrator—alleging that the defendant presented false claims to the government, based on false certifications of compliance with the Higher Education Act. Specifically, the relator alleged that the defendant unlawfully put student loans

into forbearance, so as to allow interest to continue accruing on the loans and to allow the Department of Education to continue paying special allowances to the defendant, thereby increasing the defendant's return on such loans. In addition, the relator alleged that the defendant would continue to postpone default on loans in forbearance, thereby artificially keeping its default ratio low and maintaining the defendant's status as an eligible lender under Department of Education guidelines. Moreover, the relator alleged that the defendant paid bonuses to employees who reduced delinquencies on loan payments by granting unlawful forbearances; the relator alleged that the defendant advised its employees to disregard their training and to grant forbearances to any student whose loan payments were delinquent, regardless of whether or not the borrower intended to repay the loan.

The defendant moved to dismiss the relator's complaint for lack of subject matter jurisdiction, citing the False Claims Act's first-to-file bar, which precludes relators from filing *qui tam* actions whenever related actions have already been filed and are still pending. The U.S. District Court for the District of Columbia granted the defendant's motion and dismissed the relator's complaint with prejudice, based on its finding that an earlier-filed *qui tam* complaint against the defendant barred the relator's complaint. The relator appealed the district court's ruling to the U.S. Court of Appeals for the District of Columbia Circuit, arguing that the district court improperly dismissed his action because his complaint alleged a different fraudulent scheme from the earlier-filed complaint. Further, he argued that the district court erred in holding that the first-to-file bar does not require first-filed complaints to satisfy Rule 9(b)'s heightened pleading standards, and thus improperly dismissed his complaint with prejudice.

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

First-to-File Bar

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

The court then considered the relator's argument that first-filed *qui tam* complaints must satisfy Rule 9(b)'s pleading standard in order to bar later-filed complaints under the FCA's first-to-file rule. The relator, supported by the government as *amicus curiae*, contended that the circuit court should impose a heightened pleading requirement on complaints for first-to-file purposes, arguing that such a requirement would ensure that first-filed *qui tam* complaints provide the government with sufficient information to pursue an investigation and prevent overly-broad complaints from barring more detailed, later-filed complaints. The circuit court, though, found that the heightened pleading standard is designed to protect defendants in fraud cases from frivolous accusations and to allow them to prepare an appropriate response—the pleading requirement is not designed to serve the interests of relators. Further, the appellate court agreed with the district court that a *qui tam* complaint may give the government sufficient information to launch an investigation, even if the complaint does not satisfy Rule 9(b)'s particularity standard. Accordingly, the court of appeals rejected the relator's argument that prior *qui tam* complaint must meet the heightened pleading standard in order to bar later complaints.

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

U.S. ex rel. Howard v. Lockheed Martin Corp., 2011 WL 4348104 (S.D. Ohio Sept 16, 2011)

Two relators (Howard and Wilson) initially brought a *qui tam* action in the U.S. District Court for the Southern District of Ohio, alleging that a manufacturer of fighter planes (Lockheed Martin Corp.) and five of its subcontractors violated the False Claims Act. While that case was still in its initial stages, two other relators (Harrison and Moss) filed a separate *qui tam* suit with similar claims against Lockheed in the U.S. District Court for the District of Georgia. When the government became aware of both suits, it sought leave of court and informed the two sets of relators about one another. Relators Harrison and Moss then moved to vol-

untarily dismiss their second-filed action, which was granted. Howard and Wilson then moved for leave to amend their complaint and add Harrison and Moss as co-relators in their case. The government did not oppose the motion and the Ohio district court granted the relators' request. The relators then filed an amended complaint, which was served on the defendants.

Defendant Lockheed moved to dismiss the relators' amended complaint under Federal Rules of Civil Procedure 8, 9(b), and 12(b)(6). The district court granted the motion in part. Only days later, Lockheed filed a second motion to dismiss, this time arguing that the relators' action was precluded by the FCA's first-to-file rule. Lockheed argued that the two sets of relators' original complaints alleged fraud allegations that were based on the same facts, and therefore, Howard and Wilson's first-filed complaint precluded Harrison and Moss from being added as co-relators. Lockheed noted that if the second set of relators had filed their complaint in the same Ohio district court, then that court would have automatically dismissed the complaint under the first-to-file rule; they argued that the same result was required, now that the second set of relators was attempting to join the first-filed case. The U.S. District Court for the Southern District of Ohio denied Lockheed's motion.

First-to-File Rule

The original two relators argued that the first-to-file rule bars anyone except the government from intervening in or file a related action that is based on the same underlying facts as a pending *qui tam* action, and that the addition of new parties does not constitute the type of "intervention" prohibited by the rule—the relators argued that for purposes of the first-to-file rule, "intervention" is defined under Federal Rule of Civil Procedure 24, and thus, the first-to-file rule did not bar the addition of new relators, which is accomplished under Rule 15. Additionally, the relators argued that the first-to-file rule is designed to eliminate duplicative litigation, but since the second-filed complaint was voluntarily dismissed and was no longer pending, there was no duplicative litigation and thus, the first-to-file rule could not apply. The court agreed with the relators' arguments and also determined that policy considerations weigh in favor of the relators—the court observed that the government informed the two sets of relators about each other and did not oppose their motion to join forces, and that Lockheed was not subject to potential multiple or inconsistent judgments and was therefore not prejudiced by the addition of the second set of relators to the first relators' suit. Consequently, the court denied Lockheed's motion to dismiss.

U.S. ex rel. Torres v. Kaplan Higher Educ. Corp., 2011 WL 3704707 (S.D. Fla. Aug. 23, 2011)

A relator brought a *qui tam* action against his former employer, a higher education service provider, alleging violations of the False Claims Act. Specifically, the rela-

tor alleged that the defendant's claims for federal financial aid funds were false, because the defendant submitted those claims with the knowledge that it was not eligible to receive such funding, due to its noncompliance with the Higher Education Act's (HEA) incentive compensation ban—the incentive compensation ban prohibits institutions from basing bonuses and other incentive compensation to admissions and student aid employees on those employees' success in securing student enrollments and/or financial aid. Furthermore, the relator alleged that the defendant conditioned the continued employment of its directors of admissions on the number of students they recruited. Not only did the relator allege that the defendant's claims for financial aid funds were false, but he also alleged that the defendant caused its students and their lenders to submit false claims to the government, since only students attending eligible institutions can receive federal financial aid funds. The defendant moved to dismiss the relator's complaint for failure to state a claim and for failure to plead with particularity; the defendant also contended that the relator's claims were barred by the FCA's first-to-file rule. The U.S. District Court for the Southern District of Florida granted the defendant's motion. The court held that the relator failed state a claim under the FCA and that he filed claims that were precluded by the first-to-file rule.

Failure to State a Claim

The court first considered the relator's allegation that the defendant improperly based the continuing employment of its admissions directors on their ability to recruit students. The defendant argued that its policy of requiring a minimum level of performance to retain employment does not violate the HEA incentive compensation ban, which only prohibits "bonuses, commissions, and other incentive payments." The court agreed and held that the incentive compensation ban does not cover such personnel decisions. Thus, the court granted the defendant's motion to dismiss claims based on the relator's allegation that the defendant based continuing employment on student recruitment.

First-to-File Bar

The court then held that the relator's remaining claims were precluded by the FCA's first-to-file bar, which prohibits *qui tam* suits that are based on the same underlying facts as another pending *qui tam* action. The court determined that the relator's claims were related to a previously filed suit that also alleged that the defendant failed to comply with the HEA's incentive compensation ban. The court stated that "[w]hile the allegations in the complaints are not exactly the same, the core facts are," and the court observed that both complaints alleged violations of the FCA based on the defendant's alleged noncompliance with the HEA. The court further observed that both complaints alleged that the defendant provided trips as compensation to high performing admissions representatives, with both complaints specifically mentioning trips to Puerto Rico. Both complaints also referred to high-performing admissions representatives achieving "President Club" status and admissions representatives losing their jobs if they failed to meet certain recruitment goals. The court held that both complaints alleged a fraud scheme in which the defendant's claims for financial aid funds included a false certification to the government that the defendant had complied with the HEA's incentive payment ban. The court stated that the present relator failed to provide any additional details in his complaint, and thus, his claims were barred by the first-to-file rule.

The relator had argued that his complaint did allege completely new claims, as only his complaint alleged that the defendant caused the government to pay false claims that were presented by private banks for interest subsidies, special allowance payments and default claims when students failed to repay private loans. However, the court observed that these fraud claims were ultimately based on the fact that the defendant was ineligible to participate in the federal financial aid program because it did not comply with the ban on incentive compensation. The court held that simply alleging additional facts as to how the fraud occurred did not avoid the first-to-file bar. The relator's complaint was dismissed with prejudice.

U.S. ex rel. Folliard v. Synnex Corp., 2011 WL 2836372 (D.D.C. July 19, 2011)

A relator brought a *qui tam* action against eight technology companies alleging they knowingly misrepresented the country of origin of certain products to be sold on the government website (GSA). Specifically, the relator alleged the defendants misrepresented and falsely certified that their products complied with the Trade Agreement Act (TAA). Defendants Synnex, Emtec, GovConnection, GTSI and Force3 moved to dismiss, arguing the relator failed to plead fraud with particularity, failed to state a claim and was barred by the first-to-file rule. Defendants GovPlace and Govt. Acq., moved to dismiss for failure to plead fraud with particularity and for failure to state a claim. Defendant HP moved to dismiss under the first-to-file rule and on *res judicata* grounds. The U.S. District Court for the District of Columbia granted the motions to dismiss pursuant to the first-to-file rule. The court also denied defendants GovPlace and Govt. Acq.'s motions. Further, the court considered moot defendant HP's motion to dismiss on *res judicata* grounds in light of its dismissal under the first-to-file rule.

The court began by analyzing whether the claim was barred by the first-to-file rule. The court found a previous litigation revealed the same facts and alleged the same claims as the relator. Further, the court found the previous complaint supplied enough information for the government to begin an investigation that would reveal the facts alleged by the relator in this case. The court also found the relator's complaint did not incorporate any material elements different from those in the complaint of the previous litigation. The relator argued that since the previous

complaint was dismissed for failure to plead with particularity, the FCA's first-to-file bar could not be applied. The court observed that the primary purpose of the heightened pleading standard for dismissal was deterrence and not preclusion, noting that although the previous case did not plead facts strong enough to overcome Rule 9(b), the pleading was still sufficient to enable the government to uncover related frauds. Accordingly, the court granted the defendants' motions to dismiss on first-to-file grounds.

The court then analyzed whether the relator failed to plead fraud with particularity. The court found the relator provided sufficient evidence pertaining to products that were allegedly misrepresented as TAA compliant and were the subject of procurement orders placed on specific dates through the GSA website. The court held these facts created a strong inference that a false claim was submitted. The defendants argued the relator failed to provide the names of individuals involved in the fraudulent scheme. The court agreed but held that this mere fact was not sufficient to merit dismissal. Accordingly, the court held the relator stated a valid claim and met the heightened pleading standards.

U.S. v. AseraCare, Inc., 2012 WL 187519 (E.D. Wis. Jan. 23, 2012)

Three relators brought a *qui tam* action in the U.S. District Court for the Eastern District of Wisconsin, alleging that two healthcare providers defrauded Medicare. The relators' action was similar to two other *qui tam* suits—one in the U.S. District Court for the Northern District of Georgia and one in the U.S. District Court for the Northern District of Alabama. The government intervened in the Alabama action and filed a complaint against the defendants. The relators, supported by a Statement of Interest from the government, moved for transfer of venue to the Alabama district court. The defendants opposed the motion, and argued that the other *qui tam* actions would be dismissed pursuant to the False Claims Act's first-to-file rule, and consequently, a transfer of venue would be futile.

Holding: The U.S. District Court for the Eastern District of Wisconsin granted the relators' motion.

First-To-File Rule

The defendants argued that a transfer of venue would be futile, since the FCA's first-to-file bar would lead to the dismissal of both the Georgia and Alabama *qui tam* cases. The court disagreed and accepted the relators' argument that the first-to-file bar only precludes actions by private parties, and does not bar suits by the government. The court noted that the plain language of the statute prohibits a "person *other than the Government* [from intervening or bringing] a related action based on facts underlying [a] pending action." The court then applied the first-to-file rule to the related Alabama action—which had been filed as a *qui tam* action by private parties—and asked:

"did the government's intervention suddenly change the classification of that case, or would it still be subject to dismissal under the first-to-file bar?" The court relied on the U.S. Supreme Court's decision in *Rockwell Int'l Corp. v. United States*, in which the Court held that, because the government intervened in a *qui tam* action, its complaint-in-intervention survived the dismissal of the relator's complaint pursuant to the FCA's public disclosure bar. Similarly, the district court held that the government's complaint-in-intervention in the instant action would survive in the event that the relator in the related Alabama case was dismissed on first-to-file grounds. As a result, the court concluded that a transfer of venue would not be futile.

The defendants also argued that a transfer of venue would not satisfy the standard of 28 U.S.C. § 1404(a), which reserves changes of venue "[f]or the convenience of parties and witnesses, in the interest of justice." The court held that each of these factors weighed in favor of a change of venue. Thus, the relators' motion was granted.

U.S. ex rel. Sonnier v. Allstate Ins. Co., 2012 WL 75041 (M.D. La. Jan. 10, 2012)

A relator brought a *qui tam* action against an insurance company, alleging that the defendant violated the False Claims Act and defrauded the Federal Emergency Management Agency by engaging in "unit price manipulation" in its reimbursement claims to the National Flood Insurance Program, following various hurricanes that had struck the Golf Coast region. Specifically, the relator alleged that when the defendant adjusted flood insurance claims on properties for which it also provided wind insurance, it improperly inflated the replacement costs for damages attributable to flooding and reduced the replacement costs for damages attributable to wind. Since wind insurance, unlike flood insurance, is generally not underwritten by the federal government, the defendant could decrease its own exposure for insurance claims, while increasing the federal government's exposure. In addition, the relator alleged that the defendant received a 3.3% allowance fee from the government for each flood insurance claim it serviced, and that since this fee was based on the amount of each flood insurance claim, the defendant was able to receive inflated allowance fees from the government for each of its inflated flood insurance claims. As a result, the defendant doubly benefitted, while the government was doubly defrauded.

The defendant moved to dismiss the relator's claims for lack of jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1). First, the defendant argued that the False Claims Act's first-to-file rule and its public disclosure bar deprived the court of subject matter jurisdiction over the relator's claims, since the relator's "unit price manipulation" allegation was substantially similar to claims alleged against the defendant in four previously filed *qui tam* suits; for purposes of its public disclosure argument, the defendant alleged that the relator was not an original source of the information on which his allegations were based. The de-

fendant also moved to dismiss the relator's claims on the grounds that the relator failed to plead the alleged fraud with particularity, as required by Federal Rule of Civil Procedure 9(b).

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

First-to-File Bar

The court first considered the defendant's "first-to-file" argument. The court noted that the False Claims Act only bars *qui tam* actions when a separate, related *qui tam* case, based on the same facts, is still pending. After examining the four previously filed actions, the court noted that all four suits alleged that the defendant defrauded the federal government by mischaracterizing wind damage as flood damage, and then submitting flood insurance claims to the government for reimbursement under the National Flood Insurance Program. The court rejected the present relator's argument that the allegations in his complaint differed from the prior complaints, finding that the allegations contained in the five complaints "differ[ed] only in degree." In addition, although the court acknowledged that, at the time the present relator's complaint was filed, two of the prior actions had already been dismissed, and thus, were no longer pending, the other two previously filed complaints were still pending at the time the relator's suit was filed. With respect to one of those two pending suits, the court found that the allegations were "identical" to the relator's. Consequently, the court held that the present action was barred, and the purposes of the FCA's first-to-file rule's were served, since the relator's action did not "help reduce fraud or return funds to the federal fisc because long ago the government had enough information to discover related frauds."

Since the court granted the defendant's motion to dismiss on first-to-file grounds, it declined to consider the defendant's public disclosure bar and Rule 9(b) arguments.

See *U.S. ex rel. Bartz v. Ortho-McNeil Pharm., Inc.,* 2012 WL 695886 (D. Mass. Mar. 2, 2012), at page 58.

See *U.S. ex rel. Nowak v. Medtronic, Inc.*, 2011 WL 3208007 (D. Mass. July 27, 2011), at page 79.

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

U.S. ex rel. Sanchez v. Abuabara, 2012 WL 1999527 (S.D. Fla. June 4, 2012)

A relator brought a *qui tam* action against an engineering solutions corporation and three individuals, alleging that the defendants violated the False Claims Act by making false representations to the government regarding the corporation's solvency, abilities, and personnel and fraudulently induced the U.S. Department of Defense and the U.S. Army to award them a contract to test telecommunications to be used by U.S. troops in combat. The defendants moved to dismiss the relator's claims for lack of subject matter jurisdiction, pursuant to the FCA's public disclosure bar provision. They also moved to dismiss for failure to state a claim and for failure to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Southern District of Florida denied the defendants' motion to dismiss the relator's complaint for lack of subject matter jurisdiction, finding that the relator's claims had not been previously publicly disclosed, for FCA purposes. The court, however, granted the defendants' motion to dismiss for failure to state a claim and failure to plead fraud with particularity; the court granted the relator leave to amend the complaint one last time.

Public Disclosure Bar

The defendants argued that the court had no subject matter jurisdiction over the relator's claims, pursuant to the public disclosure bar, because the relator's allegations were substantially similar to information that had been previously disclosed through two letters, and that the relator was not an original source, for FCA purposes, with respect to that information. The defendants claimed the first letter was sent to the government by one of their prospective subcontractors, and relayed his concerns about representations the corporate defendant made regarding its personnel in its proposals to the government; they claimed that the second letter was the response that the Army sent to the prospective contractor.

The court first determined—and the parties agreed—that the public disclosure bar, as amended by the Patient Protection and Affordable Care Act, applied to their dispute. This amended provision does not include an absolute subject matter jurisdiction bar, but instead allows the government to oppose the dismissal of *qui tam* claims on that basis. Here, the government informed the court that it would not object to the dismissal of the relator's claims, should the court determine that they were barred. The court also noted that the amended public disclosure bar provision only applies to federal—not state and local—government disclosures. The court then turned to the two purported public disclosures, noting that U.S. Supreme Court precedent established that "report" under the public disclosure bar should be read broadly. Applying that standard, the court held that the initial letter from the private citizen to the Army was not a federal "report" for FCA purposes, but the response letter from the Army did qualify. The court rejected the defendants' argument that since the private citizen's letter was referenced in the Army's response letter, it also qualified as a public disclosure under the FCA. Instead, the court observed that the Army's letter did not adopt the private citizen's claims, but refuted them. As the court determined that the Army's letter—the only public disclosure—did not suggest that the defendants engaged in any wrongdoing, it did not disclose the relator's fraud claims. The court also noted that the letters did not contain any information regarding the corporate defendant's solvency or abilities, and thus, could not possibly bar the relator's claims regarding those alleged misrepresentations by the defendants. The court denied the defendant's motion to dismiss for lack of subject matter jurisdiction.

Failure to State a Claim/Plead Fraud with Particularity

While the court denied the defendants' motion to dismiss for lack of subject matter jurisdiction, it referenced prior oral argument on the defendants' motion to dismiss for failure to state a claim under the FCA and to plead the fraud with particularity. The court noted that during oral argument, it granted those motions, but granted the relator leave to amend his complaint one final time.

U.S. ex rel. Banignan v. Organon USA Inc., 2012 WL 1997874 (D. Mass. June 1, 2012)

Two relators brought a *qui tam* action on behalf of the United States and 27 states, alleging False Claims Act violations against an international pharmaceutical company (Akzo Nobel), two of its subsidiaries and the company that later purchased the subsidiaries (collectively, Organon), and two pharmacies (Omnicare and PharMerica). Specifically, the relators alleged that the defendants engaged in a scheme in which the pharmaceutical companies provided illegal kickbacks to long-term care pharmacies to induce the pharmacies to switch patients' prescriptions from other drugs to its drug—a drug that the pharmaceutical companies also promoted for non-approved off-label uses. They further alleged that, due to the improper kickbacks it provided, defendant Organon failed to report its "best price" to Medicaid, which resulted in federal and state government agencies overpaying for its drug. The relators claimed that the defendants' conduct resulted in pharmacies filing fraudulent Medicaid reimbursement claims for the drug. They also claimed that the defendants presented false Medicaid claims or caused false Medicaid claims to be presented; that they made false statements to the government or caused false statements to be made to the government; and that they conspired with one another to commit Medicaid fraud.

Defendant Akzo Nobel moved to dismiss all the relators' claims for lack of personal jurisdiction and improper service of process, and the U.S. District Court

for the District of Massachusetts granted that motion. The remaining defendants separately moved to dismiss the relators' claims for lack of subject matter jurisdiction, for failure to plead the alleged fraud with particularity, and for failure to state a claim.

Holding: The U.S. District Court for the District of Massachusetts dismissed all the relators' federal FCA claims against PharMerica. The court dismissed all the relators' federal FCA claims against Omnicare, except their claims regarding direct kickbacks provided to pharmacies. And the court dismissed all the relators' federal FCA claims against the Organon defendants, except for their off-label marketing claims. The court dismissed 19 corresponding state FCA claims, since the parties agreed that those state laws mirrored the federal statute, but declined to rule on the claims under the remaining state FCAs, pending further briefing by the parties.

Subject Matter Jurisdiction

The court first considered the relators' kickback claims, in which they alleged that Organon offered improper remuneration to pharmacies—including defendants, PharMerica and Omnicare—that filled prescriptions for its antidepressant drug and illegally promoted the drug for off-label uses, such as to treat anxiety. The relators contended that this conduct caused pharmacies to submit fraudulent Medicaid claims to state and federal governments for prescriptions that were based on the alleged kickbacks and off-label promotion. Pharmerica and Organon argued that the relators' allegations were barred by the False Claims Act statutes' respective "first-to-file" and "public disclosure" provisions. The court agreed. With respect to the first-to-file bar, the court determined that the relators' allegations against PharMerica and Organon included the same essential elements of the alleged fraudulent kickback scheme that were previously described in a prior *qui tam* lawsuit. The court did not note whether or not the prior suit was still pending at the time the relators' action, but mentioned that the operative complaint in the prior suit had been unsealed years before the relators' suit was filed. The court observed that although the prior suit only named PharMerica, but not Organon, as a defendant, it implicated Organon by contending that the same Omnicare drug at issue in the present suit was at the center of the illegal kickbacks scheme. The court also determined that the relators' kickback allegations against PharMerica and Organon were barred by the FCAs' public disclosure provisions, since the relators' allegations were substantially similar to the kickback allegations disclosed in the prior *qui tam* case.

Omnicare also argued that several previous cases barred the relators' kickback claims against it under the first-to-file and public disclosure provisions. However, the court held that neither of these provisions precluded the relators' kickback claims against Omnicare, because the previous cases did not mention Omnicare or the drug at issue in the present case. In denying Omnicare's motion to dismiss the relator's kickback claims pursuant to the public disclosure bar, the court rejected Omnicare's argument that the public disclosure bar applied to documents the Texas Attorney General's Office acquired while investigating the relators' claims of fraud against Texas Medicaid, and then shared with the relators. The court noted that "[s]ince these documents were produced in connection with Relators' *qui tam* suit, however, they are not 'public disclosures' under the FCA." The court further noted that the relators had already filed suit against Omnicare and did not "pursu[e] a case against a new defendant based on the Texas documents."

Next, the court examined the relators' "best price" claims against Organon and determined that those claims were also barred by the first-to-file and public disclosure bar provisions, as the same prior *qui tam* action that barred the kickback claims against PharMerica and Organon also "disclose[d] a fraudulent pricing scheme, the essential elements of which are alleged against Organon in this case."

The court then turned to the relators' off-label marketing claims against Organon. The Organon defendants argued that these claims should be barred, asserting that the claims were based on prior public disclosures made in FDA warning letters that were sent to Organon and which were available on the FDA's web site. However, the court found that the essential elements of the relators' fraudulent off-label promotion claims were not disclosed, nor could be inferred from, the FDA letters.

As a result of the court's findings on subject matter jurisdiction, the court allowed the relators only to maintain their kickback claims against Omnicare and their off-label marketing claims against Organon. All other claims—including all of the relators' claims against PharMerica—were dismissed for lack of subject matter jurisdiction.

Failure to Plead Fraud with Particularity/Failure to State a Claim

Having determined that it only had subject matter jurisdiction over the kickback claims against Omnicare and the off-label marketing claims against Organon, the court next evaluated whether those remaining claims should be dismissed for failure to state a claim or for plead the alleged fraud with particularity.

Organon argued that since Medicaid chose to provide reimbursements for drugs prescribed for off-label uses, the claims were not false or fraudulent. The court agreed, noting that the Medicaid statute seems to allow states to determine whether or not they will pay for drugs prescribed for off-label uses, and the relators did not allege that the states are required to deny coverage for off-label prescriptions. Consequently, the court held that the relators' off-label marketing claims would be dismissed for failure to state a claim.

The court, though, allowed the relators to maintain their kickbacks claims against Omnicare, rejecting Omnicare's argument that the alleged kickbacks were disclosed in accordance with the safe harbor provisions of the Anti-Kickback Statute, and thus, did not constitute fraud. Instead, the court agreed with the relators that Omnicare did not fully disclose the terms and conditions of the discounts and rebates it offered to pharmacies, and in fact concealed the extent of those discounts from the government. The court further found that the relators' direct kickback claims against Omnicare satisfied Rule 9(b)'s heightened pleading requirements, stating that the "[r]elators have sufficiently pled the 'who, what, and when" of Omnicare's participation in the kickback scheme." The court observed that the relators' complaint detailed the discounts and rebates Omnicare provided to pharmacies that converted prescriptions to its drug, and described meetings between Omnicare and Organon executives, during which the plans for providing illegal discounts in exchange for drug-switching were discussed. The court concluded that the relators adequately pled that Omnicare's alleged direct kickbacks caused false claims to be presented to the government, caused false statements to be made to the government, and involved a conspiracy to defraud the government, stating that the relators' allegations "sufficiently plead that Omnicare knew that Medicad would be the primary payor for ling-term care prescriptons, that it agreed to participate in the kickback scheme, and that it was amply familiar with the Medicaid system to know that any false record or statement it submitted would be material to the government's decision to pay or approve a claim." But the court held that the relators' allegations of collateral kickbacks, in the form of plans between Omnicare and Organon to have Organon sponsor Omnicare's annual meetings, data purchases, educational grants, and other initiatives were deficient, since the relators could not demonstrate that any such payments were actually made. Moreover, the court determined that the relators failed to identify any employees who were involved in other alleged collateral kickback arrangements. Thus, the collateral kickback claims against Omnicare were dismissed, while the direct kickback claims were not.

U.S. ex rel. Goldberg v. Rush Univ. Med. Ctr., 2012 WL 1813694 (7th Cir. May 21, 2012)

Two relators brought a *qui tam* action against a teaching hospital and the hospital's director of real estate, alleging that the defendants violated the False Claims Act and the Illinois Whistleblower Reward and Protection Act (IWRPA) by knowingly submitting improper fee-for-service bills to Medicare for work that was performed by unsupervised residents. The defendants moved to dismiss the relators' claims for lack of subject matter jurisdiction, pursuant to the FCA's public disclosure rule. The U.S. District Court for the Northern District of Illinois granted the defendants' motion, based on its finding that the relators' allegations had been previously publicly disclosed in a General Accounting Office (GAO) report. The relators appealed the district court's ruling to the U.S. Court of Appeals for the Seventh Circuit, arguing that their allegations were not substantially similar to the information contained in the GAO report and, therefore, their complaint was not precluded by the public disclosure bar.

Holding: The Seventh Circuit vacated the district court's judgment and remanded the case for further proceedings.

Public Disclosure Bar

The relators argued that their allegations regarding the defendants' alleged false Medicare billing for unsupervised services were more specific than those contained in the GAO report, and therefore were not previously publicly disclosed. More specifically, they contended that the defendant hospital scheduled teaching physicians to supervise multiple surgeries simultaneously, resulting in situations in which physicians were not present for critical portions of the services. The relators alleged that the GAO report did not describe these fraudulent activities. The appellate court held that no one who read the GAO report, or followed the progress of the government's audits, could know or suspect that the defendants were misrepresenting the availability of teaching physicians during the scheduled procedures. The court found that the relators alleged a kind of deceit that the GAO report did not attribute to the defendants. Accordingly, the court vacated the district court's judgment, and remanded the case.

U.S. ex rel. Davis v. D.C., 2012 WL 1673655 (D.C. Cir. May 15, 2012)

A relator brought a *qui tam* action alleging that the District of Columbia and its schools violated the False Claims Act by submitting a Medicaid reimbursement claim without maintaining adequate supporting documentation. The relator alleged that D.C's Medical Assistance Administration (MMA) reimburses the District of Colombia Public Schools (DCPS) for the estimated costs of medical and transportation services provided to special education students throughout the year and that, at the end of the year, DCPS submits a reimbursement claim to MMA that sets forth its actual costs incurred during the year. The estimated costs are then reconciled with the actual costs to determine whether or not DCPS was underpaid or overpaid. As a result, the relator alleged, DCPS must maintain accurate financial documentation so that auditors can properly perform the reconciliation, and claims for expenses that lack the required supporting documentation cannot be considered.

The relator alleged that his firm prepared DCPS's Medicaid reimbursement claims for fiscal years 1995-1997. He alleged that while his firm was in the process of preparing the 1998 claim, they were replaced by DCPS with another firm. The relator alleged that DCPS could not have submitted all the required documentation to support its 1998 reimbursement claim because only he had the relevant documentation, which he never returned to DCPS. Upon learning that DCPS submitted the other firm's claim, the relator alleged that he reported to District officials that its DCPS claim lacked necessary supporting documentation. The relator then alleged that MMA paid DCPS $10.3 million as a tentative settlement for fiscal year 1998, but that MMA hired an auditor who determined that portions of DCPS's claims should have been disallowed because they were not adequately documented. The relator alleged that MMA returned to the government $7.6 mil-

lion that had been overpaid to DCPS for 1998. He contended in his *qui tam* complaint that the defendants knowingly violated the False Claims Act by submitting a claim for DCPS's actual costs that were not supported by proper documentation and thus, were not reimbursable.

The defendants moved to dismiss the relator's claims and the U.S. District Court for the District of Columbia granted the motion in part—the court dismissed DCPS as a defendant, as relevant state law provided that the agency could not be sued directly; the court also dismissed the relator's treble damages and conspiracy claims, as it determined that the relator failed to allege any actual damages sustained by the government. After discovery, the court also granted defendant D.C.'s motion to dismiss the relators' claims for lack of subject matter jurisdiction. The District had argued that report issued by the Office of the District of Columbia Auditor publicly disclosed the defendants' alleged fraud nearly four years before the relator filed his suit, and therefore, the relator's suit was barred under the FCA's public disclosure provision. The court reversed its earlier holding that the relator qualified for the "original source" exception to the public disclosure provision and instead determined that the relator was not an original source, since he did not notify the federal government of the alleged fraud before the public disclosure occurred. The relator appealed the district court's rulings on subject matter jurisdiction and the dismissal of his claims for treble damages and conspiracy to the U.S. Court of Appeals for the District of Columbia Circuit.

Holding: The D.C. Circuit Court vacated the district court's judgment on the public disclosure bar issues and remanded the case for further proceedings; the appeals court upheld the district court's dismissal of the relator's claims for conspiracy and treble damages.

Public Disclosure Bar

The D.C. Circuit Court first considered the relator's appeal of the district court's ruling on the public disclosure bar and original source issues. The court, examining the 1986 version of the public disclosure bar, which was in effect at the time the relator's complaint was filed, first declared that, for purposes of the public disclosure bar, "a suit is 'based upon' publicly disclosed 'allegations or transactions' when the allegations in the complaint are 'substantially similar' to those in the public domain." Thus, a relator may be precluded from filing a *qui tam* action, even if he/she did not actually derive information for his/her complaint from a prior public disclosure. The circuit court determined that the audit report at issue "revealed to the public the "allegation" that DCPS did not have adequate supporting documentation for its 1998 Medicaid reimbursement claim and provided ample reason for the government to investigate further." As a result, the court held that the relator's suit was barred, unless the relator qualified for the original source exception to the public disclosure rule.

The district court, applying D.C. Circuit caselaw, had held that the relator was not an original source, because even though he had direct and independent knowledge of the alleged fraud—and therefore, did not need to rely on the public disclosure—he did not voluntarily provide his information to the government before the public disclosure occurred. The relator, relying on U.S. Supreme Court precedent and the plain language of the statute, argued that the original source exception does not require relators to disclose their allegations to the government prior to any public disclosure; rather, relators who wish to be deemed original sources are simply required to disclose their allegations to the government before they file a *qui tam* action. The D.C. Circuit Court agreed with the relator and declared that, when applying the 1986 version of the public disclosure bar provision, "we will no longer require that a relator provide information to the government prior to any public disclosure of allegations substantially similar to the relators' and will instead enforce on the text's deadline of 'before filing an action." Since the relator could show that he informed the government of his allegations before filing his *qui tam* suit, the circuit court found that the relator qualified as an original source. The district court's ruling on the subject matter jurisdiction was reversed.

Damages

The circuit court then considered the relator's contention that the district court wrongly dismissed his claims for treble damages and conspiracy on the grounds that he failed to allege any actual damages to the government. The relator argued that the entire amount the government paid to DCPS in 1998 constituted damages, since the government would not have paid those amounts to DCPS if it had known that DCPS did not have supporting documentation for its 1998 reimbursement claim. However, the appellate court held that the district court rightly held that the government suffered no damages, since the relator never alleged that any of the services the government paid for were not actually provided. The D.C. Circuit Court reasoned that "[t]he purpose of maintaining documentation is to ensure that the government pays only for services actually rendered. Because all agree that the services were actually provided, the maintenance of documents to prove that they were has no independent monetary value." The court likened the situation to not receiving a receipt after a meal, which generally causes no harm when the diner knows that he/she has been properly charged. The court stated that "[t]he same is true here: The government got what it paid for and there are no damages." The court noted that the relator could still share in any recovery the government might receive from the imposition of statutory civil penalties.

U.S. ex rel. Schumann v. AstraZeneca PLC, 2012 WL 1071133 (E.D. Pa. Mar. 30, 2012)

A relator brought a *qui tam* action alleging that a group of pharmaceutical companies—one of which he'd formerly worked for—entered into fraudulent agree-

ments so that their respective brand-name drugs would be dispensed, rather than equivalent generic drugs. The relator alleged that the defendants entered into these agreements in order to evade their best price reporting obligations to the government. The relator also alleged that his former employer received illegal kickbacks from the other group of defendants in exchange for promoting the sale of their drugs. The defendants moved to dismiss the relator's claims, on the basis of the False Claims Act's public disclosure bar, and the U.S. District Court for the Eastern District of Pennsylvania granted the defendants' motion, finding that the relator failed to plead that he was an original source of the information underlying his claims. The relator then moved for reconsideration of the court's ruling.

Holding: The U.S. District Court for the Eastern District of Pennsylvania denied the relator's motion, finding that the relator failed to specify any error of law or fact that would justify reversing the court's previous order.

The court first analyzed the declaration the relator attached to his motion and found that the declaration did not present any new information, but instead contained information that was available to the relator at the time when he filed the amended complaint at issue. Therefore, the court refused to consider the relator's declaration when deciding the motion for reconsideration. The court also rejected the relator's argument that the court had committed error by requiring him to have knowledge of all the elements of the defendants' alleged fraud scheme at the pleading stage. The court noted that the relator failed to cite where the court determined that the relator was required to have such knowledge. Thus, the court held that the relator failed to show any direct and independent knowledge of the alleged fraud and held that it had applied the proper standard when dismissing his *qui tam* suit.

The court then examined the relator's allegations of error regarding his pleadings, in which he argued that since the defendants did not challenge his original source status, the court erred by considering the jurisdictional attack related to his status as an original source as factual instead of facial and by not accepting his allegations as true. The court, though, stated that it did consider the defendants' challenge as a factual attack, that is did not consider any information outside the complaint when determining the relator's original source status (although the court did consider information outside the complaint when determining that the relator's claims had been previously publicly disclosed), and that it did accept the relator's allegations as true. The court reiterated that it dismissed the relator's complaint based on its determination that the relator simply failed to plead sufficient facts regarding his direct and independent knowledge of the alleged fraud scheme, and instead only made conclusory allegations that the defendants entered into improper agreements to evade the best price requirements.

Furthermore, the court held that the relator's claims regarding the defendants' alleged kickback scheme were nearly identical to his best price allegations, and were thus, equally conclusory and insufficient to establish his direct and independent knowledge. Consequently, the court denied the relator's motion for reconsideration.

The court also denied the relator's request for leave to amend his complaint again, noting that such an amended would be the relator's fifth attempt to modify his allegations.

U.S. ex rel. Colquitt v. Abbott Labs., 2012 WL 1081453 (N.D. Tex. Mar. 30, 2012)

A relator brought a *qui tam* action against three medical device manufacturers: Abbott (his former employer), BSC, and Cordis. He alleged that these defendants violated the False Claims Act and various state laws by engaging in a fraudulent scheme to obtain FDA clearance and by promoting the off-label use of their devices, which led to the submission of false claims to the government for Medicare/Medicaid reimbursement. More specifically, the relator alleged that the defendants defrauded the Food and Drug Administration by making false statements and omitting material information regarding their stents, including the classification, type, predicate devices, substantial equivalence, intended use, appropriate labels and risk to patients posed by their stents, because they knew that it was easier to get FDA-approval for the devices as biliary stents rather than as vascular stents. He further alleged that once the defendants received FDA approval for their respective biliary stents, they committed fraud by improperly marketing the devices for off-label uses in vascular applications. He claimed that during his employment with Abbott, he was trained to promote Abbott's stent for off-label vascular uses; he asserted that he other defendants used similar training methods. He further claimed that the dimensions of the defendants' devices were more appropriate for use in the vasculature than in the biliary tree. Furthermore, the relator alleged that the defendants violated the FCA by providing illegal kickbacks to physicians and hospitals that used their devices for off-label uses.

The defendants separately moved to dismiss the relator's claims, arguing that the relator failed to state a claim, that he failed to plead his fraud allegations with particularity, and that his allegations were barred by the FCA's public disclosure rule.

Holding: The U.S. District Court for the Northern District of Texas granted defendants BSC's and Cordis' motions and dismissed all claims against those defendants. The court granted defendant Abbott's motion in part, and only allowed the relator to maintain his off-label marketing claim against that defendant.

Public Disclosure Bar

The court first examined whether the relator's claim was barred by the public disclosure rule. The defendants argued that, prior to the filing of the relator's complaint, the information underlying the relator's claims had been publicly disclosed in the defendants' submissions to the FDA, in various news articles, in the defendants' advertisements in medical journals and trade publications, and in two publicly-available "warning letters" the FDA sent to the defendants in response to advertisements promoting stents for off-label uses. The relator argued that the defendants' FDA submissions and advertisements did not qualify as public disclosures under the False Claims Act. The court disagreed and found that although the FDA submissions in question had been prepared by the defendants, that information was subsequently published by the FDA and therefore, qualified as a public disclosure. The court also held that the articles and advertisements had been disclosed in scholarly periodicals and thus, qualified as public disclosures through the news media. The court further found that one of the FDA warning letters—a letter sent to defendant Cordis in response to Cordis' off-label promotion of its stent—qualified as a public disclosure because it included information regarding the relator's off-label marketing allegations. The court held that the other warning letter—a general letter sent to multiple device manufacturers to remind them about improper off-label promotion of biliary stents—did not qualify as a public disclosure because it was not sufficient to disclose which specific device manufacturers had engaged in improper conduct. As a result of its findings, the court held that the relator's allegations had been publicly disclosed before he filed his *qui tam* complaint.

Then the court then considered the relator's argument that he qualified as an original source, and therefore, his complaint was not barred. The relator argued that he was an original source of the information on which his allegations were based, because he witnessed the defendants promoting off-label uses of their stent devices during his employment. The court, though, held that the relator was not an original source of his claimed that the defendants fraudulently induced the FDA to approve their devices, because his knowledge regarding that claim was not independent of the public disclosures, since the information regarding the defendants' submissions to the FDA—including the dimensions of their medical devices—was available to anyone who wanted to find it. However, the court concluded that the relator did qualify as an original source for his off-label promotion claims, as the relator alleged that he was trained to promote the off-label use of Abbott's medical devices and was trained to teach physicians how to use the devices for off-label uses. The court found that the relator's knowledge was "independent" because his particularized information had not been publicly disclosed, and that his knowledge was "direct" because he gained it firsthand as an Abbot employee. Therefore, the court held that the relator only qualified as an original source for his off-label claims, but not for his fraudulent inducement claims.

Failure to State a Claim/Failure to Plead Fraud with Particularity

Finally, the court examined whether the relator failed to state a claim under the FCA with respect to his remaining off-label marketing claims and/or whether he pled those claims with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure. The defendants argued that the relator's allegations did not allow for a reasonable inference of FCA liability, claiming that the Medicare/Medicaid reimbursement claims submitted by healthcare providers for off-label uses of the defendants' medical devices did not constitute false or fraudulent claims. The defendants further argued that the relator failed properly to plead his off-label promotion theory of FCA liability, because he did not allege sufficient facts regarding any false claims alleged submitted to the government. The court determined that the relator alleged that providers' claims for reimbursement associated with off-label uses of the defendants' devices were improper and false because the government should not have paid claims for non-FDA approved uses of the defendants' devices. Moreover, the court found that the relator alleged specific instances in which he witnessed the defendants promoting their devices for off-label uses, and that he also alleged that the defendants distributed reimbursement guidelines to instruct healthcare providers on how they could seek reimbursements from the federal government for stents used for off-label purposes. However, the court held that the relator only provided sufficient factual detail to satisfy the particularity requirements with respect to his claims against defendant Abbot. The court found that the relator provided only vague claims about BSC and Cordis' alleged frauds. Therefore, the court dismissed the relator's off-label marketing claims against BSC and Cordis, but allowed the relator to maintain those claims against Abbott.

Finally, the court held that the relator failed to provide any specific details about the defendants' alleged kickbacks schemes and as a result, the court dismissed all of the relator's kickback claims.

U.S. ex rel. Zizic v. Q²Administrators, LLC, 2012 WL 1019047 (E.D. Pa. Mar. 27, 2012)

A relator brought a *qui tam* action against two companies that had been hired by the Centers for Medicare & Medicaid Services to serve as qualified independent contractors and to provide appellate review of Medicare claim denials related to a medical device used to treat osteoarthritis of the knee. The relator alleged that the defendants violated the False Claims Act because they did not provide—and could not have provided—the statutorily-required level of review by physicians or other healthcare professionals, due to the large number of appeals and the small number of healthcare professionals employed by the defendants. The relator claimed that these failures led to the submission of false healthcare claims to the government, as well as the submission to the government of false statements/records material to healthcare claims. He claimed that he was president of another company that had been formed to commercialize the medical device at issue, and that, based on

his own review of the appeals related to the device in question, he had first-hand knowledge that the defendants' fraudulent conduct. The government declined to intervene in the relator's case. The defendants separately moved to dismiss the relator's claims, arguing that the relator failed to state a claim, that his complaint failed to plead the alleged fraud with particularity, and that his claims were barred by the FCA's public disclosure rule.

Holding: The U.S. District Court for the Eastern District of Pennsylvania granted the defendants' motions to dismiss, finding that the relator's claims were barred by the public disclosure rule.

Public Disclosure Bar

The court first examined whether the relator's claims were precluded by the public disclosure bar. The court found that prior administrative hearings revealed that the defendants had conducted claim denial reviews inconsistently and that these findings suggested to the relator that the defendants had not provided reviews of claim denials as per the contract; instead the findings suggested an inference of fraud. The court also noted that prior litigation warranted an inference of fraud, as a prior bankruptcy proceeding alleged that most of the defendants' claims denial reviews were not conducted by a physician and that only a small number of reviews were even handled by a nurse. The court found that the relator's claims were similar to the information contained in the prior public disclosures, and thus, the court had no subject matter jurisdiction over the relator's fraud claims.

The court held that the relator did not qualify for the "original source" exception to the public disclosure rule, since he lacked direct knowledge of the alleged fraud—notably, the relator based his allegations on the affidavit of another individual. The relator alleged that he only relied on the affidavit to substantiate his own first-hand information, but the court determined that the affidavit alleged additional facts that were not revealed to the relator through his own review of the defendants' reconsiderations of claim denials. Therefore, the court held that the relator lacked direct knowledge. The court also found that the relator lacked independent knowledge of the information his claims were based on, since any allegations that did not depend on the affidavit were based on the public disclosures. Therefore, the court concluded that it lacked subject matter jurisdiction over the relator's action and dismissed his complaint.

U.S. ex rel. Allen v. Guidant Corp., 2012 WL 878023 (D. Minn. Mar. 14, 2012)

A relator brought a *qui tam* action against a medical device manufacturer and its subsidiaries, alleging violations of the False Claims Act, as well as common law claims. Specifically, the relator alleged that the defendants caused hospitals, physicians, and other healthcare providers to submit and receive payment for false Medi-

care and Department of Veterans Affairs claims, by intentionally misrepresenting the allegedly defective and dangerous nature of their implantable cardiac devices to the FDA—the relator alleged that the defendants' devices were designed to deliver a shock when it detected an irregular heartbeat, but that the devices were prone to electrical short circuit problems, which could lead to patient deaths. The United States intervened in the relator's suit and added allegations that the defendants did not inform the FDA about any corrective actions and continued to sell defective devices. The defendants moved to dismiss the relator's FCA claims, arguing that: (1) the government's complaint-in-intervention superseded the relator's complaint; (2) the relator's claims were precluded by the FCA's public disclosure bar provision; and (3) the relator failed to plead the alleged fraud with particularity.

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

Superseding Complaint

The court first analyzed whether the government's complaint-in-intervention superseded the relator's complaint. The court found the relator's complaint pled a fraud scheme regarding allegedly defective medical devices manufactured after April 2002, while the government brought additional allegations related to devices manufactured before April 2002. Therefore, the court held the government's claims were not duplicative of the relator's. The court also noted that the government did not seek to dismiss or settle the relator's claims or to limit the relator's participation in the *qui tam* action. Accordingly, the court held the government's complaint did not supersede the relator's complaint and denied the defendants' motion to dismiss the relator's complaint on the basis that it was superseded by the government's complaint.

Public Disclosure Bar

Next, the court considered whether or not the relator's claims were based on publicly disclosed information that would trigger the FCA's public disclosure bar provision. The defendants argued that the allegations in the relator's complaint were based on media reports and other public materials. The court, though, did not address the defendants' argument, as it determined that the relator qualified as an original source of the information on which his complaint was based, since he had used one of the defendants' cardiac devices and his own device had malfunctioned on at least three occasions, rendering the relator unconscious, causing damage to his heart, and causing him to fall down a flight of stairs. The court held that the relator's direct and independent personal knowledge of the alleged device malfunctions, coupled with the fact that he reported the relevant information about the alleged fraud to the government before filing his complaint, qualified him as an original source. As a result, the court held that the relator's claims were not barred by the public disclosure bar, and denied the defendants' motion to dismiss the relator's complaint for lack of subject matter jurisdiction.

Pleading Fraud with Particularity

Finally, the court addressed the defendants' argument that the relator failed to plead his fraud allegations with particularity, as required by Rule 9(b) of the Federal Rules of Civil Procedure. The court rejected that argument, finding that the relator alleged the time, place, and content of the defendants' allegedly fraudulent acts and misrepresentations. The court also found the relator detailed his own experiences with the defendants' device and described specific representations made by the defendants' personnel about the supposed safety of the device. Further, the court found that the relator alleged the dates on which the defendants were alleged to have submitted false reports to the FDA, which in turn, allegedly led to false representations to Medicare and the Department of Veterans Affairs that the defendants' devices were free from any known defects. Accordingly, the court held the relator pled his fraud allegations with sufficient particularity, and denied the defendants' motion to dismiss the complaint on that basis.

U.S. ex rel. Jones v. Collegiate Funding Servs., Inc., 2012 WL 835747 (4th Cir. Mar. 14, 2012)

Two relators brought a *qui tam* action against their former employer—a private commercial lender (CFS)—and its subsidiaries, alleging that the defendants submitted Federal Family Education Loan Program (FFELP) claim forms in which they falsely certified that all of the information they provided was accurate and in compliance with all federal regulations. The relators alleged 21 counts of resulting FCA violations. The first 15 counts alleged that, in order to get the government to provide insurance guaranty payments and to pay for loans, CFS and its loan serving company caused the use of false statements through: (1) unlawful inducements (Counts 1-3); (2) deceptive exit counseling (Counts 4-6); (3) deceptive direct mail solicitation (Counts 7-9); (4) bonus compensation for recruiters (Counts 10-12); and (5) violations of the single holder rule (Counts 13-15). The relators also alleged that the defendants directly presented false claims to the government and conspired to submit false claims for insurance guaranty payments, loan interest, and special allowance payments (Counts 16-19). Finally, the relators alleged that the defendants falsely certified their compliance with regulations so as to avoid obligatory repayments of government insurance, interest, and special allowance payments (Counts 20-21). The defendants moved to dismiss the relators' claims, arguing that the relators failed to plead the alleged fraud with particularity and thus failed to state under the False Claims Act. In addition, the defendants asserted that, due to the FCA's public disclosure bar, the court lacked subject matter jurisdiction over all Counts except Counts 10-12. The relators voluntarily dismissed Counts 13-15. The disputes over the remaining counts were referred to a magistrate judge, who prepared a Report & Recommendation (R&R).

The U.S. District Court for the Eastern District for Virginia adopted the magistrate's R&R and granted the defendants' motion to dismiss the relator's claims. The court held that it lacked subject matter jurisdiction over Counts 1-6 of the relator's complaint, pursuant to the public disclosure bar and that the relators failed to plead the remaining counts with particularity. The relators appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit, arguing that they had no knowledge of any prior public disclosures and that certain SEC filings did not qualify as administrative reports for purposes of the public disclosure bar.

Holding: The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's judgment.

Public Disclosure Bar

The court began by analyzing the public disclosure bar and subject matter jurisdiction issue. The relators argued that the district court erred in determining that the essential elements of the relators' allegations in Counts 1-6 of their complaint had already been disclosed in the defendants' SEC filings and in media reports, prior to the filing of the *qui tam* complaint. The district court further held that the relators failed to provide evidence of their direct and independent knowledge of the information on which their complaint was based, and thus did not qualify as original sources of the information supporting their claims.

The relators argued to the circuit court that the documents at issue failed to set out the relators' fraud allegations against the named defendants. The defendants responded, arguing that their parent organization had been named in the media coverage and that various other news reports and their own SEC filings provided enough information for the relators to build their claims. The relators then argued that the defendants' reliance on public accounts of general industry behavior, which did not include any specific allegations against the defendants named in the *qui tam* action, were insufficient to trigger the public disclosure bar. The appellate court determined that the district court relied on a published report of investigations in which the defendants were named, and also relied on the defendants' own claims that their business model included special inducement arrangements with schools for access to student borrowers. The appeals court also determined that the defendants' SEC filings at issue were "administrative reports" for the purposes of the public disclosure bar, since those documents were requested, received, and made public, as they were presumably included in any corporate profiles compiled by the federal agency. Further, the court found that the documents provided access to information regarding the transactions between the defendants and their customers. Thus, the court held that the SEC filings were administrative reports for the purposes of the public disclosure bar, and affirmed the district court's decision to consider those documents as part of its analysis of the public disclosure bar.

In response to the relators' claims that they did not read the publicly-available documents that gave rise to the defendants' subject matter jurisdiction defense, and thus should not be precluded by the public disclosure bar, the circuit court agreed with the district court's reasoning that while the relators were not required to prove the source of their information, their mere denial of knowledge of the public disclosures was not enough to overcome the public disclosure bar. As a result of these findings, the circuit court affirmed the district court's dismissal of Counts 1-6 of the relators' *qui tam* complaint for lack of subject matter jurisdiction.

Pleading Fraud with Particularity

The court then turned to the remaining counts of the relators' complaint and the defendants' argument that those counts should be dismissed because the relators failed to plead the fraud scheme with particularity. The relators theorized that CFS's alleged habitual violations of the FFELP rendered false all loans CFS made or serviced, as those loans were based on CFS's alleged false certifications of compliance with applicable federal regulations. The relators also provided the district court with blank copies of the certification forms they alleged were falsified. The district court had held that blank certification forms, coupled with the relators' allegations of fraud, did not meet Rule 9(b)'s heightened pleading standard. The circuit court agreed, finding that the relators alleged only broad inferential claims and failed to provide sufficient supporting facts, such as details regarding particular transactions between the defendants and the government or the name and identity of any person who made a false certification of compliance to the government. Consequently, the circuit court upheld the district court's ruling that the relators failed to plead their fraud claims with particularity and the circuit court affirmed the district court's dismissal of the relators' remaining claims.

U.S. ex rel. Bartz v. Ortho-McNeil Pharm., Inc., 2012 WL 695886 (D. Mass. Mar. 2, 2012)

A relator brought a *qui tam* action against the pharmaceutical company he previously worked for (Johnson & Johnson (J&J)), the company's subsidiaries, and a medical distributor (McKesson). The relator alleged that the defendants violated the False Claims Act, the Anti-Kickback Statute (AKS) and various state laws. The relator also alleged a claim for retaliation under the False Claims Act. Specifically, the relator alleged that the J&J defendants manipulated rebate amounts owed to the government, falsely reported to the government the Average Manufacturer Price and the Best Price of drugs, and paid illegal kickbacks to nursing home drug purchasers who purchased their drugs, including defendant McKesson. The relator's retaliation claim was based on his assertion that he was demoted and eventually fired from his sales job with a J&J subsidiary when he complained about the defendants' allegedly fraudulent conduct. The defendants moved to dismiss the relator's fraud claims under the FCA's public disclosure and first-to-file provisions.

Holding: The U.S. District Court for the District of Massachusetts granted the defendants' motion to dismiss the fraud claims, but allowed the relator to maintain his retaliation claim.

Public Disclosure Bar

First, the court analyzed whether the relator's *qui tam* allegations were precluded by the FCA's public disclosure bar provision. The defendants had argued that the relator's allegations were barred by previously filed lawsuits, by media reports, and by industrial journal publications. The relator countered that his fraud allegations provided new details of financial accounting records and explanations of the defendants' internal accounting policies and that any previously disclosed information regarding the relator's Best Price allegations was too vague to qualify as a true "public disclosure" for FCA purposes. The relator also noted that many of the prior lawsuits the defendant relied on as public disclosures were not *qui tam* actions. The court agreed with the defendants' assessment, finding that all essential elements of the relator's fraud claims had been publicly disclosed before he filed his *qui tam* complaint and that the information contained in the prior disclosures was sufficient to put the government on notice of the alleged fraud. The court then turned to the question of whether or not the relator qualified as an original source. The relator argued that, as a former employee of one of the defendants, he possessed first-hand knowledge of the sales data used to calculate sales bonuses. The court, though, determined that the relator failed to provide any supporting facts regarding his first-hand knowledge, as he merely copied numerous documents from computer systems he had access to during his employment. Thus, it held that the relator failed to show that he was an original source. Since the allegations giving rise to the relator's fraud claims had been previously publicly disclosed, the court held that it lacked subject matter jurisdiction over the relator's *qui tam* allegations, and the relator's fraud claims were dismissed.

First-to-File Rule

Next, the court considered the defendants' argument that the relator's fraud claims were also barred by the FCA's first-to-file rule. The relator acknowledged the existence of other *qui tam* actions against the defendant, but argued that these suits did not bar his complaint, since he alleged different types of frauds, based on different material facts, and none of the cases relied on by the defendants was pending when he filed his complaint. The court disagreed, finding that the relator's allegations were substantially similar to the previously-filed *qui tam* complaints and that those actions were indeed pending when the relator's *qui tam* action was filed. Accordingly, the court held that the relator's fraud claims were also barred by the FCA's first-to-file rule.

Stating a Claim for Relief

The court analyzed the relator's fraud claims against McKesson, wherein the relator alleged that McKesson, as a direct purchaser—and not as a purchasing agent—took kickbacks from J&J in exchange for purchasing certain J&J drugs. The relator further asserted that since McKesson served as a direct purchaser, it was not eligible for the "administrative fees" it received from J&J, which were originally termed as discounts, apparently in an attempt to fall within the Safe Harbor Provisions of the AKS. The court held that the relator's reliance on the defendants' alleged non-compliance with the AKS as a basis for FCA liability was misplaced. The court observed that the AKS was amended to expressly provide that claims to the government that result from violations of the AKS constitute violations of the FCA as well, but noted that this amendment only applied to drugs dispensed after July 1, 2010. Since the relator's employment had been terminated in 2007, and since the relator failed to identify any illegal "kickback" paid to McKesson after 2006, the court held that the relator's claims against McKesson failed.

Retaliation

With respect to the relator's retaliation claim, the defendants argued that the relator failed to put them on notice of his *qui tam* action, and thus failed to satisfy one of the criteria for properly pleading a cause of action under the FCA's anti-retaliation provision. The relator responded that the defendants had knowledge of his whistleblowing activities, particularly since he alleged that he made several complaints to his former employer about the defendants' allegedly illegal practices. The court held that the relator was not required to "inform[] the employer of the exact nature of his investigative activities," and noted that he would be protected from retaliations if "the employer knew (or believed) of [sic] the employee's 'disloyal' acts, and punished him accordingly. Ultimately, the court held that the relator's allegations were sufficient to state a claim for retaliation under the False Claims Act.

U.S. ex rel. Assocs. Against Outlier Fraud v. Huron Consulting Group, Inc., 2012 WL 506824 (S.D.N.Y. Feb. 16, 2012)

A corporate relator brought a *qui tam* action against two medical service corporations (Huron and Vincent) and a financial intermediary (Empire), alleging that the defendants violated the federal False Claims Act and the New York State FCA by submitting Medicare/Medicaid reimbursement forms seeking outlier reimbursement. The relator alleged that Huron controlled Vincent and exercised its control to have Vincent submit inflated claims to the government. The relator further alleged that Empire ignored the inflated claims and processed them at a higher reimbursement level. The defendants moved separately to dismiss the relator's claims, arguing that the relator's complaint was barred by the FCA statutes' respective public disclosure bar provisions.

Holding: The U.S. District Court for the Southern District of New York denied the defendants' motions and held that even though the relator's allegations had been previously publicly disclosed, the relator qualified as an original source of the information on which its allegations were based.

Public Disclosure Bar

The court first determined that the relator's fraud allegations had been previously publicly disclosed, as those allegations were based on information obtained through requests made under the Freedom of Information Act (FOIA). The defendants argued that the relator's action should be dismissed because the Supreme Court held that information gleaned from FOIA requests constitutes publicly disclosed government reports under the FCA. As the court confirmed that the requested documents contained information on which the relator's fraud allegations were based, it held that the relator's claims were based on the public disclosure.

The court then analyzed whether the relator qualified as an original source of the information on which his complaint was based, and would be exempted from the public disclosure bar. The relator argued that he based his allegations on information he obtained as a former independent contractor working for Huron's reimbursement department. Huron countered that the relator was not an original source, citing the Second Circuit's opinion in *U.S. ex rel. Dick v. Long Island Lighting Co.* for the proposition that in order to qualify as an original source, a relator must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which the *qui tam* allegations were based. The court, however, found that the Supreme Court had already rejected this interpretation of the public disclosure bar and the original source exception, and held that Congress did not intend to link original source status to the information underlying the public disclosure. Defendant Empire then argued that because the relator did not work for them and did not know how they processed outlier charges, he had no direct and independent knowledge of the allegations. The court disagreed, and found that although the relator might not have known who made which specific decisions at Empire, the relator demonstrated direct and independent knowledge of his core allegations against that defendant. Therefore, the court held that the relator was an original source of his claims against all the defendants and each of their respective motions to dismiss was denied.

U.S. ex rel. Green v. Serv. Contract Educ. & Training Trust Fund, 2012 WL 432569 (D.D.C. Feb. 13, 2012)

A relator brought a *qui tam* action against his former employers, an international labor union (LIUNA) and its training institute (SCETTF), as well as 29 government contractors, alleging that the defendants submitted false claims in connection with various federal service contracts. Specifically, the relator alleged that the defendants misrepresented to the government that the training they provided

qualified as a bona fide fringe benefit under the Department of Labor regulations because: (1) the 29 government contractor defendants were reimbursed for a substantial portion of their training costs; and (2) those government contractor defendants improperly used government funds for on-the-job training to compensate employees for work required under the government contracts. The relator eventually voluntarily dismissed his claims against 24 of the contractor defendants. All but one of the remaining defendants moved to dismiss the relator's claims, arguing that the claims were based information that had already been publicly disclosed on one of the defendants' websites and for which the relator did not qualify as an original source, and that the relator failed to plead facts with particularity.

Holding: The U.S. District Court for the District of Columbia granted the defendants' motion, finding that the relator's action was based on publicly disclosed information and he did not qualify as an original source. Further, the court held the relator failed to plead his fraud claims with particularity. Accordingly, the court dismissed the relator's claims.

Public Disclosure Bar

The court began by addressing the defendants' public disclosure argument, in which they claimed that the relator's fraud allegations were based on information about one of the defendants' training programs that had been publicly disclosed on that defendant's website. The relator countered that the website—which was specifically referenced in his complaint—was merely a self-promoting advertisement for a select audience and was not a traditional public news source. The court, though, found that the promotional webpage was readily accessible to the public and that there was no evidence that access to the information on the site was limited or restricted in any way. Therefore, the court held that the website qualified as news media, for purposes of the FCA's public disclosure bar. The court then determined that the relator's complaint included fraud allegations that were "based upon" the publicly disclosed information, as the relator's allegation that the defendants engaged in a scheme to receive improper reimbursements from the government mirrored information from the website. The court, however, held that the relator's fraud claims regarding on-the-job training had not been previously publicly disclosed. Finally, the court held that the relator did not qualify as an original source of that information, noting that the relator's "general assertion that he has direct and independent knowledge 'derived through his employment' does not suffice to explain the basis of his knowledge of any elements of the alleged fraud committed by these defendants," particularly since the relator alleged a fraud scheme that spanned from around 1978 though 2009, yet he was only employed by defendant companies between 2001 and 2004. Moreover, the court found that the relator failed to adequately show that he provided the government with information regarding the fraud before the public disclosure occurred, as required by the D.C. Circuit Court. Consequently, the court held that the relator did not qualify as an original source of the information upon which his complaint was based. Since the public disclosure bar precluded the relator's claims regarding improper reimbursements, those claims were dismissed for lack of subject matter jurisdiction.

Pleading Fraud with Particularity

Next, the court considered the defendants' argument that the relator's remaining on-the-job training claims were not pled with the requisite particularity. The court agreed with the defendants, noting that the relator "set forth neither an adequate factual basis nor any detailed description of the specific falsehoods underlying those claims," and that "nowhere in the complaint does [the relator] identify with particularity a single lie, or false representation, regarding on-the-job training made by ant of the defendants to a government official in order to secure a contract, or in order to get a claim paid." As a result, the court held that the relator failed to plead a single on-the-job-training fraud claim with particularity, and thus, the court granted the defendants' motion to dismiss those claims.

U.S. ex rel. Johnson v. Golden Gate Nat. Senior Care, LLC, 2012 WL 465676 (D. Minn. Feb. 13, 2012)

An individual and her new employer—a healthcare rehabilitation company—brought a *qui tam* action against her former employer, an occupational therapy company—and other nursing care centers, alleging that the defendants conspired to defraud the government and ultimately did fraudulently bill Medicaid and Medicare for services that were not properly supervised by certified physical and occupational therapists and for individual therapy services that were actually provided as part of group sessions. The defendants moved to dismiss the relators' claimed based on the False Claims Act's public disclosure bar. They also asserted that the relators failed to plead the alleged fraud scheme with particularity, as required by Federal Rule of Civil Procedure 9(b).

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

Public Disclosure Bar

The court began by analyzing the FCA's public disclosure bar. The defendants identified a series of public documents and cases, which they alleged disclosed the relators' fraud allegations before the *qui tam* action was filed. However, the court found that none of the public documents identified the alleged fraud or any of the specific acts or practices raised by the relators in their complaint. The court also found that, even if the relators' allegations had been previously publicly disclosed, the relators qualified as original sources of the information on which their allegations were based, because one of the relators worked at one of the defendants' therapy centers and had personal knowledge of the alleged improper services and billing. Therefore, the court held the public disclosure bar did not prohibit the relators' suit.

Pleading Fraud with Particularity

The court then considered the defendants' argument that the relators' complaint did not plead the alleged fraud scheme with particularity. The court, though, found that the relators alleged the time, place and manner of the alleged fraud and identified 41 specific instances of allegedly false bills to the government. The court also found that the relators listed the initials of the patients who received the defendants' services, as well as the dates and amounts of time billed. Accordingly, the court held that the relators' allegations were pled with sufficient particularity.

The defendants' motion to dismiss was denied.

U.S. ex rel. Rille v. Sun Microsys., Inc., 2012 WL 260755 (E.D. Ark. Jan. 30, 2012)

Two relators brought a *qui tam* action alleging that a technology company violated the False Claims Act by engaging in illegal kickbacks schemes and by charging the government inflated prices. Days before the relators filed their suit, and unknown to the relators, the General Service Administration (GSA) initiated an audit of the defendants' pricing practices. The Department of Justice intervened in the relators' case, a settlement agreement was eventually reached, and the claims against the defendant were dismissed. The government later moved to dismiss the relators' pricing claims, arguing that those claims were prohibited by the False Claims Act's public disclosure bar. The defendant separately moved to dismiss all of the relators' fraud claims on public disclosure grounds.

Holding: The U.S. District Court for the Eastern District of Arkansas denied both motions.

Public Disclosure Bar

The government argued that the relators' defective pricing allegations had been publicly disclosed in GSA audit-related discussions with the defendant and in two magazine articles, and as a result, those allegations should be dismissed for lack of subject matter jurisdiction, pursuant to the False Claims Act's public disclosure bar provision. The government argued that the audit reports revealed that the defendant: (1) had not provided the government with current, accurate, or complete customer sales practice information; (2) had not complied with contractual price reduction clauses; and (3) had not administered its contracts in accordance with their terms. Although the relators' initial complaint was filed before the disclosures occurred, the government argued that the relators did not allege any pricing claims until they amended their original complaint—after the public disclosures. However, the court found that the relators' original complaint, taken as a whole, included defective pricing claims. In addition, the court found that the purported public disclosures did not clearly indicate that a fraud had occurred, and therefore could not preclude the relators' claim. Moreover, the court held that even if the relators' allegations had been previously publicly disclosed, the relators were an original source of that information, and therefore their *qui tam* action and defective pricing claims would not be barred. The court noted that one of the relators became aware of the alleged fraud during his employment with another technology company, and that the relators also possessed documentary evidence of the alleged fraud. Accordingly, the court denied the government and the defendant's motions to dismiss the defective pricing claim.

The defendant echoed the government's arguments with respect to the relators' pricing claims and the court also denied the defendant's motion to dismiss those claims. The defendant also argued that the relators' kickback claims had been previously publicly disclosed and should be dismissed for lack of subject matter jurisdiction. The defendant argued that the alleged kickback scheme had been widely publicized in the press and that the government was aware of its practices before the relators filed their complaint. However, the court found that the alleged prior disclosures failed to disclose the critical elements of fraud or to clearly indicate that fraud was involved. Additionally, the court again emphasized that the relators would have qualified for the original source exception to the public disclosure bar nonetheless. Accordingly, the court denied the defendant's motion to dismiss the relator's claims.

U.S. ex rel. Estate of Cunningham v. Millennium Labs. of Cal., 2012 WL 259572 (D. Mass. Jan. 30, 2012)

A relator brought a *qui tam* action against a medication monitoring services company (Millennium) and several other defendants, alleging violations of the federal False Claims Act and several state FCA statutes. Specifically, he alleged that Millennium encouraged healthcare providers who used its urine drug testing services to fraudulently double-bill Medicare and Medicaid—the scheme involved having providers use a Millennium drug testing kit that could test for multiple drugs from a single specimen, and then advising those providers to improperly bill the government for every drug for which the specimen was tested, rather than for only one comprehensive test. The relator claimed that he became aware of Millennium's billing practices while he worked for a competing company. Less than a year after filing his *qui tam* complaint, the relator passed away. His estate was substituted as the relator and the case proceeded. Millennium moved to dismiss the suit, arguing that the fraud allegations were based on information that had been previously publicly disclosed, that the fraud allegations were not pled with particularity, and that the complaint failed to state a claim.

Holding: The U.S. District Court for the District of Massachusetts held that the relator's claims were based on a prior public disclosure, and were barred by

the False Claims Act's public disclosure provision. Consequently, the court determined that it did not have subject matter jurisdiction over the relator's claims against Millennium, and those claims were dismissed with prejudice. The court declined to address Millennium's other arguments or to entertain the relator's state-law claims.

Public Disclosure Bar

Millennium argued that, before the relator's *qui tam* action was filed, the alleged fraud scheme had already been publicly disclosed in a civil action brought in state court. In fact, Millennium asserted that five days before the relator's suit was filed, Millennium filed a complaint against the relator and his employer in state court alleging, among other things, defamation and intentional interference with contractual relations. Millennium alleged that one of the relator's co-workers had emailed some of the Millennium's customers and informed them about the defendant's alleged wrongdoing, which, according to Millennium, constituted a public disclosure. The court first noted that after the original *qui tam* action was filed, but before it was amended to include the relator's estate, the False Claims Act's public disclosure bar provision was amended to make clear that only public disclosures made in <u>federal</u> court proceedings will bar *qui tam* actions. The defendant argued that the public disclosure rule that existed when the original *qui tam* complaint was filed—which allowed for public disclosures in both federal and state court proceedings—should apply. The relator's estate countered that the amendment to the public disclosure bar is retroactive and thus, the new public disclosure bar should apply. The court concluded that, since the public disclosure bar deprives courts of jurisdiction over *qui tam* claims, it first needed to determine whether or not it had jurisdiction over the original *qui tam* complaint. The court also mentioned that "[i]f jurisdiction did not exist over this claim at the time the suit was filed, then the suit must be dismissed because a party cannot amend to fix a jurisdictional defect." Thus, the amended complaint, filed after the public disclosure bar was amended, could not save the *qui tam* action, in the event that the public disclosure rule barred the original complaint.

And the court did hold that the public disclosure rule barred the original *qui tam* action, since, at the time that action was filed, the allegations of fraud had already been disclosed in a forum that triggered the public disclosure bar, the relator's allegations were substantially similar to, and therefore, "based upon" the public disclosure, and the relator did not assert that he was an original source of that information and could qualify for an exception to the public disclosure bar. The *qui tam* action was dismissed with prejudice.

U.S. ex rel., Leveski v. ITT Educ. Servs. Inc., 2012 WL 266943 (S.D. Ind. Jan. 30, 2012)

A relator brought a *qui tam* action alleging that her former employer, an educational institution, caused false claims for federal educational funds to be submit-

ted to the government, by falsely certifying its compliance with a requirement not to base incentive compensation on student recruitment success. The defendant moved to dismiss the relator's complaint, arguing that the relator's allegations were based on publicly disclosed information from previously filed suits, and that she was not an original source of that information. The U.S. District Court for the Southern District of Indiana granted the defendant's motion, agreeing that the relator's allegations were based on public disclosures from a previously-filed *qui tam* action against the defendant.

The relator then moved to alter or amend the judgment, arguing that the court had committed two fundamental errors: (1) the court ignored the differences between her action and the previously filed action; and (2) the court did not apply binding Seventh Circuit precedent that purportedly set out a "notice of fraud standard" that applied to public disclosure.

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

Public Disclosure Bar

The relator argued that the previously-filed suit was materially different from her action, because it involved a simple, direct, and obvious violation of the incentive compensation provision, as opposed to her allegations of a more elaborate and disguised violation. Due to these differences, she argued, her allegations were not based upon those in the previously-filed action. The court disagreed, as it found that the relator's allegations mirrors those in the previously-filed action, since both complaints alleged violation of the incentive compensation provision which, in turn, caused the submission of false claims to the government. The court held that the allegations raised in the previously-filed action were sufficient to put the government on notice of the alleged fraud scheme. The relator then argued that her allegations could not have been based upon information from the previously-filed action, because her claims arose before the enactment of a safe harbor provision which allowed salary adjustments for recruiters not based "solely" on recruitment success. The court disagreed and held that the safe harbor provision was only designed to "clarify" the type of activity that violated the incentive compensation provision, and "was not a tectonic shift in the law." Further, the court held that the safe harbor did not change the fundamental point that both cases alleged the same scheme of falsely certifying compliance with the incentive compensation ban.

The court distinguished this situation from situations in which a prior public disclosure did not include enough information to give rise to an inference that a particular defendant committed a particular fraud. The court found that here, the prior public disclosure alleged that the same defendant committed the same fraud—even though the allegations in the two cases were not identical, the court held that substantial similarity was all that was required. Accordingly, the court denied the relator's motion to alter or amend its judgment.

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

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

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

Public Disclosure Bar

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

Pleading Fraud with Particularity

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

Waiver/Release of FCA Claims

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

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

A relator brought a *qui tam* action against his former employer, alleging that the defendant submitted false claims to the Export-Import Bank of the United States—a federal agency. The government intervened in the relator's suit and added common law claims to the relator's False Claims Act claims. The plaintiffs

alleged that the defendant had arranged to sell irrigation pumps and other equipment throughout Nigeria and that, to facilitate the sales, the defendant and Nigeria received a series of loans from the Export-Import Bank, totaling $74.3 million. Each of these loans was conditioned on a "supplier's certificate" that the defendant was required to submit, which certified that the defendant had not paid any "irregular commissions" in connection with its equipment sales. The plaintiffs alleged that these certificates were necessary to ensure that any U.S. exports financed by the Export-Import Bank were not tainted by the stigma of bribes or other illegal activity. The plaintiffs contended that the defendant's certificates were false, since the defendant had paid its Nigerian sales representative $28 million in excessive and irregular commissions, which, the plaintiffs contended, amounted to bribes. The plaintiffs alleged that the defendant usually paid commissions of about 10% of the standard discounted sales price, and 50% of any amount received over that price. The Nigerian sales representative in question, however, was alleged to have received far greater commissions, which represented 34% of the sales price.

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

Holding: The U.S. District Court for the District of Columbia denied all motions.

Public Disclosure Bar

The court first determined that it had subject matter jurisdiction over the relator's claims and thus denied defendant's motion to dismiss the relator's complaint for lack of jurisdiction. The defendant had argued that the relator's allegations were based on information that was publicly available at the time he filed suit, citing several news articles and documentary evidence that purportedly showed that the government had received Freedom of Information Act requests related to the case. The court, though, found that that the defendant failed to provide copies of the majority of the news articles and did not furnish any copies of relevant FOIA requests or responses. The relator countered that the news articles in question did not publicly disclose the central allegations of his complaint, as they did not disclose the allegedly fraudulent loan documents or the underlying allegations concerning the defendant's alleged bribes. Rather, the relator claimed, he used his insider position with the defendant to obtain the information upon which his *qui tam* complaint was filed and he provided that information to the government before filing suit. While the relator acknowledged gathering some information through FOIA requests to the Export-Import Bank, he stated that he only received background documents and other general information, and thus, the FOIA responses did not result in a public disclosure that would bar his *qui tam* action.

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

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

Motions for Summary Judgment

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

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

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

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

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

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

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

U.S. ex rel. Repko v. Guthrie Clinic, P.C., 2011 WL 3875987 (M.D. Pa. Sept. 1, 2011)

A relator brought a *qui tam* action in the U.S. District Court for the Middle District of Pennsylvania, alleging that four healthcare service providers (GC, GHC, RPH and GH) and an individual violated the False Claims Act, among other laws. Specific to the alleged FCA violations, the relator alleged that, over a period of years, an improper financial relationship existed between the various defendants, by which defendant GC (a clinic) provided referrals to the other defendants (two affiliated healthcare companies, a hospital, and a doctor) in exchange for millions of dollars in financial benefits. The relator alleged that these financial relationships violated the Stark law and the Anti-Kickback law, and resulted in the presenting false Medicare and Medicaid claims to the government—the claims were false because they allegedly included the defendants' false certification of compliance with all Medicare and Medicaid regulations, including prohibitions against Stark law violations. The defendants moved to dismiss the relator's complaint, arguing that, pursuant to the FCA's public disclosure bar provision, the court did not have subject matter jurisdiction over the relator's claims.

Public Disclosure Bar

The defendants argued that the FCA's public disclosure bar precluded the relator's complaint, because the relator based his allegations of improper financial relationships on information that had been previously publicly disclosed—citing various IRS forms and bond statements, information gleaned from prior civil and criminal proceedings, and information listed on various publicly-available websites. However, the relator argued that his allegations had not been previously publicly disclosed and asserted that even if they had been, any such disclosures would not preclude him from filing his *qui tam* action, since his fraud claim was based on the defendants' alleged false certifications of compliance with applicable Medicare/Medicaid regulations disclosures, and those certifications had not been previously revealed in any public disclosure. The court then considered each of the purported sources of public disclosures in turn.

First, the court analyzed whether the relator's complaint was based on information disclosed in earlier civil litigation. The defendants claimed that, before the relator filed his complaint, defendant GC engaged in at least two civil proceedings in which defendant GC's financial relationships were at issue and investigated. The court agreed, and held that, due to the prior litigation, the relator's claims of improper relationships between GC and the other defendants had been publicly disclosed before the relator filed his *qui tam* action.

Second, the court examined whether information contained on publicly-available websites fell within the public disclosure bar's "news media" category, noting that the defendants had argued that the relator's allegations were based on information disclosed on four websites that disclosed financial information about the defendants, including filings with the IRS. The court found that though websites are not traditional news sources, they serve the same purpose as newspapers or radio broadcasts—namely, providing the general public with access to information—and are easily accessible by anyone. Thus, the court concluded, websites *could* qualify as public disclosures. The court then considered whether the relator's allegations had been publicly disclosed through the websites in question. Again, the court concluded that the allegations of improper financial relationships had been publicly disclosed, since the websites included information regarding various transactions between and among the defendants that the relator claimed were improper.

Third, the court analyzed whether the alleged illegal referrals by GC had also been previously publicly disclosed, and again, the court held that they had been, observing that defendant GC's website—which was publicly-accessible—included information about the company's "in-house referrals," which was sufficient to publicly disclose the defendants' alleged improper referrals scheme.

Having found that the relator's factual claims had been previously publicly disclosed, the court turned its attention to the question of whether or not the relator based his claims on public disclosures. The relator argued that he did not, since his fraud allegations hinged on the defendants' alleged false certifications to Medicare and Medicaid of their compliance with the Stark law and the Anti-Kickback law, and this information had not been publicly disclosed before he filed his complaint. The defendants countered that the relator's allegations were substantially similar to the publicly disclosed information. The court held that there was ample evidence in the public record of the defendants' financial and referral relationships with one another, and that the relator's claims were based upon that information. The court stated that "[a]ny stranger to the transactions here referenced could examine the evidence of remunerative financial relationships described above, see that the defendants had referral relationships, and conclude that the Stark and Anti-Kickback statutes had been violated." While the court noted that the public disclosures did not reveal the substance of the defendants' certifications to Medicare and Medicaid, it reasoned that such disclosures "were routine filings, necessary for the payment of any claims. They do not represent the sort of information unavailable to strangers to the public transactions that constitute non-disclosed information." Consequently, the court held that the relator's claims were based on publicly disclosed information.

Having determined that the relator's allegations had been previously publicly disclosed and that the relator's FCA claims were based upon those disclosures, the court analyzed whether the relator was qualified for the "original source" exception to the public disclosure rule, noting that in order to qualify, the relator needed to have direct and independent knowledge of the information upon which his allegations were based and must have voluntarily provided that information to the government before filing his complaint. The court concluded that the relator was not an original source of the information upon which his complaint was based. As an initial matter, the court mentioned that the relator's original *qui tam* complaint did not contain any allegations regarding the defendants' allegedly illegal financial relationships; the court determined that the relator only included those allegations after such information became widely available through public disclosures. In addition, although the relator had been previously employed by two of the defendants, he left was not employed by any of the defendants during the time period in which the alleged improprieties occurred and thus, did not have direct and independent knowledge of the information contained in his complaint. The court was not persuaded by the relator's contention that he remained in close contact with former colleagues who were still working for the defendants, as the court held that this was insufficient to meet the original source standard because it did not give the relator any first-hand information. Moreover, the court held that the relator did not voluntarily provide information regarding the defendants' alleged fraud to the government. The court noted that the relator "filed his initial complaint in this matter in 2004, after he had been arrested on federal financial charges and signed a plea agreement that required him to provide information on illegal activities of others as a condition of that agreement." Given the relator's situation, the court concluded that he was compelled to disclose information regarding the defendants' alleged wrongdoing to the government before filing his complaint. Since he did not voluntarily provide the information to the government, he did not satisfy the requirements for original source exception to the public disclosure rule. As a result, the court held that it lacked subject matter jurisdiction over the relator's claims, and those claims were dismissed pursuant to the public disclosure bar.

U.S. ex rel. Lewis v. Walker, 2011 WL 3794690 (11th Cir. Aug. 26, 2011)

Three relators brought a *qui tam* action against a group of EPA employees, the University of Georgia, and a foundation affiliated with the university. The relators alleged that the defendants violated the False Claims Act by providing false information to the government in order to obtain research funds in order to investigate a variety of sewage sludge incidents on local Georgia farms. The defendants moved for summary judgment on the relators' claims, and the U.S. District Court for the Middle District of Georgia granted the defendants' motion, finding that it lacked subject matter jurisdiction over the claims because of the FCA's public disclosure bar rule. The district court held that the relators' fraud claims were based on information they obtained through requests under the federal Freedom of Information Act (FOIA) and the Georgia Open Records Act (GORA), and therefore, their claims fell within the public disclosure bar. Since the district court

concluded that the relators did not qualify for the "original source" exception to the public disclosure bar, it held that it did not have jurisdiction over the relators' claims, and consequently, those claims were dismissed. The relators appealed this ruling to the U.S. Court of Appeals for the Eleventh Circuit, which affirmed the district court's decision.

Public Disclosure Bar

The relators argued that the district court erred when it held that documents they obtained through FOIA and GORA requests were publicly disclosed for the purposes of the FCA. The relators relied heavily on the Second Circuit's decision in *U.S. ex rel. Kirk v. Schindler Elevator Corp.*, 601 F. 3d 94 (2d Cir.2010), as they apparently assumed that the U.S. Supreme Court would affirm the Second Circuit's holding that agencies' written responses to FOIA request are not automatically deemed "report" for purposes of the FCA's public disclosure bar. However, the Supreme Court reversed the Second Circuit's decision and held that a federal agency's written response to a FOIA request does indeed constitute a "report" within the meaning of the FCA's public disclosure bar—even if the "report" does not reflect an investigation by the agency of any possible FCA violation.

The Eleventh Circuit observed that the relators obtained their information through FOIA and GORA requests, from previous litigation records, from various government reports, and from a journal article—all of which the court held, were "public disclosures" for FCA purposes. The court observed that the public disclosure bar was amended in 2010 to clarify that only disclosures from federal government sources can bar federal *qui tam* cases. However, the court noted that the present case was already pending when that amendment became effective, and that since the amendment does not apply retroactively, it would not apply to the present case. Furthermore, the court observed that there was no indication in the record that the any of the relators had independent knowledge of any of the information upon which their fraud claims were based, and concluded that the relators did not qualify for the original source exception. The court rejected the relators' argument that by compiling the various publicly disclosed information they'd received in order to reconstruct the defendants' allegedly fraudulent grant application, they exhibited some independent knowledge that qualified them for the original source exception. Instead, the court held that the information the relators' compiled "was available to anyone who wished to use it for the same purpose," and thus, did not reflect any "independent" knowledge.

Therefore, the court affirmed the district court's ruling and upheld the grant of summary judgment in favor of the defendants.

U.S. ex rel. Leveski v. ITT Educ. Servs., Inc., 2011 WL 3471071 (S.D. Ind. Aug. 8, 2011)

A relator brought a *qui tam* action against her former employer, an educational services corporation, alleging that the defendant violated the False Claims Act by causing the submission of false claims for federal education grants and loan subsidies arising under Title IV of the Higher Education Act. Specifically, the relator alleged that the defendant violated the HEA by improperly compensating its admissions and recruitment employees based directly on the number of students they enrolled. The United States declined to intervene in the relator's suit. The defendant then moved to dismiss the action for lack of subject matter jurisdiction, arguing that the relator's claims were precluded by the FCA's public disclosure bar, since she based her allegations on previously-filed suits and other publicly disclosed information. The defendant further argued that the relator did not qualify as an original source, and thus, there was no exception to the rule barring her *qui tam* suit. The U.S. District Court for the Southern District of Indiana granted the defendant's motion.

The defendant argued that nearly identical allegations had already been filed in a prior case, and that the relator even reviewed those similar claims before filing her own suit. The relator countered, arguing that her suit added claims regarding additional misconduct by a financial aid advisor and that the time period for her claims did not overlap with the time period for the prior claims. The court found that the relator's claims did overlap with the prior claims and held that the relator's addition of violations by the financial aid advisor was insufficient to differentiate her action from the prior suit. As a result, the court held that a public disclosure occurred when the prior suit was filed. Additionally, the court held that since the relator's allegations were substantially similar to the claims already asserted, the relator's claims were based upon the public disclosure, and thus, the relator's complaint was barred. The relator then argued she qualified as an original source of the information upon which her allegations were based. The court observed that although the relator possessed facts relating to the defendant's incentive-based compensation practices, this was not enough to overcome the public disclosure bar, because the relator did not allege that she had direct and independent knowledge of the defendant's overall fraud scheme, which included knowledge that the defendant intentionally and knowingly defrauded the Department of Education. Since the relator could not demonstrate that she qualified for the original source exception to the public disclosure bar, her claim was dismissed for lack of subject matter jurisdiction.

U.S. ex rel. Jamison v. McKesson Corp., 2011 WL 3370344 (5th Cir. Aug. 5, 2011)

A relator brought a *qui tam* action against a nursing facilities management company (Beverly), its durable medical equipment (DME) supplier subsidiary (CSMS),

and another Medicare supplier and its parent company (McKesson). The relator alleged that the defendants submitted fraudulent Medicare claims that falsely certified compliance with Medicare program standards. Specifically, the relator alleged that Beverly set up CSMS as a sham DME provider and that CSMS entered into a joint venture with McKesson to provide DME to Beverly. Consequently, the relator alleged that all claims presented under CSMS' Medicare supplier number were false. The United States intervened in the relator's suit. The defendants then moved for summary judgment, arguing that the district court did not have subject matter jurisdiction over the relator's complaint, since that complaint was based on publicly disclosed information and the relator was not the original source of the information upon which the complaint was based. The U.S. District Court for the Northern District of Mississippi granted the motion. The relator appealed to the U.S. Court of Appeals for the Fifth Circuit, which affirmed the district court decision.

The circuit court first determined that the relator's original complaint was the operative complaint for purposes of determining subject matter jurisdiction, since that complaint would have been dismissed if the district court did not have subject matter jurisdiction—the court held that amended complaints cannot save an original complaint for subject matter jurisdiction purposes. After examining the relator's original complaint, the court found that it "described various fraudulent schemes only generally," and that even though it alleged several schemes and listed numerous defendants, it did not allege which defendants engaged in which fraud schemes. The court, relying on a group of documents that the defendants purported publicly disclosed the relator's allegations, then determined that the relator's action was based upon prior public disclosures. Although none of those documents named any of the defendants specific to the relator's suit, the court held that those disclosures were sufficient to bar the relator's suit, because the relator's complaint also only included general allegations. The appeals court gave little weight to the fact that the relator's complaint named specific defendants, while at best, the public disclosures only exposed industry-wide fraud. The court found that the relator's list of nearly 450 defendants was arbitrarily created, finding support for this conclusion because the government chose to intervene against only the seven defendants named in the relator's amended complaint and because the relator refused to discuss his method for choosing defendants. Thus, the Fifth Circuit held that the relator did not show that his identification of defendants provided useful additional information and was not based upon the public disclosures, and his *qui tam* action was barred. The court noted that if it had ruled otherwise, then "a *qui tam* relator could arbitrarily select a large group of defendants in any industry in which public disclosures have revealed significant fraud, in hopes that his allegations will prove true for at least a few defendants.

Finally, the Fifth Circuit considered whether or not the relator qualified for the "original source" exception to the public disclosure bar. It held that he did not, since his "complaint merely listed a large group of possible defendants, without

identifying specific allegations about any particular one." Thus, the court declared, "it is obvious that he was not a 'direct' or 'independent' source of any of the 'information on which the allegations are based,'" and the district court's dismissal of his *qui tam* action was affirmed.

U.S. ex rel. Nowak v. Medtronic, Inc., 2011 WL 3208007 (D. Mass. July 27, 2011)

Two relators (Nowak and Dodd) brought a *qui tam* action against their former employer, a medical technology company, alleging violations of the federal FCA, twenty two state FCA statutes, and the District of Columbia's FCA. Nowak filed her original complaint first, followed by Dodd. Subsequently, the relators reached an agreement and filed a consolidated complaint. First, the relators alleged that the defendant knowingly submitted false certifications to the Food and Drug Administration (FDA), in order to obtain clearance for its medical device, which caused fraudulent reimbursement claims to be submitted to various federal government healthcare programs. The relators also alleged that the defendant knowingly and improperly promoted an off-label use of the medical device, which also caused third parties to submit fraudulent claims. Nowak also alleged retaliatory discharge under the federal FCA and the California FCA. The defendant moved to dismiss the relators' claims for lack of subject matter jurisdiction, failure to state a claim and failure to satisfy Rule 9(b)'s pleading requirements. The defendant further argued that Dodd's FCA claims were barred by the FCA's first-to-file rule, and that Dodd's claims were further barred by the release he signed as part of his termination agreement. The U.S. District Court for the District of Massachusetts granted the motion in part. The court dismissed the relators' fraud claims, but denied the defendant's motion to dismiss Nowak's retaliation claims.

Public Disclosure Bar

First, the court analyzed whether the public disclosure bar applied to the relators' allegations. The court found that the defendant produced sufficient evidence of public disclosure in the news media and by the government to establish that there was prior public disclosure. Specifically, the court focused on several news articles that pre-dated all of the relators' complaints and which discussed the government's concerns about the type of off-label marketing and abuses of the medical device clearance process that the relators alleged the defendant was engaged in. Moreover, the court noted that the FDA had published articles regarding the off label use of the device at issue and had also called a meeting of all the manufacturers of such devices to warn them against off-label use and promotion of the devices. The court concluded that these disclosures contained enough information to enable the government to pursue an investigation, and thus, the relators' fraud allegations had been previously publicly disclosed. The relators contended that the disclosures only revealed industry-wide suspicion, and not specific allegations against the specific defendant. This alone, they argued, was not sufficient to constitute a public disclosure that would bar their *qui tam* action. The court disagreed, and found that several of the disclosures identified the defendant and recognized it as a significant manufacturer. The court held that these public disclosures explicitly linked the defendant to both the allegedly fraudulent off-label promotion and false-certification schemes. Since the publicly disclosed information was "substantially similar" to the relators' allegations, the court held that the relators' complaint was "based upon" the public disclosures; although the court acknowledged that the relators' complaint added details about the fraud, it still concluded that the relators alleged the same fraudulent scheme as was revealed in the prior public disclosures. Accordingly, the court held that the public disclosure bar applied to the relators' allegations.

The court then analyzed whether the relators qualified as original sources of their allegations. The relators conceded that Dodd failed to voluntarily disclose his allegations to the government prior to filing his *qui tam* action. Instead, he provided the government with such information concurrent with filing his complaint. As a result, relator Dodd did not satisfy one of the criteria for original source status, and all claims attributable to Dodd were dismissed. With regard to Nowak, the court found that she disclosed her claims of off-label marketing to the government prior to filing her *qui tam* complaint and that her off-label marketing allegations were based on personal knowledge and did not simply parrot the public disclosures. However, the court determined that Nowak had no first-hand knowledge of the information on which her false-certification claims were based. Accordingly, the court held that Nowak qualified as an original source with respect to her off-label promotion allegations, but her false-certification allegations were dismissed.

First-to-file

Next, the court analyzed whether the relators were barred by the FCA's first-to-file rule. The court found that even if Dodd qualified as an original source, his allegations would be barred under the first-to-file rule, because Nowak's action, which was filed before Dodd's, was a related, pending action that was based on the same facts. The relators had argued that while their allegations were similar, Dodd disclosed additional essential facts, and therefore was not precluded by the first-to-file bar. The court disagreed, and held that Dodd added no new essential facts and that Nowak offered sufficient allegations and evidence to put the government on notice of the essential facts of the defendant's allegedly fraudulent scheme. Accordingly, the court dismissed Dodd's claims for lack of jurisdiction, pursuant to the first-to-file bar. The relators argued that because they had a relator-share agreement and submitted a consolidated complaint, Dodd could not be dismissed from the *qui tam* action. The court, however, held that since it lacked jurisdiction over Dodd's claims, those claims must be dismissed; the court held that whether the relator-share agreement survives the dismissal of one relator was a matter of contract between the two relators.

Relator's Release of FCA Claims

The court then considered the defendant's argument that Dodd released his FCA claims as part of his termination agreement with the defendant. The relators argued that the release was unenforceable with respect to the FCA claims—they contended that only the government could release those claims, and that public policy considerations should also prohibit the release of the FCA claims. The court found that the language of Dodd's release was sufficiently expansive to include his *qui tam* claims, and that the information Dodd relied upon and the fraud he alleged were known to him before he executed the settlement agreement and, consequently, any claims arising from that information fell within the group of released claims. The court also rejected the relators' public policy argument, concluding that the government knew of Dodd's allegations prior to the execution of the release and before his action was filed. Thus, the court held that Dodd's release stripped him of standing and his action was dismissed.

Failure to State a Claim

Following Dodd's dismissal from the case, the court analyzed whether Nowak stated a valid claim under the FCA. The court found that she failed to identify any specific claim for off-label use that was submitted to the government. However, she alleged that ninety percent of all devices were being used off-label and that eighty percent of payments for such devices were through Medicare and Medicaid. Accordingly, the court held that a very high probability existed that improper claims were submitted to the government. Further, the court found that Nowak adequately supported her claim that the defendant falsely represented its medical device as effective and safe for use, by alleging sufficient facts to infer that the use of the defendant's device was not medically necessary, safe, or effective, and that the defendant was aware of these deficiencies. Further, the court found that Nowak alleged sufficient facts to show the defendant intended physicians to consider its device as safe and effective and to use it for procedures that would, in turn, form the basis of reimbursement claims to the government. Accordingly, the court held that Nowak stated a valid claim under the FCA.

Failure to Plead Fraud with Particularity

With respect to the defendant's assertion that Nowak's off-label marketing claims did not meet Rule 9(b)'s pleading requirements, the court concluded that Nowak's claims alleging fraudulent direct sales to the government were largely conclusory and did not meet the particularity requirement. And with regard to her allegations that the defendant caused third party submissions of false claims, the court found that she failed to provide the time, place, and content of any alleged false representation. Further, the court found that she failed to provide any evidence that the third parties sought reimbursement from the government or that the defendant intended the government to pay for the medical devices. The court found that the defendant clearly intended to profit from off-label sales, but concluded that it was unclear whether or not the defendant intended to do so specifically at the expense of the government. Accordingly, the court held that Nowak failed to allege the fraud with requisite particularity. As a result, her off-label marketing claims were dismissed.

FCA Retaliation

Finally, the court analyzed Nowak's retaliation claim. The court observed that Nowak described various instances in which she allegedly had challenged the defendant's off-label promotion activities, refused to engage in those activities, spoke with in-house counsel about her concerns, and expressed concerns about her own legal liability should she participate in the defendant's alleged off-label promotion scheme. However, the court found that she failed to allege her concerns with regard to any knowing submission of fraudulent claims to the government. Accordingly, the court held that her complaints and objections alone were not sufficient to constitute protected conduct. However, Nowak filed a *qui tam* action against the defendant, which certainly constituted protected conduct, and she was terminated from her job about a year and a half later.

The court then examined whether the defendant knew of Nowak's protected conduct before she was terminated from her job, and held that the relator adequately pled that the defendant was on notice of her protected conduct. The court noted that, very soon after the relator filed her *qui tam* complaint, the defendant made public an FDA investigation of its off-label marketing practices. The court reasoned that the defendant knew that this investigation could very well be related to the FCA, and, while the defendant was not aware of Nowak's sealed *qui tam* complaint when she was terminated, the court held that, at the motion to dismiss stage, Nowak's allegations and circumstantial evidence made it plausible that the defendant knew that her actions were related to the government's investigation. The court further found that, several months after the government initiated its investigation, Nowak was placed on probation, after having been consistently praised for her performance in the previous months. The court then held that the inferences raised by Nowak's retaliation claim were sufficient to establish that the defendant fired her at least in part as retaliation due to her protected activity. Thus, the court held that Nowak stated a valid claim under the FCA for retaliation and she was allowed to maintain that claim.

U.S. ex rel. Ketroser v. Mayo Found., 2011 WL 2967475 (D. Minn. July 22, 2011)

A group of four relators brought a *qui tam* action against a foundation, alleging that the defendant submitted false claims for payment to Medicare and Medicaid, by misrepresenting its compliance with certain procedures and by billing for services that were not provided. The government intervened on part of these latter allegations. The defendant moved to dismiss. The U.S. District Court for the District of Minnesota partly granted the defendant's motion. The court dismissed the

relators' first claim for lack of subject matter jurisdiction. Further the court dismissed the non-intervened portion of the relators' second claim for failure to state a claim and denied as moot the remainder of the claim. The court also granted the government leave to file a statement of interest.

The defendant argued that the relators' false certification claims should be dismissed for lack of subject matter jurisdiction pursuant to the FCA's public disclosure bar. After stating that "[i]t is undisputed that Relators' first claim is based on allegations that were publicly disclosed before Relators brought this action," the court turned its attention to determining whether or not the relators qualified for the FCA's "original source" exception to the public disclosure bar. The relators argued that they did qualify, as they had direct and independent knowledge of the information on which that first claim was based. The court disagreed, though, and found that the record revealed that the relators acquired the information upon which their first claim was based through public disclosures from prior litigation. As a result, the court dismissed the relators' first claim for lack of subject matter jurisdiction.

With regard to second, non-intervened claim—that the defendant had accessed and examined a surgical pathology slide without producing reports—the court observed that the applicable billing codes did not explicitly require a written report for surgical pathology services. Thus, the court dismissed the relators' second claim for failure to state a claim. The defendant further argued that the remainder of the relators' second claim should be dismissed, since it essentially repeated the allegations of the government's complaint in partial intervention, but the court denied as moot the defendant's motion to dismiss the remainder of relator's second claim.

U.S. ex rel. Kirk v. Schindler Elevator Corp., 2011 WL 2632130 (2nd Cir. July 6, 2011)

A relator brought a *qui tam* action in the U.S. District Court for the Southern District of New York, alleging that his former employer, an elevator company, violated the False Claims Act by providing false reports and false certifications to the U.S. Department of Labor regarding the number of veterans it employed, in order to fraudulently receive federal contract funds. As part of his pre-filing investigatory efforts to confirm his suspicions, the relator—who was a Vietnam veteran himself—and his wife requested copies of the defendant's reports to the Department of Labor through requests under the Freedom of Information Act (FOIA). The Department of Labor supplied the relator with the requested materials, but undertook no substantive investigation of the elevator company's certifications contained in those materials. Once the relator received the materials and confirmed that the company's reports to the Department of Labor were false, he commenced his *qui tam* action against the company.

The defendant moved to dismiss the action, arguing that the relator's complaint was barred by the False Claims Act's public disclosure provision. Notably, the company did not allege that the underlying documents the relator received—the actual reports the company had filed with the Department of Labor—were public disclosures. Rather, the company asserted that the Department of Labor's search for the documents constituted an "administrative investigation" and that the agency's written response to the relator constituted an "administrative report", which deprived the district court of subject matter jurisdiction over the relator's claims. The district court agreed, and dismissed the relator's action. The relator appealed that decision to the U.S. Court of Appeals for the Second Circuit, which vacated the district court's decision and remanded the case, holding that government agencies' responses to FOIA requests do not automatically result in administrative investigations and/or reports, under the False Claims Act's public disclosure bar, but are merely ministerial acts. The defendant then petitioned the U.S. Supreme Court for certiorari, which the Court granted. TAF Education Fund then filed an *amicus curiae* brief in support of the relator.

The U.S. Supreme Court, in a 5-3 decision (Justice Kagan, who served as U.S. Solicitor General when the Court addresses similar issues in 2009, recused herself from the case) disagreed with the relator, the Second Circuit, and TAFEF, and held that "[a] federal agency's written response to a FOIA request for records constitutes a 'report' within the meaning of the FCA's public disclosure bar." The Court reasoned that the FCA does not define "report", and that since the public disclosure bar include other broad categories of disclosures, such as "news media", the term "report" should also be broadly construed. Relying on the broadest plain meaning of the term, the Court concluded that "report" means "something that gives information," and held that all agency written responses to FOIA requests provide information, and are thus, reports, for FCA purposes. The Court determined that its expansive reading of "report" was consistent with congressional intent to preclude parasitic relators, stating that "[a]nyone could identify a few regulatory filing and certification requirements, submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall in a *qui tam* action under the FCA." The Supreme Court then remanded the matter to the Second Circuit, for further proceedings regarding whether the relator's *qui tam* action was "based upon" the public disclosures.

Justice Ginsburg, joined by Justices Breyer and Sotomayor, dissented, and agreed with the Second Circuit that the types of disclosures discussed in the FCA's public disclosure bar provision all arise in an investigatory context, and that the term "report" should also be read in that context. These Justices reasoned that since routine responses to FOIA requests do not involve synthesizing documents for the purpose of gleaning insight or information, but merely consist of assembling and duplicating records and/or noting the absence of records, such routine responses do not generate "reports," for purposes of the FCA's public disclosure bar.

The dissenting Justices declared that the majority's opinion weakens the FCA as a fraud-fighting tool, as it bars non-parasitic, non-frivolous relators with partial information from substantiating that information through FOIA requests, in order to satisfy Rule 9(b)'s pleading standards.

On remand, the Second Circuit first observed that the relator's claims amounted to two separate allegations: (1) that, for some years, the defendant filed reports with the DOL that contained false information; and (2) that, for other years, the defendant failed to file reports with the DOL at all. The circuit court then considered each of the relator's claims. With respect to the defendant's failure to file, the Second Circuit held that since the relator lacked independent knowledge of the defendant's practices, the fact that the defendant did not file DOL reports for certain years was indisputably derived from the DOL's FIOA responses that indicated that reports were not found, and were therefore publicly disclosed through the FOIA responses. Moreover, since the relator did not have direct and independent knowledge of that information, the circuit court held that he did not qualify for the public disclosure bar's original source exception. Consequently, his failure-to-file reports claim was dismissed.

With respect to the relator's claim that the defendant filed false reports, the Second Circuit noted that, unlike the failure-to-file claim, this claim was premised on alleged facts that were not publicly disclosed, but which were based on the relator's personal knowledge. Accordingly, the appeals court held that the relator's claim regarding the defendant's allegedly false reports was not based on publicly disclosed information. As a result, that claim was allowed to proceed. The matter was then remanded to the district court for further proceedings consistent with the Second Circuit's order.

See *U.S. ex rel. McLean v. County of Santa Clara*, 2011 WL 5223076 (N.D. Cal. Oct. 31, 2011), at page 213.

FALSE CLAIMS ACT RETALIATION CLAIMS

Thompson v. Quorum Health Res., LLC, 2012 WL 2368871 (6th Cir. June 22, 2012)

The plaintiff brought a claim under the False Claims Act, alleging that his former employer—a healthcare company—fired him from his job in retaliation for his filing a *qui tam* action accusing the defendant of Medicare fraud. Months after the plaintiff's *qui tam* suit had been filed, the defendant's independent accounting firm conducted an audit, which included a questionnaire that asked about the potential for fraud. The plaintiff completed the questionnaire and expressed his concerns about the alleged fraud. He was then asked to meet with the accounting firm, where he provided additional details regarding his concerns. The accounting firm relayed those concerns to the defendant's board of directors. Eventually, the defendant's corporate compliance officer and its general counsel requested a meeting with the plaintiff, but the plaintiff refused to answer any of their questions, as his attorney was not present. The plaintiff was informed for the first time that he had violated the defendant's code of conduct and could face disciplinary action, including termination. Soon after, an Assistant United States Attorney working on the *qui tam* matter sent a letter to the defendant, informing the defendant of the plaintiff's suit, and cautioning the defendant not to take any retaliatory actions against the plaintiff. The defendant then launched an internal investigation into the plaintiff's claims, but informed the plaintiff that, prior to receiving the letter, the decision had been made to discipline the plaintiff—he was first suspended with pay, and later terminated from his job.

The defendant moved to dismiss the retaliation claim, arguing that the plaintiff was not fired for a retaliatory reason, but rather that he was fired for failing to report his suspicions of fraud, pursuant to the defendant's code of conduct—a code with which the plaintiff certified his compliance on an annual basis. The plaintiff countered that he was advised by an AUSA working on his *qui tam* case not to disclose the existence of the suit to the defendant, as the suit was still under seal. He also claimed that he called the defendant's internal compliance hotline, but did not report his concerns, once he was asked for information that might potentially reveal his identity. At trial, the plaintiff prevailed on his claim and was awarded nearly $1 million in damages. The defendant moved for judgment as a matter of law, or in the alternative, for a new trial. The U.S. District Court for the Western District of Kentucky denied those motions, The Defendant then appealed the district court's rulings to the U.S. Court of Appeals for the Sixth Circuit, arguing that the district court erred by allowing the plaintiff to testify about his fraud allegations against the defendant, while prohibiting the defendant from introducing

evidence that the government declined to intervene in the plaintiff's *qui tam* suit and that the plaintiff voluntarily dismissed those claims with prejudice.

Holding: The Sixth Circuit affirmed the district court's rulings.

Retaliation

The Sixth Circuit determined that the district court did not err when it allowed the plaintiff to introduce evidence relating to his fraud allegations, as he could not otherwise establish that the defendant retaliated against him for revealing the alleged fraud and covered up its allegedly minimal investigation into his fraud claims. The appeals court held that the district court did not allow the plaintiff to offer evidence that exceeded what was necessary to establish the alleged retaliation, and noted that the defendant was allowed to offer evidence that refuted the plaintiff's claims. The circuit court also affirmed the district court's decision not to allow the defendant to introduce evidence that the government declined to intervene in the *qui tam* suit and that the suit was ultimately dismissed by the plaintiff. The court held that the defendant was not prejudiced by that ruling, as it was allowed to introduce evidence that it was not fined or penalized as a result of the plaintiff's allegations, and thus, could discredit the plaintiff's claims.

The Sixth Circuit also rejected the defendant's argument that it was entitled to a new trial because the plaintiff failed to offer sufficient evidence that the defendant's stated reason for firing him was pretextual. Instead, the appellate court concluded that the plaintiff presented evidence from which the jury could have inferred that he was terminated for a retaliatory reason, since the plaintiff provided evidence showing that the defendant knew that he had failed to comply with their code of conduct months before firing him—his claimed that he was first suspended only one month after the defendant learned that he had filed his *qui tam* suit. The Sixth Circuit declared that "[s]uch temporal proximity between when [the defendant] became aware of [the plaintiff's] protected conduct and when he suffered an adverse employment action gives rise to an inference of retaliatory motive." The court also noted the plaintiff's argument that the defendant had not yet received his *qui tam* complaint when it launched its internal investigation into his claims, and thus, could not have conducted a thorough investigation; he argued that the "investigation" was a sham to cover up the fact that the defendant was not committed to resolving the issues he raised and that he was not fired for violating the code of conduct.

U.S. ex rel. Paris v. Trustees of Indiana Univ., 2012 WL 2376088 (S.D. Ind. June 22, 2012)

A relator alleged that while he was working as a visiting faculty member at a public university's dental school, he learned that the school was submitting false claims for dental hygienist services to the Indiana Medicaid program. He further claimed that after he complained to various university officials about the practice, they

retaliated against him by declining to renew his employment contract. He filed *qui tam* claims against the university and the dental school under the False Claims Act and Indiana's False Claims and Whistleblower Act, alleging fraud, as well as claims for retaliation under both statutes. The defendants moved to dismiss all of the claims with prejudice, arguing that they were protected from suits under the FCA by Eleventh Amendment sovereign immunity. Once the government declined to intervene in the *qui tam* claims, the plaintiff agreed to dismiss the fraud claims, based on the defendants' sovereign immunity. But the plaintiff opposed the motion to dismiss his retaliation claims.

The U.S. District Court for the Southern District of Indiana dismissed the plaintiff's federal FCA retaliation claim with prejudice, observing that the U.S. Supreme Court "expressed 'serious doubt' that Congress could have abrogated state sovereign immunity under the FCA even if it had wanted to do so for claims by individuals." In addition, the court noted that the plaintiff failed to cite any authority supporting his proposition that individuals can bring anti-retaliation actions against states. The court, though, refused to exercise jurisdiction over the state law retaliation claim, finding that neither party cited any state law authority in support of their arguments and thus, it was unclear on how the Indiana courts would resolve the dispute. The court determined that it would leave the matter for the Indiana courts to decide and dismissed the Indiana retaliation claim without prejudice to re-fling in state court.

Gilbert v. St. Rita's Prof'l Servs., LLC, 2012 WL 2344583 (N.D. Ohio June 20, 2012)

The three plaintiffs included a woman (Gilbert), her mother (Haught), and her daughter-in-law (Kirby). They brought claims under the False Claims Act, alleging that their former employer—a professional services company and its affiliated medical center—retaliated against them in response to Gilbert's investigation into fraudulent accounting and billing issues with Medicare and Medicaid payments. The defendants moved to dismiss their claims, contending that the claims were untimely. According to the defendants, the U.S. Supreme Court directed courts to apply the limitations period of the most analogous state law to FCA retaliation claims. The defendants claimed that the Ohio whistleblower statute provides the applicable statute of limitations for the plaintiffs' claims—180 days—and argued that the plaintiffs' claims should be dismissed, since they were brought after that period had expired. The U.S. District Court for the Northern District of Ohio disagreed, noting that, five years after the Supreme Court's decision, Congress amended the FCA and supplied a 3-years statute of limitations for retaliation claims. The court determined that the plaintiffs' claims were brought within the 3-year limitations period, and denied the defendants motion to dismiss.

McNerney v. Lockheed Martin Operations Support, Inc., 2012 WL 2131826 (W.D. Mo. June 12, 2012)

The plaintiff filed an employment action under the False Claims Act and state common law, alleging that her former employers—prime contractor, Parsons Corp., and its subcontractor, Lockheed Martin—fired her from her quality control job in retaliation for her complaints to the defendants about their allegedly fraudulent billing to the government on contracts with the Federal Aviation Administration (FAA). The defendants moved for summary judgment on the plaintiff's claims.

Holding: The U.S. District Court for the Western District of Missouri granted the defendants' motions, as it held that the plaintiff failed to demonstrate a reasonable belief that the defendants had engaged in violations of the False Claims Act.

Retaliation

The plaintiff alleged that the defendants directed her to improperly charge time she spent working on the FAA contracts at issue, which, she believed, could be illegal and could lead to the government being overbilled for certain projects. She claimed that after the defendants questioned her time recording practices, she was met with "bogus" performance reviews and was eventually terminated from her job, after first being sent out of town on a non-existent engagement, during which she was given no work and simply sat in a cubicle for four weeks. The plaintiff filed her lawsuit against the defendants about six months after she was terminated from her job. The defendants moved for summary judgment, arguing that the plaintiff could not establish the necessary elements to support her claims. With respect to the retaliation claim under the False Claims Act, the defendants argued that the plaintiff could not show that they engaged in any fraudulent conduct; she could not show that she reported any alleged violations of the law to a superior, a decision-maker, or the government; and she could not show that her termination was connected to her alleged whistleblowing activity.

The court determined that, based on the plaintiff's allegations, she complained about alleged fraud to her supervisors many times and that her claims were sufficient to raise a reasonable inference that her complaints contributed to her termination, since he had received good performance reviews until she began complaining about time-keeping issues and since she was "exiled to a do-nothing position for a month" while the defendants prepared to terminate her position. Thus, the court rejected two of the defendants' three arguments on summary judgment. The court, though, agreed with the defendants that the plaintiff failed to show that the defendants engaged in violations of the law. The court noted that the plaintiff complained that the defendants directed her to bill her time working on quality assurance matters to general billing codes used for overhead and other non-specific items, and instructed her to "spread out" her time. However, the court also observed that the plaintiff failed to show how this alleged misconduct could have resulted in any financial loss to the government—even if the defendants' practices failed to comport with the FAA's time recording guidelines—since the plaintiff never alleged that she was directed to inflate her time and thus, the FAA paid the same amount it would have paid had the proper billing codes been used. Consequently, the court held that the defendants' alleged "practices do not implicate the policy animating the False Claims Act." Since the plaintiff could not show that she had a good faith, reasonable belief that the defendants were violating the False Claims Act, the court held that, as a matter of law, her claims should be dismissed. Therefore, the court granted the defendants' summary judgment motions.

Thomas v. ITT Educ. Serv., Inc., 2012 WL 1964501 (E.D. La. May 31, 2012)

A plaintiff brought an action under the False Claims Act's anti-retaliation provision and under Louisiana state law, alleging that her former employer, an education provider, wrongfully terminated her from her job as an instructor after she refused to falsify student grade records in order to keep students eligible to receive financial aid funds from the United States and the State of Louisiana. The defendant moved to dismiss her complaint for failure to state a claim and the U.S. District Court for Eastern District of Louisiana granted the defendant's motion, as it held that the plaintiff failed to allege that she engaged in protected activity under the FCA, that the defendant had knowledge of any protected activity, and that the plaintiff failed to allege that the termination was due to her actions. The plaintiff then filed an amended complaint alleging that the defendant's Dean of Academic Affairs and its Associate Dean of General Studies instructed her to inflate grade records so that students could remain enrolled at the facility and remain eligible to receive financial aid. She further alleged that after she was instructed to falsify grades, she contacted the Accrediting Counsel of Independent Colleges and Schools (ACICS) to report the alleged fraud and inquired about the defendant's compliance with ACICS guidelines. The defendant moved for summary judgment on the plaintiff's amended claims, arguing that the plaintiff could not produce evidence to support the necessary elements of a retaliation claim under the FCA.

Holding: The U.S. District Court for the Eastern District of Louisiana again agreed with the defendant, and granted the defendant's motion for summary judgment. The plaintiff's complaint was dismissed with prejudice.

Retaliation

The plaintiff argued that she was fired from her job because she refused to falsify students' grades as part of the defendant's plan to receive improper financial aid funds. The defendant countered that the plaintiff was not terminated from her job for an improper, retaliatory reason. Instead, the defendant claimed that the plaintiff was presented with a corrective action form, in response to students' complaints she would not accept late work assignments and had alienated students. The defendant alleged that the plaintiff disputed the students' allegations, left the meeting with the defendant upset, missed scheduled in-service training meetings, and could not be reached. The defendant then argued that after numerous attempts to contact the plaintiff were made, it determined that she had resigned from her position. The court found that the plaintiff alleged that she sent the defendant's compliance manager an email disputing the contents of the corrective action form but failed to include any allegations or concerns that the defendant was engaged in fraudulent or illegal conduct. The court also found that the plaintiff's deposition testimony made it clear that she did not contact ACICS until after she was terminated and failed to submit a written complaint to ACICS. The defendant argued that the plaintiff did not engage in protected activity under the FCA because her actions were not motivated by concern about fraud against the government, nor was the defendant aware of any alleged concerns on her part about a possible fraud against the government. The defendant also argued that the plaintiff did not testify that, before being fired, she told her supervisors or anyone else that the defendant was submitting fraudulent or false claims for financial aid funds to the government—rather, the defendant argued that the only complaints the plaintiff made to her superiors prior to her termination were with respect to the corrective action form she received. The court observed that for internal complaints to constitute protected activity under the FCA, the complaints must concern false or fraudulent claims for payment submitted to the government.

The plaintiff argued that her refusal to change grades constituted protected conduct; she stated that she refused to engage in such conduct in order to prevent the defendant from causing students to present false claims for student loans to which they were not entitled, to prevent the defendant from submitting false grades to ensure the defendant's continued accreditation, and to prevent the defendant from concealing students' true grades to retain tuition and fees from grants and loans paid to students on the basis of the false grades. The court, though, held that even if the plaintiff's contention that she was terminated for refusing to change grades was correct, her FCA retaliation claim still failed because she did not present any evidence showing that her employer knew that her refusal to change grades was due to concerns that the defendant had engaged in a fraud against the government. Therefore, the court dismissed the plaintiff's federal and state law retaliation claims.

Rhodes v. Sutter Health, 2012 WL 1868697 (E.D. Cal. May 22, 2012)

A plaintiff brought an action alleging that her former employer—a radiology center (GMG)—its parent foundation (SGMF), and one of its subsidiaries (Sutter Health) violated, among other laws, the federal and California False Claims Acts by retaliating against her after she reported false Medicare billings for medically unnecessary procedures and allegations of sub-standard patient care to GMG's senior partners. While GMG was the plaintiff's employer, she alleged that Sutter Health and SGMF were also her joint employers under the "integrated enterprise" theory. SGMF and Sutter Health jointly moved to dismiss the plaintiff's claims, arguing that she failed to state a claim.

Holding: The U.S. District Court for the Eastern District of California granted the defendants' motion.

Retaliation

The court first examined the applicability of the plaintiff's integrated enterprise theory and the relationships between the defendants, noting that the anti-retaliation provisions of the federal FCA and the California FCA apply only to "employers." The plaintiff alleged that SGMF and Sutter Health were her employers, and pointed to a variety of ways in which SGMF and GMG were interrelated, including in matters of labor relations, financial control, and management. She also alleged that Sutter Health and SGMF had interrelated operations and common management. The court observed that she did not detail any connection between GMG and Sutter Health. The court noted that although multiple businesses could be considered as a single employer under the integrated enterprise test, only a few courts have considered the test in the context of claims under the FCA—the court was not aware of any instance in which the integrated enterprise test was applied under the CFCA—and "none have squarely held the test applicable to claims like plaintiff's." Ultimately, the court concluded that the plaintiff failed to clearly explain why the integrated enterprise test should apply to her federal and state FCA claims, and as a result, the court rejected the plaintiff's theory. The plaintiff's claims against SGMF and Sutter Health were dismissed.

Forkell v. Lott Assisted Living Corp., 2012 WL 1901199 (S.D.N.Y. May 21, 2012)

A plaintiff brought an action under the federal and New York False Claims Act statutes, alleging claims of retaliation against his former employers—a not-for-profit assisted-living facility (Lott) that provided services to Medicaid patients, a not-for-profit corporation that developed low-income housing (SFDS) financed by various tax credits, and the former president and CEO of both organizations (Janeski). Specifically, the plaintiff alleged the defendants unlawfully terminated his employment in retaliation for his protected conduct. The defendants moved for summary judgment. The U.S. District Court for Southern District of New York granted the defendants' motion. The court held that the defendants provided legitimate, non-discriminatory reasons for his termination.

The plaintiff alleged that he was hired as the CFO of both Lott and SFDS after the U.S. Department of Housing and Urban Development (HUD) conducted an audit of the companies that revealed numerous problems with the companies' accounting practices. One of the plaintiff's responsibilities was to reconstruct financial records for the companies to turn over to HUD as part of its audit. The relationship between the plaintiff and the companies' President and CEO, Janeski, became strained almost immediately—the court cited various email correspondence between the two as well as testimony from members of the companies'

board of directors as evidence of the plaintiff's combative interactions with the companies' other officers and directors. Eventually, following a board meeting, the plaintiff confronted Janeski, which led to Janeski contacting an attorney and several board members regarding the event. The plaintiff apologized to Janeski the next day, and soon thereafter, the plaintiff met with two board members and revealed allegations of various frauds by the defendants against government agencies. He stated that he would report the alleged fraud to the government, unless he received a severance package of a year's salary and health insurance. Defendant SFDS decided to retain an outside organization to investigate the plaintiff's fraud claims and complete the plaintiff's work with respect to the HUD investigation, while board members began discussing whether or not to terminate the plaintiff from his job. Eventually, the companies hired an additional outside accounting and consulting firm to further investigate the plaintiff's fraud allegations.

According to the defendant, the plaintiff continued to exhibit insubordinate behavior toward his superiors and made comments to other employees—which the plaintiff characterized as jokes—about fearing for his safety while at work and possibly needing to bring a gun to work and check beneath his car for bombs. The plaintiff was eventually terminated from his job and was informed that his termination was due to his professed dissatisfaction with the defendant companies, his refusal to take direction from Janeski, his acts of insubordination, and his inappropriate comments to other employees that raised concerns about workplace safety.

The plaintiff countered that the defendants' stated reasons were merely a pretext for retaliatory animus and that he was actually terminated from his job because he exposed the defendants' schemes to defraud the United States and the State of New York. More specifically, the plaintiff alleged that he exposed, among other things: fraudulent invoices; misappropriations of government grant funds; self-dealing between the defendants and improper comingling of government and private funds; and the diversion and retention of government funds. The plaintiff alleged that he complained about these alleged practices to the defendants' board members prior to being terminated, although he did not inform any government agency of his allegations until after he had been terminated. He alleged that his reports to his superiors constituted protected conduct under the False Claims Act statutes, and that he was protected by those laws from retaliation.

The court expressed some concern that some of the alleged conduct about which the plaintiff complained may not have been actionable under the False Claims Act laws. However, the court assumed, for the purposes of the defendants' motion, that the plaintiff's allegations were actionable and that his reports of his concerns represented protected conduct. Since there was little dispute that the plaintiff informed his superiors of the supposed fraudulent conduct, the court also assumed that the defendants were on notice of the protected conduct. The court then turned to the question of causality—whether or not there was a causal connection between the

plaintiff's protected conduct and the defendants' decision to terminate his employment. The court found minimal evidence of any connection. The plaintiff argued that there was a connection because his superiors only began discussing his termination after he had disclosed his allegations. However, the court, noting that the defendants commissioned two independent investigations into the plaintiff's claims, concluded that it would have been illogical for the defendants to terminate the plaintiff's employment in retaliation for his bringing concerns to their attention, only to later hire independent analysts to review the merits of those very same allegations. The court then noted the defendants' stated reasons for terminating the plaintiff's job, which included his insubordination and confrontational nature, as well as the plaintiff's extortionary offer to remain silent about the alleged fraud in exchange for money and benefits. As a result of these findings, the court held that, notwithstanding the close proximity between the plaintiff's reports to his superiors and their discussions about terminating him, no rational jury could find that the defendants' reasons for the termination were pretexual. Accordingly, the court granted the defendants' motion for summary judgment.

U.S. ex rel. Zemplenyi v. Group Health Co-op., 2012 WL 1642213 (W.D. Wash. May 10, 2012)

The plaintiff originally brought a *qui tam* action against her former employer, a non-profit health system, and its physician-owned corporation, alleging that the defendants defrauded Medicare. Specifically, the plaintiff alleged that the health system was reimbursed by Medicare on a "capitated" basis, whereby the provider would receive a per patient payment based on the package of services it provided. Providers set per patient payments by submitting bids to Medicare explaining their anticipated costs—surgical procedures are of relatively high value—and the plaintiff alleged that the defendants sought and received improper Medicare capitation payments by pressuring her and other ophthalmologists to perform unnecessary cataract surgeries on Medicare beneficiaries. Further, the plaintiff alleged that she was subjected to various forms of harassment, discrimination, threats and other adverse actions and later was constructively terminated from her job, when she objected to the defendants' fraudulent practices. She filed claims under the False Claims Act for fraud and for retaliation.

The defendants moved to dismiss the plaintiff's complaint for failure to state a claim. The U.S. District Court for the Western District of Washington granted the defendants' motion in part. The court dismissed the *qui tam* claims but allowed the plaintiff to maintain the retaliation claim. The defendants then moved for summary judgment on the retaliation claim.

Holding: The U.S. District Court for the Western District of Washington granted the defendants' motion and dismissed the retaliation claim. The court held that the plaintiff's retaliation claim failed to establish a *prima facie* case of retaliation.

The court also held that there was no triable issue as to whether the plaintiff engaged in protected activity under the FCA or suffered retaliatory discrimination.

Retaliation

In determining whether or not the plaintiff established a *prima facie* case of retaliation, the court first decided whether she engaged in protected activity. The court concluded that a jury could not reasonably ascertain that the plaintiff subjectively suspected a fraud against the government. The court found that in the only instances in which the plaintiff alleged that she expressed concern about Medicare guidelines for cataract surgeries, she did not express concern about fraud. The court noted that she tried to show that she suspected fraud based on various emails, but the court found that the emails postdated the instances in which the plaintiff expressed concerns about the Medicare guidelines, and thus, did not shed any light on her subjective beliefs about fraud. The court also concluded that a jury could not find that a reasonable employee would have suspected that the cataract surgeries in question led to fraudulent Medicare claims and improper capitated payments, without evidence of the importance of cataract surgeries to the defendants' bids. The court declared that the plaintiff "must show 'some nexus' between the concerns she raised and a possible FCA violation, and she has failed to do so; in fact, the court stated that she did not even try to obtain data relevant to the defendants' bids. Therefore, the court found that any suspicion the plaintiff had could have only been speculative and did not support a claim of protected activity.

The court also examined the retaliatory discrimination element of the plaintiff's claim. The defendants argued that the only evidence she presented of constructive discharge was that her superior, Lee, put her on a Performance Development Plan (PDP) four months prior to her resignation. The plaintiff argued that the PDP was designed to force her to resign, but the defendant argued that its policies classified PDP as a corrective measure and not a disciplinary action. The court found the PDP was corrective rather than disciplinary and that performance critiques and suggestions for improvement are ordinary in the workplace. The court also found that the plaintiff testified that no one suggested to her that a reduction of staff was likely or that she was placed on PDP to make it easier for the defendants to fire her. The court also considered the plaintiff's argument that she was subjected to numerous adverse employment actions. She claimed that she no longer received referrals, but the court noted that she conceded that the optometrist's refusal to refer patients to her was not in retaliation for her alleged protected activity. She also claimed that she was subjected to arbitrary enforcement of an attendance policy for quarterly ophthalmology staff meetings, but the court found that though there was evidence that other doctors occasionally missed meetings without any reprimand, it was undisputed that the plaintiff regularly missed meetings—the court held that there was simply no evidence of arbitrary enforcement. The plaintiff also argued that she was subjected to a biased audit of her coding practices and that Lee scoured her patients' records for errors. But the court found that she had prior coding errors and held that the audit was a reasonable attempt to measure her progress on an admitted performance issue. Lastly, the court rejected the plaintiff's assertion that she lost her office space and had to share an office with another employee, finding that there was no evidence that Lee ordered or condoned the incident. Accordingly, the court granted the defendants' motion for summary judgment on the retaliation claim.

U.S. ex rel. Hepburn v. Northrop Grumman Sys. Corp., 2012 WL 1631682 (M.D. Fla. May 8, 2012)

A relator brought an action under the False Claims Act and state law, alleging that his former employer—a manufacturer of military aircraft, electronics, and precision weapons—defrauded the government and retaliated against him for engaging in protected whistleblower activity. The government declined to intervene on the relator's fraud allegations and the defendant moved to dismiss that count of the relator's complaint, pursuant to Federal Rule of Civil Procedure 9(b). The defendant also moved to compel arbitration with respect to the relator's retaliation claims.

Holding: The U.S. District Court for the Middle District of Florida granted the defendant's motions.

Failure to Plead Fraud with Particularity

The court first considered the defendant's motion to dismiss the relator's FCA fraud allegations for failure to plead the alleged fraud with particularity. The court granted that motion, as it determined that the relator's complaint did not contain sufficiently specific allegations to survive a motion to dismiss. The court found that the relator failed to specify when the allegedly fraudulent activity took place and failed to identify who engaged in the allegedly improper conduct. Moreover, the court stated that the relator's complaint failed to include sufficient details about the requirements of the government contract at issue. Consequently, the court dismissed the relator's fraud allegations without prejudice. The court granted the relator leave to amend his complaint, as it held that the complaint's deficiencies could be cured.

Retaliation

The court then considered the defendant's motion to compel arbitration to resolve the relator's retaliation claims under the FCA and state law. The defendant argued that those claims should be submitted for arbitration pursuant to the arbitration policy the relator agreed to in course of his employment. Again, the court agreed with the defendant, as it found that the relator failed to argue against the defendant's motion with respect to this issue. Furthermore, the court found that the relator provided no facts disputing the defendant's claim that he had received the defendant's arbitration policy through his company email and at his home address. Accordingly, the court held that the relator agreed to submit his employment claims to arbitration and those claims were stayed, as the court directed the parties to engage in arbitration.

Vander Boegh v. Energy Solutions, Inc., 2012 WL 1576158 (W.D. Ky. May 3, 2012)

A plaintiff brought a suit against his former employer—a multinational corporation—and its subcontractors and affiliates, alleging retaliation under the False Claims Act and various federal environmental statutes. The plaintiff, who was employed as a landfill manager, alleged that the defendants contracted with the U.S. Department of Energy (DOE) to manage the Paducah Gaseous Diffusion Plant, which required them to oversee the plant's nuclear enrichment program and its environment management. The plaintiff claimed that he and other landfill employes were transitioned to the defendants companies, once the contract begand and were termed "Grandfathered Employees." He claimed that the defendants' contract required them to manage the landfill he managed, which included handling any waste management and disposal responsibilities. The plaintiff alleged that he made several complaints to his superiors about the defendants' lack of storage capacity and the leakage of waste materials from the landfill. He stated that the defendants engaged in other violations of environmental regulations as well. He stated that his complaints about the defendants' conduct were met with retaliation—including removal as landfill manager—and that he filed his lawsuit in response to the adverse employment actions he experienced. The defendants separately moved for summary judgment on his claims.

Holding: The U.S. District Court for the Western District of Kentucky granted the defendants' motions for summary judgment.

Retaliation

The court considered the first of the defendants' summary judgment motions, in which one of the defendants argued that the plaintiff could not prevail on his FCA retaliation claim because he was never actually employed by that defendant—the defendant noted that it had been subcontracted to perform waste management duties with respect to the contract. Although the defendant conceded that one of its employees (Kelly) assisted the prime contractor in preparing a bid for the government contract, and that the bid included plans for hiring a new landfill manager, the defendant claimed that the decision to remove the plaintiff from his job was not retaliatory, as that decision was made before either that defendant or Kelly became aware of the plaintiff's complaints or safety concerns. Accordingly, the first defendant argued that the plaintiff could not establish a causal connection between his protected activities and the subsequent decision not to retain him as landfill manager. The plaintiff countered that Kelly did have knowledge of his protected activities because other individuals employed by the other defendants were aware of his protected activities and those individuals worked with Kelly on the contract—he contended that, at the very least, Kelly should have known of his protected activities because he conducted due diligence during the bidding process and would have accessed information about the plaintiff's complaints posted by the other defendants on the internet. The court determined, based on testimony, that Kelly did not receive any direction from any superiors or from the other defendants when making hiring decisions for plaintiff's former position and that the plaintiff failed to present any evidence to refute that assertion. Accordingly, the court held that there was no genuine issue of material fact regarding whether or not Kelly was influenced by any employee of the other defendants or by the individual who eventually took the plaintiff's position. Further, the court found that the plaintiff's arguments were purely speculative and that his conclusory allegations could not defeat the defendants' motions for summary judgment. As a result, the court granted the defendants' summary judgment motions, based on its finding that the plaintiff produced no evidence that any defendant had any input into the hiring process that led to the plaintiff being removed from his position.

U.S. ex rel. Provuncher v. Angioscore, Inc., 2012 WL 1514844 (D. Mass. May 1, 2012)

A relator brought a *qui tam* action against his former employer, a biotechnology firm that manufactured and distributed angioplasty catheters. The relator alleged that the defendant's catheters were defective and that, in violation of the False Claims Act, the defendant made numerous false statements that caused hospitals to purchase the catheters and subsequently submit reimbursement claims for those purchases to federal healthcare programs. He further alleged that he informed the Food and Drug Administration (FDA) about the defendant's conduct, after the defendant issued a sham recall of the catheters but did nothing to ensure that the products were actually taken out of stock. In addition, he alleged that the defendant violated the FCA's anti-retaliation provision by terminating him from his job as a sales representative in retaliation for his whistleblowing activity—he alleged an employment claim under state law as well. The United States declined to intervene in the relator's suit, but filed a statement of interest, supporting the relators' position that a defendant's concealment of information from the FDA that would be material to the agency's decision regarding the approval, the withdrawal of approval, or the recall of a medical device could lead to FCA liability, as such concealment might also be material to the federal healthcare programs' decisions to pay reimbursement claims for that device. The defendant moved to dismiss the relator's fraud claims for failure to plead with particularity, and sought to dismiss his retaliation claim for failure to state a claim under the FCA. The relator moved for leave to amend his complaint, but the U.S. District Court for the District of Massachusetts reserved its ruling, and chose to determine the motion to dismiss first.

Holding: The U.S. District Court for the District of Massachusetts granted the defendant's motion without prejudice and granted the relator's motion for leave to amend his complaint.

Pleading Fraud with Particularity

The court first examined whether the relator pleaded the alleged fraud scheme with particularity. The court concluded that the relator did not allege any particulars regarding the defendant's presentment of any specific false claim to the government. In addition, although he relator alleged that the defendant made numerous false statements regarding the safety of its catheter and that the defendant's sales representatives were trained to make false statements, the court found the relator failed to establish a connection between the defendant's alleged false statements and the submission of false claims by healthcare providers. As a result of these findings, the court granted the defendant's motion to dismiss the relator's fraud claim. The court, though, granted the relator leave to amend his complaint, noting that the defendant did not oppose the relator's request and that the relator asserted that his amended complaint would provide "specific allegations concerning claims directly submitted to the government."

Retaliation

The court then considered the defendant's argument that the relator did not make sufficient allegations that he engaged in protected conduct under the FCA, and thus, failed to state a claim under the FCA's anti-retaliation provision. The relator argued that he complained to his superior that the defendant's device was unsafe and that, through his reporting of this information, he engaged in conduct to stop violations of the FCA caused by the sale of the device and related reimbursement claims submitted to the government. The court agreed with the relator and held that his allegations adequately pled protected conduct under the FCA. The court then examined whether or not the defendant had knowledge of the relator's protected conduct. The relator argued that he spoke to several of the defendant's employees—including his supervisor and the defendant's regulatory compliance department—regarding his concerns about the safety of the defendant's catheter. The court also mentioned that the relator specifically told his supervisor that "to continue to sell the device was to defraud the United States." Next, the court addressed the question of whether or not the relator established a connection between the defendant's decision to terminate his employment and his protected conduct. The court noted that the defendant offered a non-retaliatory reason for terminating the relator's job: that he refused to sell one of the defendant's products. The relator agreed that he did not sell many of the defendant's catheters, which he believed were defective, but that he performed his other job duties. He argued that the defendant's offered basis for his dismissal was merely a pretext and that his termination for refusing to promote the defendant's catheters was actionable under the FCA. The court, though, relied on evidence showing that the relator and his supervisor had "dozens" of conversations about the relator's low catheter sales and that the supervisor threatened to replace the relator with another sales representative if he did not promote the product. The court concluded that the relator was indeed terminated for his refusal to sell the product, and not in retaliation for whistleblowing activity. Notably, the court found that it was undisputed that the defendant's decision makers were unaware of the fact that the relator had contacted the FDA at the time the decision was made to terminate his employment. As a result, the court held that the relator failed to plead a causal connection between the defendant's decision to terminate him and its alleged knowledge that he was engaged in protected activity. The retaliation claim was dismissed.

Bechtel v. St. Joseph Med. Ctr., Inc., 2012 WL 1476079 (D. Md. Apr. 26, 2012)

The plaintiff brought a claim under the False Claims Act and common law doctrines, alleging that her former employer—a medical center—illegally threatened, harassed, and discriminated against her after she provided information to an associate that was used in furtherance of the associate's *qui tam* action against the defendant. The plaintiff claimed that she was eventually terminated from her job, and that as a result, she was limited in her ability to pursue a medical degree and a career as a physician. The defendant argued that the plaintiff failed to plead that she engaged in protected conduct in furtherance of a *qui tam* action and that the defendant had no knowledge of her involvement with her associate's *qui tam* action. The defendant moved to dismiss the FCA retaliation claim for failure to state a claim.

Holding: The U.S. District Court for the District of Maryland granted the defendant's motion in part. The court dismissed the majority of the plaintiff's FCA claims, except for claims based upon a September 2009 performance appraisal and upon the plaintiff's eventual termination in November 2009.

Retaliation

The court first observed that the FCA was amended twice while the plaintiff's case was still pending. Therefore the court examined the plaintiff's retaliation claims under each version of the FCA. The court began by examining the allegations under the 1986 version of the FCA. The plaintiff argued that she regularly provided her associate with information regarding the defendant's illegal activities, which he in turn, would pass on to the United States in furtherance of his *qui tam* case against the defendant—a case that was filed in June 2010. The court found that the plaintiff plausibly alleged that she acted in furtherance of that *qui tam* action by passing relevant information to her associate. Accordingly, the court held that the plaintiff adequately pled that she acted in furtherance of a *qui tam* action. The court then examined whether the defendant was aware of the plaintiff's protected conduct. With respect to this element, the plaintiff argued that the defendant knew that her associate was acting in furtherance of a *qui tam* action, due to the associate's numerous complaints about the defendant's allegedly fraudulent activity. She further asserted that the defendant knew or should have known that she had been supporting her associate's *qui tam* action, due to the relationship she had with him. However, the court found that this connection was insufficient to put the defendant on notice that she had acted in furtherance of a possible future *qui tam* case, which could have caused the defendant to retaliate against her before the FCA was amended on March 20, 2009 by the Fraud Enforcement and Recovery Act of 2009 (FERA). Thus, the court dismissed the plaintiff's retaliation claim to the extent that it alleged wrongful conduct prior to the FERA amendment to the FCA's anti-retaliation provision.

Then the court then examined the plaintiff's allegations arising after the FERA amendment to the anti-retaliation provision, but before that provision was again amended on July 21, 2010, as part of the Dodd-Frank financial reform legislation. The court observed that during this year-long period, the FCA's anti-retaliation provision expanded protections to also prohibit retaliation against employees because of lawful acts done by associated others in furtherance of *qui tam* actions. Therefore, the court found that the plaintiff properly alleged that she was retaliated against for the actions her associate took in furtherance of his *qui tam* case. Then, the court again examined whether or not the defendant had been made aware of the plaintiff's protected conduct. Again, the court held that the plaintiff did not plead that the defendant had knowledge of <u>her</u> protected conduct in furtherance of her associate's *qui tam* case. This time, though, the court held that the plaintiff's assertion that the defendant was aware of her association with the relator was sufficient to plead her retaliation claim. The court held that the plaintiff stated a claim under the FCA with respect to conduct that arose after the FERA amendment, since she pled that the defendant retaliated against her because of her association with another employee who was engaged in protected conduct. The plaintiff was allowed to maintain claims that alleged post-FERA conduct.

The defendant, though, sought to limit those claims as well, arguing that the FCA does not provide a remedy for post-termination conduct and thus, the plaintiff's claims should be limited to alleged retaliatory conduct that occurred after the March 20, 2009, FERA amendments, and should not extend to any alleged retaliatory conduct that occurred after the plaintiff was terminated on November 23, 2009. The court agreed, noting that the language of the FCA's anti-retaliation provision "is not reasonably interpreted to include post-termination retaliatory actions. Indeed, it appears that all courts considering the issue have held that [the FCA's anti-retaliation provision] does not provide a remedy for acts of retaliation subsequent to termination. The court then looked to the plaintiff's specific claims of retaliation and noted that between March 20, 2009 and November 23, 2009, the plaintiff alleged two instances of retaliation: a falsely negative performance appraisal and her eventual termination. The court allowed the plaintiff to maintain those claims. The court observed that the Dodd-Frank amendment to the FCA's anti-retaliation provision did not apply to the plaintiff's claims, since that amendment was enacted on July 21, 2010—after the plaintiff had been terminated—and the FCA does not provide protection from retaliation that occurs post-termination. The plaintiff was allowed to maintain her claims regarding alleged retaliation arising from the negative performance appraisal and her ultimate termination. All other claims were dismissed.

U.S. ex rel. Westlund v. Lab. Corp. of Am. Holdings, 2012 WL 1416417 (M.D. Fla. Apr. 24, 2012)

A relator brought a *qui tam* action against her former employer—a clinical laboratory—and its affiliate, alleging that the defendants falsely represented to physicians that they had a contract with the Blue Cross and Blue Shield of Florida (BCBSF) and that BCBSF would reimburse the physicians' claims. Further, the relator alleged that the defendants' false statements violated the False Claims Act, because those statements caused physicians to submit claims to Medicare and Medicaid, once the claims to BCBSF were rejected. The defendants moved to dismiss the fraud claims and the U.S. District Court for the Middle District of Florida granted the defendants' motion. The relator then filed an amended complaint, alleging a claim against the laboratory that had formerly employed her for retaliatory discharge under the FCA. The laboratory moved to dismiss the retaliation claim.

Holding: The U.S. District Court for the Middle District of Florida granted the defendant's motion and dismissed the retaliation claim.

Retaliation

The court declared that the FCA's anti-retaliation provision "protects an employee only if pursuing a potential claim under [the FCA] and only if the employer knows that a *qui tam* action might arise from the employee's acts." The court held that the plaintiff failed to satisfy this standard, since she never alleged that she investigated the defendant's possible fraud under the FCA, but rather, merely expressed concerns to the defendants about a potential fraud against the government, or a possible *qui tam* action. The court found the relator only questioned and raised concerns to the defendant and never put the defendant on notice that a possible *qui tam* action might arise from <u>her</u> conduct. Thus, he court determined that the defendant was not aware of the relator's engagement in any protected conduct before her *qui tam* action was first unsealed—the court held that the only protected conduct alleged by the plaintiff was the filing of her *qui tam* suit. The relator argued that she suffered retaliation after the complaint was unsealed, as a laboratory account she managed was transferred to another sales representative, which caused her to lose commissions and income. The court, though, held that the plaintiff failed to cite any subsection of the FCA's anti-fraud provisions that the defendant supposedly violated, and that she failed to establish a direct link between any of the defendant's false statements to physicians and the government's decision to pay or approve any false claim. Since the plaintiff could not establish that she acted in furtherance of an FCA action, the court held that she was not protected by the FCA's anti-retaliation provision. Therefore, the court dismissed her retaliation claim with prejudice.

U.S. ex rel. Yanity v. J & B Med. Supply Co., Inc., 2012 WL 1247163 (E.D. Mich. Apr. 13, 2012)

Three relators brought a *qui tam* action against their former employer, a seller of bulk medical and surgical supplies, alleging Medicaid fraud. More specifically, the relators alleged that the defendant violated the False Claims Act by billing Medicaid for supplies that were never delivered to their intended beneficiaries and by posting false rejections from insurers whose coverage was primary to Medicaid. In addition, the relators alleged that the defendant violated the False Claims Act and state law by terminating their employment in retaliation for their refusal to participate in the alleged fraud scheme. The defendant moved to dismiss the fraud allegations pursuant to Rule 9(b) of the Federal Rules of Civil Procedure and moved to dismiss the FCA retaliation claim pursuant to Rule 12 (b)(6).

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

Pleading Fraud with Particularity

The court quickly disposed of the defendant's motion to dismiss the fraud claim. The court held that the relators properly pled the fraud scheme with particularity, as they pled the time, place and amounts of the alleged fraudulent payments, and based their allegations on first-hand knowledge. The defendant's motion to dismiss the fraud claim was denied.

Retaliation

Next, the court considered the defendant's motion to dismiss the retaliation claim. The defendant argued that the relators' purported internal efforts to correct the alleged false billing did not constitute a protected activity under the False Claims Act. However, the court observed that internal reporting could constitute protected activity, as long as the internal reports alleged fraud on the government. Since the relators alleged that they reported false billing to their supervisors and objected to the submission of false claims and fraud on the government, the court held that their complaint sufficiently pled claims for retaliation under the False Claims Act. The defendant's motion to dismiss the retaliation claims was also denied.

Goodwin v. Novartis Pharms. Corp., 2012 WL 1079086 (W.D. Ky. Mar. 30, 2012)

The plaintiff brought an action against her former employer, a pharmaceutical corporation, alleging unlawful retaliation and other employment law claims under the False Claims Act and common law claims. The plaintiff alleged that the defendant retaliated against her after she internally reported her concerns that

off-label marketing tactics discussed at a training session were illegal and violated the False Claims Act. Specifically, the plaintiff alleged that she informed her immediate supervisor of her concerns, she reported her concerns through the defendant's internal compliance hotline, she spoke directly with the company's ethics and compliance director, and she spoke to a member of the defendant's corporate security team. She claimed that none of those efforts led to any changes to the defendant's marketing plans, but instead, the plaintiff suffered retaliation, as she was harassed, was avoided by other employees, was placed under a new supervisor, was denied managerial support, was not given credit for work she had done, and received two unsigned letters at her home—ostensibly from other employees of the defendant corporation—demanding that she quit her job. The defendant moved to dismiss her retaliation claim under the False Claims Act for failure to state a claim.

Holding: The U.S. District Court for the Western District of Kentucky denied the defendant's motion to dismiss the FCA retaliation claim.

Retaliation

The defendant first argued that the plaintiff's retaliation claim failed because she could not show that she had engaged in any protected activity under the FCA, as she did not allege that the defendant submitted any false claim for payment to the government. Further, the defendant argued that the plaintiff's internal reporting only raised concerns regarding violations of government regulations, not FCA violations. The court, though, found that the plaintiff repeatedly expressed concerns about possible FCA violations, not just regulatory matters. The court further determined that drug manufacturers can be liable under the FCA for encouraging submitting reimbursement claims to the government that are based on off-label prescriptions, and thus, the plaintiff was not required to demonstrate that the defendant submitted false claims to the government. Accordingly, the court held the plaintiff sufficiently pleaded that she had engaged in protected activity under the False Claims Act.

The court then turned to the defendant's argument that it did not have notice of the plaintiff's protected activity. First, the court found that reporting possible illegal conduct was not part of the plaintiff's job duties, and thus, her complaints were not routine. The court also found that the plaintiff's internal complaints specifically referenced possible FCA violations, thus putting the defendant on notice that her complaints could lead to a *qui tam* action. As a result, the court held that the plaintiff's complaints to the defendant satisfied the notice element of an FCA retaliation claim. Lastly, the court found that the defendant never challenged the plaintiff's assertion that her protected activity was the cause of the defendant's retaliatory conduct. Accordingly, the court held that the plaintiff sufficiently pled each element of a retaliation claim under the FCA. The defendant's motion to dismiss the FCA retaliation claim was denied.

Rohler v. Rolls-Royce Corp., 2012 WL 1098636 (S.D. Ind. Mar. 30, 2012)

A plaintiff brought an employment law action against her former employers—an aero-engine manufacturing company and its affiliate—alleging, among other things, violations of the False Claims Act's anti-retaliation provision that arose following the plaintiff internal reporting of the defendants' falsification of information and submissions of fraudulent claims to the government. The defendants moved for summary judgment.

Holding: The U.S. District Court for the Southern District of Indiana granted the defendants' motion.

Retaliation

The court began by dismissing the claim against the affiliated defendant, noting that at the time the alleged retaliation occurred, the plaintiff was not employed by that the defendants. The court then examined the retaliation claim against the remaining defendant and found that the plaintiff failed to satisfy all of the necessary elements for pleading her FCA claim. First, the court determined that the plaintiff could not demonstrate that she engaged in a protected activity. The court noted that the plaintiff's retaliation claim was based on internal reporting of a conversation she overheard in which her supervisor advised another employee to "make up" something—the plaintiff conceded that she could not remember the substance of the conversation and did not know whether the supervisor had instructed the other employee to submit any false information to the U.S. government. The court held that the plaintiff's claim was based on tenuous facts and that a reasonable employee overhearing the same conversation or receiving the plaintiff's internal reports would not conclude that the defendant was defrauding the United States. Thus, the court held that the plaintiff failed to show that she engaged in protected activity, pursuant to the FCA's anti-retaliation provision. Since the plaintiff was unable to show that she had engaged in protected activity, she could not demonstrate that the defendant was on notice of any protected activity or retaliated against her in response. Consequently, the defendant's summary judgment motion was granted and the plaintiff's FCA retaliation claim was dismissed.

Manfield v. Alutiiq Intern. Solutions, Inc., 2012 WL 1048597 (D. Me. Mar. 28, 2012)

Two plaintiffs brought an action against their former employer and its subsidiaries, alleging a variety of claims. Included among the allegations was a claim by plaintiff Manfield for retaliatory discharge under the False Claims Act. Manfield alleged that he had been employed as one of the defendants' site supervisors, with responsibility for security at a naval shipyard. Manfield alleged that the defen-

dants shipped a package of ammunition to him at the shipyard, without having the proper memorandum of understanding (MOU) in place with the Navy. As a result, he claimed, he was not allowed to legally accept the delivery. Although he eventually found a place where he could legally store the ammunition, he informed the defendants' project manager of the problem with the delivery. He claimed that his supervisor became upset that he was "not willing or able to help us out." Manfield alleged that the defendants later sent a shipment of guns to him, prior to executing an MOU with the Navy. Again, he refused the delivery and informed another of his superiors of the problem. He was then directed to accept the delivery of a "computer," but he noticed that the "computer" had the same tracking number as the guns. He informed both of his superiors that the "computer" delivery actually contained guns, but did not receive a response from them.

Subsequently, the defendants executed an MOU with the Navy. A day after the MOU was approved, the defendants brought rounds of frangible ammunition to the security officers at the shipyard. This delivery violated the defendants' contract with the Navy, which required the defendants to provide the more lethal ball ammunition. Manfield claimed that he informed his manager of the contract violation, and the manager agreed with his assessment and stated that ball ammunition would be delivered to replace the frangible ammunition. Manfield also reported problems with the gun belts and holsters the defendants provided to their security officers, as the equipment did not meet contract specifications and created safety hazards. Furthermore, Manfield alleged that several of his co-workers were not properly paid for the time they worked for the defendants and that he alerted the defendants' human resources department of the discrepancies and directed his co-workers to do the same. He alleged that some of the other security officers may have filed complaints with the Department of Labor. Days later, Manfield met with his manager and was informed that he was being fired from his job. He alleged that the manager told him that the defendants did not trust his decision to refuse pre-MOU shipments or to instruct other employees to contact human resources regarding their payroll issues. The defendants moved to dismiss Manfield's retaliation claim, arguing that Manfield failed to state a claim under the FCA for which relief might be granted.

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

Retaliation

Manfield argued that he was protected from retaliation under the False Claims Act's anti-retaliation provision because his complaints to his supervisors about the defendants' alleged attempts to make improper ammunitions deliveries and their distribution of improper gun belts and holsters constituted protected activity under the FCA. Manfield further argued that the defendants knew that he was engaged in protected activity and that he was discharged, at least in part, because of his complaints. The court found that neither Manfield's reporting of his co-workers' payroll complaints, nor his complaints of unlawful shipments of guns and ammunition were related to potential FCA violations, and therefore could not be considered protected conduct. However, the court also found that Manfield's reports regarding the inadequacy of equipment distributed to security officers under the contract with the Navy could concern possible FCA violations.

The defendants argued that alleged equipment deficiencies at best amounted to a breach of contract, which could not form the basis of an FCA claim—they argued that Manfield's retaliation allegations were fatally defective because they did not specify how the allegedly inadequate gear provided by the defendants was linked to the presentment of any false or fraudulent claims to the government. The court rejected the defendants' argument, noting that the FCA includes liability provisions that are not tied to the presentment of false claims to the government. The court also found that although Manfield did not allege how the defendants were paid by the government, he did allege that the defendants and Navy had a contract for security services and that the contract itself constituted a claim for payment, for FCA purposes. The court stated that the defendants' representations to the government regarding their future compliance with the Navy contract will amount to false statements for FCA purposes, if either the defendants made those representations with the intention of shortchanging the government or if they recklessly disregarded the contract's requirements. The court also mentioned that Manfield's manager admitted that the defendants' actions had violated the contract, and held that although these contractual violations may have stemmed from honest mistakes, they also may have resulted from fraud. Since all reasonable inferences were construed in favor of the plaintiff at the motion to dismiss stage, the court held that Manfield has alleged a sufficient factual predicate for his claim that he was engaged in protected conduct when he reported potential violation of the Navy contract to his employer.

The court further found that the defendants were aware of Manfield's protected activity, since his internal reporting to his former employer constituted both an effort to stop a potential FCA violation and put the employer on notice that Manfield had engaged in activity that could reasonably lead to the filing of an FCA suit. Finally, the court held that Manfield alleged sufficient facts to support his claim that he was fired for a retaliatory reason, and not, as the defendants claimed, for being defiant and uncooperative. The court concluded that a reasonable inference could be drawn that the defendants fired Manfield because they could not trust him to ignore improper conduct. Therefore, the court held that there was at least some factual support for Manfield's allegation. Accordingly, the court denied the defendants' motion to dismiss the retaliation claim.

U.S. ex rel. George v. Boston Scientific Corp., 2012 WL 1038633 (S.D. Tex. Mar. 27, 2012)

A relator brought a *qui tam* action against two companies—Guidant Corp. (GS) and Boston Scientific (BS)—both of which designed, developed and marketed cardiovascular products. She alleged that BS acquired GS's Cardiac Rhythm Management and Cardiac Surgery Units and that GS hired her as a manager during the transition. She claimed that the defendants violated the False Claims Act by improperly promoting a medical device for an off-label use, which caused physicians to submit fraudulent reimbursement claims to Medicare and Medicaid. She also included a claim under the FCA for retaliatory discharge, alleging that she openly complained about the defendants' off-labeling marketing and healthcare fraud, and was harassed and within months, was terminated from her job. The relator's complaint was dismissed, but she was granted leave to amend. She filed an amended complaint that only asserted her retaliation claim. The defendants moved to dismiss that complaint, arguing that the plaintiff failed to state a claim for relief under the FCA and that her claim was time-barred.

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

Retaliation

The defendants first contended that the plaintiff's retaliation claim was time-barred. They argued that the most closely analogous state law limitations period applied to the claim and that the Texas Whistleblower Act, with its 90-day statute of limitations, was the most closely analogous state law. The Texas district court rejected this argument, noting that the Fifth Circuit had already decided that the two-year statute of limitations for personal injury claims applied to FCA retaliation claims filed in Texas. The plaintiff's claim was filed within this time frame, and thus, the court held, her retaliation claim was not time-barred.

Next, the court next examined whether or not the plaintiff had engaged in protected activity. The plaintiff alleged that the defendants were well aware of the dangers of off-label marketing and that she'd asked, during two separate employee presentations, whether the government would view BS's marketing of a medical device for off-label uses as fraud. The defendants argued that the plaintiff failed to allege that she engaged in protected activity because she did not expressly complain to the defendants about fraud against the government or about making false claims for federal funds, nor did she inform management of her intention to file a *qui tam* action. The court found that the plaintiff's allegations of asking questions about the legality of off-label promotions of medical devices during employee presentations was sufficient to support a reasonable conclusion that BS could have feared being reported to the government for fraud or sued in a *qui tam* action by the plaintiff or another employee attending the presentations. The court noted that the plaintiff further alleged that after she complained to the defendants, she was reprimanded and warned that she could lose her job. The court concluded that the plaintiff properly alleged that she had engaged in protected activity under the FCA.

The court also held that the plaintiff adequately pled that the defendants were on notice of her protected activity. The court rejected the defendants' argument that the plaintiff's claim was deficient because she did not allege who made the decision to fire her or whether that person knew about the questions and concerns she raised during employee presentations. Rather, the court relied on the plaintiff's allegations that her manager was present at both presentations and certainly knew about her complaints, and that the same manager was one of the people who reprimanded her and told her to resign. Therefore, the court held that the defendants were on notice of the plaintiff's protected activity.

Finally, the court examined causation. The defendants argued that they fired the plaintiff because she did not complete work on time. The plaintiff, of course, contended that, because of her whistleblowing activity, the defendants held her to a higher standard than other employees, and that she was reprimanded, told to stop inquiring into the legality of off-label marketing, instructed not to discuss her allegations with anyone else and told that she should resign, improperly placed on a performance improvement plan, required to return internal telephone calls within 30 minutes or face termination, harassed with telephone calls at all hours and held out as an example to the other employees. The court found that these detailed allegations, coupled with the approximate two-month time period between the plaintiff's complaints and her termination, were sufficient to state a retaliation claim under the FCA. The defendants' motion to dismiss was denied.

Tolman v. Am. Red Cross, 2012 WL 892312 (D. Idaho Mar. 14, 2012)

A plaintiff brought an action against his former employer—the Idaho Chapter of the American Red Cross—as well as its national parent organization—the American Red Cross—alleging, among other things, that the defendants violated the False Claims Act by firing him from his job in retaliation for his complaints about their alleged misuse of public funds. This claim had been previously dismissed for failing to state a claim, as the U.S. District Court for the District of Idaho held that the plaintiff failed to show that he had engaged in "protected conduct" under the FCA, since his complaint failed to adequately describe the defendants' alleged fraud against the government about which he had complained. The plaintiff was granted an opportunity to amend his complaint. His amended complaint included more specific allegations, including allegations that the CEO of the Idaho Chapter failed to do fundraising or to hold required fundraising meetings, cut employee pay instead and immediately fired the finance director who challenged her decision, fired the plaintiff when he complained about her misuse of funds as well, and later raised about $90,000 from a raffle fundraiser that went "missing." The defendants

again moved to dismiss his retaliation claim, arguing that he failed to state a claim under the FCA and that he failed to allege the fraud scheme with particularity.

Holding: The U.S. District Court for the District of Idaho granted the defendants' motion in part.

Retaliation

In response to the defendants' argument that his complaint did not describe a fraud on the government, the plaintiff asserted that his allegations about the CEO's misuse of the raffle funds was sufficient to state a fraud against the government. The court, though, noted that the raffle fundraiser occurred after the plaintiff had been fired, so any complaints about the raffle funds could not have led to his termination. Thus, the court was left to consider whether or not the plaintiff's complaints about the defendants' financial mismanagement amounted to "protected activity" under the FCA. The court first determined that actionable conduct under the FCA involves a false assertion of entitlement to obtain or retain government money or property. The court then held that the plaintiff's complaint did not include any such allegation, stating that "at most, he is complaining about mismanagement and intimidation tactics." As a result, the court dismissed the relator's retaliation claim once again.

Gerhard v. D Constr., Inc., 2012 WL 893673 (N.D. Ill. Mar. 14, 2012)

A plaintiff brought an action against his former employer, a construction company and its owners, alleging, among other things, a claim for retaliatory discharge under the False Claims Act. The plaintiff alleged that the defendants received federal funds under the American Reinvestment and Recovery Act to complete various construction projects and that the defendants' government contracts included the defendants' agreement to comply with all applicable laws and regulations in performing their work. He further alleged that he was hired by the defendants as a safety inspector and that observed and reported OSHA violations at two of the defendants' federally-funded work sites. The plaintiff alleged the defendants' safety manager instructed him to attend a training program at a nuclear power plant, which the plaintiff ultimately did not attend due to concerns about his health. He was fired the next day. The plaintiff alleged that the training program was not mandatory, and that he was fired in retaliation for reporting the defendants' noncompliance with their contractual obligations. The defendants' moved for summary judgment on the plaintiff's claim.

Holding: The U.S. District Court for the Northern District of Illinois granted the defendants' motion to dismiss the retaliation claim. The court rejected the plaintiff's argument that the defendant's mere non-compliance with OSHA could result in a fraud on the government, noting that the plaintiff had not offered any

authority for such a broad reading of the False Claims Act—a reading that the court said would mean that "any violation of any law or regulation on the job site of a construction company receiving ARRA stimulus funds would potentially violate the FCA." The court also mentioned that the plaintiff failed to show that the defendants had any knowledge of his alleged protected conduct, finding no evidence that the plaintiff ever informed the defendants that he was engaged in actions that could result in the filing of an FCA complaint. Instead, the plaintiff only reported safety violations to the defendant, consistent with his normal job responsibilities.

Guerrero v. Total Renal Care, Inc., 2012 WL 899228 (W.D. Tex. Mar. 12, 2012)

A plaintiff brought an action against his former employer, a renal care provider, alleging retaliatory discharge in violation of the False Claims Act. He alleged that one of his co-workers committed Medicare and Medicaid fraud by charging for procedures that were not performed or that were not ordered by doctors. He further alleged that he notified the defendant's director of the fraudulent activity and the director became incensed and threatened to report false allegations about the plaintiff to the human resources department. The relator claimed that he also discussed the matter with another supervisor, whom he also told that he was going to report the alleged fraud to the director's superiors, as he did not believe that the director would remedy the problem. The plaintiff was later terminated from his job, without explanation, and before he had been able to discuss the alleged fraud with the director's superiors. The defendant moved to dismiss the plaintiff's claims for failure to plead the alleged fraud with particularity. The defendant also argued that the plaintiff's actions did not amount to "protected activity" under the False Claims Act and that it had no knowledge of the plaintiff's investigation of alleged fraud against the government.

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

Retaliation

The court first analyzed whether Rule 9(b)'s heightened pleading standard applied to the plaintiff's claims. The defendant had argued that since retaliation claims under the False Claims Act must be "supported by an allegation of fraud against the government," such claims are subject to Rule 9(b)'s particularity standard. The court rejected the defendants' argument and noted that all circuit courts that have considered the issue have held that retaliation claims under the FCA are not dependent on allegations of fraud, and thus, retaliation claims need not be pled with particularity.

The court then turned to the issue of whether the plaintiff's actions constituted protected conduct under the FCA. The plaintiff argued that both his reports to the director about "Medicare/Medicaid fraud" and his revelation to a co-worker that he planned to report the fraud to the director's superiors constituted protected activity. On the other hand, the defendant argued that the plaintiff's investigation of his employer's activities can only be deemed protected activity if the plaintiff could show that a viable FCA claim existed. The defendant argued that the plaintiff failed to allege that a viable FCA claim existed, since he failed to provide any examples of the fraud and failed to offer facts describing the fraud. The court held that the plaintiff's allegations were sufficient to state a claim, as he specifically alleged that he reported to a supervisor that the defendant was submitting fraudulent claims for federal funds.

The defendant then argued that the plaintiff failed to allege sufficient facts to show that he had a reasonable, good faith belief that the defendant was engaged in a fraud against the government. The court refused to apply such a standard—although it noted that courts in other jurisdictions had adopted a "good faith/reasonableness" test. Instead, the court declared that the FCA provides protection from retaliation even before the plaintiff has completely discovered the fraud or "put all of the pieces of the puzzle together," and "even if it is later discovered that no fraud occurred." Thus, the court held that the plaintiff was not required to plead details regarding the underlying fraud or his good faith belief that a fraud was occurring.

Finally, the court considered the defendant's argument that it had no knowledge of any protected conduct by the plaintiff, since the plaintiff did not give the defendant any details or substantive information about the alleged fraud. The plaintiff argued that the defendant was on notice of his protected activity, since he specifically informed his supervisor that the defendant's employee was committing fraud. The court agreed with the plaintiff and found that his assertion that he internally reported a co-worker's submission of fraudulent claims to two supervisors was sufficient to put the defendant on notice of his protected activity. Therefore, the court denied the defendant's motion to dismiss.

James v. Conceptus, Inc., 2012 WL 845122 (S.D. Tex. Mar. 12, 2012)

A plaintiff brought a claim against his former employer, a medical device firm, alleging retaliation under the False Claims Act. According to the relator, who had been employed as one of the defendant's sales representatives, the defendant fired him from his job after he questioned the legality of the defendant's sales practices with respect to the marketing of certain medical devices to doctors and subsequent claims to Medicaid for reimbursement. The defendant moved to dismiss the plaintiff's complaint and to compel arbitration of the plaintiff's claims, citing the employment agreement between the two parties. The plaintiff countered that the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (the Act) made the arbitration clause unenforceable.

Holding: The U.S. District Court for the Southern District of Texas granted the defendant's motion and held the arbitration clause was enforceable, since the Act did not invalidate such clauses in the context of FCA retaliation actions, although it did so for retaliation actions brought under the whistleblower provisions of the Commodities Exchange Act and the Sarbanes-Oxley Act. The court did not that the arbitration clause was unconscionable under California law, to the extent that it required the plaintiff to pay half of the defendant's arbitration costs; it was not unconscionable, however, to the extent that it required the plaintiff to arbitrate his claim in Caifornia.

As a result, the plaintiff's retaliation claim was dismissed without prejudice, in favor of arbitration in California, pursuant to the parties' agreement.

Khami v. Ortho-McNeil-Janssen Pharm., Inc., 2012 WL 414812 (E.D. Mich. Feb. 8, 2012)

A plaintiff brought an action against her former employer (a pharmaceutical company) and two supervisors. The plaintiff, who had been employed as a pharmaceutical sales representative, alleged among other things, that the defendants violated the anti-retaliation provision of the False Claims Act, as well as other federal and state laws, by laying her off and refusing to re-hire her after the defendant corporation disbanded its sales force and transferred about half of those employees to another of its divisions. With respect to her False Claims Act assertions, the plaintiff alleged that the corporate defendant had encouraged its sales representatives to illegally promote one of its drugs for off-label uses. She alleged that the company pled guilty to criminal charges stemming from this conduct, and was fined by the U.S. Food and Drug Administration. She alleged that she testified before the grand jury that investigated the company's illegal activity and that she subsequently refused to engage in off-label promotion of the drug. She claimed that her testimony and refusal amounted to protected activity under the FCA, that the defendants were aware of these activities, and that the activities were factors in the company's decision not to re-hire her. As a result, she alleged, the defendants violated the FCA's anti-retaliation provision. The defendants argued that they had legitimate, non-pretextual reasons for terminating the plaintiff's job, and that there was no causal connection between her grand jury testimony and her termination. The defendants moved for summary judgment.

The U.S. District Court for the Eastern District of Michigan denied the defendants' motion with respect to the plaintiff's FCA retaliation claim. The court held the plaintiff's grand jury testimony constituted protected activity, and that the defendants were aware of this activity. The court noted that this protected activity could have been the reason for her termination, and thus held that summary judgment was not proper, due to disputed issues of material fact regarding the cause of her termination.

U.S. ex rel. Hendren v. Mayo, 2012 WL 405665 (N.D. Miss. Feb. 8, 2012)

Two relators (Hendren and Day) brought a *qui tam* action against five healthcare service providers (Mayo, UHS, Parkwood, MPM and Evergreen) and several individuals, alleging that the defendants violated the False Claims Act and other federal and state laws, by engaging in Medicare fraud. Specifically, the relators alleged that the defendants engaged in patient "poaching," by allowing patients to be diverted from one of the relators' practices to another provider. The relators alleged that this other provider was confronted about the alleged poaching and informed that any Medicare claims he submitted for services provided to patients in the absences of a written order from a treating physician were fraudulent. The relators also alleged that after they discovered and reported the poaching to the defendants, the defendants retaliated against them by revoking one of the relators' privileges to maintain office space at one of the defendants' facilities and by issuing a warning to the other relator, after he conducted an audit that allegedly uncovered the poaching activity. As a result, the relators added an FCA claim for retaliation to their complaint. Defendants Mayo, UHS, and Parkwood moved to dismiss the relators' complaint, arguing that the relators failed to state a claim and failed to plead the alleged fraud with particularity. Further, these defendants argued that the relators' claims were frivolous and that the defendants were entitled to recover their attorneys' fees from the relators.

Holding: The U.S. District Court for the Northern District of Mississippi granted the defendants' motion to dismiss the relators FCA allegations, but denied their request for attorneys' fees.

Pleading Fraud with Particularity

The court began by analyzing Rule 9(b)'s particularity requirement. It found that the relators failed to allege the "who, what, when, where, and how" of the alleged fraud. The court noted that the relators' complaint did not include an "allegation that the defendants submitted bills for unperformed services or acted with the intent of getting a false claim paid by the Government." Accordingly, the court held the relators' complaint failed to meet the particularity requirements and should be dismissed on that basis.

Retaliation

The court then analyzed the relators' retaliation claims under the FCA. The court observed that at the time the plaintiffs filed their retaliation claims, the FCA only protected "employees" from retaliation. One of the relators was never an "employee" of any of the defendants, and was only allowed to rent space at one of the defendants' facilities. Thus, the court held, that relator was not protected by the FCA's anti-retaliation provision, as that provision existed at the time of the alleged retaliation. The court held that the second relator had been an employee of one of the defendants, until he conducted an audit of that defendant's practices, allegedly discovered the poaching activity, received a warning from that defendant, and ultimately chose to find another job. The court, though, found that this second relator failed to allege that he engaged in protected activity, as the audit he conducted was encompassed by his routine job functions, and therefore did not put the defendant on notice of any protected activity under the FCA. Accordingly, the court dismissed the relators' retaliation claims.

Attorneys' Fees

Finally, the court considered the defendants' requests for their attorneys' fees. The court found the relators' claims did not meet the standard set forth under the FCA as the claims were not clearly frivolous nor were they brought primarily for the purposes of harassment. Therefore, the court denied the defendants' request.

Harrington v. Aggregate Indus. Northeast Region, Inc., 2012 WL 372708 (1st Cir. Feb. 7, 2012)

A plaintiff brought a claim under the False Claims Act, alleging that the construction company he had previously worked for retaliated against him and fired him, in response to his protected whistleblowing activity. The plaintiff had previously served as a relator in a *qui tam* lawsuit against the defendant, in which he alleged that the defendant had substituted substandard material for the concrete specified in the defendant's contract to build the "Big Dig"—a highway project in which significant federal funds were used. The United States intervened in the *qui tam* action, the parties reached a settlement, and the relator received a percentage of the government's proceeds from that settlement. The plaintiff alleged that a few days after the settlement agreement was executed, the defendant retaliated against him by firing him from his job. The defendant moved for summary judgment on the plaintiff's retaliation claim, contending that the plaintiff was fired for refusing to take a drug test. The U.S. District Court for the District of Massachusetts granted the defendant's motion, finding that the plaintiff failed to establish a causal connection between his protected whistleblowing activity and his termination. The plaintiff appealed the district court's ruling to the U.S. Court of Appeals for the First Circuit.

Holding: The U.S. Court of Appeals for the First Circuit vacated the district court's order and remanded the matter for further proceedings.

Retaliation

The appellate court first concluded that the plaintiff presented a *prima facie* case of retaliation, noting that he alleged that some of the defendant's high-ranking executives were aware of his status as a relator months before he was fired and that the termination occurred within days of the settlement agreement being signed. The court rejected the defendant's argument that the plaintiff's act of signing the settlement agreement was not protected activity, since that act was not conduct "in furtherance of" a *qui tam* action, but instead, ended the action. The court instead found that the plaintiff's "execution of the settlement agreement was surely conduct in furtherance of that action" commenced by the relator—the action that was resolved when the relator signed the settlement agreement.

The circuit court then turned its attention to the defendant's assertion that the plaintiff was fired for a legitimate, non-retaliatory reason, namely, his refusal to take a drug test. The court found that the record casted substantial doubt as to whether the defendant followed its own drug testing protocols when requiring the plaintiff to submit to a drug test and then firing him for refusing to do so. The court observed that when the defendant initially insisted that the plaintiff take a drug test, he objected, citing his union contract, and the defendant did not press the issue further. The court noted that the defendant tried to force the plaintiff to take a drug test a second time, telling him that the test was required as a follow up to a prior positive test result from years before. The plaintiff again refused and brought the matter to his union representative. The defendant relented once again. Finally, the defendant made a third attempt to force the plaintiff to submit to a drug test, telling him that his name was randomly selected by a third-party testing company. The court, though, found that the defendant failed to provide any evidence showing the plaintiff was randomly selected. Ultimately, the circuit court concluded that the defendant's behavior created a reasonable inference that the plaintiff was terminated for retaliatory reasons.

The defendant then argued that the plaintiff was barred from bringing a retaliation claim because the settlement agreement in the *qui tam* action, since that settlement released all of the plaintiff's claims against the defendant. The defendant argued that although the plaintiff was fired after the release was signed, the alleged conduct underlying the firing occurred before the execution of the settlement agreement and therefore, his "claim" arose at that time. The court disagreed and held that the plaintiff retaliation claim was limited to the defendant's post-settlement conduct, and that the defendant only informed the plaintiff that he would be terminated after the settlement agreement had been signed. Thus, the circuit court held, the termination itself was the incident out of which the plaintiff's retaliation action arose, and the prior settlement agreement did not bar the plaintiff from bringing that claim.

Clinkscales v. Walgreen Co., 2012 WL 80543 (D.S.C. Jan. 11, 2012)

A plaintiff brought an action against his former employer, a pharmacy company, alleging a retaliation claim under the FCA, as well as claims under common law. The plaintiff, who had been employed as a pharmacist at one of the defendant's stores, alleged that the defendant's computer system experienced problems, resulting in numerous prescription sales not being properly recorded as sold, but rather as "ready." The plaintiff alleged that he was instructed to perform a reconciliation,

in order to compare the prescriptions that the computer indicated were "ready" with the prescriptions that were actually physically available in the stores bins for pickup—this reconciliation would assist the store in determining how many of the prescriptions actually had been sold. The plaintiff began performing the reconciliation, and discovered that nearly 200 prescriptions were listed as "ready", but were not physically available in the bins, and had not been otherwise noted as sold. As a result, the defendant could not immediately verify whether those prescriptions had been sold without first being properly scanned (which would have removed the "ready" status), had been put back into the defendant's stock, or had been stolen. The plaintiff alleged that he twice asked the store's manager for guidance with respect to performing the reconciliation, and eventually refused to finish the reconciliation, and asserted that he believed that doing so would result in unlawful billing to the government—it is unclear whether the prescriptions at issue were for Medicare/Medicaid patients. The store manager, however, believed that the plaintiff simply did not understand how to perform the reconciliation, and left his own work for another employee to complete.

Within two weeks of that incident, the store manager reviewed store surveillance video that showed the plaintiff behaving erratically on the job and violating various company policies. The plaintiff received written warnings for his misconduct and soon after was placed on short-term, and eventually, long-term disability, due to his bi-polar condition. A year later, his employment with the defendant ended, and subsequently, he filed the present action against the defendant, alleging that he was, in essence, "constructively discharged" from his job. The defendant moved for summary judgment on the plaintiff's FCA retaliation claim.

Holding: The U.S. District Court for the District of South Carolina granted the defendant's motion for summary judgment on the plaintiff's retaliation claim under the False Claims Act.

FCA Retaliation Claims

The defendant first argued that the plaintiff's retaliation claim failed because he did not plead that he had engaged in protected activity under the False Claims Act. In response, the plaintiff argued that he had engaged in protected conduct, since he expressed his concerns about possible improper billing practices and refused to perform the bin reconciliation. The court noted that the FCA's anti-retaliation provision protects plaintiffs who hold a reasonable, good faith belief that a defendant has submitted a false claim to the government—even if that belief is ultimately unsubstantiated. The court, however, also noted that mere allegations of "mischarging" or investigations of a defendant's non-compliance with federal or state regulations does not rise to the level of protected conduct. The court concluded that the plaintiff did not engage in protected activity under the FCA, because he never alleged that he informed the store manager of his suspicions that the defendant might submit false claims to the government or that he believed that the reconciliation process might be illegal. Thus, the court held, not only did the plaintiff's conduct not rise to the level of "protected activity" under the FCA, even if it did, there was no evidence that the employer-defendant had knowledge of any protected activity, and thus, the defendant could not have retaliated against the plaintiff in response to the plaintiff's actions—in fact, the court noted that the written warnings issued to the plaintiff did not result in a termination, suspension, pay decrease or demotion, and that the defendant had a legitimate, non-retaliatory reason for its warning, given the plaintiff's misconduct that was captured on video. Accordingly, the court held the defendant was entitled to summary judgment on the retaliation claim.

Riddle v. Dyncorp Intern. Inc., 2012 WL 19794 (5th Cir. Jan. 5, 2012)

A plaintiff brought an action against his former employer and three of its employees, alleging a claim for retaliation under the False Claims Act. Specifically, he alleged that the corporate defendant contracted with the federal government to create a database, but never took any meaningful step to fulfill its obligations. He further alleged that when he protested the company's inaction, he was marginalized at work and was eventually terminated. The defendants moved to dismiss his claim, arguing that the claim was time-barred. At the time the plaintiff's complaint was filed, the FCA did not include a statute of limitations for retaliation claims and courts looked to the most analogous state law and applied that law's statute of limitations. The U.S. District Court for the Northern District of Texas agreed with the defendants that the 90-day limitations period of the Texas Whistleblower Act (TWA) applied to the plaintiff's claim. Since the plaintiff's claim was filed 178 days after he was terminated from his job, the district court held that his claim was time-barred and the claim was dismissed. The plaintiff appealed the district court's ruling to the U.S. Court of Appeals for the Fifth Circuit, arguing that a the TWA is not the most closely analogous Texas state law to the federal FCA, and that the district court should have applied a longer limitations period; the plaintiff noted that a few months after he filed his complaint, the FCA was amended to include a standard three-year limitations period for retaliation claims, and he argued that this new three-year period should have been applied to his claim.

Holding: The U.S. Court of Appeals for the Fifth Circuit reversed the district court's ruling and remanded the case for further proceedings, finding that the district court erred by referencing the limitations period contained in the TWA.

Statute of Limitations for FCA Retaliation Claims

The plaintiff argued that the district court erred by looking to the TWA for the appropriate limitations period to apply to his FCA retaliation claim. The Fifth Circuit agreed and noted that the Texas legislature enacted several whistleblower statutes for various types of whistleblowers, and that some of those statutes were specific to whistleblowers in certain employment fields. The appellate court further observed that the TWA was intended to only apply to a specified group of employees—namely, public employees—and thus, should not have been referenced with respect to the plaintiff's claim. The circuit court stated that "[i]n light of Texas's status-based whistleblower regime, it makes no more sense to borrow from the statute for public employees than it would to borrow from the statute for hospital employees, physicians, nursing home employees, agricultural laborers, or handlers of hazardous materials. Each of these employment fields benefits from a different Texas whistleblower statute." The court also noted that the TWA generally requires public employees first to pursue retaliation claims through administrative proceedings, during which time the 90-day statute of limitations period is suspended. Since the plaintiff was not a public employee and could not avail himself of those administrative remedies, the Fifth Circuit concluded that he was deprived of an extended limitations period by the district court.

Rather than apply the TWA, the Fifth Circuit held that the two-year limitations period for personal injury claims under Texas law should be applied. The court held that the personal injury provision was more analogous to the FCA than the TWA, because it applied to private employees and applied broadly to actions for wrongful discharge, including wrongful discharge claims that arise when a person is terminated for refusing to commit an illegal act—the appellate court held that, like the FCA, these types of claims "protect law-abiding employees from retaliation from their law-breaking employers and superiors."

The circuit court considered the plaintiff's argument that, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the FCA's anti-retaliation provision was amended to include a standard three-year statute of limitations, and that this three-year limitations period applied to his retaliation claim. However, the court observed that the amendment was enacted months after the relator's claim was filed, and thus, was not in effect at the time his claim was made. The appeals court did acknowledge that newly-enacted statutes of limitations are sometimes applied to pending cases, but only when doing so would not revive claims that had already expired before the new limitations period took effect. Thus, had the plaintiff's limitations period expired before the amendment was enacted—which would have been the case if the 90-day limitations period applied—then the newly-enacted FCA limitations period would not have revived his claim. But since the court determined that a two-year limitations period applied to the plaintiff's claim, and since the plaintiff's complaint was filed well within that time period, the court concluded that the plaintiff's claim was timely, essentially leaving open the question of whether the amended FCA's statute of limitations should be applied retroactively. In any event, the Fifth Circuit ruled that the district court erred in applying the TWA's limitations period and dismissing the plaintiff's complaint as time-barred. The district court's judgment was reverse and the case was remanded for further proceedings.

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

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

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

Statute of Limitations for FCA Retaliation Claims

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

Failure to State Retaliation Claim

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

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

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

In response to these actions, the plaintiff alleged that he filed a grievance with the university, but soon after, Dr. Johnson, an associate dean, informed him that he was being placed on administrative leave, amid allegations that he had taken laboratory equipment without permission and had tried to pass off his supervisor's work as his own. The plaintiff denied those allegations and filed a formal complaint with the university. Dr. Johnson recommended that the university terminate the plaintiff's employment. The university, however, concluded that it was possible that the plaintiff's employment contract was not renewed for retaliatory

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

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

Retaliation Claims Against State Officials

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

The court, though, noted that the plaintiff also sought equitable relief against the individual defendants in the official capacities—up to and including reinstatement of his job. The court noted that the FCA's anti-retaliation provision specifically allows for injunctive relief, and that, unlike with claims for damages, states are not exempt from actions for prospective relief. The court observed that the university offered to reinstate the plaintiff's job for a year, presumably to make up for the year he "lost" while pursuing grievances against the university and being placed on administrative leave. The court shared the defendants' concern that reinstatement of the plaintiff's job would be circular and futile, given the long history of poor relations between the parties. However, the court decided that the plaintiff presented sufficient facts to pursue the claim, and would not, at the motion to dismiss stage, decide whether or not the plaintiff forfeited his right to request equitable relief when he rejected the university's job offer, or whether—in the event that reinstatement would be futile—the plaintiff might be entitled to front pay as a means to make him whole, even though the FCA does not specifically list front pay as a remedy. Since the plaintiff's claims for prospective relief against the individual defendants in their official capacities could not be resolved at the motion to dismiss stage, the court denied the defendants' motion with respect to those claims.

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

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

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

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

Statute of Limitations on FCA Retaliation Claims

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

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

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

Failure to State a Retaliation Claim

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

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

A plaintiff brought a claim under the False Claims Act, alleging that her former employer retaliated against her and wrongfully terminated her employment in response to her protected whistleblowing activity. She alleged that the defendant—a management and technology service provider—oversaw U.S. Air Force government contracts related to environmental risk studies on military dump sites. She claimed that her job was to provide quality assurance oversight and progress reviews for the work, and that she discovered that a government contractor was

double-billing the government. She alleged that she reported the overbillings to the Air Force and to her boss. She stated that her boss had previously worked with the government contractor involved in the alleged overbilling, and consequently told her to show some lenience to the contractor—threatening that if she continued finding flaws with the contractor's billing, then she would be fired. She further alleged that she provided the Air Force with a detailed spreadsheet regarding the contractor's fraudulent billing, which was eventually forwarded to her boss. She alleged that she was then placed on probation and later terminated from her job. The defendant moved for summary judgment on the plaintiff's claims, arguing that she did not engage in protected conduct under the False Claims Act, that the defendant had no notice of any protected conduct she may have engaged in, and that she was fired for non-retaliatory reasons.

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

Retaliation

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

Next, the court determined that the defendant was on notice of plaintiff's protected activity, as the plaintiff discussed the contractor's alleged improper billing with both the defendant and Air Force employees. Additionally, the court found that the spreadsheets the plaintiff prepared for the Air Force—and which were eventually sent to the plaintiff's boss—was sufficient evidence for a reasonable jury to conclude that the defendant had been put on notice that the plaintiff was engaging in protected conduct.

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

The defendant's motion for summary judgment was denied.

U.S. ex rel. Moore v. City of Dallas, 2011 WL 4912590 (N.D. Tex. Sept. 27, 2011)

A relator originally brought a *qui tam* suit against his former employer, the City of Dallas, as well as a private company, alleging FCA and state law claims. The plaintiff alleged he was hired in the city auditor's office and assigned to work in the fraud, waste, and abuse section. In that position, the plaintiff alleged that he discovered that the defendants had improperly billed ambulance calls and submitted false Medicare and Medicaid claims to the government, resulting in overpayments to the defendants. He later filed a *qui tam* case and three business days after the city learned of the litigation—and only weeks after the plaintiff had received a "fully successful" performance review—he was terminated from his job. He then amended his complaint to add a retaliation claim under the False Claims Act, the Texas Medicaid Fraud Prevention Act (TMFPA) (which is Texas' counterpart to the federal False Claims Act), and the Texas Whistleblower Act (TWA) (which prohibits governmental entities from retaliating against employees who report violations of the law by that government entity or its employees). Both the plaintiff and the city moved for summary judgment on the plaintiff's retaliation claims, and the U.S. District Court for the Northern District of Texas denied both motions.

Retaliation

The city argued that it had a legitimate non-retaliatory reason for the plaintiff's firing and that the plaintiff could not show that those reasons were a pretext for retaliation. The court noted that, according to the city, the relator was not fired for any whistleblowing activity, but rather because he had breached a fiduciary duty to the city and had violated both government auditing standards and his office's policies and procedures, by creating a significant personal interest in the subject matter of an audits for which he had been hired to perform. The court, though, found that the plaintiff had proffered sufficient evidence for a reasonable jury to conclude that he was fired in retaliation for engaging in protected activity under the False Claims Act, since he alleged that he discovered a pattern of fraudulent Medicare/Medicaid billing by the city, that he expressed his concerns about the city's potential FCA liability (and even discussed with his supervisor the possibility of someone filing a *qui tam* suit), that he ultimately filed a *qui tam* suit himself, and that he was fired from his job within days of the city learning about his FCA suit, notwithstanding the fact that he had recently received a good performance review. The court also noted that the city's former mayor had testified that, in the initial meeting with the city auditor following the revelation of the *qui tam* suit, the city auditor stated that he wanted to fire the relator and that he viewed the FCA suit as an incredible breach of ethics. The court concluded that there were disputed issues of material fact regarding the reason for the plaintiff's firing, which precluded a grant of summary judgment for either side. Thus, the court denied both parties' motions for summary judgment on the relator's retaliation claim under the FCA.

The court also denied the parties' motions for summary judgment on the retaliation claim under the TMFPA. The plaintiff sought summary judgment, arguing that he had produced conclusive evidence of retaliation and therefore summary judgment was warranted as a matter of law. The defendant disputed that allegation and further countered that the relator's claim was time-barred. The court again held that the evidence proffered by both parties created a dispute of material fact regarding the reason behind the relator's firing, and therefore, summary judgment in favor of either party was inappropriate. The court did, however, determine that the relator's retaliation claim under the TMFPA was not time-barred, since the parties apparently agreed that the TMFPA includes a 180-day statute of limitations period for retaliation claims, and the court held that the relator first brought his retaliation claims within 180 days after he was terminated from his job—based on the date the court granted the relator's motion to amend his original *qui tam* complaint in order to add a retaliation claim under the TMFPA.

Finally, the court considered the parties' summary judgment motions on the retaliation claim under the Texas Whistleblower Act. Again, the relator argued that he was entitled to summary judgment, since he had produced conclusive evidence of retaliation. And again, the defendant city argued that it was entitled to summary judgment because the relator had not shown that he was retaliated against, and since his claim was time-barred. Once again, the court denied both parties' motions, finding that the existence of material disputed facts regarding the circumstances surrounding the relator's firing precluded summary judgment. The court, though, did determine that the relator's retaliation claim under the TWA was not time-barred. Although the TWA only includes a 90-day limitations period, the court found that before adding retaliation allegations to his original *qui tam* complaint, the relator filed a grievance with the city, which was ultimately denied by the city on the basis that the law only covers current employees, and he was no longer employed by the city. The court held that during the period when the city was considering the relator's grievance—about one month—the statute of limitations was tolled. As a result, the court held that the relator's TWA claim, was not time-barred.

Mayer v. Boys & Girls Clubs of Philadelphia Inc., 2011 WL 4467669 (E.D. Pa. Sept. 23, 2011)

A plaintiff brought an action against her former employer, the Boys and Girls Club of Philadelphia (BGCP) and the School District of Philadelphia, alleging retaliatory discharge under the False Claims Act (FCA) and the Pennsylvania Whistleblower Law (PWL). The plaintiff alleged that the school district received federal government funding from the U.S. Department of Labor to remedy academic underachievement in one of its schools, and that the school district used those funds to contract with BGCP, which operated a mentor program that the school district wanted to implement in the school. The plaintiff further alleged that the federal funding provided students participating in the program with catered meals, but that she—in her capacity as BGCP's program assistant for the mentoring program at the school—observed a shortage of those meals because staff and teachers at the school were stealing them. She stated that she reported what she saw to the school district's superintendent, noting that the school was not only cheating the students, but was also defrauding the Department of Labor (DOL) by falsely representing that the meals were going to the students. She alleged that no remedial action was taken in response to her complaints to the superintendent and that when she complained to the school's principal, she was told that the meals were not her concern and that she had no right to question the school district's actions. The principal also allegedly told that plaintiff that she knew that the plaintiff had spoken to the superintendent and that she (the principal) intended to teach the plaintiff a lesson. Some time later, the plaintiff alleged, she also complained about the purloined meals to BGCP's site coordinator for the school, and within a couple of days, she was terminated from her job, with the school district terminating her assignment as program assistant to the school and the BGCP terminating her employment as well. Months later, the plaintiff filed her suit. BGCP moved to dismiss her complaint for failure to state a claim, but the U.S. District Court for the Eastern District of Pennsylvania denied that motion.

Retaliation

With respect to her retaliation claim under the False Claims Act, BGCP argued that the plaintiff failed to adequately plead that she engaged in any protected conduct that led to her being terminated from her job. With respect to her state law retaliation claim, BGCP argued that the claim failed because BGCP was not a public body and the Pennsylvania Whistleblower Law only protects employees of public bodies from retaliation. Moreover, BGCP argued that purloining school meals does not qualify as "wrongdoing" as that term is used in the PWL.

The court first determined that the plaintiff sufficiently pled her protected conduct under the FCA, as she alleged that she witnessed misconduct regarding student meals that were paid for with federal funds and that she expressed her concerns to appropriate individuals about fraudulent representations being made to the DOL. The court also determined that the plaintiff adequately pled that she was terminated from her job because of her protected conduct, as she alleged that she informed appropriate BGCP officials of the alleged misconduct she observed, thereby making them aware of her protected activity, and the close proximity of her final complaint to the BGCP site coordinator and firing strongly suggested a causal connection between the two. Thus, the court held, the plaintiff stated a retaliation claim under the FCA and the defendant's motion to dismiss her federal claim was denied.

The court also denied the defendant's motion to dismiss the plaintiff's retaliation claim under the PWL. The defendant had argued that it is a private entity, and that the PWL only applies to a "public body." The defendant argued that its receipt of public funds pursuant to its contract with the school district does not make it a public body within the meaning of the PWL. The district court disagreed, though, and, relying on prior caselaw interpreting the relevant language, an entity is a public body under the PWL if it is funded in any amount by the Commonwealth of Pennsylvania. The court held that the plaintiff's allegations—namely, that the BGCP received state funds—when construed in the light most favorable to her, were sufficient to overcome the defendant's motion to dismiss. In addition, the court rejected the defendant's argument that the alleged misconduct of school employees stealing students' meals was, at best, a *de minimis* violation of the law and could not serve as the basis for a claim under the PWL. Instead, the court held that the plaintiff adequately pled that the defendant engaged in "wrongdoing" under the PWL, as she alleged that the misconduct led to a shortage of student lunches, that it occurred on multiple occasions, and that it resulted in fraudulent misrepresentations to the DOL. Consequently, the court denied the defendant's motion to dismiss the PWL claim.

Jewell v. Lincare, Inc., 2011 WL 4336710 (D. Me. Sept. 15, 2011)

A plaintiff brought an action against his former employer, alleging retaliatory discharge under the False Claims Act and state law. Specifically, the plaintiff alleged that he suspected his supervisor of forging client signatures and backdating Medicare and Mainecare documents. He further alleged that he raised concerns about the supervisor's actions to one of his managers, but the managers only gave the supervisor a warning, while telling the supervisor that the plaintiff had reported his alleged wrongdoing. The relator alleged that, upon receiving this information, the supervisor began harassing him, by yelling at him, making fun of him, and even throwing a heavy object at him. Additionally, the plaintiff alleged that a manager told him that he did not want to know anything about forging or backdating docu-

ments, and that the office would be shut down and employees would lose their jobs if the supervisor's actions ever became public. Finally, the plaintiff alleged that a month after his last complaint to the manager, he was called into a meeting with the manager and the supervisor and was told that he being terminated for failing to complete paperwork the day before—paperwork that he had actually completed. Instead, the plaintiff alleged that he was terminated in retaliation for his whistleblowing. The defendant moved to dismiss the plaintiff's retaliation claim under the FCA, arguing that the plaintiff failed to state a claim. The U.S. District Court for the District of Maine denied the motion.

Retaliation Under the FCA

The defendant argued that the plaintiff failed to state a claim under the FCA, since he did not sufficiently allege that he engaged in any protected conduct. The defendant argued that the plaintiff only alleged that his supervisor forged and backdated unspecified documents—allegations that the defendant claimed amounted to nothing more than an internal complaint about regulatory violations and incorrectly completed paperwork. The defendant argued that the plaintiff had not stated a retaliation claim under the FCA, since he did not complaint about any alleged fraudulent bills to the government. The plaintiff argued that his investigation and inquiry into the alleged forgeries could reasonably lead to a *qui tam* suit under the FCA and, therefore, he had engaged in protected conduct. The court agreed with that plaintiff and held that, at the motion to dismiss stage, the plaintiff's allegations that his supervisor backdated and forged client signatures on documents that were later submitted to Medicare and Mainecare for reimbursement were sufficient to state a claim for retaliation under the FCA.

Next, the court rejected the defendant's argument that it was not aware of the plaintiff's protected conduct, finding that the defendant was on notice because the plaintiff informed his supervisor and manager of the suspected forgeries, and they knew that the documents in question were eventually submitted to the government for reimbursement. The defendant then argued that the plaintiff had inadequately pled the causation element of FCA retaliation claims, stating that the plaintiff relied solely on conclusory allegations that were unsupported by any facts. The defendant argued that the plaintiff was fired because he failed to complete necessary paperwork, while the plaintiff argued that he did complete the paperwork and was fired in retaliation for his whistleblowing. The court found that the plaintiff sufficiently alleged that he was terminated for a pretextual reason, relying on the fact that he was fired soon after making his protected conduct known to the defendant. Accordingly, the court held that the plaintiff's allegations were sufficient to state a claim under the FCA, and denied the defendant's motion to dismiss.

Quint v. Thar Process, Inc., 2011 WL 4345925 (W.D. Pa. Sept. 15, 2011)

A plaintiff brought a *qui tam* action against his former employer, alleging, among other things, a claim under the False Claims Act for retaliation. The plaintiff alleged that the defendant made false statements to the Advanced Technology Program of the National Institute of Standards and Technology in order to receive federal grants to develop production of diesel-grade biofuel from plants. Specifically, he alleged that the defendant misrepresented the capabilities of its extraction system, which failed to meet federal standards. He alleged that he raised concerns about this issue to the defendant, through its management and that he continued reviewing the defendant's reports to the government, in an effort to stop the defendant from misappropriating federal funds. He stated that he received a hostile reaction from management and was discouraged from contacting the government, but was subsequently terminated from his job because he prepared a report for the government about the alleged false claims. The defendant moved to dismiss the plaintiff's FCA retaliation claim, arguing that he failed to state a claim. The U.S. District Court for the Western District of Pennsylvania granted the defendant's motion.

Retaliation

The defendant argued that the plaintiff failed to plead facts which demonstrated that his alleged reports to management should be considered "protected conduct" under the FCA. In addition, the defendant argued that it did not have any knowledge of acts which arguably constituted protected conduct. Furthermore, the defendant argued that even if it failed to achieve success in the program funded by the government, such failure did not constitute fraud under the FCA. The plaintiff, on the other hand, argued that he engaged in protected conduct by bringing specific concerns about possible fraudulent conduct to the attention of the management. The court found that the only action by the plaintiff that might be deemed protected conduct was his alleged review of the defendant's allegedly fraudulent reports that were filed with government. The court, though, found that the plaintiff failed to allege that the defendant knew about his investigation of possible fraud, or that he advised anyone in management of his intention to complain to the government about the company's purportedly fraudulent claims. As a result, the court dismissed the retaliation claim for failure to state a claim.

Halasa v. ITT Educ. Servs., Inc., 2011 WL 4036516 (S.D. Ind. Sept. 12, 2011)

The plaintiff brought a *qui tam* action against his former employer, an educational institution, alleging retaliatory discharge under the False Claims Act and state law. The plaintiff alleged that the defendant was not fairly distributing leads about potential students among its recruitment employees, that the defendant admit-

ted ineligible students by either improperly assisting them to pass the placement test or by altering their scores, that the defendant forced its employees to alter students' data regarding whether graduates' employment positions were related to their degrees, and that the defendant falsified students' grades and attendance records to alter its statistics. The plaintiff alleged that he was terminated because he listened to employees' complaints about these alleged practices, investigated them, and put his superiors on notice. The defendant moved for summary judgment on the plaintiff's claims. The U.S. District Court for the Southern District of Indiana granted the defendant's motion.

Retaliation

The court found that the plaintiff failed to show how the defendant's alleged practices violated the FCA. Specifically, the court found he failed to show that the defendant was required to distribute leads fairly pursuant to any federal regulation, contractual provision, or particular policy. Similarly, the court held that the plaintiff failed to show that any federal regulation, contractual provision, or particular policy required the defendant to utilize a placement exam or to certify that it only admitted students who passed a particular exam. With regard to the plaintiff's remaining claims, the court observed that he conceded that he had no specific information about any inaccurate reporting by the defendant of students' grades, attendance, or graduate employment, and the court found that the plaintiff failed to show that the defendant had an improper compensation policy and conceded that he only suspected that the policy was fraudulent. Accordingly, the court held that the plaintiff's alleged investigation conducted of these practices could not form the basis of an FCA retaliation claim. Further, the court found the plaintiff failed to put the defendant on notice about any possible protected activity. The plaintiff conceded that he did not report his concerns directly to any of the individuals who terminated him and that he did not have any direct evidence that they were aware of his concerns. Moreover, the court found that the plaintiff—who had been hired as one of the defendant's "College Directors," responsible for ethics and compliance issues—failed to show that he was not expected to address the defendant's alleged improprieties as part of his job, and therefore, could not establish that any complaints he allegedly made to the defendant were conspicuous enough to constitute protected activity under the FCA. Accordingly, the court held that the plaintiff failed to put the defendant on notice about any protected activity under the FCA and granted summary judgment in the defendant's favor.

Glynn v. Impact Sci. & Tech., Inc., 2011 WL 3792358 (D. Md. Aug. 25, 2011)

A plaintiff brought an action against his former employer, a technology corporation, alleging, among other things, that the defendant retaliated against him in violation of the False Claims Act. The plaintiff had worked as a principal engineer for

the defendant, with the primary responsibility of designing various modules and components for the defendants' Mobile Multi-Band Jammer systems (MMBJs), which were used to counteract improvised explosive devices (IEDs) by interfering with their trigger signals. The defendant was contracted to deliver these devices to the U.S. Special Operations Command (SOCOM). The plaintiff alleged that he became concerned about a new technology the defendants were developing and that he believed the MMBJ devices would fail under extreme temperatures. He alleged that he raised these concerns to his supervisors and management, that he contacted a United States Attorney's Office to raise his concerns, and that he met with a government investigator from the Department of Defense. He claimed that as a result of these actions, he was terminated from his job a few months later. The defendant countered that the plaintiff was terminated because of his bad behavior and insubordination. Both parties moved for summary judgment, and the defendant also countersued for breach of contract, among other claims, citing an employment agreement the plaintiff signed at the commencement of his employment.

Retaliation

The plaintiff alleged that he engaged in protected activity by investigating the defendants' submission of defective MMBJ devices to SOCOM, by opposing the defendants' submission of false claims to SOCOM, and by initiating government investigations of the defendants' allegedly fraudulent conduct. The defendant, though, asserted that the plaintiff was not protected by the FCA's anti-retaliation provision, arguing that he did not engage in protected activity, since he never subjectively believed that he was investigating false claims and since his disclosures to the government were not objectively reasonable. The court noted that the FCA only protects employee-plaintiffs from retaliation when they can show that their conduct raised a "distinct possibility" of a *qui tam* action. The court concluded that the plaintiff's acts of investigating and opposing the defendant's provision of allegedly defective MMBJ devices to SOCOM were not sufficient to constitute protected conduct under the FCA, since the plaintiff did not show that these acts raised a distinct possibility of an FCA action. The court found that even though the plaintiff raised his concerns to the defendant, he appeared to have been merely performing his job duties, and significantly, he did not raise concerns about fraud against the government. Thus, the court denied the plaintiff's motion for summary judgment with respect to his assertion that he engaged in protected conduct by investigating and opposing the defendant's delivery of allegedly defective products to SOCOM.

Next, the court examined the plaintiff's claim that he engaged in protected activity by investigating the defendant's allegedly false certifications of compliance with the terms of its government contracts. He claimed that the contract required the defendant to prepare monthly status reports, detailing its progress and describing any issues affecting the quality of its devices. Moreover, the plaintiff claimed that the defendant was required to prepare a separate report, certifying that it had completed various performance tests. He claimed that he engaged in protected conduct when he investigated the defendant's failure to satisfy these contractual requirements. The court agreed that the plaintiff conducted an investigation, but found that his conduct did not raise a distinct possibility of an FCA action, since he had not personally seen the contractual terms at issue. The court held that without knowledge of the contract requirements, it was very difficult to characterize the plaintiff's belief that the defendant was falsely certifying compliance with the contract requirements as objectively reasonable; this fact "cast doubt on whether [the relator]'s investigation of false certification raised a distinct possibility of an FCA suit from his perspective." Thus, the court held that the plaintiff could not show that he was engaged in protected activity by investigating the defendants' alleged false certification of compliance with the MMBJ contracts, and denied the plaintiff's motion for summary judgment on that aspect of the retaliation claim.

Finally, the court examined the plaintiff's claim that he engaged in protected activity by initiating government investigations into the defendant's allegedly fraudulent conduct and false billing. Once again, the court determined that while the plaintiff's actions constituted an investigation, those actions did not raise a distinct possibility of an FCA action, since the plaintiff had not seen the contracts at issue and thus could not form a reasonable, objective belief that the defendant was engaged in false billing. In addition to these findings, the court held that the plaintiff could not demonstrate two other elements of retaliation claims under the FCA—that the defendant had knowledge of the plaintiff's reports of concern to the government and that, as a result it took adverse action against him. The court then denied the plaintiff's summary judgment motion with respect to that aspect of his retaliation claim.

Furthermore, the court noted that the plaintiff failed to set forth facts demonstrating that his discharge was motivated, even in part, by his alleged protected acts. The court also found that the plaintiff's poor attitude and behavior at work was a legitimate reason for his termination and that he did not begin his external reporting until after he was informed of his poor reviews. The court held that his termination was not caused by his alleged protected activity. Therefore, the court granted the defendant's summary judgment motion on the retaliation claim.

Defendant's Counterclaims

The plaintiff contended that the defendant's counterclaims against him constituted additional post-termination retaliation. The court, though, concluded that the defendant only became aware of facts giving rise to its counterclaims during the course of discovery with the plaintiff, which "provides legitimate, non-retaliatory bases for [the defendant]'s counterclaims. Thus, the court granted the defendant's motion for summary judgment as to the relator's post-termination retaliation claim.

The relator also argued for a declaratory judgment that his employment agreement with the defendant was unenforceable to the extent that it prohibited him from reporting unlawful conduct to the government. The court rejected this argument, finding that the plaintiff failed to meet his burden of proof, since he only stated that he did not agree with the defendant's position that the agreement was enforceable and then made "an irrelevant assertion with respect to the confidentiality provision." Consequently, the court granted summary judgment in favor of the defendant on the plaintiff's request for a declaratory judgment that the terms of the employment agreement were unenforceable. The court then granted the defendant's summary judgment on its breach of contract counterclaim, finding that the plaintiff violated the agreement's nondisclosure provision by "using, disclosing, and failing to return confidential information in breach of a nondisclosure provision." The court held that this was a standard, enforceable employment contract provision and observed that the plaintiff admitted that he violated the provision when he failed to return over one thousand confidential and proprietary files to the defendant after his termination.

U.S. ex rel. Hobbs v. MedQuest Assocs., Inc., 2011 WL 3703762 (M.D. Tenn. Aug. 23, 2011)

A relator brought a *qui tam* action alleging that her former employer, a diagnostic testing corporation (MedQuest), and three of its affiliated companies violated the False Claims Act and committed Medicare fraud by unlawfully conducting diagnostic tests of Medicare beneficiaries without the required and appropriate physician supervision, and by improperly using another physician's Medicare billing number. The relator also alleged that the defendants violated the FCA by terminating her employment in retaliation for her whistleblowing. The government intervened in the relator's *qui tam* action and added several common law claims. Both the government and the defendants moved for summary judgment on the fraud claims. The defendants also moved to dismiss the relator's retaliation claim. The U.S. District Court for the Middle District of Tennessee granted the government's motion for summary judgment. The court further granted in part the defendants' motion to dismiss the relator's retaliation claim.

Retaliation Claim

The defendants argued that the relator's retaliation claim should be dismissed, as it lacked factual bases. They claimed that the relator was aware that her employment was "at will" and that she could be terminated from her job at any time, with or without cause. They contended that there were complaints about the relator's job performance, and that was the reason she was fired. Given the defendants' factual representations regarding the circumstances of the relator's firing, the court converted the defendants' motion to dismiss into a motion for summary judgment.

The defendants also argued that the relator's retaliation claim should be dismissed as time-barred. The court first noted that when the relator's retaliation claim was filed, the FCA did not specify a statute of limitations for bringing such claims. Instead, the Supreme Court directed courts to apply the most analogous state law statute of limitations. As the relator's employment was governed by Tennessee law, the court looked to the law of that State to determine the statute of limitations to apply to the relator's retaliation claim. The court observed that under Tennessee law, claims for injuries to personal property carry a three-year statute of limitations, while personal injury claims only carry a one-year limitations period. The court determined that claims by "at will" employees are deemed personal injury claims under Tennessee law—only individuals with employment contracts are entitled to personal property claims for retaliation. Since the relator's retaliation claim was filed more than a year after she was terminated from her job, the court agreed with the defendants that the claim was time-barred.

The court rejected the relator's argument that the standard three-year statute of limitations that was as part of the 2010 amendment to the FCA should apply, noting that, by its own terms, that provision has an effective date of July 22, 2010—more than three years after the relator filed her retaliation claim.

Fraud Claims

Next, the court considered the parties' summary judgment motions on the plaintiffs' fraud claims. The court summarized the plaintiffs' fraud claims as follows: (1) the defendants caused legally false claims to be presented to Medicare, by knowingly violating and/or disregarding Medicare regulations for payment that require the presence of qualified supervising physicians for the tests conducted by the defendants; and (2) the defendants intentionally used an improper Medicare provider number when billing for certain testing services, in order to hide the fact that one of their facilities was not eligible to receive payments under Medicare's regulations.

With regard to the plaintiffs' first theory of liability, the defendants argued that the claim failed as a matter of law, for lack of proof of a violation of a controlling federal statute or regulation, as they claimed that the applicable Medicare regulations did not require a board certified radiologist to serve as a supervising physician for the testing at issue—the defendants claimed that any physician could supervise those diagnostic tests, and that there was a conflict among Medicare carriers regarding this practice, which precluded any liability under the FCA. The court then considered the defendants' contention that a violation of a federal statute or regulation was a prerequisite for finding an FCA violation, and disagreed with the defendants' characterization. The court held that materially false statements and omissions in MedQuest's Medicare enrollment applications resulted in a contract of sorts with Medicare in which the defendants agreed to conform to various requirements that an approved supervising physician be present during the defendants' tests. In addition, the court held that the defendants' claims for payments and their omissions in reports to necessary to secure Medicare payments were sufficient to prove a violation of the FCA.

Ultimately, though, the court determined that the defendants were indeed subject to express Medicare regulations and that there was no conflict among Medicare carriers regarding the requirement that a qualified physician be present during the testing at issue. The court held that the defendants were aware of these express regulations, engaged in a pattern of violating them, and improperly billed for procedures in violation of the FCA. The court granted the government's motion for summary judgment on these claims, and denied the defendants' motion.

The court then analyzed the plaintiffs' claims that the defendants submitted false Medicare claims that included an incorrect provider billing number. The plaintiffs alleged that the defendants failed to give the Medicare proper notice of its acquisition of a doctor's facility by completing a new Medicare enrollment form, and instead, they improperly continued using the doctor's Medicare billing number for their testing. The court agreed, as it found that such changes in ownership of existing health care institutions required proper notice. Thus, since MedQuest waited 18 months before notifying the government of the change in ownership by completing a new enrollment application, the court held that the plaintiffs established proof of the defendants' reckless disregard for Medicare regulations. Consequently, the court held that granting the government's summary judgment motion with respect to this claim was also warranted.

Damages and Civil Penalties

With respect to the government's first claim—that the defendants failed to comply with Medicare regulations regarding supervising physicians—the court concluded that the defendants caused 474 false claims to be presented, for a total of $343,758.22 in damages to the government. The court held that the maximum civil penalty of $11,000 should be imposed for each of these false claims, since the defendant was an experienced healthcare provider that chose to disregard the applicable Medicare regulations. Moreover, the court determined that the defendants submitted an additional 995 false claims that included an improper billing number, for a total of $493,185.46 in damages. The court imposed the minimum $5,500 civil penalty for each of these claims; the court also noted that since the defendants were given a one-month grace period under the applicable regulations to notify Medicare of the change in ownership, the defendants would only pay penalties for 17—not 18—months of false claims that included the incorrect provider number.

Thomas v. ITT Educ. Servs., Inc., 2011 WL 3490081 (E.D. La. Aug. 10, 2011)

The plaintiff brought an action against her former employer, an educational institution, alleging retaliatory discharge under the FCA. The plaintiff alleged that the defendant received state and federal subsidies to assist students with expenses, but that the defendant would only qualify for these subsidies if it met certain accreditation requirements, which included having its student body maintain a cumulative 2.5 grade point average. The plaintiff alleged that when she reported to the deans of the school that she was going to assign many of her students low and failing grades, the deans instructed her to falsify student grade records, so that the defendant would meet the subsidy requirements. She further alleged that she refused to falsify her students' grades, and instead contacted the Accrediting Coun-

sel of Independent Colleges and Schools (ACICS) to report the alleged fraud and that she also inquired about whether the defendant's conduct was compliant with its accreditation guidelines. She alleged that, as a result of these actions, the defendant terminated her from her job. The defendant moved to dismiss the claim, arguing that the plaintiff failed to state a claim and failed to meet the heightened pleading standard. The U.S. District Court for the Eastern District of Louisiana denied the motion.

The court first turned its attention to whether or not Rule 9(b)'s heightened pleading standard applied, or whether Rule 8(a)'s notice pleading standard applied. The court, relying on decisions from various circuit courts, noted that FCA retaliation claims do not allege fraud, and therefore are not subject to Rule 9(b)'s pleading requirements. Consequently, the court ruled that Rule 8(a) applied to FCA retaliation claims and denied the defendant's motion to dismiss for failure to satisfy pleading requirements. The court then evaluated whether or not the plaintiff stated a claim for relief under the FCA. It determined that she did, as she "provided enough factual matter to 'allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" As a result, the defendant's motion to dismiss the plaintiff's FCA retaliation claim was denied.

Collins v. Ctr. For Siouxland, 2011 WL 2893038 (N.D. Iowa July 15, 2011)

Two plaintiffs filed an action under the anti-retaliation provision of the False Claims Act, alleging that their former employer, a nonprofit corporation that provided comprehensive human services, as well as two individual defendants, improperly terminated their employment after they sought to expose the defendants' misuse of federal funds. The defendants moved for summary judgment, arguing that they did not engage in any wrongdoing and did not misuse federal funds. They also argued that they did not have any knowledge of protected activities by the relators and asserted that the relators were terminated for legitimate reasons. The U.S. District Court for the Northern District of Iowa denied the defendants' motion for summary judgment on the relators' retaliation claims.

The defendants argued that when the plaintiffs were discharged, they were not engaged in conduct protected by the FCA. The court, though, noted that the plaintiffs believed that the individual defendants fraudulently changed billing records in order to defraud the government and concluded that the defendants were aware of this, as the plaintiffs reported their beliefs to their supervisors and took their concerns to members of the board of directors. Further, the court found that the plaintiffs warned the defendants about possible legal action by the government as a result of what they perceived to be wrongful conduct. The court also found that one of the plaintiffs made copies of files she believed to be evidence of the

fraud and delivered those documents to government investigators before she was discharged. The court held that both plaintiffs made out a *prima facie* case that they were engaged in protected activity at the time of their discharge. The court also observed that any reasonable person would consider the plaintiffs' discharge from their employment to be a materially adverse employment action. The court found that there were fact questions for the jury on whether plaintiffs were terminated *solely* on the basis of protected activity, but found sufficient evidence on record to support the plaintiffs' claims that they were terminated because of their whistleblower activities. Accordingly, the court denied the defendant's motion for summary judgment on the plaintiff's retaliation claim.

See *U.S. ex rel. Bragg v. SCR Med. Transp., Inc.*, 2012 WL 2072860 (N.D. Ill. June 8, 2012), at page 155.

See *U.S. ex rel. Schweizer v. Oce N.V.*, 2012 WL 1372219 (D.C. Cir. Apr. 10, 2012), at page 294.

See *U.S. ex rel. Moore v. Cmty. Health Servs., Inc.*, 2012 WL 1069474 (D. Conn. Mar. 29, 2012), at page 200.

See *U.S. ex rel. Bartz v. Ortho-McNeil Pharm., Inc.,* 2012 WL 695886 (D. Mass. Mar. 2, 2012), at page 58.

See *U.S. ex rel. Kappenman v. Compassionate Care Hospice of the Midwest, L.L.C.*, 2012 WL 602315 (D.S.D. Feb. 23, 2012), at page 270.

See *U.S. ex rel. Sasaki v. N.Y. Univ. Med. Ctr.*, 2012 WL 220219 (S.D.N.Y. Jan. 25, 2012), at page 209.

See *U.S. ex rel. Glynn v. Compass Medical, P.C.*, 2011 WL 5508916 (D. Mass., Nov. 10, 2011), at page 174.

See *U.S. ex rel. Davis v. Point Park Univ.*, 2011 WL 4916190 (W.D. Pa. Oct. 17, 2011), at page 217.

See *U.S. ex rel. Knapp v. Calibre Sys., Inc.*, 2011 WL 4914711 (C.D. Cal. Oct. 17, 2011), at page 219.

See *U.S. ex rel. Yannity v. J & B Med. Supply Co., Inc.*, 2011 WL 4484804 (E.D. Mich. Sept. 27, 2011), at page 177.

See *U.S. ex rel. Diaz v. Kaplan Univ.*, 2011 WL 3627285 (S.D. Fla. Aug. 17, 2011), at page 183.

See *U.S. ex rel. Dyer v. Raytheon Co.*, 2011 WL 3294489 (D. Mass. July 29, 2011), at page 242.

See *U.S. ex rel. Nowak v. Medtronic, Inc.*, 2011 WL 3208007 (D. Mass. July 27, 2011), at page 79.

See *U.S. ex rel. Stone v. OmniCare, Inc.*, 2011 WL 2669659 (N.D. Ill. July 7, 2011), at page 250.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Not Knowingly False

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

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

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

Not Knowingly False

The court denied the government's motion as it determined that the defendant could have had reason to believe that her claims and statements to the government were not false. The court found that: (1) prior to her mother's death, the defendant received notice from the U.S. Department of Labor (DOL) that her EEOICPA claim had been accepted; (2) that she had waived any right to object to the amount of the benefit, so as to receive prompt payment; (3) that the payment would be made upon completion of the

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

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

U.S. v. Kaman Precision Prods., Inc., 2011 WL 3841569 (M.D. Fla. Aug. 30, 2011)

The United States brought an action against a defense contractor corporation, alleging that the defendant violated the False Claims Act and common law by knowingly presenting false claims for payment under a contract with the U.S. Army. Specifically, the government alleged that the Army entered into a contract in which the defendant agreed to supply fuzes used in bunker buster bombs. The fuzes contained a component part, called a bellows motor. The U.S. government alleged that the bellows motor the defendant originally used was too powerful and caused the fuzes to fire unpredictably, and consequently, the defendant developed a new bellows motor to solve that problem. The original bellows motor was then used in another, different fuze, for a different Army project. The two sets of bellows motors looked identical, but were given different stock numbers, were ordered using different purchases orders, and were stored in different areas of the defendant's facility. The government alleged that, at some point, the defendant became concerned that it would not be able to fill an Army order for fuzes containing the new bellows motor, and decided to substitute fuzes containing the old, nonconforming bellows motor instead, without disclosing the substitution to the Army. The government alleged that the defendant substituted over one thousand fuzes without the Army's knowledge or consent, and that the claims it submitted for payment for the shipment of fuzes were all false, as they included a certification that the fuzes conformed to all the requirements of the contract.

The defendant moved for summary judgment on the government's claims, arguing that the government failed to present any evidence that the defendant knowingly submitted false information. The defendant argued that that its substitution of

the bellows motors was unintentional and that the government failed to prove that the substitution was material to its decision to make payments under the contract. The defendant also alleged that there was no evidence of falsity, because the certification of compliance with the contract only related to the contract's performance requirements and not to its design requirements. The U.S. District Court for the Middle District of Florida denied the defendant's motion.

Scienter

The defendant argued that the government failed to present any evidence that it knowingly submitted false information, arguing that the substitution of bellows motors was not intentional because the two sets of bellows motors were identical and the defendant thought that it was using the same part. The court found that this contention raised a genuine issue of material fact, since it was not clear whether the defendant's manager made an inquiry at all before substituting the parts, or whether the defendant's management was even told about the shortage of the new bellows motors. As a result, the court held that the government's evidence regarding scienter was sufficient to withstand the defendant's motion for summary judgment, and that motion was denied.

Materiality

The defendant then argued that the government's FCA claims fail because it failed to show that the defendant's certifications of compliance were material to the government's payment decision. The court, though, held that the government put forth sufficient evidence showing that it would not have paid the defendant, had it known about the substitution of the fuze parts. The court further found that after the government was made aware of the fact that the defendant had used the wrong bellows motors, all fuzes containing those bellows motors were quarantined. As a result, the court held that the government presented sufficient evidence on the materiality element to withstand the defendant's summary judgment motion.

Falsity

Finally, the defendant argued that the government did not present sufficient evidence of falsity, because the defendant only certified its compliance with the contract's performance requirements and not its design requirements. The court found that the defendant's arguments were misplaced, because the contract required the defendant to use parts that met unique requirements. The court made clear that this was not a performance contract in which the defendant could be absolved of liability by providing parts that were "just as good" as those specified in the contract—the court further noted that the defendant's own documents supported the conclusion that the two sets of motors were not interchangeable. Accordingly, the court held that the government offered sufficient evidence of the falsity of the defendant's claims to withstand summary judgment. Thus, the defendant's motion was denied.

B. *Pro Se* Relator

U.S. ex rel. Pedersen v. Hosp. Corp. of Am., Inc., 2012 WL 718896 (D. Utah Feb. 14, 2012)

A *pro se* relator brought a *qui tam* action against several hospitals and various individual defendants. The defendants moved to dismiss the relator's claims under the False Claims Act, arguing that the statute does not allow *pro se* relators to proceed on behalf of the government. The relator moved for an extension of time to obtain legal counsel and to respond to the motions. The U.S. District Court for the District of Utah referred the matter to a magistrate judge whose Report and Recommendation suggested that the court grant the defendants' motions. The magistrate, relying on case law from various circuit courts, concluded that the FCA does not *pro se* relators to prosecute *qui tam* actions on behalf of the government—the real party in interest. The district court agreed. The magistrate also recommended that the district court deny the relator's motion, noting that the relator purportedly requested additional time to retain new counsel because his prior attorney withdrew from the case "without cause and without warning. The magistrate, however, determined that the relator had never been represented by counsel, and that there was no evidentiary support for the relator's request for an extension based on a showing of "good cause." Again, the district court agreed and the relator's request was denied.

C. Relator Released Defendant from FCA Claims

U.S. ex rel. Linnette Sun and Greg Hamilton v. Baxter Healthcare Corp., 2012 WL 366599 (D. Mass. Jan. 26, 2012)

Two relators brought a *qui tam* action against a pharmaceutical company, alleging violations of the FCA, Stark Act, the Medicaid Best Prices Statute and various state laws. Specifically, the relators alleged that the defendant inflated the prices of various drugs (Recombinate and Advate) and biologics, causing false claims to be submitted to Medicaid and Medicare. In a prior *qui tam* action, another relator alleged that various pharmaceutical companies, including the defendant, had inflated prices of various drugs, including Recombinate, causing false claims to be submitted to Medicaid and Medicare. The defendant and the prior relator reached a settlement agreement, in which the defendant agreed to pay the United States $25 million to resolve the prior relator's claims. In exchange, the defendant was released from any further liability arising from the alleged misconduct. The government consented to the agreement and the prior relator's suit was dismissed with prejudice. In the present action, the defendant moved for partial summary judgment, arguing that the present relators' claims were barred by the settlement agreement. Even though the prior relator had not alleged a fraud scheme with respect to the drug Advate, the defendant argued that the settlement agreement was so broad that it covered any alleged wrongdoing with respect to that drug as well.

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

Settlement Agreements and Release of FCA Claims

The defendant argued that the present relators were barred by the prior settlement agreement and release, because the government had an opportunity to object to the broad terms of the agreement, but failed to do so. The relators countered that the government expressly consented only to the dismissal of claims brought by the prior relator, and therefore, their own claims alleging fraud with respect to Advate should be allowed to proceed. The court, though, agreed with the defendant and determined that the plain language of the settlement agreement indicated it included a release from liability with respect to all drugs manufactured by the defendant, without limitation. The relators then argued that limiting the release to only the claims alleged in the prior *qui tam* complaint was consistent with the requirements of the False Claims Act and with public policy. The court, however, concluded that the FCA does not require such an interpretation and that other courts have routinely sanctioned broad releases contained within settlement agreements resolving other *qui tam* cases. The court noted that the FCA allows the government to withhold its consent, if it believes that a settlement's release language is too expansive. Finally, the relators suggested that the defendant and the prior relator colluded to "sneak language" into the settlement in order to impair the present case. The court rejected that assertion, observing that the government did not contend that it had been "hoodwinked" or that any misrepresentation as to the scope of the release had been made. Accordingly, the court held that the defendant was entitled to judgment as a matter of law and granted the summary judgment motion.

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

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

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

Release/Waiver of FCA Claims

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

See *U.S. ex. rel. McNulty v. Reddy Ice Holdings, Inc.*, 2011 WL 6102046 (E.D. Mich. Dec. 7, 2011), at page 68.

See *U.S. ex rel. Nowak v. Medtronic, Inc.*, 2011 WL 3208007 (D. Mass. July 27, 2011), at page 79.

D. Sovereign Immunity

U.S. ex rel. Oberg v. Kentucky Higher Educ. Student Loan Corp., 2012 WL 2247661 (4th Cir. June 18, 2012)

A relator brought an action under the False Claims Act, alleging that a group of corporations organized by the states of Kentucky, Pennsylvania, Vermont, and Arkansas defrauded the U.S. Department of Education (DOE). Specifically, the relator alleged that the States created the defendant corporations to make, finance, and guarantee student loans, in order to improve the availability of higher educational opportunities. The relator claimed that the defendants knowingly made false claims to DOE and fraudulently inflated loan portfolios that were eligible for a special federal loan interest subsidy program. As a result the alleged scheme, the United States overpaid millions of dollars to the defendants in subsidies.

The defendants each moved to dismiss the relator's claims, on the grounds that as state agencies, they were not "persons" subject to *qui tam* suits under the False Claims Act. The U.S. District Court for the Eastern District of Virginia agreed with the defendants and dismissed the relator's claims. In determining whether or not the defendants were "state agencies," the district court relied on state statutory provisions that it deemed sufficient to establish the defendants' status. The relator appealed the district court's rulings to the U.S. Court of Appeals for the Fourth Circuit.

The circuit court first noted that the FCA does not define "person." The court further observed that the U.S. Supreme Court has determined that "person" does not include sovereigns—and therefore, states are not "persons" for purposes of the FCA's *qui tam* provisions. In addition, the Supreme Court decided that corporations are "persons," and thus, cities and other municipal corporations are subject to liability under the FCA. The appellees argued to the Fourth Circuit that they are treated like state agencies by their states' respective legislatures and judicial branches, and should be treated like state agencies for FCA purposes as well. The relator-appellant countered that the appellees were created as "corporations," and since corporations are subject to liability in FCA *qui tam* suits, the motions to dismiss should be denied. The appeals court summarized the parties' dispute as follows: "the critical inquiry is whether appellees are truly subject to sufficient state control to render them a part of the state, and not a 'person,' for FCA purposes." The Fourth Circuit determined that it should employ the same test for determining whether an entity is an arm-of-the-state for Eleventh Amendment purposes. That test consists of four nonexclusive factors: (1) whether a judgment against the entity will be paid by the state or a recovery by the entity will inure to the benefit of the state; (2) the degree of autonomy the entity has—especially with respect to its leadership and funding—and whether the state has any veto power over the entity; (3) whether the entity is involved with state and local concerns; and (4) how

the entity is treated under state law. The appellate court found that the district court did not employ the arm-of-the-state test when granting the defendants' motions to dismiss. As a result, the circuit court vacated the district court's judgment and remanded the case with a directive to apply the proper analysis.

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

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

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

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

See *U.S. ex rel. Paris v. Trustees of Indiana Univ.*, 2012 WL 2376088 (S.D. Ind. June 22, 2012), at page 88.

E. Statute of Limitations

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

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

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

Statute of Limitations

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

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

What Constitutes a False Claim?

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

See *Gilbert v. St. Rita's Prof'l Servs., LLC*, 2012 WL 2344583 (N.D. Ohio June 20, 2012), at page 89.

See *U.S. ex rel. Washington v. Educ. Mgmt. Corp.*, 2012 WL 1658482 (W.D. Pa. May 11, 2012), at page 195.

See *U.S. ex rel. Mustafa v. Najjar*, 2012 WL 177412 (M.D. Fla. Jan. 23, 2012), at page 168.

See *Riddle v. Dyncorp Intern. Inc.*, 2012 WL 19794 (5th Cir. Jan. 5, 2012), at page 119.

See *Tolman v. Am. Red Cross*, 2011 WL 6333700 (D. Idaho Dec. 19, 2011), at page 121.

See *U.S. ex rel. Berglund v. The Boeing Company*, 2011 WL 6182109 (D. Or. Dec. 13, 2011), at page 124.

See *U.S. ex rel. Carter v. Halliburton Co.*, 2011 WL 6178878 (E.D. Va. Dec. 12, 2011), at page 32.

See *U.S. ex rel. Estrada v. Quad City Prosthetic, Inc.*, 2011 WL 3273142 (C.D. Ill. Aug. 1, 2011), at page 240.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Bragg v. SCR Med. Transp., Inc., 2012 WL 2072860 (N.D. Ill. June 8, 2012)

A relator brought a *qui tam* action against his former employer, an organization that provides non-emergency medical transportation services, alleging violations of the federal False Claims Act and the Illinois Whistleblower Reward and Protection Act. Specifically, the relator alleged that the defendant knowingly falsified pick-up times for riders in order to report better on-time performance ratios and maintain its federal and state government contracts, improve its ability to win new government contracts, and receive payments to which it was not entitled. The relator also filed claims for retaliation, alleging that he was threatened, harassed, discriminated against, and constructively discharged from his job by the defendant because of actions he took in furtherance of his *qui tam* claim, which was filed about a month after he resigned from his job. The federal and state governments declined to intervene in the relator's suit. The defendant moved to dismiss the relator's complaint for failure to state a claim and failure to plead the alleged fraud scheme with particularity. The U.S. District Court for the Northern District of Illinois granted the defendant's motion, finding that the relator alleged a general scheme by the defendant to commit fraud by modifying trip tickets, but failed to specify the "who, what, when, where and how" of the alleged fraud. The court further held that the relator failed to adequately allege that he was engaged in protected whistleblowing activity, and thus, could not support his retaliation claim.

The relator filed an amended complaint, alleging the same claims, but he included two additional attachments in an attempt to satisfy Rule 9(b)'s particularity requirement: a collection of 90 "trip tickets," some of which included handwritten notes that the relator alleged were evidence of falsifications; and a corroborating affidavit from one of the defendant's former drivers. The defendant again moved to dismiss the relator's complaint for failure to state a claim and failure to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Northern District of Illinois again granted the defendant's motion to dismiss, without prejudice.

Pleading Fraud with Particularity

Although the court acknowledged that the relator's amended complaint included two new attachments, which purportedly supported his fraud claims, the court found that neither attachment provided the requisite particularity for those claims. The court found that 71 of 90 trip tickets the relator submitted were dated after his employment ended and that a majority of his allegations—such as allegations raised in the supporting affidavit—were not based on the relator's personal knowledge and experience as one of the defendant's former employees. Focusing on the 19 trip tickets that were dated during the time the relator was employed by the defendant, the court observed that the relator relied on a very small amount of the more than 3 million trip tickets the defendant submitted during the relator's tenure—and that some of the tickets the relator offered did not even result in the defendant receiving any additional payments. Therefore, the court held that the relator could not establish that the defendant's alleged ticket modifications were inherently fraudulent. The court held that the relator's conclusory allegations were insufficient to plead the defendant's alleged fraud scheme with particularity. The relator's federal fraud claims were once again dismissed, but the court again dismissed the fraud claims without prejudice and allowed the relator to seek leave to amend his complaint again.

Retaliation

The court then examined the retaliation claim and found that the relator also added new allegations to his amended complaint with respect to that claim. Specifically, the relator alleged that he was unwilling to attend a meeting the defendant's president called for the purpose of expanding the allegedly fraudulent trip ticket scheme. The court found this allegation insufficient to demonstrate that the relator engaged in protected activity or that the defendant was aware of his protected activity. Further, the court found that the relator failed to allege that, during his employment, he investigated the defendant's ticket modification process or took any steps to initiate or assist an FCA action against the defendant. The court held that the relator's objection to the defendant's conduct alone was not sufficient to constitute protected activity, since the relator did not allege any facts showing that he informed the defendant that he was investigating fraudulent conduct. Therefore, the court held the relator failed to plead that he was discharged in violation of the FCA's anti-retaliation provision. Accordingly, the court dismissed the relator's federal retaliation claim.

State Law Claims

After the court dismissed the federal claims, it declined to exercise jurisdiction over the relator's Illinois claims.

U.S. ex rel. Nunnally v. West Calcasieu Cameron Hosp., 2012 WL 1866586 (W.D. La. May 21, 2012)

A relator brought a *qui tam* action alleging that a hospital violated the False Claims Act and the Anti-Kickback Statute (AKS) by submitting false Medicare claims for laboratory services at a higher price than was charged to non-Medicare patients and for laboratory services provided to patients illegally referred by physicians. The defendant moved to dismiss the relator's claims for failure to state a claim and failure to plead the alleged fraud with particularity. In addition, the defendant argued that the relator failed to adequately plead that the defendant induced or received any improper referrals of Medicare patients, or that any claim made by the defendant to the government was false and violated Medicare regulations.

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

The defendant argued that the relator's complaint failed to state a claim because it did not plead a single specific false claim or a single referral that was made in violation of the AKS or the FCA. The court agreed and found that the relator failed to allege sufficient facts showing that the defendant induced any improper referrals or submitted any false claims based on an improper referral. The court also found that while the relator alleged that the defendant falsely certified to Medicare that it had complied with applicable regulations, he did not identify any specific Medicare patient who was improperly referred to the defendant, nor did he identify any Medicare claim submitted by the defendants for services rendered pursuant to an improper referral. The court held that the relator failed to state a claim.

In addition to these findings, the court concluded that the relator's allegations failed to plead the fraud scheme with particularity, as the complaint did not plead any actual false certification the defendant made to the government that was a prerequisite to obtaining Medicare reimbursement. Accordingly, the court held that the relator failed to plead the alleged fraud with particularity. The defendant's motion to dismiss the relator's claims was granted.

U.S. ex rel. Wilson v. Crestwood Healthcare, L.P., 2012 WL 1886351 (N.D. Ala. May 18, 2012)

A relator brought a *qui tam* action against a healthcare clinic and several physicians, alleging that the defendants had an improper relationship, whereby the physicians leased office space from the clinic at a rate below market value, were not required to pay utilities, and did not have to pay ground lease expenses, in exchange for providing illegal referrals to the clinic. The relator further alleged that the defendants knowingly submitted false Medicare and Medicaid claims, as those claims were based on illegal referrals. Consequently, the relator alleged violations

of the False Claims Act's fraud, conspiracy and a reverse false claims provisions. The defendants moved to dismiss the relator's claims, contending that the relator failed to state a claim under the FCA. The defendant also moved the court to strike the relator's response to their motion.

Holding: The U.S. District Court for the Northern District of Alabama granted the defendants' motion to dismiss, dismissed all of the relator's claims with prejudice, and assessed all costs to the relator. The court denied the defendants' motion to strike as moot.

Failure to State a Claim/Plead Fraud with Particularity

The court granted the defendants' motion to dismiss the relator's fraud claims, since the relator failed to identify any particular false claim submitted by the defendant—notably, the relator did not provide the date, physician name, patient name, type of service rendered, or any other relevant detail regarding any alleged false Medicare/Medicaid claims. The court also found that the relator failed to allege any amount that the defendants owed to the government—since he could not plead with particularity that the government suffered any damages as a result of the defendants' alleged fraud, the court held that he could not maintain his conspiracy claim. Finally, the court held that the relator failed to allege a reverse false claim because he merely made conclusory allegations that the defendants' used a false record or statement to decrease an obligation to pay money to the government.

The court then considered the relator's response to the defendants' motion to dismiss, in which he attempted to cure his pleading deficiencies by including further details in support of his allegations and offering to amend his complaint. Specifically, the relator provided additional details regarding the lease agreements between the defendants and he alleged that the defendant physicians admitted to improperly referring patients to the defendant clinic. The defendants moved to strike the relator's response, but the court decided that this motion was moot, as it found that the relator *still* failed to plead his fraud claims with the required level of specificity. As a result of the court's findings, the relator's complaint was dismissed with prejudice.

U.S. ex rel. Manuel v. Livingston Mgmt., Inc., 2012 WL 1656283 (M.D. La. May 10, 2012)

Three relators brought a *qui tam* action against their former employer, a property management company, alleging violations of the False Claims Act that arose from the defendant's participation in the USDA's Rural Development Program (RDP)—a program that provided loans to construct or rehabilitate rental housing in rural communities, in order to increase the availability of affordable housing in such areas. The relators alleged that as a condition of participation in the program, the defendant was required to certify its compliance with the program's

guidelines, which included "Tenant Income Certifications" (TICs). They claimed that the defendant engaged in a conspiracy to defraud the government and actually committed fraud by falsifying or otherwise misrepresenting tenants' income; the relators claimed that the defendant's TICs constituted false certifications of compliance, for FCA purposes. The defendant moved to dismiss the relators' claims for failure to plead with particularity and failure to state a claim.

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

Failure to State a Claim/Plead Fraud with Particularity

The court first considered the relators' allegation that the defendant's employees routinely and falsely underreported tenants' income and misrepresented that applicants met the RDP's income requirements. They also alleged that these employees routinely forged tenants' and managers' signatures on TICs to ensure continued compliance with the program's requirements. The defendant argued that the relators failed to allege a FCA certification claim and instead only offered a vague reference to the defendant's employees submitting forged certifications to the RDP. Further, the defendant argued that the relators' allegations failed to show how the alleged false certifications related to any payments it received from the government that were above and beyond what it was entitled to receive under the program, or how any payments it received from the government were conditioned on certifications of compliance with the RDP requirements. The court disagreed with the defendants, noting that the relators identified specific employees of the defendant who were alleged to have "under-reported the income of tenants, failed to properly and annually certify tenant income, forged signatures, altered dates, and improperly attested to the veracity of Tenant Income Certifications." The court further noted that the relators included specific time periods during which this fraudulent activity allegedly occurred, and specified that by submitting false TICs, the defendants submitted false claims to the government. As a result, the court held that the relators satisfied Rule 9(b)'s heightened pleading requirements and stated a valid claim for relief under the FCA.

Next, the court analyzed the relator's contention that the defendant engaged in a conspiracy to defraud the government, by leasing apartments to applicants for RDP rental assistance who never actually moved into RDP-subsidized apartments and by refusing to lease apartments to disabled persons and renting apartments to non-disabled tenants instead. The relators further alleged that the defendant's conspiracy included an agreement with a company the defendant used to make repairs on properties it managed. The relators contended that the company routinely billed—and was paid—for services that were never performed and that the defendant allowed this because some of its employees received kickbacks from the company or had ownership interests in the company, which allowed them to engage in improper self-dealing. The defendant argued that the relators' claim was deficient, stating that the relators failed to allege an actual conspiracy, failed to allege that the defendant made any false representations, failed to allege that the defendant had the requisite state of mind to support their FCA claim, and failed to allege any facts showing that the defendant's conduct had the potential to influence the government's payment decisions or that the alleged wrongful activities were connected to any government payment or claim.

The court found the relators sufficiently alleged the details regarding their conspiracy claims, as they specified "the time, place and identity" of those associated with the alleged fraud, and alleged "the requisite mental element."

Accordingly, the court denied the defendant's motion to dismiss.

U.S. ex rel. Coots v. Reid Hosp. & Health Care Servs., Inc., 2012 WL 1098930 (S.D. Ind. April 2, 2012)

A relator brought a *qui tam* action against a healthcare service provider and its subsidiary, alleging that the defendants submitted false Medicaid claims and conspired to defraud the government. The defendants moved to dismiss the complaint for failure to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Southern District of Indiana converted the defendants' motion to dismiss into a motion for a more definite statement. The court then granted that motion.

Pleading Fraud with Particularity

The defendants argued that the relator's allegations lacked particularity and did not sufficiently plead the "who, what, when, where, and how" of the fraud scheme. In a short opinion, the court agreed, stating that the *qui tam* complaint "lack[ed] some of the details required by the heightened pleadings requirements of Rule 9(b)." The court also noted that the procedural posture of the case had changed since the complaint was filed, as the relator dismissed one of her claims and two of the original defendants from the case. As a result, the court determined that both parties would benefit from a more explicit statement of the facts supporting the relator's remaining claims against the remaining defendants. Thus, the court converted the defendants' motion to dismiss into a motion for a more definite statement and granted that motion.

U.S. ex rel. Ciaschini v. Ahold USA Inc., 2012 WL 959352 (D. Mass. Mar. 22, 2012)

A relator brought a *qui tam* action on behalf of the United States, multiple states, and the District of Columbia, alleging that his former employer—a pharmacist—and its subsidiaries conspired to commit fraud and engaged in three specific practices that led to the submission of false claims: (1) the defendants engaged in "shorting" or "front-loading," whereby they would bill customers' insurers for the full amount of prescriptions that were only partially filled, asked the customers to

return and pick up the remainder of their prescriptions, and then restocked any amounts that were not picked up within fourteen days; (2) the defendants engaged in readjudication, whereby they restocked unclaimed prescriptions, billed the federal healthcare programs in full, and failed to refund the overpayments from the government; and (3) the defendants engaged in "lot control," whereby they failed to ensure that prescription drugs were returned to the proper lot when they were restocked, which led to the commingling of multiple inventories of the same drugs with different expiration dates. The defendants moved to dismiss the relator's complaint for failure to plead the fraud scheme with particularity, as required by Rule 9(b) of the Federal Rules of Civil Procedure.

Holding: The U.S. District Court for the District of Massachusetts granted the defendants' motion.

Failure to Plead Fraud with Particularity

The court began by analyzing the relator's front-loading claims. The court found that the relator provided detailed information regarding twenty specific instances of alleged front-loading, including billing dates, prescription numbers, customer initials, the number of tablets prescribed, the number of tablets initially dispensed, and the retail price of the prescriptions. However, the court also found that the relator failed to show that any false claims were actually submitted to the government—the court acknowledged the relator's assertions that the defendants' employees would submit statements to corporate headquarters, in which they implied that they dispensed full prescription, but the court determined that the relator failed to provide any evidence that company headquarters, in turn, actually submitted this information to the government for reimbursement. The court found that the relator failed to establish that any of the employee statements was used by the defendants to prepare claims to the government. Further, the court found that the relator failed to specify the date or content of any particular false claim the defendants allegedly submitted to the government. Therefore, the court held that the relator failed to plead the front-loading claim with particularity. That claim was dismissed.

Next, the court analyzed the relator's re-adjudication claims and found that the relator failed to provide the date, the identification number, the amount charged to the government, the name of any restocked prescription, or the identity of anyone who restocked a prescription. The court held that the relator merely alleged that the defendants <u>could</u> have violated the FCA, and that his re-stocking allegations failed to meet the pleading requirements. Consequently, that claim was also dismissed. The court also determined that the relator's lot control claim was deficient. The court found that the relator failed to show which prescriptions were returned to the defendants' inventory, the dates any prescriptions were returned, the respective expiration dates for any affected prescription, which lot(s) they were returned to, or whether claims for the prescriptions were originally billed to Medicare or Medicaid. As a result, the relator's lot control claim was dismissed.

Finally, the court concluded that the relator presented no details demonstrating how the defendants conspired to defraud the government. Accordingly, it held the relator's conspiracy allegation failed.

U.S. ex rel. Perry v. Hooker Creek Asphalt & Paving, LLC, 2012 WL 913229 (D. Or. Mar. 16, 2012)

A relator brought a *qui tam* action against several construction companies, alleging that the defendants falsified the character and quality of materials used in the construction of federally-funded highways. The relator alleged that he had direct and independent knowledge of the defendants' fraudulent conduct and their false statements to the government. The defendants moved to dismiss, arguing that the relator failed to plead the alleged fraud with particularity. The U.S. District Court for the District of Oregon granted the defendants' motion and dismissed the relator's complaint with prejudice. The court had twice previously granted the relator leave to amend his complaint, directing him to plead his fraud allegations with more particularity. However, the found that the relator's second amended complaint still failed to allege who committed the fraud, failed to identify any invoices that were alleged to contain false statements, failed to describe when the deficient work was done or when any false records or statements were created, and failed to state where the alleged fraud took place. The court noted that the relator conceded that "he does not have access to the information the billing, records and practices underlying defendant's billing for work performed and materials provided relating to the road construction at issue." Consequently, the court again dismissed the relator's complaint for failure to satisfy the pleading standard. Moreover, the court held that it would be futile to give the relator another chance to amend, since he lacked the information necessary to plead his claims with particularity. Therefore, the relator's complaint was dismissed with prejudice.

Klusmeier v. Bell Constructors, Inc., 2012 WL 555736 (11th Cir. Feb. 21, 2012)

Two relators brought a *qui tam* action on behalf of the United States and the State of Florida, alleging that a construction company falsely certified its compliance with the specifications of two Army Corps of Engineers contracts for the construction of a pump station and levees. The relators alleged that, as a condition of payment, the defendant was required to submit monthly invoices to the government, which included a certification that the requested payment was for work performed in accordance with the contract's specifications. The relators alleged that each of these invoices was false. The defendant moved to dismiss the relators' claims for failure to plead the alleged fraud with particularity. The U.S. District Court for the Southern District of Florida agreed with the defendant and granted the defendant's motion.

The relator's complaint was dismissed with prejudice. The relators appealed the district court's ruling to the U.S. Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit affirmed the district court's decision, as it agreed with the district court that the relators only made conclusory allegations regarding the alleged fraud scheme, and provided no specific details regarding the defendants' alleged presentment of false claims. Although the appellate court determined that the relators alleged details regarding how the defendant allegedly violated its contracts and although the relators provided some details regarding when the defendant's monthly invoices were submitted, it found that the relators failed to establish that the defendant's alleged contractual violations resulted in the submission of false claims to the government. The circuit court also held that the relators lacked the type of personal knowledge required to support their FCA claim, noting that one of the relators alleged that he was present on the construction site and observed contract violations, but did not provide facts to support the allegation that the defendant submitted requests for payment for non-compliant work. Finally, the Eleventh Circuit held that the relators had already been given opportunities to amend their complaint and had failed to properly request leave to amend their complaint a third time. Thus, the circuit court upheld the district court's denial of the relators' request for leave to amend their complaint and the complaint was dismissed with prejudice.

U.S. ex rel. Watine v. Cypress Health Sys. Fla., Inc., 2012 WL 467894 (N.D. Fla. Feb. 14, 2012)

A relator brought a *qui tam* action against his former employer—a hospital—and its administrator, alleging that the defendants violated the federal and Florida False Claims Act statutes by defrauding various government healthcare programs. The relator claimed that the defendants improperly increased reimbursements from the government by engaging in upcoding, fraudulently reporting the location where patients received services, and "churning," which involved separating patient appearances for diagnoses, testing, treatment, and medication in order to bill the government for separate office visits. With respect to the relator's upcoding claim, the relator alleged that the defendants instructed their employees to use the highest-paying codes in order to receive the largest reimbursements from the government. He further alleged that he was asked to appeal the denial of 25 of the defendants' Medicare claims, but that he was unable to do so, since all of the claims included incorrect codes. He also alleged that, on his own initiative, he pulled 16 random patient history charts covering a seven-year period and found that the codes used on the charts were higher-paying than what should have been used. With respect to the relator's claim that the defendants fraudulently reported the locations of patient services, the relator stated that the defendants submitted false healthcare claims to the government which billed the government for services

provided at the hospital's more expensive out-patient clinic than at the nursing home where the services were actually provided. With respect to the relator's allegation that the defendants engaged in churning, the relator asserted that a hospital administrator explained an eight-step plan to him regarding the defendants' churning practices.

The U.S. District Court for the Northern District of Florida dismissed the relator's original complaint without prejudice for failure to plead the alleged fraud with particularity. The relator filed an amended complaint and the defendants once again moved to dismiss the complaint for failure to plead the fraud scheme with particularity. The corporate defendant also argued that it should not be held liable for the alleged fraud, which occurred when 100% of its stock was owned by different owners.

Holding: The U.S. District Court for the Northern District of Florida granted the defendants' motion in part. The court held that the relator could maintain claims for upcoding and place-of-service, but that his fraudulent churning claim did not meet Rule 9(b)'s pleading requirements. The court also held that the corporate defendant could be held liable for fraud that occurred before its stock was purchased by new owners.

Pleading Fraud with Particularity

The court began by analyzing the relator's upcoding claims, noting two categories of claims: claims based on the relator's review of twenty-five Medicare submissions; and claims based on the relator's review of sixteen patient charts. With respect to the 25 Medicare submissions, the court held that the relator failed to allege the amount of the claims, identify who submitted the claims, or state when the claims were submitted. Thus, the court held the relator's allegations regarding those 25 claims were insufficient to meet the heightened pleading standard. Those claims were dismissed. The court then examined the relator's allegations regarding the 16 patient charts he randomly pulled and examined. With respect to these claims, the court found that the relator only provided specific dates and amounts of the claims submitted for four of the 16 patients; the claims regarding the remaining charts contained only general allegations and were dismissed. Thus, the court held that the relator's upcoding claim was limited to the four patient charts for which he provided sufficient particularity.

The court then analyzed the relator's place of service claim and found that the relator provided three examples of visits to the nursing home being billed as visits to the outpatient clinic. The relator alleged specific billing dates and payment amounts for each of the examples. The court held that these details were sufficient to meet the particularity requirements with respect to the place of service claim. Finally, the court analyzed the relator's allegation of fraudulent churning, observing that the relator alleged the he was reprimanded by a hospital administrator for not fraudulently churning patients. However, the court found that although the relator alleged he was told the particulars of the alleged churning scheme, he failed to plead the details of any false claim based on churning. Therefore, the court held the relator failed to adequately plead the fraudulent churning claim and that claim was dismissed.

Defendant's Change of Ownership

The defendant hospital argued it could not be held liable for alleged fraud caused by its prior owner. The court, though, found that under governing federal Medicare regulations—which preempted any conflicting state law—transfers of corporate stock do not constitute changes of ownership. Accordingly, the court held that the sale of the hospital's corporate stock did not affect its liability under the federal FCA. The court recognized that Florida law defines changes of ownership to include transfers of at least 51 percent of corporate stock, but did not speculate regarding whether or not this definition affected the defendant's liability under the Florida FCA, as the defendant did not argue that its liability under the Florida statute was different than under the federal statute.

U.S. ex rel. Santa Ana v. Winter Park Urology Assocs., P.A., 2012 WL 386680 (M.D. Fla. Feb. 7, 2012)

A relator brought a *qui tam* action against a clinic that had previously employed him (WPU), as well as another clinic (ROC) and its personnel, alleging that the defendants submitted false Medicare claims. The defendants moved to dismiss the relator's fraud claim, arguing that the relator failed to meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b); the ROC defendants additionally argued that the relator failed to allege that any of them even submitted a false claim. The U.S. District Court for the Middle District of Florida denied the defendants' motions and held that the relator described the defendants' alleged fraud scheme in extensive detail, by describing several types of fraudulent activities including billing practices, failures to supervise radiation therapy procedures, improper self-referrals, submissions of false Medicare claims, and the defendants' knowledge of these activities. Further, the court found that the relator alleged his own personal knowledge of these events, which provided the necessary "indicia of reliability" to overcome the defendants' motions to dismiss. The court also held that although the relator did not allege that the ROC defendants submitted false claims to the government, he did allege and describe how the ROC defendants caused such claims to be presented, in violation of the FCA. Thus, the relator was allowed to maintain his fraud claims and the defendants' motions to dismiss were denied.

U.S. v. Peterson, 2012 WL 315443 (E.D. Wash. Feb. 1, 2012)

The United States brought an action against the vice president of a supply company that provided materials to government contractors. The government alleged that the defendant violated the False Claims Act, the Anti-Kickback Statute (AKS) and common law, by conspiring with a U.S. Department of Energy (DOE) prime contractor materials coordinator to purchase products at inflated prices from the coordinator's wife's business, in exchange for the coordinator purchasing the defendant's materials at inflated prices for the DOE. The government contended that through this scheme, the defendant and the coordinator's wife received increased business as well as improper and excessive profits. In addition, the government alleged another scheme in which the defendant conspired with another DOE prime contractor materials coordinator to purchase various personal items through the company. The defendant moved to dismiss the government's fraud claims, arguing that the government failed to plead the alleged fraud scheme with particularity.

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

Pleading Fraud with Particularity

Although the court found that the government's complaint provided sufficient detail of the alleged fraudulent schemes, it concluded that the government failed to detail the factual allegations relating to the president's involvement in the alleged fraud, as the government did not allege when, where, or how the defendant company president participated in or facilitated the alleged fraud. Further, the court found that the government failed to detail with specificity why the defendant's alleged conduct violated the FCA or any benefits the defendant received from the alleged schemes. Accordingly, the court held the government failed to meet the pleading requirements and dismissed the FCA claim. The court granted the government leave to amend its complaint.

U.S. ex rel. Sanchez v. Abuabara, 2012 WL 254764 (S.D. Fla. Jan. 27, 2012)

A relator brought a *qui tam* action against an engineering services company and three individuals, alleging that the defendants fraudulently induced the U.S. Department of Defense (DOD) and the U.S. Army to contract with them. Specifically, he alleged that the defendants submitted false certifications regarding the corporate defendant's financial condition, which caused the DOD to award a contract to the defendants' insolvent company. The defendants moved to dismiss the *qui tam* complaint for failure to state a claim and failure to plead the alleged fraud scheme with particularity.

Holding: The U.S. District Court for the Southern District of Florida granted the defendants' motion to dismiss the relator's complaint without prejudice for failure to plead the fraud scheme with particularity. The court granted the relator leave to amend his complaint.

Stating a Claim

The relator argued that the contract with the government was obtained by means of false statements and fraudulent inducements, and consequently, each of its claims to the government should be deemed false, even if they contained technically accurate information. Additionally, the relator argued that the company's financial statements were, for FCA purposes, false statements that were material to payments the government made to the defendants. The defendants argued that the relator failed to allege that they actually submitted any claims—a failure that, according to the defendants, made the relator's complaint dead on arrival. The court, however, found that, due to defendants' financial relationship with the government under the contract, the relator sufficiently pled that the defendants presented claims for money to the government. Next, the defendants argued that the relator failed to allege that any of the claims submitted were actually false. The relator argued that he was not required to show that the claims contained false information, because all of the claims arose from a contract procured by fraud. The court agreed with the relator and held that because the relator's theory of liability was based on an allegation that the contract was the result of fraud, the relator did not need to allege that the defendants' claims were false or fraudulent on their face. The court held that the relator's allegations were sufficient to state a claim—if the relator pled the alleged fraud with particularity.

Pleading Fraud with Particularity

The court then analyzed whether or not the relator pled the alleged fraud with particularity. First, the court identified the defendants' allegedly false statements—the relator had described an allegedly false statement made by one of the individual defendants relating to the company's financial viability, and another allegedly false statement made by a second individual defendant regarding the company's awardee status. The court found that the relator did not cite any statement or omission by the third defendant. Next, the court examined the relator's allegations regarding the time and place of each statement and found that the relator identified the time and place with respect to only one of the two alleged false statements. Third, the court examined the content of the statements. The court found that the relator had alleged that the defendant company misled the DOD, but failed to provide any factual basis connecting the individual defendants' alleged false statements. Finally, the court examined what the defendants obtained as a consequence of the alleged fraud and found that the relator had pled this element, as he alleged that the defendant company received payments from the government pursuant to the contract.

The defendants then argued that that the relator's most critical allegations were alleged only upon "information and belief" and argued a second reason for the court to dismiss the *qui tam* complaint for lack of particularity. The relator countered that pleading FCA allegations upon information and belief is permitted when details about the fraud are peculiarly within the defendants' knowledge and control. The court agreed with the relator, but determined that the relator's complaint failed to include sufficient details regarding one of the most crucial allegations—that one of the defendants' allegedly falsely certified financial statements was actually submitted to the DOD—even though details regarding that fact were not solely within the defendants' knowledge and control. Further, the court found that the relator failed to assert whether or not he sought to obtain additional detailed information from the DOD. The court held that the relator's failure to obtain this information was a fatal defect. As a result, the court granted the defendants' motion to dismiss the complaint for failure to satisfy the particularity requirement. The court determined that the one allegedly false statement that the relator appeared to plead with particularly would be dismissed, as it was pled upon information and belief.

Lastly, the court considered the defendants' argument that the relator failed to allege that they knowingly deceived the government, arguing both that the government was not deceived and that the defendants did not deceive the government knowingly. The defendants argued that the government was not deceived and had the same knowledge as the defendants, because it could have discovered all evidence of the alleged fraud through a "cursory review of the financial statements." The court, though, found that it was clearly plausible that the DOD could have been misled by false financial statements. The court also held that, under the FCA, the "knowledge" standard requires no proof of a specific intent to defraud. Accordingly, it held that the relator's allegations of knowledge did not constitute a separate ground for dismissal.

The relator's complaint was dismissed solely for failing to plead fraud with particularity and the relator was granted leave to amend the complaint.

U.S. ex rel. Mustafa v. Najjar, 2012 WL 177412 (M.D. Fla. Jan. 23, 2012)

In 2001, Samir Najjar pled guilty in a criminal proceeding to making false statements in connection with a scheme to obtain improper medical services reimbursements to government entities. The plea agreement included restitution and forfeiture. Subsequently, Samir made some payments, but eventually informed the government that he lacked the means to make the remaining restitution payments and submitted supporting financial disclosures to show his inability to pay. The government then filed a civil action against Samir and his brother Lee, alleging that the brothers hid Samir's control of valuable assets and submitted false statements to avoid Samir's obligation to pay the full restitution amount. The defendants moved separately to dismiss those claims, arguing that the FCA allegations failed to state a claim and failed to plead the alleged fraud with particularity.

Defendant Lee also asserted that the statute of limitations applied to the FCA claims against him.

Holding: The U.S. District Court for the Middle District of Florida denied the defendants' motions.

What Constitutes a Reverse False Claim

The defendants first argued that the government failed to state a claim under the False Claims Act, because the government was not collecting a debt owed, but was merely acting as a collection agent for a third party—the victims of Samir's criminal offenses. The court disagreed and held that a reverse false claim can occur whenever someone makes false statements in order to avoid making a payment to the government—"regardless of ultimate destination of those funds." As a result, the court held that the government's claims fell within the reverse false claim provisions of the FCA and the defendants' motion to dismiss was denied.

Pleading Fraud With Particularity

Next, the defendants argued that the government failed to plead its claims with sufficient specificity. The court again disagreed. The court found numerous specific allegations of fraud, including: (1) that the defendants engaged in the transfer of several pieces of real estate within weeks of Samir's guilty plea; (2) that an LLC registered to Lee, but which had no staff or legitimate business operations, purchased a million-dollar house that Samir used as a personal residence only a few days before Samir's guilty plea; (3) that Samir failed to state in a financial disclosure that he had sold valuable real estate; and (4) that the brothers offered to sell certain properties worth millions of dollars to an undercover agent. Therefore, the court held the government sufficiently described the alleged fraudulent scheme and that the government's pleading could permit a reasonable inference that the defendants were liable for violating the False Claims Act. Thus, the court denied the defendants' motion with respect to their Rule 9(b) argument.

Statute of Limitations

Defendant Lee argued that the False Claims Act allegations against him were barred by the FCA's statute of limitations. He argued that he was first named as a defendant in a 2011 amended complaint, but that the most recent alleged false statement attributed to him was a financial disclosure made in May 2004. Therefore, he claimed that the FCA's six-year statute of limitations had expired on the claims brought against him. The court disagreed, and noted that the False Claims Act provides that suits be brought within the later of "(1) six years from when the violation occurred or (2) three years after the pertinent Government official knew or should have known of the violation," but, in any event, not more than 10 years after the violation occurred. The court reasoned that defendant Lee could not establish that, in May 2004—or even three years later—the government knew or should have known that the financial disclosure at issue was false. Therefore, the government would have had up to ten years in which to amend its complaint and name him as a defendant. The court noted that even if the six year limitations period applied, the government's claims would still be timely, as the government alleged that the defendants submitted false statements until October 2006, and that it was reasonable to infer that defendant Lee was responsible for at least one of the false statements submitted within the six-year limitations period.

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

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

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

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

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

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

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

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

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

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

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

Pleading Fraud with Particularity

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

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

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

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

struction costs as work performed by a subcontractor. The defendant denied all of the relator's allegations and argued that the relator could not prove that the defendant's billing practices constituted actual claims to the government or that any claims were knowingly false when they were submitted. The defendant moved for summary judgment, and the relator cross-moved for partial summary judgment.

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

Relator's Knowledge of FCA Violations

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

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

The court then examined the defendant's two affirmative defenses. First, the defendant argued that the court lacked jurisdiction over some of the relator's claims because the relator was not the original source of information regarding those claims. The court noted that the relator rebutted the defendant's argument in his opposition papers, and that the defendant failed to counter the relator's argument. The court, though, did not discuss the relator's arguments in its opinion, so it is unclear from the opinion whether or not the defendant raised a public disclosure issue or merely argued that all relators must demonstrate that they qualify as original sources. The court simply held that the defendant forfeited the point, and granted summary judgment in favor of the relator on the defendant's purported original source affirmative defense. Second, the defendant argued that the FCA's statute of limitations barred the action. The court again rejected the defendant's argument and found that the statute of limitations expires either six years after the violation occurs or three years after the appropriate government official knows or should reasonably have known about material facts regarding the alleged fraud. The court clarified that when the government does not intervene in a *qui tam* action—as was the case here—then the three-year limitations period begins to run from the date the *qui tam* relator knows or should know about material facts giving rise to his/her allegations. The court determined that the relator filed his action within three years of learning about the defendant's alleged fraudulent billing, and accordingly, the court granted the relator's cross-motion for summary judgment on the defendant's affirmative defenses.

Pleading Elements of FCA Liability

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

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

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

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

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

Pleading Fraud With Particularity

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

The court similarly dismissed the relator's second claim, finding that the relator pled conclusory allegations that the doctor defendant falsified billing sheets, without offering any details about any those billing sheets forming the basis for any false claims to the government. Notably, the court found that the relator failed to allege when the allegedly false records were created, and she did not "connect any given billing sheet to a specific patient, nursing home, date, billing code, or the treatment claimed." Without these details, the court held that the relator's fraud allegations were deficient. The relator stated that since she was a nurse practitioner and did not have access to billing records, she should be given an opportunity to take discovery in order to access the necessary records and then plead her fraud allegations with sufficient particularity. The court denied the relator's request, stating that the FCA does not offer special leniency to relators who wish to "allege it now" and "prove it later." The court also held that Rule 9(b)'s heightened pleading standard would not be relaxed, since the relator had not pled a far-reaching, complicated fraud scheme.

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

Retaliation

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

U.S. ex rel. Yannity v. J & B Med. Supply Co., Inc., 2011 WL 4484804 (E.D. Mich. Sept. 27, 2011)

Three relators brought a *qui tam* action against their former employer, a medical supply company, alleging, among other things, violations of the federal FCA and the Michigan Medicaid False Claims Act. Specifically, the relators alleged that the defendant defrauded the United States and the State of Michigan by fraudulently billing for medical supplies. Furthermore, the relators alleged that when they identified, researched, and opposed these billing practices, they were terminated from their respective jobs in the defendant's billing department as part of the defendant's attempt to cover up its wrongdoing. After a two year investigation, the federal government filed a notice which stated it was not able to make a decision as to whether it would or would not intervene, allowing the relators to pursue their fraud claims on behalf of the government. The defendant separately moved to dismiss the relator's fraud and retaliation claims and also moved to unseal the entire court file, while the relators moved for leave to file an amended complaint.

The U.S. District Court for the Eastern District of Michigan considered each motion in turn.

Leave to File an Amended Complaint

With respect to the relators' request to amend their complaint, the court observed the relators' assertion that their proposed amended complaint would enhance their existing allegations with a more detailed identification of names, dates and other matters that were pertinent to this lawsuit. Further, they argued that the proposed amendments were timely and designed to respond to certain arguments raised by the defendant. As the defendant did not oppose the relators' motion and acknowledged the propriety of allowing the proposed amendment in an effort to cure the deficiencies, the court granted the relators' motion for leave to amend their complaint.

Failure to Plead Fraud with Particularity

Next, the court analyzed the defendant's motion to dismiss the relators' fraud claims for failure to satisfy the heightened particularity standard of Federal Rule of Civil Procedure 9(b). The defendant argued that the relators failed to identify any specific false claims, the names of the patients allegedly involved, the types of services allegedly rendered, and the dates of service relating to certain allegedly fraudulent Medicaid claims—the defendant argued that although the relators were not required to list every single patient, claim or pertinent document, they were required to provide representative examples. The defendant, however, also acknowledged that in lieu of dismissing the relators' complaint, the court should give the relators an opportunity to amend in order to provide greater specificity. The relators argued the heightened pleading standard could not be read in isolation from the notice-pleading standard, which simply required a short and plain statement of the claim. Further, they urged the court not to impose a standard that was too harsh and to view their allegations in their entirety. They argued that Rule 9(b)'s pleading standard should be relaxed, since they were unable to allege the specifics of the defendant's false claims, since that information was within the defendant's exclusive possession. The court held that since it already granted the relators' motion for leave to amend their complaint, the defendant's motion to dismiss their fraud allegations for failure to plead the alleged fraud scheme with particularity must be rejected as moot.

Retaliation

The court then analyzed the defendant's motion to dismiss the relators' retaliation claims. The defendant argued that the FCA, as it existed when the relators' retaliation claim was brought, only prohibited retaliation against an employee who engaged in conduct "in furtherance of an action" under the FCA. The defendant contended that the relators could not show that they engaged in any conduct that would have led the defendant to believe that they were contemplating filing a *qui tam* action, and therefore, the retaliation claim failed. The relators countered that they all identified, researched, and opposed an array of fraudulent schemes within the defendant's billing practices and that these activities were a direct cause of their termination. They also argued that the FCA only requires a showing that they were engaged in some "protected activity" about which their employer was aware. They claimed that, under the FCA, both an "investigation" in furtherance of a *qui tam* action is a protected activity, as well as bringing alleged fraud to the attention of one's supervisors. As they alleged that they did both of these things, they argued that their retaliation claim should not be dismissed. Finally, they argued that even if there was a question as to whether the defendant lacked notice of its potential FCA liability, such an issue created a factual question that could not be resolved at the pleading stage. The court, having already granted the relators' motion to amend their complaint, held that the defendant's motion to dismiss the retaliation claims would also be denied as moot.

FCA Seal

Finally, the court analyzed the defendant's motion to unseal the entire court file, asserting that due process principles required the unsealing of the entire case, so that the defendant could properly defend itself. The government opposed the defendant's request, arguing that unsealing the court file would undermine the confidentiality of the government's ongoing investigation of the defendant's alleged wrongdoing. The defendant, though, argued that to the extent the government resisted the unsealing for fear of jeopardizing its ongoing investigation, the court should conduct an *in-camera* review of any purportedly confidential or protected documents to assess the propriety of keeping them sealed. The court found the government failed to sufficiently establish the risk it might incur from the unsealing of the court file, finding that, based on the government's requests for extensions of the seal and the documents that had already been furnished by the relators, unsealing the court file would not jeopardize the government's investigation, cause harm to any prospective witness, or otherwise disclose the government's confidentiality investigatory methods. Further, the court found the defendant was entitled to explore any relevant defenses and to understand the basis of the allegations being lodged against it. Accordingly, the court granted the defendant's request to unseal the entire record subject to an *in-camera* review of the file contents by the court.

U.S. ex rel. Nathan v. Takeda Pharms. N. Am., Inc., 2011 WL 3911095 (E.D. Va. Sept. 6, 2011)

A relator brought a *qui tam* action against two related pharmaceutical companies, alleging violations of the FCA and state laws. Specifically, the relator alleged that the defendants improperly promoted a drug for an unapproved usage, misrepresented the nature and efficacy of the drug, and provided unapproved sample doses—all of which allegedly caused health care providers to submit false claims to various federal health care programs. In an earlier opinion, the U.S. District Court for the Eastern District of Virginia dismissed the relator's second amended complaint for failure to state a claim and failure to plead with particularity. Thereafter, the relator filed a third amended complaint and the defendants again moved to dismiss. The court again granted the defendants' motion and dismissed the relator's complaint with prejudice, holding that the relator's third amended complaint asserted similar facts as the earlier complaint. Further, the court declined to exercise supplemental jurisdiction over the relator's state law claims and dismissed those claims without prejudice.

Failure to Plead Fraud with Particularity

The court began by analyzing the relator's claim that the defendant's caused providers to present false claims to the government. The court found that the relator relied on statistics and general allegations concerning the patients to whom the defendants' drug was marketed and distributed. The relator argued that the drug was being promoted for non-approved uses because the types of medical specialists who were prescribing the drug to patients do not treat any condition for which the drug had been approved, and because, based on two prescriptions he was aware of, he inferred that a significant percentage of non-reimbursable prescriptions from the sales territory he worked in were submitted for reimbursement. The court found the relator's allegations failed to establish that specific false claims were presented for payment or approval or that the defendants' activities caused such false claims to be presented.

Next, the relator alleged that primary care physicians generally received 60 milligram sample doses of the drugs from the defendants, and that these physicians wrote 98 prescriptions for the drug that were submitted to Medicare for reimbursement. The relator alleged that the Medicare claims for these prescriptions were false, because primary care physicians do not treat conditions for which a 60 milligram dose of the drug has been approved. The court, though, found that these allegations were insufficient to establish FCA liability, since the relator failed to allege that any of the 98 were for actually for 60 milligram doses of the drug. Similarly, the court rejected the relator's allegation that approximately 9,000 prescriptions for the drug were submitted for reimbursement in two particular sales districts, noting that the relator failed to identify the doctors who issued those prescriptions or the illnesses for which they issued the prescriptions. The relator then pointed to several physicians who attested that they were unaware of the drug's availability in a 30 milligram dosage—the relator alleged that these physicians prescribed the drug for an off-label use and that the defendants caused those physicians to submit false healthcare reimbursement claims to the federal government. The court found the relator failed to allege when the prescriptions were allegedly issued, or that any claims for payment were actually submitted for these prescriptions. Accordingly, the court held the relator failed to identify any false claims or to plead the necessary facts to establish the defendants' FCA liability for causing the presentment of false claims.

Finally, the court rejected the relator's contention that the defendants directed its sales representatives to make false representations about the drug to physicians. The court found that the relator failed to allege what, when, where and to whom the alleged representations were made. Further, the court found that the relator failed to allege any fraudulent acts that were the result of the defendants' alleged misrepresentations or that any such fraud was material to a claim to the federal government for payment. Accordingly, the court dismissed the relator's claim for failure to plead with particularity.

U.S. ex rel. Pilecki-Simko v. Chubb Inst., 2011 WL 3890975 (3rd Cir. Sept. 6, 2011)

Two relators brought a *qui tam* action against an educational institute (TCI) and two other corporations (TCC and HTI), alleging that the defendants violated the False Claims Act by knowingly causing false claims to be presented to the government and by using false statements to get the false claims paid. The relators alleged that TCI made misrepresentations to the Department of Education that allowed it to improperly secure federal student financial aid funds in the form of loans and grants from the government, pursuant to Title IV of the Higher Education Act (HEA). According to the relators, the defendants entered into a Program Participation Agreement that required compliance with the HEA, but failed to abide by the terms of that agreement because they violated the HEA's incentive compensation ban. Consequently, the relators' alleged, the defendants' certifications of compliance with the HEA—and the defendants' claims for financial aid funding—were false. The relators further alleged that TCI's corporate parents, HTI and TCC had control over TCI's actions and were therefore liable for its conduct.

The defendants moved to dismiss the relators' complaint for failure to state a claim and for failure to plead with particularity. The U.S. District Court for the District of New Jersey granted the defendants' motions and dismissed the relators' complaint with prejudice. The court held that the relators failed to plead the alleged fraud scheme with particularity and that the alleged improper conduct fell within an HEA safe harbor provision that shielded the defendants from FCA liability. The relators moved for reconsideration, arguing that the safe harbor provision was not appropriately raised as an affirmative defense in the defendants' motion to dismiss, that the safe harbor provision did not apply to allegations about TCI's conduct prior to its enactment, and that the safe harbor regulation did not cover some of the defendants' alleged improper conduct, such as gifts and offers of trips to its top admissions officers. The district court denied the relators' motion for reconsideration, finding that it was procedurally improper and that the relators had not demonstrated a clear error of law resulting in manifest injustice. The relators appealed this ruling to the U.S. Court of Appeals for the Third Circuit, challenging the district court's dismissal of their *qui tam* complaint and its denial of their request for leave to amend their complaint. The Third Circuit affirmed the district court's decision. It also granted defendant TCC's motion for damages and costs, finding that the relators' allegations against that defendant were frivolous, pursuant to Federal Rule of Civil Procedure 38.

Failure to Plead Fraud with Particularity

The relators argued that the district court erred in applying Rule 9(b)'s pleading standard, since the court required them to plead knowledge beyond what they had access to. They argued that they sufficiently pled the necessary elements to establish the defendants' FCA liability, as they alleged that TCI violated the incentive compensation ban, but signed the Program Participation Agreement (PPA) in which they stated that they were in compliance with that provision. However, the Third Circuit found that the relators' complaint did not state facts supporting a reasonable inference that TCI knew, acted in reckless disregard, or deliberately ignored the fact that any of its submissions and/or statements to the government were false because of an alleged violation of the incentive compensation ban. As a result, the circuit court held that relators' complaint could not survive the defendants' motion to dismiss. Additionally, the court found that the relators did not allege sufficient facts, such as how the defendants documented, or were made aware of the alleged violations to the extent needed to support a plausible claim that they knowingly submitted false claims. The circuit court held that since it was able to resolve the dismissal of relators' complaint on this basis, it did not need to make a determination with respect to the district court's allegedly heightened knowledge standard.

Chesbrough v. VPA, P.C., 2011 WL 3667648 (6th Cir. Aug. 23, 2011)

Two relators brought a *qui tam* action against a medical services provider, alleging that the defendant violated the False Claims Act and state law by submitting false Medicare and Medicaid billings. They contended that the defendant's billings were fraudulent because the defendant was an invalid corporation. In addition, they alleged that the defendant's billing for radiology studies was fraudulent because the tests were either not properly documented, were performed with equipment that did not conform to industry standards, or were administered by inadequately trained radiology technologists. The defendants moved to dismiss the relators' complaint, arguing that the relators failed to state a claim and failed to plead fraud with particularity. The U.S. District Court for the Eastern District of Michigan granted the defendant's motion. The district court held that the relators were "unable to provide dates or particularities for even a single claim that was submitted to the government, much less any false statement made in connection therewith." The relators appealed the district court's ruling to the U.S. Court of Appeals for the Sixth Circuit, arguing that their FCA claim was pled with sufficient particularity.

Pleading Fraud with Particularity

First, the circuit court analyzed whether the relators had alleged a scheme that constituted fraud. The court noted that the relators attached to their complaint x-ray studies that were allegedly defective or nondiagnostic, and which did not meet industry standards. But the court observed that, although the relators alleged that the defendant failed to meet objective standards for testing, they failed to allege that the defendant was expressly required to comply with those standards as a prerequisite to payments for its claims. The court found that the relators failed to identify any specific regulations that mentioned compliance with industry standards or that conditioned payment of claims on compliance with those standards. Similarly, the Sixth Circuit concluded that the relators failed to cite any regulation in support of their allegations that the defendant violated HIPAA or that it violated Medicare regulations because it was an "illegal corporation" under Michigan law. As a result, the Sixth Circuit held that the relators' allegations regarding these issues did not amount to pleading a "fraudulent scheme" actionable under the FCA.

But the circuit court determined that the relators did adequately allege that the defendant knowingly submitted claims to the government for purely nondiagnostic tests that had no medical value, noting that the examples of five such nondiagnostic studies the relators attached to their complaint. The court then examined whether or not the relators sufficiently alleged that the defendant actually submitted claims for the worthless nondiagnostic tests to the government. It held that they did not, since they could not identify with particularity any billings or costs reports that were actually submitted to the government, or any dates on which bills were submitted.

The relators argued that a relaxed pleading standard should be applied to their action because they had no access to the defendant's billing records, but that the facts they alleged support "a reasonable inference—not a mere assumption—that [the defendant] did, in fact, submit claims to Medicare." However, the court refused to apply a relaxed standard, since the relators lacked any personal knowledge of the defendant's billing practices or contracts with the government. It held the relators only assumed that the tests in question were performed on Medicare or Medicaid patients and that the defendant billed those programs for the services. The court declared that the mere existence of a few nondiagnostic tests did not support a strong inference that the claims for those tests were submitted to the government, and thus, affirmed the dismissal of the relators' complaint.

U.S. ex rel. Diaz v. Kaplan Univ., 2011 WL 3627285 (S.D. Fla. Aug. 17, 2011)

Three relators (Gillespie, Diaz, and Wilcox) brought a *qui tam* action against their former employers, a higher education service provider and one of its subsidiaries, alleging that the defendants violated the False Claims Act. Specifically, the relators alleged that the defendants submitted false claims to the federal government for education funds under the Higher Education Act (HEA)—the relators alleged that the defendants' claims were false because the defendants failed to comply with various provisions of the HEA, and were therefore not eligible to file claims for funds. In addition, one of the relators alleged that the defendants violated the FCA by retaliating against him after he engaged in protected whistleblower activity.

Relator Gillespie alleged two theories of FCA liability: (1) that the defendants failed to comply with the Rehabilitation Act (RA)—a statute that prohibits recipients of federal financial assistance from discriminating against individuals with disabilities—even after the Department of Education conducted an investigation and directed the defendants to make specific remedial changes; and (2) that, in order to continue receiving federal funding, the defendants inflated students' grades—by tying professors' jobs to their student evaluations and by implementing a grade distribution system in which half of each class received "A" or "B" grades—and falsely certified to the government that those students were maintaining satisfactory academic progress.

Relators Diaz and Wilcox alleged that the defendants: (1) violated the HEA's incentive compensation ban, which prohibited the defendants from basing student recruiters' bonuses and other forms of incentive compensation on the number of students they enrolled; (2) violated the HEA's 90/10 Rule, which required the defendants to ensure that at least 10% of student tuition came from cash, rather than student loans; (3) falsified documents in order to receive the accreditation

they needed in order to be eligible to receive federal student loan funds; and (4) violated the "Program Participation Agreement" they signed—in which they certified that, in exchange for receiving federal student financial aid, they would comply with various HEA and Department of Education requirements—by enrolling unqualified students, placing extreme pressure on admissions representatives, misusing accreditation claims, and encouraging students to use student loan funds to buy cars and other non-educational items. Relator Diaz also filed a retaliation claim under the FCA, alleging that he was fired from his job with the defendants after he informed them that he was going to notify federal and state authorities of the defendants' HEA noncompliance.

The defendants moved to dismiss the relators' fraud allegations, pursuant to the FCA's first-to-file rule, and for failing to plead the alleged fraud with particularity. The U.S. District Court for the Southern District of Florida granted the defendants' motion in part.

Failure to Plead Fraud with Particularity

The court examined each of the relators' fraud claims, beginning with the allegation that the defendants violated the FCA by inflating students' grades and falsely certifying their compliance with the academic progress requirements. The defendants argued that the relators failed to establish that the alleged grade inflation formed the basis of an FCA action. The court found that because the relators failed to show how grade inflation violated any regulation, they failed to allege any fraud. Further, the court found that Gillespie failed to allege the "who, what, when, where and how" of the defendants' alleged false certifications to the government that their students maintained satisfactory academic progress. Moreover, the court found that the relators failed to allege the specifics of any non-performing students about whom the defendants made false certifications in order to receive student loans funds. Accordingly, the court dismissed the fraud claims based on the defendants' alleged grade inflation and false certification of satisfactory student academic progress.

Next, the court analyzed the fraud claims based on the defendants' alleged failure to comply with the HEA's incentive compensation ban. The relators had alleged that the defendants paid retention bonuses, cash bonuses, trips and other incentive compensation to their recruiters, based on the number of students they recruited. The court, though, held that the relators' allegations were insufficient to state a violation of the incentive compensation ban, noting the relators' concession that other factors were also part of the defendants' incentive compensation plan. The court found that the relators' complaint acknowledged that these "other factors" were formally part of the defendants' compensation plan, and simply made conclusory assertions, unsupported by fact, that those factors were not actually considered by the defendants. The court held that the defendants did not plead the alleged fraud with particularity, and that claim was dismissed as well.

The court then considered the relators' allegation that the defendants violated the 90/10 Rule. The relators had argued that the 90/10 Rule prohibited the defendants from deriving more than 90% of its revenue generated by student tuition, and certain other fees and institutional charges from student loan funds. The relators alleged that a scholarship the defendants created for their employees violated the 90/10 Rule, because the scholarship program simply diverted a portion of student loan funds into an account, awarded funds from that account back to students in the form of scholarships, and then allowed the students to use those funds to pay for tuition expenses, in cash. The defendants argued that the relators misconstrued the 90/10 Rule and stated that even if the relators' factual allegations were true, the relators failed to allege how the scholarship program would violate the 90/10 Rule. The court agreed, and as a result, the relators' fraud claims based on violations of the 90/10 Rule.

Next, the court analyzed the relators' allegation that the defendants failed to comply with the Rehabilitation Act. Relator Gillespie had alleged that the defendants violated the RA because they did not provide accommodations for his bipolar disorder. He alleged that he filed a compliant with the Department of Education's Office of Civil Rights (OCR), which investigated his claim, denied his claim, determined that the defendants had violated the RA in other ways, and entered into a Resolution Agreement with the defendants. Gillespie argued that the defendants' claims for HEA funds were false, because those claims contained the defendants' false certifications of compliance with the RA. Furthermore, Gillespie alleged that after executing the Resolution Agreement with OCR, the defendants continued their pattern of noncompliance with the RA, resulting in additional false claims to the government. The defendants argued that they did not violate the RA and thus, did not make false certifications to the government. The court, though, relying on OCR's finding of seven specific violations of the RA by the defendants, held that the relators adequately pled a violation of the RA, and thus, and FCA violation.

But the court dismissed the relators' fraud claims based on the defendants' alleged continuing failure to comply with the RA, after executing the Resolution Agreement. The court noted that "the very same documentation submitted by [the relator] to substantiate Defendants' non-compliance indicates that after Defendants and OCR entered into a Resolution Agreement, OCR found that the Defendants had complied with the terms of the Resolution." Therefore, it found that the relators failed to show continuous non-compliance, and limited the relator's RA claims to the time OCR determined that the defendants were in compliance with the RA.

The court next focused on the relators' claims involving the defendants' allegedly false accreditation documents. The defendants argued that the relators' claims failed because the relators did not allege that the defendants submitted any false claims to the government—the allegedly false documents were submitted to a non-governmental accreditation authority. The relators countered that, for FCA purposes, a false claim exists if a party makes false statements to an accrediting agency in order to obtain accreditation necessary to receive federal funds. The court, however, held that the relators failed to plead the alleged fraud scheme with particularity, since their complaint did not allege which false statements were made, which accrediting bodies the statements were made to, when they were made, or who made them. Therefore, the court granted the defendants' motion to dismiss fraud claims based on defendants' alleged false statements to accrediting bodies.

Finally, the court considered the relators' allegation of several other activities by the defendants that led to violations of the FCA, including enrolling unqualified students, placing extreme pressure on admissions representatives, misusing accreditation claims, and misadvising students. The defendants argued that these allegations should be dismissed, for failure to plead the alleged fraud with particularity and because the relators failed to state an actual violation of any statute or regulation. The court agreed and found that the relators' complaint was devoid of facts showing that any of their allegations, if true, would constitute a violation of a statute or regulation. Accordingly, the court dismissed the relators' claims based solely on those allegations.

Retaliation

Next, the court considered relator Diaz's retaliation claim. The defendants moved to dismiss that claim on *res judicata* grounds and because they claimed that Diaz failed to adequately plead that he was engaged in protected conduct under the FCA. The defendants' *res judicata* argument was based on an earlier action Diaz filed against the defendants, in which he alleged job discrimination and retaliation under Florida law. The court held that this prior suit did not bar Diaz's FCA retaliation claim; since the retaliation claims in the prior case were not FCA claims, the court held that the issues in the two cases were different, and thus, *res judicata* principles did not apply. In addition, the court observed that Diaz eventually dropped his earlier retaliation claims, and since no the "final judgment on the merits" requirement was not met, *res judicata* did not apply.

The defendants also argued that Diaz's retaliation claim should be dismissed because he did not adequately plead any protected conduct under the FCA. The court disagreed, finding that Diaz told the defendants that he was notifying governmental authorities of their alleged wrongdoing. Based on this, the court held, the defendants reasonably could have feared being reported for fraud or being sued in a *qui tam* action.

The defendants then argued that Diaz's retaliation claim should be dismissed because there was no possibility that he could have filed a viable FCA action based on the information he reported. The court again disagreed with the defendants, noting that the relators *had* plead some viable FCA claims and stating that there was a distinct possibility that Diaz could have filed other viable FCA claims. Therefore, the court denied the defendants' motion to dismiss Diaz's retaliation claim.

First-to-File Rule

Lastly, the court analyzed the defendant's contention that the FCA's first-to-file rule precluded the relators' claims. The defendants argued that approximately five months before the relators' suit was filed, another *qui tam* complaint, with the incentive compensation allegations as the relators', was filed against one of the defendants. The court noted that, in the present case, the relators' incentive compensation fraud claims were dismissed, and only a subset of their claims based on alleged violations of the RA remained. Therefore, the court held, the allegations in the two *qui tam* actions were different, and the FCA's first-to-file rule did not apply.

U.S. ex rel. Gatsiopoulos v. Kaplan Career Inst., ICM Campus, 2011 WL 3489443 (S.D. Fla. Aug. 9, 2011)

Two relators brought a *qui tam* action against their former employers, a higher education service provider and its wholly-owned subsidiary, alleging violations of the Higher Education Act (HEA). The relators alleged that the defendants submitted false claims to the government by falsely certifying their compliance with requirements of the HEA—certifications that were prerequisites for receiving student financial aid funds. Specifically, the relators alleged that the defendants violated the HEA's advertising rules by providing compensation to admission representatives based solely on their enrollment success. Further, the relators alleged that, in order to receive loans through the Direct Loan program and Federal Family Education Loan (FFEL) program, the defendants improperly advertised job placement rates while not making available the state licensing requirements for the jobs, and that they manipulated graduation and job placement rates in order to comply with the rules requiring 70% achievement rates for each. One of the relators also brought a claim for retaliation under the FCA. The defendants moved to dismiss the fraud allegations for failure to state a claim and failure to plead with particularity. The U.S. District Court for the Southern District of Florida granted the motion in part.

Pleading Fraud with Particularity

The court began by analyzing the relator's claims based on the violations of the HEA's advertising rules. The defendants argued that the relators failed to allege that they advertised job by using job placement rates. Specifically, the defendants argued that the two documents relied upon by the relators—a "Student Consumer Information" booklet and a document entitled "Student Disclosure Placement Rates"—were not advertisements. The court further concluded that the booklet was not relevant to the time period at issue. The court found that the second document, however, was distributed to prospective students and was therefore, an advertisement. The defendants then argued that the relators failed to adequately allege that the defendants did not provide state licensing requirements to prospective students. The court agreed, as it found that the relators failed to allege with particularity why the data in the document was false or that the defendants actually failed to make data available. Next, the defendants argued that the relators failed to adequately allege that the defendants did not provide state licensing requirements for any particular program. The court found the relators' general allegations established the defendants did not make the licensing information available through certain particular means, but those allegations did not establish that the defendants failed to make licensing information available through other means. Thus, the court dismissed the relators' claims based on job placement rates and licensing requirements with prejudice.

The court then analyzed the relators' claims based on the violations of the 70% rules. The defendants argued that the relators failed to allege that these rules applied to any of the defendants' specific programs. The court disagreed and found that the relators alleged that all of the defendants' programs were subject to these rules, as they all received financial assistance from the Direct Loan and FFEL programs. The defendants then argued that the relators' allegations were insufficient, since they could have been eligible for loans under these programs through other means that did not require compliance with the 70% rules. The court, though, noted that the defendants failed to identify any specific program for which eligibility was not based on compliance with the 70% rules. Taking the relators' allegations as true for the purpose of deciding the defendants' motion to dismiss, the court held the relators adequately alleged that all of the defendants' programs must comply with the 70% rules, and denied the defendants' motion to dismiss.

Cade v. Progressive Cmty. Healthcare, Inc., 2011 WL 2837648 (N.D. Ga. July 14, 2011)

A relator brought a *qui tam* action against her former employer, a healthcare company, and several individuals, alleging that the defendants violated the False Claims Act by knowingly billing for medically unnecessary tests and other services, by fraudulently using the names of physicians who did not provide those services. Further, she alleged that the owner of the healthcare company falsified or changed billing codes in order to claim higher reimbursements, and fraudulently used different codes to resubmit claims that had been rejected. The defendants moved to dismiss the relator's complaint for failure to state a claim and failure to plead fraud with particularity. The U.S. District Court for the Northern District of Georgia granted the motion, finding that the relator failed to plead fraud with particularity.

The relator argued that a relaxed pleading standard should to her claims, since the information necessary to allege the actual submission of false claims was within the defendants' possession. The court analyzed whether the relator's allegations about the defendants' billing process and her involvement in that billing process in her role as office manager provided sufficient indicia of reliability for her belief that the defendants actually submitted false claims. The court determined that the relator's role in the billing process was too limited to substantiate her claims of fraud with adequate reliability. The court then concluded that the relator's allegations that the defendants actually submitted false claims were general and con-

clusory, noting that she did not provide specific details regarding the submission of any claims, did not specify who had submitted false claims, failed to differentiate between Medicare, Medicaid and private insurance, and failed to explain the basis for her belief that false claims were submitted to any one of these entities. The court found that the relator had, at most, a limited role in the billing process, consisting only of filling out patient demographic information. Further, the court noted that the relator made no effort to describe the defendants' billing process and failed to describe the role of a third party billing company which reviewed and submitted claims on behalf of the defendants. The relator countered, alleging that she audited the defendants' claims based upon a report from the third party billing company. The court, though, found that the relator failed to specify what information was in the audit reports, whether the information was available to her or what led her to believe that false claims were actually submitted. Further, the court found that the relator failed to detail the critical process of actually submitting the defendants' claims and merely stated generic allegations of wrongdoing. Accordingly, the court held that the relator failed to plead fraud with particularity and dismissed relator's claims.

U.S. ex rel. Watine, et al. v. Cypress Health Sys. Florida, Inc., 2011 WL 2710062 (N.D. Fla. July 12, 2011)

A relator brought a *qui tam* action against two hospitals (Cypress Florida and Cypress Wyoming), alleging FCA violations due to the submission of fraudulent claims. Specifically, the relator alleged that the defendants engaged in acts, schemes and billing practices to defraud various federal and state healthcare programs to maximize Medicare reimbursements through fraudulent "upcoding." The relator worked as a physician at Cypress Florida and alleged that the physicians were instructed to falsely bill the highest paying codes and that he was even reprimanded for not doing so. Further, he alleged that he was asked to review twenty-five Medicare Summary Notices (EOBs) and to appeal Medicare's denial of those claims. He stated that he was unable to submit any letters, however, as he determined that each of the claims included incorrect billing codes. He alleged that he then, on his own initiative, pulled sixteen random patient history charts and found that improper, higher-paying billing codes were used before claims were apparently submitted to the government healthcare programs. The relator also alleged that Cypress Florida billed nursing home patient visits as if the patient was seen at the hospital, because reimbursement for seeing patients at the hospital was higher. The government declined to intervene in the relator's action. The relator made similar allegations against Cypress Wyoming, based on his claims against Cypress Florida. The defendants separately moved to dismiss the relator's complaint for failure to plead with particularity and for lack of subject matter jurisdiction. They also moved for an award of attorneys' fees. In response, the relator moved to amend his complaint, if necessary. The U.S. District Court for the Northern

District of Florida granted the defendants' motions, dismissing the relator's complaint against Cypress Wyoming with prejudice, but granting the relator's motion for leave to amend his claims against Cypress Florida.

The court began by examining the allegations against Cypress Florida. It found that the relator's allegations of fraudulent upcoding failed to allege how the claims were actually submitted. With respect to the twenty-five EOBs the relator examined, the court held that the relator failed to allege the amount of the false claims, who submitted those claims, and when the claims were submitted. Similarly, the court found, with respect to the allegations concerning the sixteen random patient charts the relator pulled, that he failed to allege the details surrounding the submission of any false claims to a government healthcare program. The court found that the relator's allegations of fraud regarding billing for nursing home visits as if they were hospital visits was based on an internally generated record and that the relator failed to provide the details as to how, when, and to whom the allegedly false claims were submitted. Finally, the court found, with respect to the relator's allegation of fraudulently churning patients, that the relator again failed to include details of any falsely submitted claims for payment. Therefore, it held the relator failed to meet Rule 9(b)'s heightened pleading requirements and dismissed the claims against Cypress Florida.

The court then examined the allegations against Cypress Wyoming. Since those claims were based on the allegations against Cypress Florida, the court held that the claims against Cypress Wyoming were also deficient. Further, the court held that the relator failed to link the actions of the two defendants, finding that the relator made no independent or specific allegations linking Cypress Wyoming to the actions of Cypress Florida. As a result, the court dismissed the allegations against Cypress Wyoming with prejudice for failure to plead with requisite particularity. Although the court ultimately dismissed the claims against Cypress Wyoming, it did reject that defendant's argument that the court did not have subject matter jurisdiction over the relator's claims against it because the relator was not an original source of the information upon which those claims were based. The court clarified that the original source inquiry is only made after a determination has been made that the relator's allegations are based on a prior public disclosure under the FCA.

Finally, despite finding the pleadings inadequate, the court did not award attorneys' fees to either defendant, as it held that the relator's claims were not filed frivolously or for the purpose of harassment.

U.S. ex rel. Jajdelski v. Kaplan, Inc., 2011 WL 2669485 (D. Nev. July 7, 2011)

A relator brought a *qui tam* action against his former employer, an owner and operator of educational and vocational institutions, alleging violations of the FCA

and state law. Specifically, the relator alleged that one of the defendant's institutions filed fraudulent student financial aid requests. The defendant moved to dismiss for failure to plead with particularity and failure to state a claim. The U.S. District Court for the District of Nevada granted the motion, finding that the relator failed to plead fraud with particularity, as he did not sufficiently plead the time, place, or parties involved, or show that the defendant had knowledge of the alleged fraud. Further, the court found the alleged activities occurred prior to the defendant's acquisition of the institution in question and that the relator did not allege that the defendant continued the alleged fraudulent activities after the acquisition. Under the standards governing successor liability, the court held that the defendant could not be held liable for the institution's alleged conduct. Accordingly, the court held that the relator failed to state a claim and his complaint was dismissed with prejudice.

U.S. ex rel. Grayson v. Genoa Healthcare, 2011 WL 2670079 (W.D. Wash. July 6, 2011)

A relator brought a *qui tam* action against his former employer, a nationwide pharmaceutical company located at Community Mental Health Centers (CMHC). The relator alleged violations of FCA, retaliatory discharge, and other common law claims. Specifically, he alleged that the defendant routinely waived copayments from some CMHC's Medicare and Medicaid patients, that he informed his supervisor of the copayment waivers on a conference call, and that one of the defendant's manager stated that the defendant had an agreement with CMHC to waive copayments under $3.10. The relator then alleged that he reported the defendant's Medicare copayment waivers to the Office of the Inspector General of the Department of Health and Human Services. A few months later, he was terminated from his job.

The relator concluded that the defendant's copayment waivers were kickbacks to CMHC (which was responsible for the payment of Medicare copayments), that the defendant billed Medicare for some prescriptions that were never dispensed, that the defendant changed dates of medication as a means of ensuring that the Medicare claims would be accepted, and retaliatory discharge. The defendant moved to dismiss for failure to state a claim and for failure to plead with required particularity. The U.S. District Court for the Western District of Washington denied the motion with respect to the retaliation claim, but granted the motion with respect to the fraud claims.

Pleading Fraud with Particularity

The court analyzed the various allegations regarding the submission of false claims. First, the court found that the relator failed to allege that the defendant submitted any false claims to the government for which copayments were waived. Additionally, the court found that the relator cited an outdated statute for the proposition that routine waivers of copayments results in false claims. Moreover, the court found that the relator failed to plead the alleged fraud scheme with sufficient particularity to create an inference that false claims were actually submitted. Second, the court found the relator failed to allege that the defendant knowingly submitted false claims to Medicare and requested payment for prescriptions that were not dispensed to patients. The court also found the relator failed to plead the specifics of the alleged fraud, as the relator failed to allege the specifics of the individuals who committed the fraud, when the fraud was committed, and where the alleged fraud took place. Third, the court similarly found that the relator failed to properly allege that the defendant changed the dates of service on medications billed to Medicare after they were dispensed to patients to prevent the rejection, since the relator failed to allege the specifics of claims for which the dates of service were changed. As a result, the court held that the relator's fraud allegations failed to state a claim under the FCA, and failed to meet the heightened requirements of Federal Civil Procedure Rule 9(b).

Retaliation Claim

The court then examined the relator's FCA retaliation claim and found that the relator set forth sufficient facts to constitute a plausible claim, as the relator sent an email to the defendant's management, expressing concerns that the routine waiver of copayments constituted fraud. Further, the court found the relator reported his concerns to the Office of the Inspector General of the Department of Health and Human Services. The court held that the relator alleged sufficient facts to establish that he was engaged in protected activity, and that he put his employer on notice of his protected activity. Therefore, the court held the relator adequately stated that his employment was terminated in retaliation because he opposed the illegal practices of his employer.

See *U.S. ex rel. Banignan v. Organon USA Inc.*, 2012 WL 1997874 (D. Mass. June 1, 2012), at page 43.

See *U.S. ex rel. Provuncher v. Angioscore, Inc.*, 2012 WL 1514844 (D. Mass. May 1, 2012), at page 99.

See *U.S. ex rel. Sandager v. Dell Marketing, L.P.*, 2012 WL 1453610 (D. Minn. Apr. 26, 2012), at page 31.

See *U.S. ex rel. Colquitt v. Abbott Labs.*, 2012 WL 1081453 (N.D. Tex. Mar. 30, 2012), at page 51.

See *U.S. ex rel. Jones v. Collegiate Funding Servs., Inc.*, 2012 WL 835747 (4th Cir. Mar. 14, 2012), at page 56.

See *U.S. ex rel. Tessitore v. Infomedics, Inc.*, 2012 WL 826889 (D. Mass. Mar. 12, 2012), at page 3.

See *U.S. ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 2012 WL 523623 (M.D. Fla. Feb. 16, 2012), at page 6.

See *U.S. ex rel. King v. Solvay S.A.*, 2011 WL 4834030 (S.D. Tex. Oct. 12, 2011), at page 10.

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

Gonzalez v. Planned Parenthood of Los Angeles, 2012 WL 2412080 (C.D. Cal. June 26, 2012)

A plaintiff brought a *qui tam* action alleging that a group of Planned Parenthood organizations violated the False Claims Act by overbilling federal and state government-funded healthcare programs for contraceptives they acquired and distributed to the public. The relator alleged that the defendants acquired contraceptives at significant discounts, but instead of billing the government programs for their actual costs, they billed the programs for the higher, "usual and customary rates" charged to the general public. The relator alleged that the defendants knew that they were engaged in overbilling, because the California Department of Health Services conducted an audit that revealed the billing practices and the defendants were subsequently put on notice that their billing practices were illegal. The defendants moved to dismiss the relator's claims, arguing that the relator failed to state a claim under the FCA and that he failed to plead the alleged fraud scheme with particularity.

Holding: The U.S. District Court for the Central District of California granted the defendants' motion.

Failure to State a Claim

The relator's argued that since the defendants submitted claims that overcharged the government, their claims were false. The defendants countered that the relator failed to state a claim under the FCA, because the defendants openly acknowledged their billing practices and the fact that they used the additional funds from the government to subsidize other services they provided. They argued that their claims to the government were not false, since those claims fully disclosed and accurately reflected the rates the government was being charged. The court rejected the relator's theory of liability, finding that the relator failed to allege that the defendants "*misrepresented* what they were billing or claimed that the amounts requested were the amounts defendants paid for the contraceptives." (emphasis in original) But the court then considered the possibility that the relator alleged a "false certification" theory of liability, which is not focused on the falsity of the claim on its face, but which relies on a false certification within the claim in which the claimant certified compliance with a government regulation that was material to the government's decision to pay the claim. Since the claims did not include an express certification of compliance, the court determined that the relator could only proceed on a theory of an implied false certification of compliance, in which the defendants' healthcare claims to the government included the certifications of compliance with underlying laws and regulations the defendants made when they signed agreements that allowed them to participate in the healthcare programs.

The defendants argued that the relator also failed to state a claim under this false certification theory, since he did not explicitly allege that they falsely certified compliance with various laws governing billing under the healthcare programs at issue. Instead, the defendants argued, they were engaged in an open dispute with the government regarding their billing practices. The court held that the defendants' potential violations of the healthcare programs' regulations did not amount to fraud, since the defendants made no misrepresentations to the government. Consequently, the court dismissed the relator's fraud claims for failure to state a claim.

Having dismissed the relator's claims, the court declined to rule on the defendants' motion to dismiss for failure to plead the fraud scheme with particularity.

U.S. ex rel. Washington v. Educ. Mgmt. Corp., 2012 WL 1658482 (W.D. Pa. May 11, 2012)

Two relators brought a *qui tam* action against EDMC, collectively one of the largest groups of post-secondary education providers in the United States, alleging violations of the federal False Claims Act and twelve state FCA statutes. The relators alleged that EDMC violated Title IV of the Higher Education Act of 1965 (HEA) by paying incentive compensation to Associate or Assistant Directors of Admissions (ADAs) who recruited new students to attend their affiliated schools. The relators further alleged that this conduct also violated the various FCA laws because EDMC falsely represented its eligibility to receive federal student aid funds and created a sham compensation plan to cover up its improper compensation practices. The federal government and four state governments intervened in the relators' suit and filed a Joint Complaint in Intervention, which also included claims against the defendants under the False Claims Act and common law. Two other jurisdictions separately intervened and filed their own complaints against the defendants, while the relators continued with their remaining, non-intervened state FCA claims. The plaintiffs' theory of FCA liability was two-fold: that EDMC's written compensation policy violated that incentive compensation ban; and that EDMC used its written compensation plan as a sham to conceal its actual, violative compensation plan. EDMC moved to dismiss the complaints for failure to state a claim.

Holding: The U.S. District Court for the Western District of Pennsylvania granted the defendants' motion in part. The court granted the defendants' motion to dismiss federal and state FCA claims based on EDMC's compensation plan "as written," but denied the motion to dismiss the claims based on the plan "as implemented."

Failure to State an FCA Claim

The court began by examining the fraud allegations related to EDMC's compensation plan "as written." The relators and the government entities alleged that the compensation plan, as written, violated the incentive compensation ban because: compensation under the plan varied based on the number of students recruited; initial eligibility for the plan was based solely on student recruitment; and adjustments to ADAs' compensation were based solely on recruitment, in violation of applicable safe harbor regulations. The court, however, agreed with EDMC that the compensation plan complied with the safe harbor provisions of the incentive compensation ban, since the plan called for fixed annual salaries that were not adjusted more than twice a year and that were not "solely" based on student enrollment. Additionally, the court determined that initial eligibility for the plan was not based on recruitment numbers, but instead was based solely on qualitative factors until after a six-month review. Moreover, the court held that the plaintiffs failed to plead the "who, what, where, when, why and how" EDMC's plan based compensation on student recruitment. Accordingly, the court held the relators and government failed to plead a plausible FCA cause of action based on the defendants' compensation plan "as written."

The court then examined the plaintiffs' claims related to EDMC's compensation plan "as implemented." Under this theory, the relators and government alleged that EDMC's ADA compensation plan was knowingly exclusively focused on the number of new students recruited, that the plan resulted in the payment of improper commissions and other bonuses, and that the written plan was a sham. EDMC countered that the plaintiffs failed to state a claim and did not sufficiently plead facts to show that it based ADA compensation solely on student enrollments, how any false claims were presented, and how any of their representations were false. Further, EDMC argued that the government had known of its compensation plan for four years and had never taken any prior action against it, and as a result, the government could not prove that EDMC caused any injury. EDMC also argued that compliance with the incentive compensation ban was only a condition of participation in the student aid program, and not a condition of payment, and thus, any alleged false certification of compliance with the incentive compensation ban was not material to the government's payment decision and not actionable under the federal FCA or any state FCA.

First, the court the court examined the falsity requirement and held that this element had been adequately pled, since the plaintiffs alleged that EDMC's compensation plan routinely ignored qualitative factors, and even identified various EDMC employees who they claimed could verify that allegation. The court held that the falsity element had been satisfied. Next, the court examined the scienter requirement. EDMC had argued that scienter must be alleged as to each of its separate schools, rather than as to "EDMC" collectively, and that all claims must also be pled with specificity. The plaintiffs asserted that scienter may be alleged generally and that all the defendant schools were related entities. The court agreed with the plaintiffs and found that scienter may be pled generally. Since there were allegations of an EDMC-wide scheme by top-level executives, the court held that it was not necessary for the plaintiffs to allege separate conduct by each school. Therefore, the court held that the scienter element was adequately pled.

Third, the court examined the sufficiency of the relators' claims that EDMC's compensation plan caused the government an economic loss. EDMC argued that the plaintiffs failed to allege that their ADA compensation practice caused an economic injury to the government. EDMC also argued that a causal connection must be shown between the alleged loss and the alleged fraudulent conduct. Further, EDMC argued that the plaintiffs failed to identify any ADAs who recruited unqualified students for incentive compensation, any students who would otherwise not have enrolled at other schools, or any students who defaulted on improperly obtained loans. The plaintiffs countered that they were not required to allege a specific injury to the government or to trace a particular loss in order to recover under the FCA. The court again agreed with the plaintiffs and held that they adequately pled an economic loss insofar as they alleged that EDMC's misrepresentations enabled it to receive billions of dollars in student aid funds.

Finally, the court considered EDMC's argument that the FCA claims should be dismissed because compliance with the incentive compensation ban was a condition of participation and not a condition of student aid payment. EDMC also asserted that ADA compensation was not a core concern and argued that compliance with the incentive compensation ban should be enforced administratively by the Department of Education, rather than through the FCA's serious penalties. The court disagreed and held that the FCA was the correct avenue to resolve government funding abuses and that without FCA liability, institutions would have a virtually unfettered ability to improperly receive government funds while flouting the law. Therefore, the court denied the motion to dismiss the plaintiffs' claim that EDMC's compensation plan "as implemented" violated the FCA.

State FCAs

The court further stated that the relators' state FCA claims regarding EDMC's compensation plan "as implemented" would go forward, rejecting the defendants' contention that compliance with the incentive compensation ban was only material to the federal government's payment decision, and not material to any state funding. Instead, the court held that the plaintiffs adequately pled that state funding was conditioned on compliance with the incentive compensation ban and that.

The court, though, dismissed the separate FCA claims brought by the District of Columbia, finding that they were untimely. The court noted that the District of Columbia FCA includes a six-year statute of limitations, that D.C. alleged fraudulent conduct between 2003 and 2005, and that D.C. FCA complaint was not filed until 2011. D.C. conceded that its claims would otherwise be time-barred, but argued that its claims should "relate back" to the date of the filing of the original *qui tam* complaint. The court rejected that argument and held that when a complaint is amended to add a new plaintiff, the new plaintiff's claims will only "relate back" to the date of the original filing when the defendant has received sufficient notice not to be prejudiced. The court held that D.C. did not meet this standard, stating that "D.C. is a tardy Plaintiff which seeks to benefit from the diligence of others. D.C. claims' were not embraced by the Relators' earlier Complaints because D.C. is attempting to recover for alleged misrepresentations made to the District, not to the other Plaintiffs. EDMC did not receive notice of D.C.'s claims within the limitations period and there is no indication that the failure to name D.C. earlier was due to a mistake concerning its identity. Even though there has been no showing of specific prejudice, EDMC 'would still be deprived of [its] interest in repose.'"

First-to-File Bar

The court denied EDMC's motion to dismiss one of the two co-relators from the *qui tam* action on the grounds that he was precluded from participating in the case by the FCAs' first-to-file provisions. The court agreed with the plaintiffs that the co-relator did not implicate the first-to-file bar provision, since he did not "intervene" in a pending action or "bring a related action;" he merely entered into a private arrangement with the original relator to be named as a co-relator in an amended *qui tam* complaint.

U.S. ex rel. Folliard v. Gov't Acquisitions, Inc., 2012 WL 1548268 (D.D.C. May 3, 2012)

A relator brought a *qui tam* action against eight information technology providers that supplied products to government agencies under separate General Services Administration (GSA) contracts. The relator alleged that these contracts were governed by the Trade Agreements Act (TAA), which requires contractors not to sell products to the government that are from non-designated countries. The relator alleged that the defendants violated the TAA by listing and selling products from non-designated countries—they asserted that the defendants' conduct also violated the False Claims Act. The government declined to intervene in the relator's suit and the defendants separately moved to dismiss the relator's complaint. The U.S. District Court for the District of Columbia granted the motions of six of the defendants. The two remaining defendants (GAI and Govplace) moved for summary judgment on the relator's claims.

Holding: The D.C. district court granted the defendants' motions in part, but granted the relator an opportunity to amend his oppositions to the motions.

The court found that the relator alleged that the defendants improperly listed products <u>and</u> made improper sales to the government. The court noted that the listing of products unconnected to purported sales cannot violate the FCA and granted summary judgment as to each defendant insofar as to the relator's claims were unconnected to sales to the government. The court then found that the parties misconstrued the court's prior opinion regarding the complexity of discovery and the timing of motions for summary judgment. The defendants construed the earlier opinion to mean that summary judgment should proceed with no discovery at all, while the relator construed the earlier opinion to mean open-ended discovery. The court clarified that the relator was only entitled to discovery that was appropriate. The court concluded that the relator's complaint identified GAI's al-

legedly improper sales as "representative" of GAI's behavior, and speculated that more improper sales would be uncovered through discover. The defendants, however, argued that if the relator was not entitled to discovery for any sales that were not alleged in the complaint. The court observed that its prior opinion stated that summary judgment should be decided on the basis of the allegations in the complaint. Accordingly, the court held that the relator would be allowed to amend his opposition to each defendant's summary judgment motion, limited to the specific sales that alleged in his complaint with respect to each defendant. The defendants would be allowed to file amended replies to the relator's oppositions and then the court would decide each defendant's summary judgment request. The court noted that if the relator prevailed, then the question for further discovery would be ripe.

U.S. ex rel. Williams v. C. Martin Co., Inc., 2012 WL 1565279 (E.D. La. May 1, 2012)

A relator brought a *qui tam* action against a group of corporate and individuals, alleging that, in the aftermath of Hurricanes Katrina and Rita, the defendants violated the False Claims Act, by conspiring to defraud the government and by falsifying information submitted to the government regarding federal disaster relief services. The relator alleged that the two corporate defendants (MJ and CMC) entered into agreements with one another, whereby the "MJ defendants" (consisting of MJ and the two individual defendants who formed it) would identify potential disaster relief government contracting opportunities for CMC, and would prepare responses to requests for proposals, in exchange for 49% of CMS's profits from any contracts it received. The relator alleged that, with CMC's knowledge, the MJ defendants submitted false information to the government regarding CMC's ability to provide the services required by the contracts. The relator further alleged that the MJ defendants fraudulently represented that CMC was eligible for various local small business and service-disabled veteran-owned business programs. The government elected not to intervene in the relator's suit. The MJ defendants moved to dismiss the complaint on the grounds that the relator failed to plead the alleged fraud with particularity and failed to state a claim under the False Claims Act. The MJ defendants argued that the relator failed to allege that they presented any false claims, made any false statements, or used any false records to get payments from the government. They further argued that the relator failed to plead that they were involved in any unlawful agreements. The relator argued that the *qui tam* complaint sufficiently described the MJ defendants' scheme to fraudulently obtain specific government contracts by misrepresenting CMC's ability to perform under the contracts.

Holding: The U.S. District Court for the Eastern District of Louisiana granted the defendants' motion in part.

The court found that the relator sufficiently pled facts showing that both CMC and the MJ defendants knew that CMC did not qualify for recognition as a service-disable and veteran-owned business or as a local small business, and knowingly assisted CMC in providing false information to the government. Further, the court found that the MJ defendants assisted CMC in preparing bids on government contracts, despite knowing that it was not a local business. The court found that the MJ defendants engaged in this behavior in order to receive additional profits from CMC's government contracts. Accordingly, the court held that the relator sufficiently pled claims for fraud and conspiracy under the FCA.

The court, however, held that it was unable to ascertain any allegations regarding the relator's alleged "reverse false claim," in which the relator alleged that the MJ defendants attempted to improperly reduce the defendants' liability to the government, or that the MJ defendants made false statements to decrease an obligation to the government. With respect to this claim, the court held that the relator failed to plead sufficient facts and thus, failed to state a claim under the FCA. As a result, the court granted the MJ defendants' motion to dismiss the relator's reverse false claim allegation without prejudice.

U.S. ex rel. Moore v. Cmty. Health Servs., Inc., 2012 WL 1069474 (D. Conn. Mar. 29, 2012)

A relator brought a *qui tam* action against her former employer, a health care facility (CHS), its chief executive officer, and its chief financial officer, alleging that the defendants engaged in a scheme to submit fraudulent bills to Medicare and Medicaid. Specifically, the relator that the defendants created a billing system that automatically upcoded reimbursement claims to reflect the highest rate for every visit by billing the government using the names of physicians, even when patients were seen by non-physicians. The relator also alleged that the defendants allowed unlicensed providers to see patients and then billed the government using the names of credentialed doctors. In addition, she alleged that the defendants routinely falsified information when applying for government grants by lying about their credentials and by falsely certifying that patients receiving treatment at CHS would be billed on the sliding fee scale mandated by the government, when in fact, virtually all of the patients were billed the same maximum rate. Further, the relator alleged that she reported the fraud to the individual defendants and complained to her employer's management. She claimed that, in response to her complaints, she was insulted, threatened with termination, and subjected to severe verbal abuse. As a result of this abuse, the relator alleged that she suffered major stress, became ill, was placed on medical leave and was thereafter terminated. CHS and the individual defendants separately moved to dismiss the relator's complaint for failure to state a claim.

Holding: The U.S. District Court for the District of Connecticut granted the defendants' motions to dismiss the fraud claims, but allowed the relator to maintain her retaliation claim.

Failure to State A Fraud Claim

First, the court examined the relator's upcoding claims. The defendants argued that these claims were deficient because the code allegedly used to automatically inflate bills to the government was not limited to describing services provided by physicians only, but could be used for other types of visits as well. Furthermore, the defendants argued that their allegedly false claims could not have resulted in the wrongful disbursement of government funds, because CHS was paid the same rate for each covered Medicare/Medicaid visit, regardless of whether the patient was seen by a physician or another core provider. The relator did not dispute that all of CHS's patient visits were billed at the same rate regardless of whether the patient saw a physician, but she argued that the defendants' false reports played a role in determining the fixed rate per visit that the government would pay CHS in the future. The defendants countered that the fixed rate was based on their cost reports to the government, not on the frequency with which they used certain billing codes. The defendants argued that the relator's complaint did not allege any falsification of cost reports, and therefore failed to state a claim under the FCA. The court agreed and held that "without any allegation that CHS falsified figures in its cost reports, the . . . Complaint does not allege that CHS took any meaningful steps to manipulate the all-inclusive rate." The court granted the defendants' motion to dismiss the relator's fraud claims based on alleged upcoding.

Next, the court examined the relator's allegation that the defendants billed the government for services provided by uncredentialed providers. The relator argued that applicable Medicare regulations required CHS to provide services through credentialed providers. However, the relator's counsel agreed at oral argument that CHS was not subject to the regulation relied upon by the relator. Neither the relator nor the court could find any applicable regulation that required CHS to provide care using only credentialed physicians. Accordingly, the court held that the relator failed to state a claim under the FCA and granted the defendants' motion to dismiss this claim as well.

Third, the court considered the relator's allegation that the defendants falsely certified their compliance with federal sliding fee scale requirements. The defendants argued that this claim failed because the applicable regulations relied on by the relator only required full or near-full discounts for patients below the poverty line, required CHS to waive fees for any patients who were unable to pay them, and prohibited discounts for patients whose incomes exceed the poverty line by two times. The defendants argued that the relator failed to allege a violation of any of these requirements. The court found that though the relator alleged that CHS did not follow its established fee scale and billed patients at a maximum fixed rate, she did not allege that CHS failed to prepare the required fee schedule, or that CHS ever turned away patients based on their inability to pay the alleged fixed rate. Accordingly, the court held that the relator failed to allege that CHS violated any of the sliding fee scale requirements and granted the defendants' motion to dismiss that claim.

Failure to State a Retaliation Claim

Finally, the court examined the relator's retaliation claim. The defendants argued that the relator failed to allege that she was engaged in protected conduct, failed to allege that CHS knew that she was investigating fraud, and failed to allege that her protected activity and termination were connected. However, the court noted that the relator alleged that she was investigating fraud and complained to CHS management and to the individual defendants about what she perceived as fraudulent billing practices. She further alleged that her complaints were met with severe verbal abuse and that she was later terminated. The court held that the relator alleged facts that plausibly supported her claims that she had engaged in protected conduct by investigating practices that reasonably could have led to a viable FCA action and that the defendants were aware of her actions. The court also held that the alleged facts gave rise to an inference that of retaliation in response to protected activity. Accordingly, the court held that the relator sufficiently alleged her claim for retaliation. The defendants' motion to dismiss the retaliation claim was denied.

U.S. ex rel. Friddle v. Taylor, Bean & Whitaker Mortg. Corp., 2012 WL 1066510 (N.D. Ga. Mar. 27, 2012)

Two relators brought a *qui tam* action against their former employers: two mortgage lending firms and three individuals (Wright, Hick, and Moseley), alleging that the defendants violated the False Claims Act by engaging in a mortgage fraud scheme in which they falsified high-risk loans in order to induce the federal government to guarantee them and pay the claims when the loans defaulted. The relators also brought claims under the FCA for retaliatory discharge, alleging that after they complained internally about the defendants' alleged schemes, the defendants forced them out of their jobs and tried to thwart their efforts to find new employment; the relators agreed that their retaliation claims were not brought against defendant Wright. The government intervened as to the relators' fraud allegations. The individual defendants separately moved to dismiss the relators' allegations for failure to state a claim, with defendant Wright moving to dismiss the relators' fraud allegations, while defendants Hicks and Moseley only moved to dismiss the retaliation claims. The relators moved for summary judgment.

Holding: The U.S. District Court for the Northern District of Georgia denied defendant Wright's motion, granted defendant Hicks' motion in part and fully granted defendant Moseley's motion. The court also denied the relators' summary judgment motion.

Failure to State a Claim

The court first examined defendant Wright's motion to dismiss the relators' fraud claims. The court found that the relators described the alleged scheme to defraud the government in detail with respect to the other defendants, but only included a vague reference to defendant Wright—a single allegation of falsifying an employment verification for a loan. The court found that the relators failed to identify when or where this alleged falsification occurred or the manner in which the document was allegedly falsified. The court also found that the relators failed to allege that the loan application in question was presented to the government. Consequently, the court held that the relators' vague reference to defendant Wright was insufficient to state a claim alleging that Wright presented a false claim or worked with the other defendants to defraud the government. However, the court denied Wright's motion to dismiss, in light of the relators' request for an opportunity to amend their complaint, in the event that their claims were deemed deficient.

The court then examined the relators' retaliation claims against defendants Hicks and Moseley. Those defendants argued that the retaliation claims should be dismissed because the FCA's anti-retaliation provision, as it was written at the time the relators' alleged retaliation occurred, applied only to "employers" and neither defendant employed either of the relators. The court agreed and held that the relators offered no persuasive reason for why "employer" should not be interpreted as it had been by other courts in previous cases. The court rejected the relators' assertion that Hicks and Moseley should be considered employers under an "alter ego" or "corporate veil piercing" theory, noting that the relators failed to point to any binding or persuasive authority that such a common law doctrine could give rise to FCA liability even though the statute did not do so. As a result, the court granted Hicks' and Moseley's respective motions to dismiss the retaliation claims with prejudice.

The court denied the relators' summary judgment motion, as it decided to grant the relators an opportunity to amend their complaint and since discovery had not yet concluded.

U.S. ex rel. Conrad v. Healthpoint, Ltd., 2012 WL 1004775 (D. Mass. Mar. 26, 2012)

A relator brought a *qui tam* action against several pharmaceutical manufacturers and distributors, alleging that the defendants received Medicaid and Medicare payments for various drugs that had not been approved by the Food and Drug Administration or that were otherwise ineligible for reimbursement. The government intervened in the relator's suit and brought the present own action against one of the defendants—Healthpoint, Ltd.—alleging violations of the False Claims Act and unjust enrichment. The government's FCA claims alleged that one of Healthpoint's drugs contained an active ingredient that the FDA determined to be ineffective and ineligible for Medicaid/Medicare reimbursement.

The government also alleged that Healthpoint fraudulently coded the drug as eligible for reimbursement on quarterly reimbursement statements to the Centers for Medicare and Medicaid Services. Healthpoint moved to dismiss the plaintiffs' fraud allegations for failure to state a claim under the FCA.

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

Failure to State a Claim

The court first considered the defendant's argument that the government failed to allege that the defendant had the requisite scienter to be subject to FCA liability, based on the defendant's assertions that it was reasonable to model its drug after another, similar drug that had not been categorically precluded from Medicare/Medicaid reimbursement and that it was unaware that FDA notices withdrawing approvals for two other drugs for lack of effectiveness also applied to its drug. The court found that the FDA's categorizations of other drugs could have had an impact on whether the defendant acted reasonably, and therefore, the court decided that a determination regarding whether or not Healthpoint relied on FDA categorizations, and to what extent it may have done so, were issues of fact not properly resolved on a motion to dismiss.

Next, the court analyzed whether the FDA notices, in which the agency withdrew its approvals for drugs that contained some of the same active ingredients as Healthpoint's drug, automatically applied to Healthpoint's drug as well. Healthpoint argued that the notices did not automatically apply to its drug or render its drug ineligible for Medicare/Medicaid reimbursement, claiming that its drug was a combination product that contained many other active ingredients. Healthpoint also argued that before the FDA could revoke its authority to market its drug, it was entitled to an expert's opinion that the drug was subject to the prior FDA notices. The court held that neither the defendant's asserted reasonableness in interpreting FDA regulations, nor any expert opinion provided when the defendant's drug was launched was a matter properly decided on a motion to dismiss.

Ultimately, the court denied Healthpoint's motion to dismiss the relator's complaint for failure to state a claim.

Failure to Plead Fraud with Particularity

Finally, the court examined whether the fraud allegations had been pled with particularity. The court found that the government's allegations included the time period during which the defendant was alleged to have recklessly coded its drug as being eligible for Medicare/Medicaid reimbursement in its quarterly statements. The court also observed that the plaintiffs alleged that Healthpoint's statements were material to the claims for reimbursement for its device. Therefore, the court held that the plaintiffs adequately pled the "who, what, where, and when" of the alleged claim. Accordingly, it denied the defendant's motion to dismiss for failure to plead the alleged fraud scheme with particularity.

U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr., 2012 WL 921147 (M.D. Fla. Mar. 19, 2012)

A relator brought a *qui tam* action against a medical facility and its affiliates, alleging that the defendants violated the False Claims Act by admitting patients when it was not medically necessary to do so, by submitting inflated bills to Medicare, and by participating in improper financial arrangements and self-referrals in violation of the Stark Law. The government intervened in the relator's lawsuit and brought additional claims. The defendants moved to dismiss the fraud claims included in the government's complaint in intervention, arguing that the government failed to plead the fraud claims with particularity and failed to state a claim under the FCA.

Holding: The U.S. District Court for the Middle District of Florida denied the defendants' motion to dismiss the fraud claims.

Failure to State a Claim

First, the court examined the plaintiffs' allegation that the defendants' self-referrals and other violations of the Stark law led to fraudulent Medicaid claims. The crux of the plaintiffs' argument was that the Medicaid claims included certifications of compliance with the Stark law, and those certifications were false. The defendants argued that this allegation failed as a matter of law, since they were reimbursed by the various state governments, not the federal government, and neither the Stark Amendment nor the Medicaid statute prohibited violators from receiving reimbursement payments from the states. However, the court found that the Medicaid statute <u>does</u> prohibit payments from the federal government to the states to cover medical services resulting from improper referrals and held that submitting such claims—<u>or causing another to submit such claims</u>—can give rise to FCA liability. The court noted that several of the defendants' counterarguments regarding whether or not their financial relationships constituted violations of the Stark law, appeared to be affirmative defenses. The court declared that "it is the Defendants' obligation to plead that [these affirmative defenses] apply rather than the Government's obligation to plead that they do not apply." As a result, the court held that the plaintiffs' allegation that the defendants' improper self-referrals and other Stark law violations caused false claims to be submitted to the federal government stated a valid FCA claim.

The court also rejected the defendants' argument that the plaintiffs' fraud allegations failed to state a claim because the plaintiffs failed to identify any false records or false statements, failed to show that the defendant presented any false claims to the government, and failed to establish that the defendants acted "knowingly." The court held that the plaintiffs were not required to plead such facts in order to state a claim under the FCA and that they were allowed to allege the defendants' knowledge generally—which they did—since the FCA does not require proof of specific intent to defraud.

Failure to Plead Fraud with Particularity

Next, the court considered the defendants' argument that the government failed to plead the alleged fraud scheme with particularity. The defendants contended that the government failed to identify necessary details regarding the allegedly improper financial agreements, including when any such agreements were signed, the components of any alleged compensation paid to physicians that were improperly based on the volume or value of referrals, or any specific instances where services were not rendered by a qualified physician, as required. Again, the court concluded that the defendants' arguments "are relevant to affirmative defenses that the Defendants might raise rather than elements of the Government's causes of action." The court held that there was "no justification for requiring a heightened degree of specificity in regard to these allegations, and denied the defendants' motion to dismiss for lack of particularity. The court similarly disposed of the defendants' argument that the plaintiffs' fraud claims were time-barred.

U.S. ex rel. Matheny v. Medco Health Solutions, Inc., 2012 WL 555200 (11th Cir. Feb. 22, 2012)

Two relators brought a *qui tam* action against a health care group, its subsidiaries, and two corporate executives, alleging violations of the False Claims Act. In Count I of their complaint, the relators alleged that the defendants falsely certified their compliance with a Corporate Integrity Agreement (CIA) that required them to remit all overpayments they received from the government within thirty days of identification. The relators alleged that the defendants identified overpayments but never refunded the funds to the government, and instead, transferred the funds to unrelated and fictitious patient accounts or eliminated the overpayment from their records through a computer program called a "datafix." In Count II of their complaint, the relators alleged that the CIA also required the defendants to supply a random sample of patient accounts for compliance review, but that the defendants submitted edited non-random samples that removed evidence of overpayments, resulting in the defendants passing their annual review with a zero percent error rate and avoiding a full audit that likely would have revealed unresolved overpayments. The defendants moved to dismiss the relators' claims for failure to state a claim under the FCA. The U.S. District Court for the Southern District of Florida granted the defendants' motion and dismissed the relators' complaint with prejudice. The court held that the relators failed to state a claim under the FCA's "reverse false claims" provision, as they failed to allege with particularity that the defendants knowingly made false statements for the purpose of concealing or avoiding an obligation to pay money to the government. The relators appealed the district court's ruling to the U.S. Court of Appeals for the Eleventh Circuit.

Holding: The Eleventh Circuit reversed the district court's ruling and held that the relators' allegations were sufficient to survive the defendants' motion to dismiss.

Failure to State a Claim

The court began by analyzing the issues common to both Counts of the relators' complaint—namely, whether the defendants violated an obligation under the CIA to remit excess payments back to the government, and whether the defendants knowingly submitted false certifications of compliance with the CIA. The district court dismissed these reverse false claim allegations, finding that the relators failed to show that the defendants were under an obligation to repay money to the government. The Eleventh Circuit disagreed with this ruling, and found that the relators properly alleged that the CIA contained an express contractual obligation that required the defendants to remit overpayments within thirty days of identification. Additionally, the circuit court disagreed with the district court's holding that the relators failed to adequately allege that the defendants knowingly submitted false certifications of compliance with the CIA, noting that the relators specifically alleged that the defendants willfully and knowingly devised the schemes to create false records to conceal their failure to comply with the CIA. Accordingly, the court held that the relators adequately alleged their reverse false claim allegations.

With respect to the specific allegations contained in Count I of the *qui tam* complaint, the appellate court reversed the district court's ruling and determined that the relators properly alleged that the defendants knowingly submitted a false certification of compliance in order to avoid and/or conceal their obligation to remit overpayments to the government and that their alleged misrepresentations were material to the government. The circuit court rejected the defendants' argument that the relators' allegations were conclusory because they were not based on personal knowledge of actual false certifications of compliance or submissions of false claims. Rather, the circuit court found that the relators specifically pled the content of the alleged false statements, the date the statements were made, and the persons responsible for the alleged submission of false claims, as well as the specifics of identified overpayments, including the amounts and account numbers of specific overpayments, the dates on which the defendants identified them, the names and titles of defendants' employees who were aware of the identified overpayments, the federal sources of the overpayments—be it Medicare, Medicaid or another federal healthcare program—and the fictitious accounts created by the defendants to conceal the overpayments. Moreover, the court noted that one of the relators was personally involved in meetings in which the defendants discussed identified overpayments and the use of "datafix" to conceal them. The circuit court reasoned that such [p]ersonal involvement with the funds, direct conversations with Defendants regarding the Overpayments, and personal knowledge of the account procedures and CIA requirements further support Relators' allegations." The circuit court also concluded that the defendants' alleged false certifications of compliance were material to the government, noting that the government relied on the defendants to identify and report excess payments and that any misrepresentation by the defendants would have left the government unable to recover any such overpayments. Consequently, the Eleventh Circuit held that the relators sufficiently pled their reverse false claim allegations, and reversed the district court's dismissal of Count I.

The circuit court then analyzed the allegations raised in Count II of the relators' complaint, regarding the defendants' alleged attempts to manipulate "random" samples of patient accounts to be reviewed for compliance. The defendants argued that the relators failed to plead with particularity that the defendants actually submitted sample patient accounts. The circuit court, though, found that the relators alleged in detail who made the samples, who approved and directed the process for submitting them to the government, when the samples were submitted for annual review, and how the samples were altered. Furthermore, the court acknowledged that it is "more tolerant toward complaints that leave out some particularities of the submissions of a false claim if the complaint also alleges personal knowledge or participation in the fraudulent conduct." Since one of the relators alleged personal knowledge and involvement in the defendants' alleged manipulation of samples, the court concluded that the relators' allegations were pled sufficiently. The circuit court also noted that the alleged manipulation of samples was material to the government, since the government would routinely conduct a full audit of the defendants' accounts, if its examination of the defendants' sample patient accounts resulted in an error rate of more than 5%. Thus, the defendants' alleged manipulation of the samples delivered to the government pursuant to the CIA was material to the government, as the samples provided the basis for determining whether or not to conduct a full audit; notably, the relators alleged that the samples provided by the defendants resulted in a 0% error rate. Since the circuit court found that the relators alleged in detail the defendants' manipulation of samples submitted to the government auditors, it reversed the district court's dismissal of Count II of the relators' complaint.

U.S. ex rel. Boggs v. Bright Smile Family Dentistry, P.L.C., 2012 WL 530092 (W.D. Okla. Feb. 17, 2012)

The relators brought a *qui tam* action against two groups of dentists and their respective dental practices (the "Bright Smile defendants" and the "Abou-Nassar defendants"). The relators alleged that the defendants violated the federal False Claims Act and the Oklahoma Medicaid False Claims Act by falsely certifying their compliance with various laws and regulations when seeking reimbursement from federal and state healthcare programs. In particular, the relators alleged that the defendants violated applicable rules by improperly offering patients courtesy transportation to appointments and by distributing impermissible inducement coupons throughout their communities, whereby patients who redeemed the coupons would receive a $15 gas card. The Bright Smile defendants and Abou–Nassar defendants separately moved to dismiss the relators' complaint for failure to state a claim.

The U.S. District Court for the Western District of Oklahoma denied the defendants' motions and held that the relators alleged sufficient facts to state claim. The defendants had argued that their promotional offers were permissible, pursuant to advisory opinions issued by the Department of Health & Human Services Office of Inspector General (OIG). The relators, though, argued that these same OIG advisory opinions supported their fraud claims. The court found that the advisory opinions were not determinative of the plausibility of the relators' claims and held that their ultimate persuasiveness was limited, as they were based on different factual situations. Hence, the court held that the relators' allegations put the defendants on notice of the facts upon which their claims were based. The court noted that, at the motion to dismiss stage, an evaluation of the likely success of those claims was not appropriate. Thus, the court held that the relators claims were sufficient to overcome the defendants' motion to dismiss, and those motions were denied.

U.S. ex rel. Sasaki v. N.Y. Univ. Med. Ctr., 2012 WL 220219 (S.D.N.Y. Jan. 25, 2012)

A relator brought a *qui tam* action alleging that New York University's (NYU) medical center and school of medicine defrauded the United States Department of Veterans Affairs (VA), in violation of the False Claims Act. He also brought a claim under the FCA for retaliatory discharge. Specifically, the relator alleged that the defendants had an educational and professional partnership with the VA, which provided that NYU residents and other physicians could train at the VA Medical Center in Manhattan, and the Manhattan VA would reimburse NYU for sharing the costs of providing a joint educational program. The reimbursement procedure required NYU to submit invoices to the Manhattan VA for the number of approved resident or physician reimbursements, and the relator alleged that the defendants fraudulently billed the VA because residents often did not show up for their assignments or were being fraudulently signed in when they were not actually present. The relator—who had been a resident himself and who had participated in rotations at the Manhattan VA—further alleged that he reported the defendants' misconduct to the VA and the defendants retaliated against him and terminated him from the program. The defendants moved for summary judgment on both of the relator's claims.

Holding: The U.S. District Court for the Southern District of New York granted the defendants' motion.

Stating a Fraud Claim under the FCA

The court began by considering the defendants' argument that the relator's fraud claims failed because he did not offer any factual support for the contention that the defendants submitted false claims to the Manhattan VA. The relator argued that he properly stated a claim, because the defendants were required to provide five radiology residents at the Manhattan VA "around the clock" and to prorate its invoices for the time each resident was actually present. Further, the relator alleged that the residents were to be "physically present" during their shifts, but that doctors had testified that only one or two residents would appear for duty at the Manhattan VA, and for only two to three hours of coverage. He also claimed that it was common practice for residents who did appear to sign the names of residents who were absent. The relator alleged that, in spite of these improprieties, the defendants continued to bill VA for coverage by five residents, 24 hours per day.

The defendants argued that the relator failed to show that they were required to provide 24/7 coverage by residents, and stated that their invoices to the VA were "appropriate in all respects." They also argued that the VA reviewed and authorized all of the invoices, and thus, even if the invoices were somehow incorrect, the VA was fully informed of the particulars of the claims and thus those claims could not have been fraudulent. The court agreed with the defendants. First, the court determined that the relator had misinterpreted the defendants' agreement with the VA, finding that the agreement only outlined the process by which the VA would pay the defendants, but did not require that a resident be physically present at the Manhattan VA around the clock or otherwise the defendants would be forced to prorate invoices for that period. Second, the court concluded that the relator failed to show that the invoices submitted by the defendants were actually false, finding that the relator relied on unsubstantiated numbers when he alleged that the defendants had improperly billed the VA for 24-hour, 7-day-a-week coverage. The court instead found that the defendants' invoices made no representations regarding the number of hours worked, and therefore, that information could not have been falsified. In addition, the court noted that the relator did not offer any evidence that the defendants had manipulated the invoices in any other manner. Third, the court observed that the defendants' agreement with the VA provided that the VA's records would be "the sole determinant" of whether or not residents fulfilled their requisite duties. The court found that the relator failed to show that residents had failed to perform their duties, particularly in light of testimony from the VA's most knowledgeable witness, whose deposition testimony stated that all of the defendants' invoices were satisfactory. The court rejected the relator's assertion that another VA witness had testified that only two or three residents showed up each day. The court noted that this witness had not testified that those residents ever failed to fulfill their duties, but instead testified that there had never been a problem with the residents. Accordingly, the court held that the relator failed to raise a genuine issue of material fact regarding the defendants' alleged submission of false claims to the VA, and thus, summary judgment in the defendants' favor was warranted.

Next, the court considered the defendants' argument that the relator's fraud allegations did not meet the FCA's scienter element, because he did not offer any factual support for the claim that the defendants "knowingly" submitted any false claims to the VA. The relator argued that the defendants knew their invoices were false, alleging that the defendants encouraged residents to enter the names of absent residents on the sign-in sheets. The court noted that the relator relied on an affidavit from a resident who acknowledged that residents would often sign in for others not present and that he also produced copies of sign-in sheets that allegedly showed multiple residents' names entered in the same handwriting, as well as one of the defendants' meeting agendas, which referenced the sign-in policy. The court, though, held that these documents had no bearing on the defendants' submission of invoices because supervising attending physicians at the Manhattan VA were ultimately responsible for ensuring residents' attendance, not the sign-in sheets. The court further found that the meeting agendas did not establish the defendants' knowledge, because those notes simply advised residents to comply with VA attendance guidelines and to make use of the sign-in sheets. The court also rejected the relator's claim that the defendants knew that residents were not satisfying their obligations at the Manhattan VA because the defendants' call schedules required residents to attend meetings, trainings, and other work assignments that would preclude them from being at the VA to provide the necessary coverage. The court held that this claim was deficient because the relator failed to show that residents left the facility without the permission of supervisors—which was allowed under the defendants' agreement with the VA—or that the defendants ever billed the VA for time when the residents were absent from the facility. Accordingly, the court held the plaintiff failed to show the defendants had knowledge of the alleged fraud, which also warranted summary judgment in favor of the defendants.

Stating a Retaliation Claim under the FCA

Finally, the court analyzed the relator's retaliation claim, in which the relator alleged that shortly after he questioned the defendants' relationship with VA and their policies regarding coverage, he was placed on remediation; he was later placed on probation after failing to pass mock oral examinations; and he was eventually terminated from the VA program. The relator argued that the timing of these events, coupled with the fact that the defendants did not terminate other residents with comparable academic performance, showed that he was terminated in retaliation for his complaints. The court began by examining whether or not the relator had engaged in "protected conduct" under the False Claims Act, and found that, with respect to this issue, he had raised a triable issue. The court determined that the relator submitted complaints to the VA, which in turn triggered an inquiry by the Veterans Health Administration. These actions, the court held, revealed an objectively reasonable basis that the relator was investigating matters that could have led to a viable FCA claim. The court also found that the relator raised an issue of fact regarding the defendants' awareness of his protected conduct, since the relator was able to show that his superiors had knowledge of his complaints to the VA. However, the court ultimately held that the retaliation claim failed because the defendants submitted ample evidence that they had an independent, non-retaliatory reason for terminating the relator from the program. The defendants provided evidence that the relator performed below expectations and failed academic examinations, and notably, the relator was unable to provide evidence that other residents who were similarly situated were not also terminated from the program. Accordingly, the court determined that the defendants provided a legitimate non-retaliatory reason for the relator's termination, and granted the defendants' motion for summary judgment on the retaliation claim.

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

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

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

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

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

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

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

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

Public Disclosure Bar

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

Stating an FCA Claim

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

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

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

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

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

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

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

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

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

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

Materiality and Scienter Under the FCA

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

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

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

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

he was only charged with illegally dispensing controlled substances. The defendants pled guilty to the repsective charges against them and agreed to pay criminal restitution to Medicaid. Subsequently, the government moved for summary judgment in its civil action. The U.S. District Court for the Southern District of Illinois granted the government's motion in part.

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

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

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

A relator brought a *qui tam* action against her former employer—a university—as well as the university's Senior Vice President of Finance and Operations and its Director of Financial Aid, alleging that the defendants violated the False Claims Act and the Pennsylvania Whistleblower Law. With respect to the FCA allega-

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

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

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

Pleading FCA Fraud Claims

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

Pleading FCA Retaliation Claims

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

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

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

alleged actions to government agencies. In addition, the relator brought claims for wrongful termination and for negligent infliction of emotional distress. The defendant moved to dismiss the relator's fraud claims, arguing that the relator failed to allege that the defendant knowingly submitted a false claim to the government with the specific intent to deceive or that any allegedly false claim was material to the government. The defendant further moved to dismiss the retaliation claim, arguing that the relator failed to allege that the defendant knew that she was investigating its allegedly fraudulent conduct.

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

Pleading FCA Fraud Claims

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

Pleading FCA Retaliation Claims

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

U.S. ex rel. Porter v. HCA Health Servs. of Okla., Inc., 2011 WL 4590791 (N.D. Tex. Sept. 30, 2011)

A relator brought a *qui tam* action against a hospital (Medical City), two corporations that operated medical labs (HCA and TMSI), and an individual (Nikaein), alleging violations of the federal False Claims Act and the similar Texas Medicaid Fraud Prevention Act. Specifically, the relator alleged that the defendants performed tissue compatibility testing on transplant organs before transplantation, that such testing was regulated by federal law—namely, the Clinical Laboratory Improvement Act (CLIA), and that the corporate defendants violated CLIA by sharing and comparing their test results with each other before those results were reported to the public. The relator alleged that individual defendant Nikaein facilitated these improper communications. According to the relator, due to the defendants' violations of the CLIA, their Medicaid/Medicare claims for reimbursement to the federal and Texas governments were false, as those claims contained false certifications of the defendants' compliance with applicable laws, including the CLIA. Defendants HCA and Medical City moved to dismiss the relator's complaint for failure to plead fraud with particularity and failure to state a claim. HCA also moved to transfer venue, or in the alternative, to dismiss the complaint for lack of personal jurisdiction. The relator also moved for leave to amend his complaint. The U.S. District Court for the Northern District of Texas denied HCA's motions to transfer venue or to dismiss the complaint for lack of personal jurisdiction. However, the court granted in part the defendants' motions to dismiss for failure to state a claim and to plead fraud with particularity. The court also denied relator's leave to amend as moot.

Personal Jurisdiction/Venue

First, the court analyzed the personal jurisdiction issue raised by defendant HCA. The court determined that the False Claims Act provides for nationwide service of process on defendants, which gives the court personal jurisdiction over any defendant that has minimum contacts with the United States. As the court observed that HCA was an Oklahoma corporation, and thus, a U.S. citizen, it concluded that HCA had the requisite minimum contacts required for the court to exercise personal jurisdiction over HCA. Thus, HCA's motion to dismiss the relator's complaint for lack of subject matter jurisdiction was denied.

With respect to HCA's motion to transfer venue to the U.S. District Court for the Western District of Oklahoma, the court held that even though the relator *could* have filed his case in Oklahoma, a transfer of venue was not warranted because the Oklahoma district court was not a more convenient venue. The court noted that any pertinent documents located in Oklahoma could be easily transferred to Texas through "modern technology," and that HCA had failed to identify any non-party witnesses who were outside the court's jurisdiction—the court noted that HCA's own employees who were outside the reach of the court could be compelled to testify due to their employment status, and therefore the location of any such witnesses would not be considered for venue purposes. Moreover, the court held that since HCA was the only defendant located outside the Northern District of Texas, a change of venue would shift any burdens from HCA and onto the relator and the other three defendants. Finally, the court determined that neither the Texas district court nor the Oklahoma district court was more convenient in terms of court congestion and that Texas (which the relator alleged was defrauded by the defendants) had a stronger local interest in the case than did Oklahoma. Thus, the court denied HCA's motion to transfer venue.

Failure to State a Claim

The court then analyzed whether the relator's complaint should be dismissed for failure to state a claim. The court first noted that the Texas Medicaid Fraud Prevention Act had been amended in May of 2011, but concluded that the amended statute was not retroactive, and thus, the prior version of the law applied. Under the prior Texas law, when the State declined to intervene in a *qui tam* action, the action must be dismissed. Since the State of Texas declined to intervene in the relator's case, the court held that the *qui tam* allegations under the Texas law must be dismissed.

The court then considered the relator's allegations under the federal False Claims Act, noting the parties' disagreement over whether or not Medicaid/Medicare reimbursements were conditioned on compliance with the CLIA—if so, then such compliance was material to the government's payment decision and a false certification of compliance would lead to FCA liability. The court held that the issue of whether the government conditioned Medicaid/Medicare payments on CLIA compliance was complex and required an analysis of information outside the four corners of the relator's complaint, which in turn would convert the defendants' motion to dismiss into a motion for summary judgment. Rather than make a summary judgment ruling, the court chose only to decide the defendants' motion to dismiss and read all factual allegations in the light most favorable to the relator. As a result, the court held that there was plausible ground on which the relator's claims could rest and thus denied the defendants' motion to dismiss for failure to state a claim.

The court then considered the relator's argument that even if CLIA compliance was not a condition for payment under Medicaid/Medicare, his FCA claims could still be maintained under a fraudulent inducement theory. Specifically, the relator alleged that the defendants falsely represented to the government that their labs were in compliance with CLIA and that the government relied on these representations when it decided to award benefits that the defendants were not entitled to receive. The court, though, rejected the relator's argument, since the relator failed to allege that the defendants made any false statements that induced the government to allow them to participate in the Medicaid and Medicare programs—instead, the relator alleged that <u>after</u> the defendants were allowed to participate in the program, they made false claims for reimbursement that were based on false certifications. As a result, the relator's claims based on a fraudulent inducement theory were dismissed.

Finally, the court analyzed the relator's reverse false claim theory of FCA liability, in which the relator alleged that the defendants failed to refund the amounts they allegedly improperly received in Medicare/Medicaid reimbursements from the federal government. According to the court, these allegations were not true "reverse false claims" allegations, but rather merely re-casted the relator's original claim that the defendants presented false statements to the government. The court found that the FCA's reverse false claim provision did not apply, since the relator did not allege that the defendants had an existing obligation to reimburse money they received from the federal government. Consequently, any reverse false claims allegations were dismissed for failure to state a claim.

U.S. v. Edelstein, 2011 WL 4565860 (E.D. Ky. Sept. 29, 2011)

The United States brought an action in the U.S. District Court for the Eastern District of Kentucky alleging, among other things, that a pharmacy (Holland), the pharmacy's owner/operator and the owner/operator's wife (Mr. and Mrs. Edelstein), and one of the pharmacy's employees (Bond) violated the False Claims Act by improperly selling drug samples and then submitting claims for those samples to healthcare providers who in turned submitted those claims to Medicaid, in violation of applicable Medicaid regulations. Both the United States and defendant Bond moved for summary judgment on the government's FCA claims.

Application of FERA Amendments to the FCA

The court noted that the FCA liability provisions under which the government filed suit were amended by the Fraud Enforcement and Recovery Act of 2009. The court further recognized that the FERA amendments were enacted, at least in part, in response to the U.S. Supreme Court's decision in *Allison Engine Co. v. U.S. ex rel. Sanders*, in which the Court interpreted various liability provisions of the False Claims Act in contravention of congressional intent. However, the court held that those amendments did not apply to this case, since FERA's retroactivity provision specified that the FCA amendments only applied to "claims" that were pending on or after June 7, 2008 (two days before *Allison Engine* was decided). The court, agreeing with the analysis of other district courts, concluded that the FERA retroactivity provision's use of the word "claims" as opposed to "cases" could only mean that the FCA amendments would apply to any case in which a defendant's claims to the government for payment or approval were still pending. Since no such claims were still pending in the government's case against the defendants, the court held that the prior version of the FCA's liability provisions applied.

Presenting False Claims

Defendant Bond argued that the government could not maintain its allegation that the defendants violated the FCA's presentment provision—which prohibits knowingly presenting or causing to be presented "to an officer or employee of the United States Government" a false claim for payment or approval. Bond asserted that the government failed to demonstrate a necessary element of presentment, as the government only alleged that the defendants presented false claims to a private health care provider, not any government entity. The district court, applying the Supreme Court's holding in *Allison Engine Co.*, determined that the FCA's presentment provision imposes liability on those who present false claims to the government, as well as those who cause others to present false claims to the government. Thus, as an initial matter, the court held that the defendants were not automatically absolved of liability merely because they did not present any false claims to the government, as they could still be liable for causing health care providers to do so. In any event, the court held that there could be no FCA liability for presenting false claims, unless the government could show that the defendants submitted false claims that were ultimately presented "to an officer or employee of the United States Government."

The court determined that the government's presentment allegations were insufficient to establish the defendants' FCA liability because the government did not allege that the defendants presented any claims to the government, nor did they demonstrate that the defendants' allegedly false claims were ultimately presented to the government by someone else. The court noted that had the government alleged that the defendants submitted false claims to a state agency that administers Medicaid, then that would constitute evidence of presentment to the federal government, since Medicaid is a joint federal-state program and states routinely submit Medicaid claims they receive to the federal government during the reconciliation process. However, the court found, the government merely alleged that the defendants submitted false claims to a private managed care program, without further alleging that the claims were ultimately presented to the federal government. Thus, the court held, the government's claims were deficient.

The court rejected the government's argument that the individual defendants were estopped from contesting liability because they pled guilty in a prior criminal proceeding to violating the Prescription Drug Marketing Act. The court, though, noted that the defendants' guilty plea did not include an admission of fraud or making false statements, and thus, they were not estopped from denying those elements of FCA liability. As a result, the court denied both the government's and defendant Bond's motions for summary judgment with respect to the government's allegations that the defendants were liable for violating the FCA's presentment provision.

Making False Statements/Records

The court next considered the government's claim that the defendants violated the FCA by making false statements or records to get false claims paid or approved by the government. The court first observed that, although the government maintained this claim against the other defendant, it abandoned this claim with respect to defendant Bond—although the government alleged that Bond created records that were material to false claims, the court determined that the allegation was made only in support of the government's conspiracy claim against the defendants. Thus, this claim was dismissed against Bond. The court, again relying on the *Allison Engine* decision, held that the defendants could only be liable for making false statements or records if the government could show that they intended for any such statements/records to be material to the government's decision to pay or approve false Medicaid claims. The court held that it was not clear from the record whether the Edelstein defendants intended that the federal government would pay false claims based on their allegedly false statements/records, and therefore denied the government's summary judgment motion with respect to that claim.

Conspiracy

Finally, the court analyzed the government's conspiracy claim. The court held that the government's claim was dependent on a showing that the defendants knew and intended that the federal government would pay the allegedly false claims at issue. Since that issue was not yet resolved, the court denied the government's motion for summary judgment on the conspiracy claim.

U.S. ex rel. Onnen v. Sioux Falls Indep. Sch. Dist. No. 49-5, 2011 WL 4433163 (D.S.D. Sept. 21, 2011)

A relator brought a *qui tam* action against a school district, its superintendent, and several of its board members. The relator had previously been employed by a post-secondary technical school that was governed by (but not funded by) the school district. The school received funding from a combination of state funds, federal grants, student tuition and fees, and payments for sales and services provided to the public and to students. The relator alleged that the technical school violated that False Claims Act because, in order to receive federal funds, the school signed a "program participation agreement" in which it certified to the federal government that it was in compliance with specified federal statutes and regulations, while, in fact, the school was violating those very statutes and regulations by falsifying graduation surveys, by falsely claiming in its catalogue that one of its programs had received a specific accreditation, by violating the Family Education Rights and Privacy Act, by making false claims about its faculty's qualifications, and by awarding degrees to students who had not earned them. Notably, the school was not named as a defendant in the *qui tam* action. Instead, the relator argued that under the FCA, the school district and its governing body—which oversaw the school—were liable for the school's acts. The defendants filed a motion for judgment on the pleadings, or in the alternative, for summary judgment. The U.S. District Court for the District of South Dakota denied the defendants' motion for judgment on the pleadings, but granted their motion for summary judgment.

Failure to State a Claim

As an initial matter, the court did not consider whether or not the school—which received state funding—would be treated as an arm of the state for FCA purposes, and thus not amenable to suit by a relator. Instead, the court found that the relator's allegations were so insufficient that granted the defendants' summary judgment motion was warranted regardless. The court examined the relator's fraud claims and held that they amounted to nothing more than the relator's own speculations and were based on an affidavit he submitted that, according to the court, only included conclusory allegations. Simply stated, the court held that the relator did not meet his burden "to provide factual support for the who, what, where, when, and how of the fraudulent conduct he allege[d]." Consequently, the court granted the defednants' motion for summary judgment.

Additionally, the court, relying on Eighth Circuit precedent, held that both the U.S. Department of Education as well as the regulatory scheme at issue in the relator's complaint already provide for detailed remedies for noncompliance, including revocation of eligibility status, terminating, suspending or otherwise limiting continued participation, and recovery of benefits conferred. The district court concluded that allowing relators to use the FCA to remedy noncompliance in these areas would undermine the government's own regulatory procedures, and therefore, summary judgment in the defendants' favor was appropriate.

U.S. v. Toyobo Co., Ltd., 2011 WL 3874858 (D.D.C. Sept. 2, 2011)

The government brought an action against two related companies (collectively, "Toyobo") that manufactured and sold a synthetic fiber called Zylon. The government alleged that the defendants contracted with trading companies to distribute the Zylon fiber to weaving companies, which provided woven Zylon fabric to bullet-proof vest manufacturers. The government further alleged that the vests were sold to various local law enforcement authorities under federal government programs that reimbursed these authorities for a percentage of the costs for purchasing vests with a five-year warranty. The government alleged that the defendants learned that Zylon fiber was defective and that, as a result, vests containing the fiber degraded more quickly than they had originally represented and would not satisfy the five-year warranty. The government claimed that the defendants failed to properly disclose this information and instead chose to conspire with vest manufacturers to continue selling vests containing Zylon. The defendants moved to dismiss the government's complaint for failure to state a claim and failure to plead with particularity. The defendants argued that the government failed to plead factual allegations indicating that the defendants presented false claims for payment, made false statements, or conspired to get the government to pay these claims. The U.S. District Court for the District of Columbia granted in defendants' motion in part. The court granted the defendants' motion with respect to a subset of the government's conspiracy claims and denied it in all other respects.

Failure to State a Claim

The court first analyzed the government's allegation that the defendants caused vest companies to present false claims, based on the allegedly false 5-year warranty. However, the court noted that since the government did not allege that any of the vest manufacturers made any express false statements regarding the services they rendered or the goods they provided to the government, it could not maintain a claim that Toyobo caused false claims to be presented to the government. The court also held that the government did not properly allege a claim that Toyobo caused vest manufacturers to make implied false statements to the government, since the government could not show that any of the relevant players—including the government itself—understood that the vest manufacturer's contracts with the government included, as a prerequisite for payment, a requirement that the vests be fit for use for five-years.

The court's analysis did not end there, however. The court held that even in the absence of these allegations, the defendants' alleged misrepresentations about Zylon's rate of deterioration induced the vest manufacturers to sell Zylon vests to the government. The court determined that these alleged misrepresentations tainted all of the vest manufacturers' claims to the government for payment, resulting in payments being made for allegedly defective vests containing Zylon. Further, the court found that the government satisfied Rule 9(b)'s heightened pleading requirements by alleging in detail the time, place, and content of the allegedly false representations, and by identifying the individuals allegedly involved in the fraud. The court rejected the defendants' argument that the government misconstrued the warranty as guaranteeing service for five years. The defendants claimed that the warranty only guaranteed that the vest manufacturers would replace or repair any defective vests within five years of its retail purchase, but the held that the defendants' arguments had no bearing on the government's fraudulent inducement theory of liability, which hinged on the defendants' alleged attempts to prevent vest manufacturers from learning about defects in Zylon. The court further held that the government satisfied the causation requirement through its allegations that the defendants marketed Zylon to vest manufacturers and used the prospect of refunds, rebates, and reimbursements, to induce those manufacturers to continue producing Zylon products and selling them to the government, even in the face of questions about Zylon's suitability for use in bullet-proof vests. Thus, the defendant's motion to dismiss those claims was denied.

Next, the court analyzed the government claim that the defendants caused false statements to be made to the government. The defendants argued that their statements were immaterial to the government's decision to purchase vests, since the government continued to purchase vests after it was presented with information regarding Zylong degradation. However, the court found that the government sufficiently alleged that the natural consequences of the defendants' alleged acts of misrepresenting and concealing unfavorable data about Zylon's degradation caused the vest manufacturers to submit false claims for payment. Likewise, the defendants' motion to dismiss those claims was denied.

Finally, the court analyzed the government's conspiracy claims, in which the government alleged that Toyobo conspired with the weavers and vest manufacturers to sell defective Zylon-containing vests to the government. The defendants argued that the government's allegations failed to indicate any agreement between the defendants and any other party to conspire to defraud the government. The government responded that it had adequately pled that the defendants entered into agreements with numerous companies that participated in the chain of production of vests containing Zylon. The court agreed with the defendants and held that the government's complaint was devoid of any factual allegations that could support an inference that the defendants and the vest manufacturers entered into any agreements for the purpose of getting the government to pay for claims. The could held that the government's allegations that vest manufacturers were aware that Zylon was defective yet continued to sell Zylon vests were insufficient to aver that the defendants and the vest manufacturers entered into an agreement to commit fraud. In fact, the court noted, the government's conspiracy allegations were inconsistent with its claims that Toyobo induced the vest manufacturers to continue using Zylon by misrepresenting to them the extent of the degradation problem. Consequently, the government's claims that Toyobo conspired with vest manufacturers to violate the FCA were dismissed.

The court, though, found that the government's allegations were sufficient to state a claim under the FCA that Toyobo conspired with its Zylon weavers to commit fraud against the government. The court found that the government sufficiently pled that Toyobo entered into agreements with its weavers to provide the weavers with certain refunds and replacements, as an inducement to convince the weavers to continue weaving Zylon despite questions about its ballistic suitability. The court held that since the vest manufacturers could not produce vests without woven Zylon, these allegations were sufficient to satisfy the requirement that the agreements had the purpose of getting claims paid by the government. The court also held that the allegations fulfilled the particularity requirements for a conspiracy claim. Thus, the court denied the defendants' motion to dismiss this subset of the government's conspiracy claims.

U.S. ex rel. Feldman v. City of N.Y., 2011 WL 3862844 (S.D.N.Y. Sept. 1, 2011)

A relator brought a *qui tam* action against the City of New York, alleging that that the city caused the State of New York to submit false Medicaid claims to the federal government and that the city caused the state to make false statements to the government that were material to those claims. The United States intervened in the relator's suit and filed its own complaint. Specifically, the plaintiffs alleged that the city routinely authorized and reauthorized certain personal care service (PCS) benefits for Medicare patients, including split-shift 24-hour care, without first obtaining a Local Medical Director's (LMDs) determination as to the need for such care; the relator has twice served as an LMD, over a total period of about nine years. Split-shift 24-hour care generally requires two or more aides who work

together to provide uninterrupted 24-hour care. Split-shift 24-hour care is about twice as expensive as "sleep-in" 24-hour care, in which continuous, daytime and nighttime care is provided by a single aide. In addition, the plaintiffs alleged that the City improperly overruled LMD determinations concerning the appropriate level of care for individuals requesting 24-hour care, and reauthorized 24-hour care without first obtaining and reviewing patient assessments prepared by nurses and social workers, as required under state law. The City moved to dismiss both complaints for failure to state a claim. The defendant also moved to dismiss the relator's complaint for lack of standing. The U.S. District Court for Southern District of New York granted the City's motion to dismiss the relator's complaint, but denied the motion to dismiss the government's FCA claims.

Relators' Standing

The court began by examining the relator's standing to maintain his *qui tam* complaint following the government's decision to intervene in all of the relator's claims. The defendant argued that the relator lacked standing to maintain a separate complaint, since the relator's claims were identical to the government's. The court examined both complaints and agreed with the defendant, finding that all the material aspects of the relator's complaint were covered by the government's complaint. As a result, the court dismissed the relator's complaint for lack of standing, while noting that the dismissal did not affect the relator's ability to receive a share of any recovery by the government.

Failure to State a Claim—Submission of False Claims

The court then examined the government's complaint. The defendant argued that the government failed to establish that the City caused the submission of false claims to the government because the State of New York administers its Medicaid program through its State Department of Health ("DOH"), which had ultimate control over the form and content of the city's Medicaid reports to the government. But the government argued that the City submitted weekly authorization lists that included individuals for whom the City had unlawfully and fraudulently authorized and reauthorized PCS benefits, such as split-shift 24-hour care. The government claimed that the City caused the state to submit false claims because DOH exclusively relied on the City's lists when it submitted Medicaid reports to the federal government to obtain federal funds. But the City countered that its decisions with respect to reductions or terminations of PCS benefits are subject to review and reversal by a state administrative law judge, which breaks the causal link between the City's actions and DOH's submissions to Medicaid. The court, though, determined that state administrative law judges do not have jurisdiction over the City's initial *authorization* of PCS benefits, and also noted that the government was not seeking liability against the City in instances in which a state administrative law judge ultimately decided whether an individual should receive such benefits. Thus, the court rejected the City's argument. The City also argued that the government's fraud allegations related solely to alleged noncompliance with state, rather than federal, Medicaid regulations, and accordingly the city's claims and statements to the federal government were not "false" under the FCA. The court found that while the immediate thrust of the government's allegations related to the defendant's alleged failure to comply with regulatory requirements imposed by state law, those requirements were expressly incorporated into the applicable federal Medicaid regulations. As a result, the court held that the government adequately pled that the defendant falsely represented its compliance with federal law.

Next, the defendant argued that the New York DOH did not explicitly precondition payment on compliance with DOH regulations, and therefore, the allegedly false certifications were not material to the government. However, the court found that DOH regulations did state that the authorization of personal care service benefits "must be based on" certain considerations, and that federal Medicaid regulations state that the federal government will only reimburse costs for services that are "authorized or not prohibited under" state law. Taking these two regulatory schemes together, the court held that Medicaid reimbursements to the State of New York are conditioned on the State's compliance with its own DOH regulations. The defendant further argued that the government's claims failed because the government could point to no particular statute to which the State's Medicaid reports certified compliance. The court agreed that the Medicaid reports only included a general certification of compliance with "applicable implementing federal, state, and local statutes, regulations [and] policies." However, the court found that such a broad, non-specific certification might still, in context, include a certification of compliance with certain core, specific legal requirements, which could lead to FCA liability. The court held that, in this instance, the City did cause the DOH to submit claims that certified their compliance with applicable federal and state law. In announcing its holding on this issue, the court stated that "[b]ecause State regulations require that certain procedures be followed before PCS benefits may be authorized, and federal regulations require that States must follow their own regulatory procedures in order to be eligible for Medicaid reimbursement payments, the Court concludes that the very act of submitting a claim for reimbursement for PCS benefits . . . constitutes, at a bare minimum, an implied certification that those benefits were authorized in accordance with governing State and federal law." Thus, the court held, the government adequately pled that the DOH Medicaid reports were false.

Lastly, the court turned to the defendant's final argument—that the government failed to allege that the defendant *knowingly* caused the submission of false claims. The government had alleged that, as a matter of course, the City systematically authorized personal care service benefits in violation of DOH regulations. The government contended that its complaint adequately pled the FCA's "knowing" element, by alleging that city showed "deliberate indifference" or reckless disregard" of the fact that its routine DOH violations would lead to the submission of false Medicaid claims. The City countered that it did not exhibit reckless disregard or deliberate indifference, since it is required to pay a portion of the state's share of Medicaid costs, and that by causing the submission of false Medicaid claims, the City would not only be defrauding the federal government, but it would be defrauding itself as well. The court, though, observed that, pursuant to New York State law, the annual amount the City would have to pay to cover Medicaid costs was capped. In addition, the court determined that the city could incur substantial administrative costs by conducting proper due diligence before authorizing PCS benefits, and that by disregarding such due diligence requirements, the city could have saved itself considerable funds. The court determined that these two factors undermined any fiscal incentive the City may have had to avoid improper Medicaid billing. The court found that since the City's contribution to cover Medicaid expenses was far smaller than that of the State of New York and the federal government, "a finder of fact could reasonably infer from the Government's allegations that the City 'knowingly' caused the submission of false claims." Thus, the court held that the government adequately stated its claim that the city knowingly caused the submission of false claims.

The court denied the City's motion to dismiss the government's claims in which the city was alleged to have caused the submission of false Medicaid claims.

Failure to State a Claim—Making False Statements/Records

Next, the court considered the government's second theory of FCA liability—that the defendant caused false statements to be made that were material to false claims. The court noted that this allegation requires the government to establish a "double falsity," namely, a false statement or record, as well as a false claim. The court concluded that the government adequately pled both elements. As noted above, the court held that the government's complaint properly pled that false claims were submitted for Medicaid reimbursement. Thus, the court only needed to determine whether or not the government properly pled the existence of false statements or records, material to those false claims. The government alleged that the City's weekly authorization lists that were sent to DOH constituted false records under the FCA, since those lists impliedly represented that the city had complied with applicable DOH regulations when authorizing PCS benefits for the individuals included on those lists. The city Countered that the lists could not be false records because they did not contain any affirmative representations. However, the court held that, by alleging that DOH exclusively relied on the City's lists when submitting Medicaid reimbursement claims for PCS benefits, the government's allegation of the City's implicit false representations to DOH was sufficient to establish both the existence of false records and that such allegedly false records were material to the government decision to provide Medicaid reimbursements for PCS benefits. Accordingly, the court denied the City's motion to dismiss the government's claims alleging that the city made false statements and records that were material to false Medicaid claims. The court found that the defendant's weekly authorization lists were clearly material because they formed the primary basis by which the state compiled the defendant's benefit information for inclusion in the reports. As a result, the court held that the government sufficiently stated a claim.

U.S. v. First Choice Armor & Equip., Inc., 2011 WL 3799544 (D.D.C. Aug. 29, 2011)

The United States brought FCA claims against an armor equipment manufacturer, its founder, and its President, alleging that the defendants violated the False Claims Act and other laws, by selling body armor containing Zylon fiber to government enforcement agencies under the Bullet Proof Vest Grant Partnership Act (BPVGPA) program. Under the BRVGPA program, the federal government reimbursed local law enforcement authorities for a percentage of the cost of purchasing bullet proof vests and other body armor. The United States alleged that in the year 2000, the defendants began selling bullet proof vests containing Zylon fiber—the fiber had been woven into layers of fabric, which were inserted into the vests. According to the government, in 2001, the defendants learned that the Zylon fiber they were using degraded as it aged and when it was exposed to various light, heat, and humidity conditions. Further, the government alleged that the defendants received expert analysis recommending that they add more layers of Zylon fiber to compensate for the degradation, as other manufacturers of Zylon-containing vests had done. In spite of this, the defendants allegedly ignored the warnings, failed to add more layers, and continued to market the vests as the thinnest and lightest vests available on the market that included a five-year warranty. In fact, the government alleged that as late as 2003, the defendants were marketing their vests as "different" and "thicker" than the competition's. Finally, beginning in 2004 and continuing into 2005, the defendants began discontinuing the sale of these vests. The government alleged that the individual defendants then stripped $5 million from the vest manufacturing company, forcing it into insolvency, and used that money on expensive personal purchases, including a Ferrari, a Maserati and a private jet.

The defendants moved to dismiss the government's complaint for failure to state a claim and for failure to plead fraud with particularity. The U.S. District Court for the District of Columbia denied the defendants' motion with respect to the government's FCA claims.

Failure to State a Claim/Plead Fraud with Particularity

The defendants argued that the government did not state a claim under the False Claims Act because it did not sufficiently allege the falsity of any claim. The government responded that it believed that it was purchasing vests that met the industry-standard five-year warranty against defects, when in fact, it was not. Additionally, the government alleged that falsity was established because the defendants failed to disclose to it information that revealed the true integrity of the Zylon fabric, even though the defendants knew that its vests were defective.

In addition, the United States alleged that the materiality element of FCA liability was proven, since it would not have paid for vests or reimbursed law enforcement agencies for claims for vests they purchased, had it known that the vests degraded much more rapidly than was disclosed. Further, the government alleged that both it and the defendants understood that satisfaction of the five-year industry standard warranty was a condition of payment to the defendants. The court held the materiality requirement was satisfied as the government alleged that it would not have paid for the vests had it known about their degradation. Additionally, it held that since the defendants did not change the quality standards or the warranty period even after they were presented with the degradation data, it could be construed that the defendants understood the five year industry standard warranty as requirements for condition of payments. The court further held that the government pled its fraud claims with particularity as it set out in detail the time, place, individuals involved, and content of the defendants' allegedly false representations.

The defendants then argued that the government misconstrued the five-year warranty, asserting that the warranty only constituted a promise to replace or repair defective vests within five years of the date of purchase. The court, though, observed that such factual disputes were not to be resolved at the motion to dismiss stage, during which the plaintiff's factual allegations are to be accepted as true.

As a result, the court denied the defendants' motion to dismiss the government's FCA claims.

U.S. ex rel. Carpenter v. S & K Techs., Inc., 2011 WL 3664415 (M.D. Ga. Aug. 19, 2011)

A relator brought a *qui tam* action against her former employer, a federally-chartered corporation organized by two Native American tribes, alleging that the defendant violated the False Claims Act by submitting false claims to the United States Air Force and by later terminating her from her job in retaliation for her whistleblowing. The relator alleged that the defendant contracted with the government to update and maintain various inspection and repair manuals and records for U.S. military aircraft that were sold to foreign countries. The relator alleged that the contract required the defendant to maintain a quality control program that ensured that no less than 95 percent of these documents were error free, which required periodic updates. The relator alleged that, pursuant to her employment position with the defendant, she was responsible for reviewing the documents for errors in grammar and formatting and that her supervisor was responsible for ensuring that the content of the documents was properly and accurately updated. She alleged that one of her subordinates discovered four instances in which significant content updates, called "change bars," were needed and that this information was eventually brought to the attention of the relator's supervisor. She further alleged that the supervisor agreed with two of the four suggested changes, but disagreed with the other two recommended changes, and then directed both the relator and the other employee to refrain from checking for substantive errors, and to only focus on grammatical and formatting issues. The relator alleged that she investigated the matter and voiced her concern that the supervisor

regarded change bars as unimportant, which could lead to flight safety issues. She alleged that she was directed to forward all of her emails and documents regarding the issue to another of her superiors, which she did. She stated that less than a week later, she was fired for insubordination.

Both the relator and defendant moved for summary judgment on the relator's claims. The U.S. District Court for the Middle District of Georgia granted the defendant's motion, holding that the relator did not present sufficient evidence to support her claim that the defendant defrauded the government. In addition, the court held that the relator produced no evidence showing that she was engaged in protected activity under the FCA, and thus, she could not maintain her retaliation claim either.

Fraud Claim

The relator alleged that the defendant attempted to conceal its failures to update the documents at issue by instructing her not to check for change bar errors because they were not important. While the defendant acknowledged directing the relator not to check for change bar issues, it argued that this was not because such issues were unimportant, but rather because the relator did not fully understand the technical aspects and military standards governing the use of change bars. The court agreed with the defendant's characterization, relying in part on one of the relator's own emails that documented a conversation in which her supervisor stated that he wanted her to focus on grammar changes—notably the email did not contain any statement by the supervisor that change bar issues were unimportant. Additionally, the court found no evidence that the defendant's instruction to the relator to disregard change bar issues resulted in any errors or that it would result in a breach of contract, much less a false claim. As a result, the court held that the defendant was entitled to summary judgment on the relator's change bar claims.

The court also took note of another false claim alleged by the relator, namely that the defendant failed to satisfy a contractual obligation to provide the government with a hard copy of any revision that it sent out to its customers—a process that was referred to as "reissue." However, the court found that the relator failed to provide any evidence suggesting that such a contractual obligation existed. Furthermore, the court observed that the relator failed to show that she had sufficient personal knowledge of the defendant's contractual obligations to qualify her to testify on such matters. The court rejected the relator's argument that the defendant's reissue process was fraudulent because it allowed the defendant to deceive the government about its error rate, thus affecting the government's decision to pay and renew the contract. Instead, the court found that the relator failed to provide any evidence that the government used the reissued hard copies to evaluate whether or not to pay or renew the contract. The court also rejected the relator's argument that the reissue process was fraudulent because it was not authorized in either the military standards or in the contract. Instead, the court found that these were merely conclusory allegations, made without any evidence that the contract or military standards forbade reissues, or that reissues violated the contract or military standards. Therefore, the court held the defendant was entitled to summary judgment on the relator's reissue claim.

The court also analyzed the third fraud claim raised by the relator—that the defendant defrauded the government by failing to clear reissues with the Foreign Disclosure Office (FDO), as the applicable procedures allegedly required. The court found that the relator failed to produce any evidence of reissues that should have gone through the FDO but did not. The defendant argued that the reissues in question did not meet the requirements for FDO disclosure, and the court determined that the defendant appropriately decided whether to send information through the FDO on a case-by-case basis, in accordance with the applicable standards. The court then granted the defendant's summary judgment motion on the relator's FDO claim.

Retaliation

Finally, the court analyzed the relator's retaliation claim. The relator alleged that she was terminated in retaliation for raising concerns about the defendant's performance. The court, however, found that the relator had not engaged in protected conduct under the FCA, because the defendant's conduct, as alleged by the relator, could not have lead to a viable FCA. The court determined that the relator failed to show that the supervisor who was responsible for checking the accuracy and use of change bars ever abandoned that duty. Additionally, the court found that the relator's failed to follow the chain of command, as instructed, when she took her complaints to other superiors, which led to her termination for insubordination. As a result, the court granted the defendant's motion for summary judgment on the retaliation claim.

U.S. v. Corinthian Colls., 2011 WL 3524208 (9th Cir. Aug. 12, 2011)

Two relators brought a *qui tam* action against a public company that operates for-profit vocational schools (Corinthian), members of the company's board of directors (individual defendants) and an auditing firm (EY). The relators, who had both previously worked for Corinthian, alleged that the defendants falsely certified to the Department of Education (DOE) Corinthian's compliance with the Higher Education Act's (HEA) ban on recruiter-incentive compensation, so that Corinthian would receive education funds from the federal government. The relators alleged that Corinthian paid incentives to recruiters based on the number of students they enrolled and that those who failed to enroll a minimum number of students were terminated from their jobs. Corinthian and the individual defendants moved to dismiss the relators' complaint, arguing that the relators failed to state a claim and failed to plead the alleged fraud with particularity, and that the court lacked subject matter jurisdiction over their claims. EY filed a separate motion to dismiss on the same grounds. The U.S. District Court for the Central District of California granted the defendants' motions, holding that the relators failed to state a claim for relief under the FCA. The district court held that the

relators' complaint failed to allege that Corinthian made any false certifications to the government. Further, the court held that Corinthian had reasonably relied on DOE's Safe Harbor Provision, which allowed for increases in recruiter salaries that were not based solely on the number of new enrollees and that Corinthian reasonably relied upon the provision. After the district court determined that the claims against Corinthian should be dismissed, it also dismissed the claims against the remaining defendants, finding that those claims were contingent upon Corinthian's liability. The relators appealed the district court's ruling to the U.S. Court of Appeals for the Ninth Circuit, which reversed and remanded the district court's decision.

Failure to State a Claim

First, the appellate court considered whether the facts presented in the relators' complaint alleged an FCA violation by Corinthian. The court began by considering whether or not Corinthian's certifications to the Department of Education of its compliance with the HEA were actually false. The defendant argued that the relators' assertion that Corinthian employees were "disciplined, demoted, or terminated" based on recruiting numbers did not state a claim under the FCA, because the HEA does not prohibit adverse employment actions on the basis of recruitment numbers. Therefore, Corinthian's certification of compliance with the HEA was not false. After reviewing the HEA, the circuit court agreed.

In addition, the defendants argued that DOE's Safe Harbor Provision allowed Corinthian to award salary increases to employees on the basis of recruitment numbers, since that was not the only basis for the salary increase—the defendants argued that salary increases were based on overall performance, including whether or not the employee had achieved a rating of either "Good" or "Excellent," although those terms were undefined. The circuit court found that the mere inclusion of a performance rating was not enough to conclude that Corinthian's compensation program automatically fell within the Safe Harbor Provision, but since the relators failed to allege any facts regarding the meaning of "Good" or "Excellent," their complaint did not adequately state a claim for relief. Consequently, the Ninth Circuit granted the relators leave to amend their complaint to cure this deficiency, and held that the district court erred by denying the relators leave to amend.

Second, the court reviewed the FCA scienter requirements. The defendants argued that, even if he relators could allege false statements, Corinthian's reliance on the Safe Harbor Provision negates scienter. The district court agreed. However, the circuit court disagreed, as it found that the relators repeatedly argued that Corinthian certified compliance with the HEA, while knowing that it was compensating recruiters based on their recruitment numbers. The relators further described how the HEA funds were dispensed to educational institutions in accordance with the number of students they enrolled. The appeals court held that the relators' complaint did allege that Corinthian acted with the requisite knowledge to be liable under the FCA. However, once again, the court found the relators failed to clearly allege sufficient facts to support their assertion that Corinthian acted while knowing that its compensation program fell outside the Safe Harbor Provision. The Ninth Circuit found that these facts, if formally alleged, would certainly support an inference that Corinthian acted with fraudulent intent and not in good faith. As a result, it held the relators should be permitted to amend their complaint in order to plead additional facts that could cure these deficiencies.

Third, the court analyzed the liability of individual defendants. It held that the complaint failed to set forth each individual's alleged participation in the fraudulent scheme and failed to allege their involvement in making false statements. However, the court held that the relators should have at least one opportunity to add any facts that could render plausible an inference that one or more of the individual defendants oversaw or actively participated in the alleged fraudulent scheme. Therefore, the court granted the relators leave to amend.

Finally, the court analyzed the allegations against EY. The relators argued that EY falsely certified that Corinthian was in compliance with the recruiter compensation prohibitions and failed to perform the legally required evaluation to determine if the recruiter practices were legal. The court found that the relators sufficiently alleged that EY falsely certified Corinthian's compliance with the recruiter compensation prohibitions. It found that the relators alleged details as to Corinthian's practices, and what practices should have been used in their place. Furthermore, the relators expressly alleged that EY issued reports for Corinthian, knowing them to be false. The court held that these facts, taken together, supported a plausible inference that EY acted with fraudulent intent. Therefore, the court held that the relators sufficiently alleged an FCA violation as to EY.

U.S. ex rel. King v. DSE, Inc., 2011 WL 3421417 (M.D. Fla. Aug. 4, 2011)

A relator brought a *qui tam* action against his former employer, a grenade manufacturer (DSE), and three of its subcontractors, alleging fraud against the United States. The relator alleged that from 2005 through 2007, KDI sold grenade fuses to the United States, before eventually selling its business to DSE. The relator was a consultant for KDI in 2005 and later worked for DSE in 2008. He alleged that while working for KDI, he discovered that the company's quality-testing process could not determine whether or not the grenade fuses met the Unites States' specifications, and that after he installed a new quality-testing program that exposed an unacceptable defect rate in the grenade fuses, KDI continued to deliver shipments to the U.S., certifying to the government that its fuses complied with quality requirements. The defendants filed separate motions to dismiss. The U.S. District Court for the Middle District of Florida denied the defendants' motions. KDI then moved for reconsideration, arguing that the court failed to address its unique situation. The court denied KDI's motion for reconsideration.

First, KDI argued that the relator had no opportunity to inspect its grenade fuses and had no knowledge of any FCA violations by KDI, because the company exited the grenade fuse business and sold it to DSE before the relator joined DSE. The court, though, found that when KDI sold its business, DSE acquired all of KDI's inventory of "work in progress" fuses, and that the relator was able to determine that those parts were grossly defective. In addition, the court noted that the relator had been a consultant for KDI years before it sold the business to DSE, and that he acquired information about KDI's product during that time, after he installed new quality inspection software for KDI. Moreover, the court observed the relator's allegation that, as part of each shipment to the United States, KDI provided a certificate that claimed that the company had conformed to applicable quality requirements. Thus, the court held, the relator had an adequate basis for asserting fraud claims against KDI. Thus, KDI's motion for reconsideration was denied.

U.S. v. Kellogg Brown & Root Servs., Inc., 2011 WL 3303486 (D.D.C. Aug. 03, 2011)

The government brought an action against a contractor, alleging violations of the FCA, among other claims. The defendant had a contract with the government to provide logistical support services for various army operations and the government alleged that the defendant knowingly billed it for the cost of private security contractors—an expense that was not permitted under the contract. The defendant disagreed with the government's interpretation of the contract, and also moved to dismiss the government's fraud allegations for failure to state a claim and failure to plead fraud with particularity. The U.S. District Court for the District of Columbia denied the defendant's motion to dismiss the fraud claims.

Failure to Plead Fraud with Particularity

The court began by analyzing whether the government's complaint met Rule 9(b)'s heightened pleading requirements and concluded that the complaint adequately alleged the required specifics of the fraud. Specifically, the court found that the government alleged the "who" of the alleged fraud, by naming the defendant; the "what" of the alleged fraud, by describing the defendant's alleged false claims for private security expenses; the "when," by listing the time period in which the fraud allegedly occurred; and the "where," by stating that the fraud was committed in Iraq. The court also concluded that the government pled the "how" of the alleged fraud, by specifying that the defendant hired more than 30 private security companies and personnel without obtaining the government's approval and with knowledge that these hires were not allowed by the contract. The court noted that the government could have included additional details regarding the "how" of the fraud, including individual claim numbers from the defendant to the government or specific false claims themselves, but the court determined that even without this information, the government's complaint still adequately pled how the alleged fraud scheme operated, since the complaint provided the defendant with sufficient notice of the claims it needed to defend. As a result, the court held that the government's complaint satisfied Rule 9(b)'s pleading standard, and denied the defendant's motion to dismiss on that basis.

Failure to State a Claim

The court then analyzed whether the government failed to state a claim under the FCA. The government argued that the defendant's claims were both "factually false" and "legally false" and the court considered both arguments. With respect to the government's argument that the defendant's claims were factually false, the court noted that the claims did not seek reimbursement for services that weren't provided and didn't inflate the costs for those services. The government argued that the defendant's claims were factually false because the defendant knew that the private security expenses contained in those claims were not allowed by the defendant's contract with the government. The court was surprised by the government's "factually false" theory, which contended that the defendant's claims were false precisely because they were disallowed by the contract. The court observed that such a definition of "factually false" could blur the distinction between claims of fraud under the FCA and claims for breach of contract, which, in the court's opinion would "contradict the purpose of the [FCA]." The court rejected the government's "factually false" theory and held that "determining the scope of a contract is a quintessentially legal, not factual, question."

The court then turned its attention to the government's alternative "legally false" theory of liability, in which the government asserted that the defendant's claims were false because they included an implied certification that the defendant had complied with the terms of the contract—which prohibited billing for private security expenses—and that this certification was a prerequisite to receiving payment under the contract. The defendant argued that even if it had violated the contract by overbilling the government, the government's legally false theory of FCA liability should still fail, because the defendant's certifications of compliance were not express prerequisites for payment. The court rejected the defendant's argument and held that prerequisites for payment do not necessarily need to appear as express conditions. Instead, the court endorsed the "implied false certification" theory, which only requires that the government "show that 'the contractor withheld information about its noncompliance with material contractual requirements.'" The court observed the D.C. Circuit Court's caution that the implied false certification theory is more prone to abuse by FCA plaintiffs who wish to overstate breach of contract claims as FCA actions. So next, the court examined whether the defendant's certification was material to the government.

With respect to materiality, the court focused on the government's assertion that the defendant's false certifications were material to the government's payment decision because the contract simply did not allow for payment of private security expenses. The government supported its materiality claim with internal emails in which the defendant's employees acknowledged that the private security costs "could be considered unallowable and could "effect a material change in [the] contract." The court concluded that this evidence was sufficient to establish materiality, at least at the pleading stage.

Finally, the court examined the scienter factor. In support of the scienter element, the government alleged that the defendant tried to modify the contract to allow for billing for private security expenses, and when those negotiations failed, it billed for those expenses anyway. The defendant argued that the government's argument was insufficient, because the parties had a reasonable disagreement about the interpretation of the contract—since the defendant claimed that the contract allowed for private security expenses. The court noted that this was a persuasive argument, but held that further factual information was required before a determination could be made regarding contract interpretation. Thus, the court could not dismiss the government's complaint on that basis. The defendant also argued that scienter was negated because the government paid claims even after it knew that the claims contained private security expenses. The government, though, argued that it rejected the the defendant's claims as soon as it recognized that they were unallowable expenses. The court held that this dispute of fact must be resolved in favor of the non-moving party, the government. Accordingly, the court concluded that the government had alleged sufficient facts to establish scienter, and denied the defendant's motion to dismiss for failure to state a claim.

U.S. ex rel. Estrada v. Quad City Prosthetic, Inc., 2011 WL 3273142 (C.D. Ill. Aug. 1, 2011)

A relator brought a *qui tam* action against two corporations and two individuals, on behalf of the United States and the State of Illinois. The defendant corporations were manufacturers of prosthetics and orthotics, and the individual defendants were employees. The relator alleged that the defendants knowingly submitted false claims to Medicare and Medicaid by upcoding charges that reflected a device more expensive than the one that was actually fitted to patients. The relators also alleged that the defendants billed for services never rendered to Medicare patients. The federal and state governments intervened in part and added a claim for unjust enrichment to the FCA and Illinois FCA claims. The defendants moved to strike and dismiss, arguing that the plaintiffs failed to state a claim and failed to plead fraud with particularity. They claimed that the plaintiffs failed to sufficiently plead facts showing that the defendants had specific intent to defraud the government. Further, the defendants argued that some plaintiffs' claims were barred by the statute of limitations and should be dismissed. The U.S. District Court for the Central District of Illinois granted the defendants' motion in part, granting the defendants' motion with respect to a subset of claims that were time-barred, and denying the motion with respect to all remaining claims.

Failure to State a Claim

The defendants argued that the plaintiffs' allegation that they presented false claims or caused false claims to be presented did not meet the heightened pleading requirements because it did not allege any specific false or fraudulent claims or sufficient facts showing the defendants' specific intent to defraud the government. They argued that, at best, the government only asserted negligent billing violations, not knowing fraud. The court, though, found that the plaintiffs' allegations were specific enough to provide an adequate basis to infer that false claims were submitted and that the defendants committed fraud by upcoding, billing for services not performed, and unbundled billing. The court further found that plaintiffs had sufficiently pled facts showing defendants possessed specific intent to defraud the government, noting that their allegations: (1) contained detailed facts regarding how codings were affirmatively manipulated and listed; (2) plausibly suggested that the defendants' policies were specifically created so that the claims would be submitted in a way to maximize payment from the government; and (3) suggested that the defendants intended that their claims would be material to the government's decision to pay or approve their allegedly false claims. Thus, the court denied the defendants' motion to dismiss the plaintiffs' allegation that they presented false claims to the government or caused another to do so.

The defendants next argued for the dismissal of the plaintiffs' conspiracy claims and their allegations that the defendants made or used false records or false statements to get false claims paid or approved and to conceal, avoid or decrease obligations to pay money to the government. The defendants, relying on the Supreme Court's ruling in *Allison Engine Co. v. U.S. ex rel. Sanders*, argued that the plaintiffs could not show that they acted with the specific purpose and intent to defraud the government. The court, though, noted its prior holding (above) that the plaintiffs pled sufficient facts that the defendants had a specific intent to defraud the government. Thus, the defendants' motion to dismiss those claims was denied. The court also denied the defendants' motion to dismiss the plaintiffs' conspiracy claim, stating that the defendants had not adequately developed their argument and that a more fully developed factual record was necessary.

Statute of Limitations

Finally, the court considered the defendants' argument that some of the plaintiffs' claims were time-barred. The plaintiffs agreed that some of the claims fell outside the applicable statutes of limitations under the federal and state FCAs. The parties even seemed to agree that the governments' claims related back to the date on which the relators' *qui tam* suit was filed. However, the parties disagreed over the applicable limitations periods. Because the government intervened in the relator's suit, the plaintiffs argued for a 10-year limitations period for federal FCA claims—not the six-year period advocated by the defendants. The court resolved the dispute and held, since the defendants did not address whether or not the 10-year limitations period should apply, it would be improper to grant the defendants' motion, and thus, the court only dismissed the plaintiffs' FCA claims that were more than 10 years old. Such claims were dismissed with prejudice.

In addition, while the parties agreed that the Illinois FCA claims were limited by a 5-year statute of limitations, the plaintiffs argued that those claims accrued when the relator first learned of the violation, back in December 2003, and thus, only claims under the Illinois FCA that predated December 1998 were time-barred. The defendants countered that the Illinois FCA's 5-year began to run when the relator filed his *qui tam* complaint in March 2006 and thus, any claims under the Illinois FCA that predated March 2001 were time-barred. The court again resolved the dispute, agreeing with the defendants and dismissing all Illinois FCA claims that predated March 2001.

U.S. ex rel. Dyer v. Raytheon Co., 2011 WL 3294489 (D. Mass. July 29, 2011)

A relator brought a *qui tam* action against his former employer, a defense contractor, alleging that the defendant violated the False Claims Act by submitting false claims to the government and by terminated his employment in retaliation for engaged in protected conduct. The relator, who had been employed as a senior manager in the defendant's corporate finance group, alleged that he developed a special enterprise level working program, called the Raytheon Working Capital Incentive Program (RWCIP). This program was designed to provide bonuses to incentivize the company's business executives and managers to make improvements in daily operations that would increase cash flow and save money. Notably, cost-saving accounting reclassifications would not count towards the bonuses. As the company also believed that the incentive program would benefit the government, by maximizing efficiencies on the company's various government contracts, it sought approval from the government to bill the government for RWCIP compensation bonuses as "Overhead Charges," and the government agreed to do so.

The relator alleged that the defendant included a $23 million accounting reclassification for RWCIP purposes, which caused false claims to be submitted to the government. Further, the relator alleged the defendant retaliated against him and ultimately terminated his employment, after he raised concerns about the alleged fraud. The defendant moved to dismiss the relator's claims, arguing that the relator's fraud claim should be dismissed for failure to state a claim and for failure to plead fraud with particularity. Further, the defendant argued that the relator's retaliation claim was time barred. The U.S. District Court for the District of Massachusetts denied the defendant's motion in part. The court denied the motion with regard to the fraud claim, but granted it with regard to the retaliation claim.

Failure to State a Claim

First, the court analyzed whether the relator stated a claim under the FCA. The defendant argued that the relator failed to establish a nexus between any alleged falsehood and the defendant's contract with the government—in fact, the defendant stated that the relator failed to even identify the specific contracts for which false claims were allegedly submitted. The court observed that while FCA violations can originate from contracts, they can also arise from violations of applicable statutes and regulations. The court noted that the relator relied upon several provisions of the Federal Acquisitions Regulations (FAR) to establish that the defendant owed a duty to exclude the reclassification and corresponding bonus from its charges to the government, and that, at the pleading stage, he was not required to identify the specific contracts at issue, as there was enough evidence to suggest that a government contract did exist. The court held that it was appropriate to allow discovery to provide greater details about the contract.

Next, the defendant argued that the relator failed to establish an actionable false claim, stating that its compliance with the FAR provisions was not a precondition for getting paid. The court, though, analyzed the relevant FAR provisions and determined that "compliance is arguably a precondition to the bonus payments." The court then noted that both the defendant and the government agreed that accounting reclassifications would not be included in the RWCIP, and therefore, this requirement was part of an "established plan" and that the defendant's submission of claims to the government represented the defendant's certification of compliance with that plan. Consequently, the court held that the relator's fraud allegations were sufficient to state a claim, and denied the defendant's motion to dismiss for failure to state a claim.

Failure to Plead Fraud with Particularity

The court then turned its attention whether or not the relator's complaint met Rule 9(b)'s heightened pleading requirements. The court found that the relator's allegations provided specific details about the nature of the allegedly fraudulent scheme, including the employees involved, the "ground rules" requiring the defendant to exclude accounting reclassifications from its overhead charges to the government, and the relator's successive attempts to persuade the defendant to discontinue the alleged fraud. Accordingly, the court held that the relator provided sufficient factual allegations to demonstrate the viability of his FCA claims, and thus denied the defendant's motion to dismiss for failure to plead fraud with particularity.

Retaliation

Finally, the court analyzed the relator's retaliation claim. The defendant argued that the retaliation claim was time barred, and the court determined that the alleged retaliation occurred six years before the relator's *qui tam* complaint was filed. As the court concluded that the applicable limitations period for bringing the retaliation claim was only three years, it held that the relator's retaliation claim was time-barred. The relator, though, argued that his retaliation claim was timely under the continuing violation doctrine, because he was subjected to a continuous pattern of retaliation throughout that six year period, and even beyond his termination. The court explained that the purpose of the continuing violation doctrine "is to allow suit to be delayed until a series of wrongful acts blossoms into an inquiry on which suit can be brought;" the court clarified that the doctrine does not allow plaintiffs to avoid filing suit, as long as their rights continue to be violated. While the court was unclear as to the applicability of the continuing violation doctrine to FCA retaliation claims, it held that the doctrine could not be applied to the relator's claims, since the relator failed to show that the alleged retaliatory acts that occurred within the limitations period could be deemed an "anchoring act" that would relate to retaliation that occurred outside the limitations period. The court rejected each of the "anchoring acts" the relator presented.

First, the court determined that the relator's contention that the defendant retaliated against him when a former colleague refused to speak to him when he expressed interest in an open position with the defendant company was too speculative, particularly since the relator never alleged that he applied for the position. Second, the court determined that the relator's termination, which occurred five years after he raised concerns about the accounting reclassification, was too remote in time to support his claim of continued retaliation. Finally, the court held that the relator failed to provide sufficient factual support for his claim that the defendant retaliated against him by disparaging him professionally after his termination. Consequently, the court refused to apply the continuing violation doctrine to the relator's retaliation claim, and that claim was dismissed as time-barred.

Davis ex rel. U.S. v. Point Park Univ., et al., 2011 WL 3163251 (W.D. Pa. July 26, 2011)

A relator brought a *qui tam* action against her former employer, an educational institution, and two of its executives, alleging violations of the FCA and state laws. Specifically, the relator alleged that the defendants knowingly submitted false claims and certifications to the Department of Education in order to wrongfully obtain grant funds, which were then misused. The defendants moved to dismiss the relator's complaint for failure to state a claim. The U.S. District Court for the Western District of Pennsylvania denied the motion. The court held that the relator adequately alleged that the defendants knowingly submitted false claims to the government. Specifically, the court found that the fact alleged by the relator were "sufficient to show that Plaintiff has a 'plausible claim' for relief," as she pled all of the required elements for her fraud claim. Accordingly, the court denied the defendants' motion to dismiss.

U.S. v. Honeywell Int'l. Inc., 2011 WL 2672624 (D.D.C. July 8, 2011)

The government brought an action under the False Claims Act against a manufacturer of body armor materials to be used in bulletproof vests. The government alleged that the defendant manufactured a shield for use in bulletproof vests, that was made from a fiber called Zylon, which was manufactured by a third-party. Vests containing the defendants shield were sold to various law enforcement agencies under a federal government-funded program, and included a five-year warranty against defects. The government contended that the defendant knew that the vest manufacturer relied on the defendant's technical expertise regarding Zylon, that the defendant tested the tensile strength of Zylon shield and found that it deteriorated or failed testing, and that the defendant provided manipulated data to the vest manufacturer that showed that the Zylon shield was safe and effective. Additionally, the government alleged that the defendant received additional data from other producers of Zylon products, which suggested that the material was not suitable for use in bulletproof armor, yet the defendant refused to share this information with its vest manufacturer. Finally, the government alleged that the vest manufacturer performed its own tests which revealed a substantial decline in Zylon's strength and reduced its warranty to thirty months—a decision the defendant disagreed with. The government's basic claim was that the defendant caused the vest manufacturer to submit false claims when it sold vests to the government that contained a five-year warranty that the vests could not satisfy. The defendant moved to dismiss the government's complaint for failure to state a claim and for failure to plead the alleged fraud with particularity. The U.S. District Court for the District of Columbia denied the motion.

The defendant argued that the government failed to plead the falsity of any claim submitted to the government for payment. The government, however, alleged that it believed that it was purchasing vests that met the industry standard five-year warranty, and that the defendant either failed to disclose or only selectively disclosed information to its vest manufacturer and to the public that revealed defects in the vests, which cast doubt on the vests' ability to satisfy the warranty. Further, the government alleged that had it known the defective nature of the vests, it would not have purchased them, and state the defendant took affirmative steps to conceal those risks. The court found that the allegations about the defendant's concealment of test data and the available data on the vests' performance were sufficient to plead that the defendant understood that payment for the vests was conditioned on compliance with those requirements. Additionally, the court held that the government set out in detail the time, place, and content of the defendant's allegedly false representations and identified individuals allegedly involved in the fraud. These allegations, the court held, were sufficient to plead falsity.

The defendant then argued that the vest manufacturer disclosed the defects of its bulletproof vests to the government when it issued a storage advisory that warned

against storing the vests in heat and humidity conditions. The defendant argued that this storage advisory disclosed the facts that the government claimed were withheld. However, the court found that the storage advisory failed to address the many defects the defendant uncovered during their testing, and that the storage advisory could not be used to circumvent the government's argument that the defendant impliedly certified that the vests would satisfy the full warranty period. The court also found that the defendant knew that the vest manufacturer lacked the technical expertise and was dependant on the defendant for the assessment of test results. Therefore, the court found that the defendant's misrepresentations tainted all claims from the vest manufacturer to the government. Accordingly, the court held that the government properly stated a claim under the FCA.

The defendant then argued that the government did not plead that the defendant knew that it had caused false claims to be submitted to the government. The court, though, found that the defendant intentionally obscured its Zylon shield test data because it understood that negative data could be detrimental to its market share. Thus, the court held that it was reasonable to infer that the defendant had actual knowledge of the falsity of its representations. Finally, the defendant argued that the government failed to allege a false record or statement that the defendant made to get the payment from the government, arguing that the government merely alleged a scientific disagreement as to the efficacy of the vests. The court disagreed and found that the defendant acted in bad faith by cherry-picking the data it disclosed to the vest manufacturer and to the public. Consequently, the court held that the government sufficiently pled the falsity requirement.

Finally, the defendant argued that the government failed to allege that the defendant's express purpose in making any alleged false statement or record was to obtain payment from the government. The court found that this argument misconstrued the government's theory of FCA liability, which rested on the defendant's alleged manipulation of the test data it communicated to the vest manufacturer. Thus, the court held that the government adequately alleged that the consequences of the defendant's misrepresenting and concealing unfavorable test data about Zylon's degradation caused the vest manufacturer to submit false claims to the government. The defendant's motion to dismiss was denied.

Kellogg Brown & Root Servs., Inc. v. U.S., 2011 WL 2739776 (Fed. Cl. July 6, 2011)

The plaintiff, Kellogg Brown & Root Services (KBR), a contractor, brought an action against the United States for unpaid costs incurred under a contract to provide logistical support services for various army operations. The government filed counterclaims against the plaintiff, including a counterclaim alleging a violation of the False Claims Act, which the government alleged arose from the defendant's illegal kickback scheme—a scheme that resulted in inflated invoices to the United States under the contract. The government argued that the plaintiff knew that its reimbursement vouchers were fraudulent, based on the allegations contained in an email written by its subcontractor's administrator. The plaintiff moved to dismiss the government's counterclaim. The U.S. Court of Federal Claims granted the motion and held that the government failed to state a valid FCA claim.

The government had argued that the plaintiff's claims for payment on the government contract were fraudulent under the FCA because its reimbursement vouchers were inflated by the price of alleged kickbacks to subcontractors. The contractor plaintiff countered, arguing that the government failed to allege any causal nexus between the award of contracts and the kickbacks. Further, the plaintiff argued that the government's FCA claim failed to adequately plead the scienter element and to allege anything fraudulent about the plaintiff's reimbursement claims other than their being "tainted" by kickbacks. The government, however, took the position that contractor was vicariously liable for the "knowledge" of its managers, or that its knowledge of fraudulent claims could be inferred via allegations contained in the subcontract administrator's email. The court acknowledged that several other courts had held that the costs of a kickback are presumed to be passed on to the government under the anti-kickback statute, but declined to extend this presumption to claims under the FCA. Further, the court found that the government failed to allege that the subcontractor's charges to the plaintiff were actually inflated, even by the amount of the kickback. The court held the government's FCA counterclaim failed to indicate anything particularly fraudulent about the plaintiff's reimbursement vouchers. Thus, the court held the government failed to show that a false claim was submitted or that the plaintiff falsely certified compliance with the anti-kickback law. Further, on the issue of knowledge, the court held that the government failed to allege facts showing that the plaintiff or its managers knew of any inflation on the defendant's claims to the government—the government could not rely on the subcontractor administrator's e-mail to establish knowledge of fraud, since the message only provided generalized concerns about pricing irregularities. Accordingly, the court held that the government failed to state a valid FCA claim and the United States' FCA counterclaim was dismissed.

See *U.S. ex rel. King v. Solvay S.A.*, 2011 WL 4834030 (S.D. Tex. Oct. 12, 2011), at page 10.

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

U.S. v. Hawley, 2011 WL 3295419 (N.D. Iowa Aug. 1, 2011)

The government originally brought a *qui tam* action against an insurance corporation and its owner, alleging that the defendants knowingly presented false claims and made false records in order to get false crop insurance claims approved. The government also alleged conspiracy and common-law claims of fraud and mistake of fact. The defendants moved for summary judgment on the government's claims and the U.S. District Court for the Northern District of Iowa granted the defendants' motion with regard to presentment of false claims and common-law mistake of fact, but denied the motion with respect to all other claims. Subsequently, the court entered summary judgment, *sua sponte*, and granted the defendant's summary judgment motion with respect to the government's remaining claims, holding that the Supreme Court's decision in *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, foreclosed the government's claims alleging false records and false statements and conspiracy, since the government failed to show that that the defendants intended for the government to pay their crop insurance claims and thus, intended to defraud the government. The government appealed the district court decision with respect to those remaining claims. The U.S. Court of Appeals for the Eighth Circuit reversed, holding that the record created genuine issues of material fact regarding the defendants' knowledge and intent, because the defendant-owner had extensive experience which could lead a jury to find that he knew that the fraudulent representations would ultimately be sent to the government for payment. The defendants then moved for partial summary judgment, arguing that the then-recent amendments to the FCA, set forth in FERA, did not apply retroactively and that the prior version of the FCA—upon which the *Allison Engine* decision was based, prompting the FERA amendments—applied. The defendants also argued that any retroactive application of the FERA amendments would punish them for conduct that was not proscribed at the time it was allegedly committed, in violation of the *Ex Post Facto* clause of the Constitution. Finally, the defendants argued that retroactive application would violate their right to due process. The district court granted the defendants' motion.

Application of the FERA Amendments

The defendants argued that the FERA amendments did not apply retroactively to their case, since the amendments state that they only apply to "claims under the False Claims Act" that are pending on or after June 7, 2008. The defendants contended that "claim" is a defined term in the FCA—meaning request or demand for payment—and that none of the claims at issue was pending on or after June 7, 2008. The government countered that, for purposes of the amendments' effective date provision, the term "claim" refers to claims for relief brought under the FCA. The government argued that the defendant's interpretation of the effective date made no sense, since "claims" are not made under the FCA, and also noted that the effective date provision is included in FERA, not the FCA, and therefore, adopting the FCA's definition of "claim" was erroneous. The court held that under a plain reading of the effective date provision, "claim" means demand for money, and not legal case. Since none of the defendants' demands for government money was pending on or after June 7, 2008, the court granted summary judgment in the defendants' favor.

The defendants also argued that retroactive application of the FERA amendments would be unconstitutional, in violation of the Ex Post Facto clause, claiming that while the FCA is a civil statute, it is meant to be punitive in nature. The government responded that the FCA is a civil statute that compensates the United States for false and fraudulent claims, and that the Ex Post Facto clause does not apply to it. The court concluded that "the FCA's statutory scheme is so punitive either in purpose or effect as to negate Congressional intent to deem it civil." Thus, the court held that the Ex Post Facto clause applied and that retroactive application of the FERA amendments would be unconstitutional.

Finally, the defendant argued that retroactive application of the FERA amendments would violate his constitutional Due Process rights. The government responded, arguing that due process requirements only warrant a showing that the retroactive application of the FERA amendments is justified by a rational legislative purpose, and that the amendments serve the legitimate purpose of recovering funds for the government. The court declined to rule on this issue, finding that its prior rulings were sufficient to support summary judgment in the defendants' favor.

U.S. ex rel. Stone v. OmniCare, Inc., 2011 WL 2669659 (N.D. Ill. July 7, 2011)

A relator brought a *qui tam* action against his former employer, a provider of pharmaceuticals and related ancillary services, alleging violations of the federal FCA and various state false claims act laws, involving fraud against government entities and retaliatory discharge. Specifically, the relator, who served as the defendant's vice president for internal audit, alleged that the defendant: ignored audit results which revealed the defendant's retention of overpayments from Medicare and Medicaid; submitted false claims with respect to a pediatric drug, by improperly stockpiling supplies of the drug that should have been discarded and then using the surplus to fill additional prescriptions, while billing the government for additional supplies of the drug; engaged in a fraudulent Medicaid pricing scheme; and retaliated against him for engaging in protected whistleblower activity. The defendant moved to dismiss for lack of subject matter jurisdiction, failure to state

a claim, and failure to plead with particularity. The U.S. District Court for the Northern District of Illinois granted the motion in part. The court dismissed with prejudice two counts of the relator's complaint regarding the defendant's alleged retention of overpayments, noting that those counts were based on amended liability provisions of the federal FCA—liability provisions that were not in effect at the time of the alleged violations. To the extent that those counts purported to allege the defendant's liability under the former FCA provision, the court dismissed the two counts with prejudice without prejudice. The court held that the relator's allegations regarding the stockpiled drugs should proceed to summary judgment. The court denied the defendant's motion to dismiss the relator's retaliation claim, and all of the remaining active claims were continued.

First, with respect to the relator's argument that the defendant's alleged retention of overpayments constituted a violation of the FCA, the court noted that the parties agreed that there was no liability for retention of overpayments prior to the amendment of this liability provision through the Fraud Enforcement and Recovery Act of 2009, which did not explicitly address its retroactive effect. The court relied on the text of the Patient Protection and Affordable Care Act and a Senate Report to conclude that the relator's theory of liability would create an impermissible retroactive effect. As the court concluded that the relevant events took place before the prospective amendment enacted, it held that the defendant could not be liable for retention of an overpayment. Accordingly, the court dismissed those claims with prejudice. The court then analyzed those claims under the pre–FERA FCA and found that the relator's claims failed to adequately allege the presentment of a false claim, as the relator only alleged that the defendant knew or should have known that false claims were being made. Further, the court found that even though the relator attached a spreadsheet detailing document deficiencies at the claims level, he failed to effectively articulate how the deficiencies resulted in the submission of false claims. The court held that submitting a claim without all required documentation does not render it fraudulent. Accordingly, the court dismissed those claims without prejudice to the extent that they alleged the defendant's liability under the pre-FERA FCA.

Next, the court analyzed the relator's claims regarding the defendant's improper stockpiling of drugs and double-billing to the government—specifically the Nevada Medicaid program. The defendant argued that this alleged fraud was duly investigated by the Nevada Department of Justice and that a settlement was reached. Further, the defendant argued that the investigation and settlement triggered the FCA's public disclosure bar, and barred the relator from bringing a claim regarding that conduct. The court found that the defendant based its arguments on a series of exhibits documenting the investigation and resulting settlement, and concluded that those documents could not be considered as part of a motion to dismiss. Therefore, the court converted the defendant's motion to dismiss this claim into a narrow motion for summary judgment on the public disclosure bar

issues, which would be decided after both parties were given an opportunity to present any and all relevant evidence.

Finally, the court analyzed the relator's retaliation claim, in which the relator alleged that he presented a document to the defendant's internal audit committee that reflected the deficiencies he found as part of his audit, and that he informed the defendant that his findings amounted to fraud. However, the court found that specific types of employees called "fraud alert" employees are subject to a heightened pleading standard because their job, by definition, is to give notice to employers of fraud. The court found the relator, being the vice president for internal audit, fit within this category. However, the court determined that the relator alleged the "magic word" "fraud" when he turned over his audit reports, so the he satisfied the heightened standard and adequately alleged a retaliation claim. Consequently, the retaliation claim was not dismissed.

See *U.S. v. Edelstein*, 2011 WL 4565860 (E.D. Ky. Sept. 29, 2011), at page 223.

B. Calculating Damages and Civil Penalties

U.S. v. Charlton, 2012 WL 1678952 (M.D. La. May 14, 2012)

The United States brought an action alleging that an individual violated the False Claims Act and common law by making false statements in order to obtain FEMA disaster assistance following Hurricane Katrina. The government eventually moved for summary judgment on its claim and the defendant did not file an opposition to the government's motion.

Holding: The U.S. District Court for the Middle District of Louisiana granted the government's motion.

The court observed that the defendant had already pled guilty to making false claims in a previous, related criminal action. The court held that, pursuant to the FCA, the defendant was liable for no less than $5,500 and no more than $11,000 in civil penalties for each of the thirty-five false claims at issue, as well as three times the amount of damages the government sustained. However, the court noted that the civil penalties, which amounted to $192,500 at minimum, plus treble damages of $119,188.20—a total of $311,688.20—would be excessive when compared to the damages sustained by the government. As a result, the court granted the government's motion, but reduced the government's award to $119,188.20 in treble damages, plus $11,000 in civil penalties—a total award of $130,188.20 to the government.

U.S. ex rel. Bunk v. Birkart Globistics GmbH & Co., 2012 WL 488256 (E.D. Va. Feb. 14, 2012)

Two relators brought a *qui tam* action against several shipping companies and individuals, alleging that the defendants violated the False Claims Act and defrauded the federal government by engaging in collusive and anticompetitive arrangements in order to bid on and obtain a contract under the Direct Procurement Method (DPM), while filing a false Certificate of Independent Pricing (CIPD) that certified that the prices offered in their bids were arrived at independently. At trial, the jury found in favor of the relators. The relators did not seek damages at trial, nor did they present any evidence regarding the number of false claims that arose out of the contract and the jury found the defendants liable with respect to procurement of the contract, but not with respect to any false claims submitted to the government under the contract—instead, the relators relied on the parties' stipulation that the defendants filed more than 9000 invoices under the contract.

Following the trial, the relators sought civil penalties of between $5500 and $11,000 for each of the more than 9000 invoices the defendants submitted under the contract, while the defendants challenged the sufficiency of the evidence as to

the jury's finding of liability. The U.S. District Court for the Eastern District of Virginia held that the evidence was sufficient to sustain the jury's verdict of liability and that each of the 9,136 invoices submitted under the contract constituted a false claim. The court then determined that the minimum in civil penalties to be assessed against the defendants amounted to $50,248,000 ($5,500 multiplied by 9,136 false claims). The court, however, determined that this penalty violated the Eighth Amendment and was unconstitutionally excessive, when compared to the government's minimal damages.

Holding: The U.S. District Court for the Eastern District of Virginia held that it did not have the discretion to reduce the minimum statutory civil penalty mandated by the False Claims Act, in order to assess a penalty that within constitutional limits. Therefore, the court held that no civil penalty would be imposed.

Calculating Civil Penalties

As the court determined that each of the defendants' invoices constituted a false claim, it concluded that it was obligated under the FCA to assess a civil penalty for each of the more than 9000 separate claims, which amounted to between approximately $50-100 million. The court then decided that, for Eighth Amendment purposes, it needed to determine whether the minimum civil penalty of approximately $50 million was "grossly disproportional to the gravity of [the defendants'] offense." In order to make that determination, the court was required first to determine the harm caused by the defendants' conduct—which included both economic and non-economic harm.

The court observed that the relators did not attempt to prove any damages to the government at trial; only after trial did the relators attempt to quantify the economic harm to the government, by comparing the defendants' pricing under the contract with the pricing offered by various contractors—including the defendants—for comparable past government contracts. Based on their analysis, the relators concluded that the defendants caused approximately $3-5 million in damages to the government. The court, however, held that the relators failed to establish that the defendants' conduct caused the government <u>any</u> economic harm, noting that there was no evidence that any bidder on the contract at issue would have offered a lower overall bid than did the defendants, or that the government would have necessarily accepted such a bid. The court found that the defendants' pricing on the contract at issue was substantially the same as its pricing for comparable services to the government during previous years. The court also found that the contracts relied on by the relators for comparison purposes were structured differently than the contract at issue, which made overall cost comparisons difficult. Consequently, the court held that the relators' evidence was not sufficient to prove that the government paid more for services under the defendants' contract than it would have paid without the defendants' fraudulent activity that led to the jury's finding of FCA liability. Therefore, the court held that the evidence was insufficient to quantify any economic harm sustained by the government under the defendants' contract.

The court then examined the non-economic harm sustained by the government, which would include any inadequate services the government received and the impact of the defendants' conduct on the integrity of the government contracting process. The court first found that the relators offered no evidence, nor even claimed, that the defendants' services were deficient in any way. The court then stated that "the kind of price-fixing conspiracy that the jury found existed in this case is fundamentally inimical to the integrity of the procurement process and the public interest," but then referenced various "facts and considerations" regarding the extent to which the defendants' conduct actually compromised the government contracting process. Among those considerations was the fact that the government was to hire only one company for the contract and would require that company to have the capacity to handle short-notice packing and shipping projects throughout five countries. Due to this arrangement, the court concluded that the nature of the contract required bidders to negotiate and subcontract pricing with other companies in order to fulfill all of the government's shipping needs, reasoning that "[w]hile this requirement did not suggest or justify collusive subcontract pricing, it did require a certain amount of communication and collaboration among otherwise competing companies. The court also found that the government determined that the defendants' contract included a fair price, as the government twice exercised options to renew the contract. The court further determined that none of the 9,136 invoices contained or referenced the false Certificate of Independent Pricing and none contained any factually false information, and thus, the number of invoices the defendants filed was not reflective of the defendants' level of culpability, but merely reflected the number of jobs the government assigned over the life of the contract.

The court then examined whether or not the FCA's mandatory civil penalties were grossly disproportional to any harm caused by the defendants' conduct. Ultimately, the court held that the government had not sustained any demonstrable damages and therefore not even the minimum $50 million civil penalty could be expressed or justified as a multiple of the government's damages. Further, the court found that the defendants' received a presumed profit under the contract of approximately $150,000—an amount that would not justify the minimum mandated $50 million penalty. Therefore, the court concluded the minimum civil penalty was grossly disproportional to the harm caused by the defendants and refused to impose the minimum civil penalty.

The court then analyzed whether it could impose a civil penalty less than that minimum mandated by the FCA, in order to avoid an unconstitutional result. The court found the FCA authorizes courts to set the amount of civil penalties within a $5500 to $11,000 range, but does not grant courts the authority to "fashion some other civil penalty other than the one required by statute"—including reducing the number of false claims that would be subject to a civil penalty. The court held that the FCA it would need to rewrite the FCA in order to impose a total penalty below the statutory per claim minimum, which it refused to do. Therefore, the court held, it was left with no other option but to refuse to enforce the civil penalties provision of the FCA in this case.

Notably, the court did acknowledge three possible alternative rulings regarding the amount of civil penalties to award to the government, given the lack of binding precedent regarding the court's authority when the mandatory civil penalties are grossly disproportional to the government's damages. First, the court first noted that "the FCA does not explicitly state that a civil penalty is to be assessed per false claim," but only states that a person who violates the FCA is "liable for a civil penalty between $5,500 and $11,000." The court reasoned that the plain language of the FCA could allow for the imposition of a civil penalty for each of the defendants' false statements to the government, not for each claim the government paid as a result of those false statements. Here, the court held that the defendants made only one false statement—the false CIPD—and consequently, "were it appropriate to consider an alternative reading of the FCA in order to avoid an unconstitutional result, the Court would conclude that one civil penalty should be imposed and assess an award of $11,000." The court also considered a second alternative: imposing a civil penalty up to the constitutional outer limits that reflected an acceptably low multiple of the defendant's harm to the government. Based on its finding that the government suffered no demonstrable damages and that the defendants realized only $150,000 in financial gain, the court held that a $1.5 million civil penalty would pass constitutional muster. The court rejected the relators' argument for a $24 million civil penalty, as that amount was based on the relators' assertion that the government suffered at least $3 million in damages. Finally, the court considered a third alternative that other courts appear to have used: crafting a constitutional civil penalty that is appropriate under the circumstances of the particular case, including "the specifics of the Defendants' conduct, the gain obtained, the need to deter others as well as sanction the Defendants, and the public interest in protecting the integrity of the public procurement process." The court determined that, if it had the authority to impose such an alternative civil penalty, then it would award the government a civil penalty of $500,000.

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

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

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

Calculating Damages and Civil Penalties

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

The court began its analysis by applying the principle of proportionality. First, it held that one half of the total mandatory treble damages award served as compensatory damages to assess the proportionality to the civil penalties. Second, it examined the nature of the harm caused. While the defendants referred to their violations as "technical reporting violations," the court found the defendants' widespread use of non-approved physicians established their reckless disregard for Medicare regulations. As to the statistical disparity between actual damages and statutory penalties, the court held the single-digit ratio of treble damages to civil penalties was within the range of FCA awards approved by other courts. Third, it examined the maximum penalty available and found that although the statutory maximum civil penalty was imposed for some of the defendants' false claims, it was not imposed on all of them—and in fact, the minimum penalty was imposed on a substantial number of the defendants' false claims. Therefore, the court held that its award of civil penalties was well below the statutory maximum. Finally, the court noted that the Medicare regulations at issue were designed to serve the interests of the government and Medicare beneficiaries and that both were injured by the defendants' FCA violations. Accordingly, the court held that its award of treble damages and civil penalties did not violate the Excessive Fines Clause of the Eighth Amendment and denied the defendants' motion for reconsideration.

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

Two relators brought a *qui tam* action against a group of companies that were contracted to provide packing, unpacking, and moving services for U.S. military household goods within Germany. The relators alleged that the companies violated the False Claims Act by manipulating the International Through Government Bill of Lading (ITGBL) program and engaging in a single, overarching bid-rigging

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

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

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

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

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

See *U.S. ex rel. Davis v. D.C.*, 2012 WL 1673655 (D.C. Cir. May 15, 2012), at page 47.

See *U.S. v. Mastellone*, 2011 WL 4031199 (S.D.N.Y. Sept. 12, 2011), at page 291.

See *U.S. ex rel. Hobbs v. MedQuest Assocs., Inc.*, 2011 WL 3703762 (M.D. Tenn. Aug. 23, 2011), at page 137.

See *U.S. v. Phung*, 2011 WL 3584812 (W.D. Okla. Aug. 15, 2011), at page 292.

C. Costs and Attorney's Fees

Carter v. Subway Store No. 6319, 2012 WL 1555428 (E.D. Mich. May 1, 2012)

A *pro se* plaintiff brought a *qui tam* action against two food stores (Subway stores and Jet's Pizza) and two individuals, alleging that the defendants violated the False Claims Act by engaging in a conspiracy to defraud the government and by presenting false claims to the government in order to obtain food stamps. The plaintiff also alleged that the food stores conspired to pay employees "off the books," and failed to withhold employee federal income taxes; conspired to hire employees with the necessary "Employment Eligibility Verification;" and failed to report employees' wages or to remit employment taxes to the IRS. The government declined to intervene in the relator's suit and the food store defendants moved to dismiss the complaint, arguing that the relator failed to state a claim under the FCA. The U.S. District Court for the Eastern District of Michigan granted the defendants' motions. Those defendants then moved to recover their reasonable attorneys' fees and costs, pursuant to the FCA's fee-shifting provision. The court determined that the plaintiff's claims were frivolous and brought for the purpose of harassment, and directed the defendants to submit a detailed statement of fees and expenses. The court first observed that calculating the reasonable hourly rate for attorneys' fees involves an initial assessment of the prevailing market rate in the relevant community. The court found that the defendants' attorney billing rates were not excessive, but instead were supported by a state bar report summarizing attorneys' billing rates in the state. In addition, the court held that the number of hours billed were commensurate with the numerous pleadings and motions filed by the plaintiff—the court even noted that defense counsel tried to minimize redundant filings through joint representation and assigned the less complex tasks in the litigation to less-experienced attorneys whose billing rates were correspondingly lower. Therefore, the court held that the hours billed by counsel were not excessive either. Consequently, the court granted the defendants' motion and awarded their reasonable attorneys' fees and expenses, which amounted to $27,157 for Subway and $4000 for Jet.

U.S. ex rel. Leveski v. ITT Educ. Servs. Inc., 2012 WL 1028794 (S.D. Ind. Mar. 26, 2012)

A relator brought a *qui tam* action against her former employer, a for-profit educational institution, alleging that the defendant violated the False Claims Act by falsely certifying its compliance with the Higher Education Act's "incentive compensation" ban, in order to improperly receive federal student loan funds. The defendant moved to dismiss the relator's complaint, arguing that the relator's allegations were based on previously filed lawsuits and other publicly disclosed in-

formation, and was therefore barred by the False Claims Act's public disclosure rule. The U.S. District Court for the Southern District of Indiana granted the defendant's motion. The relator then moved to alter or amend the judgment. The court denied the relator's motion. The defendant then moved to recover its attorneys' fees and moved for sanctions against the relator and her counsel, asking the court for more than $4 million in attorneys' fees and sanctions from the relators' various attorneys, and $25,000 in sanctions against the relator.

Holding: The U.S. District Court for the Southern District of Indiana concluded that the relator's attorneys should have known that the *qui tam* suit was destined to fail; the court held that the complaint was both frivolous and was brought for an improper purpose within the meaning of Rule 11 of the Federal Rules of Civil Procedure. Therefore, the court granted the defendant's motion and allowed the defendants to recover a portion of their attorneys' fees against one of the relator's attorneys and three law firms, but denied the motion for sanctions against the relator.

Award of Defendant's Attorneys' Fees

The defendant argued that it was clear that the relator's lawsuit would fail because the relator's primary attorney had lost two prior cases with similar allegations against other for-profit educational institutions. Also, the defendant argued that the relator's attorneys should have known that failure was imminent when the relator admitted during a deposition that she had no intention of bringing an FCA action until she was contacted by the attorney, and that the factual basis for her allegations came from the attorney and from public materials. The defendant claimed that the relator's suit was barred by the FCA's public disclosure rule and that the relator did not qualify as an original source of her allegations. The relator countered that the public disclosure bar did not apply because her suit was different from a previous case filed by her attorney. However, the court disagreed and found the allegations in the previous case were sufficient to put the government on notice of the defendant's alleged fraudulent scheme. The relator then argued that she qualified as an original source for her allegations, claiming that she had first-hand knowledge of the fraud scheme, as she had been paid by the defendant based on the number of recruits she enrolled—in violation of the incentive compensation ban. However, the court found the relator only became aware that the defendant's alleged conduct violated the FCA or that she could bring an FCA action against the defendant when she was approached by her attorney.

The relator then argued her *qui tam* action could not have been filed frivolously, noting that the case had survived a motion to dismiss for failure to state a claim—before ultimately being dismissed for lack of subject matter jurisdiction, pursuant to the public disclosure rule—and that, as evidenced by its motion, the defendant had spent considerable money defending itself. The court rejected the relator's request that the court adopt a bright-line rule whereby a defendant's expenditure of substantial fees would always preclude a finding of frivolousness. While the court acknowledged that the relator's argument could be viable under some circumstances, it ultimately disagreed with the relator in this instance, finding that the defendant was only forced to incur significant expenses to defend itself because the relator's "lack of firsthand knowledge could not be determined until she was deposed . . . [the defendant] was required to do some digging before ferreting out the frivolousness of this case." Accordingly, the court held that the relator's *qui tam* lawsuit was frivolous.

The court further held that the relator's suit was brought for an improper purpose, based on its findings that the suit originated when the relator's attorney "troll[ed] public dockets and us[ed] a private investigator to cold-call ex-employees of for-profit educational institutions who had sued their former employer"—conduct the court declared was both unethical and unseemly. As a result of the court's findings, the court held that an award of attorneys' fees to the defendant was proper.

When determining the appropriate amount of attorneys' fees to award to the defendant, the court found that, from the beginning of the litigation, the defendant's counsel should have been aware that the relator was not an original source of the information upon which her fraud allegations were based. The court noted that the defendant's attorneys' fees would have been smaller if the defendant had not waited over three years to depose the relator. The court also found that, although the relator's main attorney's conduct was improper, and although other courts had cautioned the attorney for similar abuses in past *qui tam* actions against other for-profit educational institutions, no other court had issued an award of fees against the attorney. Accordingly, the court held that the appropriate award to the defendant was 15% of the attorneys' fees it incurred after the date of the relator's deposition, when the defendant first learned that the relator did not have firsthand knowledge of the alleged fraud. The court's final award of attorneys' fees amounted to $394,998.33—and was awarded jointly and severally against the relator's primary attorney and the three law firms who represented the relator with him.

Sanctions

Finally, the court examined whether sanctions against the relator were appropriate. The court found the relator had no intention of bringing this case before being approached by her attorney, but considered the costs and benefits and decided that it worth pursuing. However, the court held that it would not impose any sanctions on the relator because it had already granted the defendant a percentage of its attorneys' fees, and imposing additional sanctions was not appropriate. Thus, the court granted the defendant's motion for attorneys' fees but denied its motion for sanctions.

Halasa v. ITT Educ. Servs., Inc., 2012 WL 639520 (S.D. Ind. Feb. 27, 2012)

After a jury ruled in favor of a defendant in a retaliation case under the False Claims Act, the defendant moved for attorneys' fees, costs, and expenses. The plaintiff opposed the defendant's request, and argued that awarding the defen-

dant's costs would violate the purpose of FCA's protection against retaliatory action and would deter wrongfully discharged employees from filing actions against their employers. The U.S. District Court for the Southern District of Indiana rejected the plaintiff's argument and granted the defendant's motion, stating that "[i]t is up to Congress to make those types of policy decisions, and Congress has not chosen to exempt False Claims Act cases from the general presumption that an award of costs to the prevailing party is appropriate." The court then examined each of the defendant's claimed fees, costs, and expenses.

First, the court analyzed the claim for witnesses' fees. The plaintiff opposed this claim and argued that the defendant lacked invoices for witness fees. The court found that the defendant had provided invoices, but denied the claim because the defendants' request for fees relating to subpoenas for the production of documents—not depositions—were not compensable as witness fees. Accordingly, the court reduced the amount awarded for witness fees. The plaintiff then argued that the defendant was not entitled to recover claimed fees for expert witness deposition preparation, travel to and from a deposition and time spent for reviewing the deposition transcript. The plaintiff argued that the defendant could only recover the $40 witness fee provided under statute. The court disagreed, and held that the defendant was entitled to recover the reasonable amount paid to the expert witness.

Next, the court analyzed the claim for transcript and deposition costs. The plaintiff argued that the defendant was not entitled to recover deposition costs because it failed to provide any statement regarding the necessity of the depositions. The court found that in the absence of any suggestion that a particular deposition transcript was unreasonable, it declined to require the defendant to demonstrate their reasonableness. The plaintiff then argued that the defendant was not entitled to recover the cost for his videotaped deposition and the cost of the printed transcript. The defendant argued that the video captured the plaintiff's demeanor, facial expression, and body language which it intended to use as a contrast to plaintiff's court appearance and impeach his credibility at trial. The court found that there was strategic reason for the video but it was not reasonably necessary to the defendant's case. Accordingly, the court reduced the claim by the amount incurred in videotaping the plaintiff's deposition. The court then rejected the plaintiff's request that the court fix the rate of deposition transcripts as per the rate fixed by the Judicial Conference (JC). Instead, the court held that the defendant was entitled to recover the actual costs of its deposition transcripts, even though those rates exceeded the rates fixed by the JC, because the plaintiff had noticed most of the depositions and selected the court reporter—whose rates, according to the court, the plaintiff presumably believed were reasonable. Additionally, the court held the elevated price was reasonable due to the fact that medical depositions typically take longer to prepare for, due to medical terms; in addition, the court found that extra time was spent on the transcripts because of the plaintiff's accent and long-winded answers.

Next, the court analyzed the defendant's request for fees for exemplification and copying costs. The plaintiff argued that the claimed photocopying costs were excessive and that the defendant failed to provide sufficient information regarding whether or not the copies were reasonably necessary for the litigation. The plaintiff also objected to the claimed costs incurred to use a database service to facilitate e-discovery production. The court held that the defendant adequately supported its request for photocopying fees, noting that the defendant described the $.10/page rate, provided information regarding the dates, the numbers of pages and the numbers of documents produced and filed in the case, and provided a certification by counsel of its copying costs. The court, however, excluded the defendant's database expenses, upon a finding that the defendant did not provide sufficient information to determine whether the database was used primarily for document review and selection—which is not reimbursable—or for converting and producing documents—which would be reimbursable as a substitute for photocopying.

The court also allowed the defendant to maintain a small portion of its claimed fees associated with service of process. While the defendant sought more than $19,000 in fees, the court agreed with the plaintiff that fees for service of process were limited to the cost the U.S. Marshal Service would have incurred had it effected service of process. The court observed that the U.S. Marshal Service charges a $55/hour fee for service of process, and limited the defendants claim for service of process fees to $55/subpoena served or the defendant's actual costs per subpoena, whichever was less. The court allowed the defendant to recover all of its claimed expenses for serving third-party subpoenas in which it sought information regarding the plaintiff's attempts to find new employment in an effort to reduce his claimed damages. The plaintiff argued that these fees were unnecessary and duplicative, as the defendant would have received all of this information through discovery from the plaintiff, but the court held that the defendant's efforts to verify that information from third parties was reasonable and therefore, the court allowed the defendant to recover those fees.

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

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

Holding: The U.S. District Court for the Eastern District of Arkansas granted the relators' motion.

Calculating Relator's Attorneys' Fees and Costs

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

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

Third, the court analyzed the claimed attorneys' hourly rates, which ranged from $650 per hour for partners, to $200 per hour for associate attorneys. The defendant argued that the hourly rates were far in excess of local counsel rates, which ranged from $225 to $300 per hour. The relators responded that they could not exclusively use local counsel because of the nuances of FCA litigation and the massive costs and expenses connected with the case. The court concluded that the relators' counsel did not make adequate attempts to find local counsel, and thus, applied local rates of $375 for partners and $200 for associates. The court also held that considering the complexity of the case, along with the hourly rates and number of hours worked, no lodestar enhancement was necessary.

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

U.S. ex rel. Frazier v. Iasis Healthcare Corp., 2011 WL 130332 (D. Ariz. Jan. 10, 2011)

A relator brought a *qui tam* claim against his former employer, a healthcare corporation. The U.S. District Court for the District of Arizona dismissed that action with prejudice, but reserved jurisdiction over the collateral issue of sanctions, which arose when the defendant argued that the relator improperly removed privileged documents from the defendant and turned them over to his attorney, who refused to return the documents to the defendant. The defendant then brought a renewed motion for sanctions and attorney fees against the relator and his counsel, arguing that the relator's claims were either frivolous or vexatious and that his counsel had abused the judicial process.

Holding: The U.S. District Court for the District of Arizona granted the defendant's motion in part. The court denied as moot the defendants' motion for sanctions against the relator, citing a settlement agreement between the two parties. The court also denied the defendant's motion for attorneys' fees and expenses. However, the court did sanction the relator's counsel for failing to return certain privileged documents to the defendant, once the *qui tam* action had been unsealed.

Motions for Sanctions Against the Relator and His *Qui Tam* Counsel

Although the court had already dismissed the relator's case, the defendant sought a separate dismissal of the case and a disqualification of the relator based on the relator's alleged attorney-client relationship with the defendant, his alleged misappropriation of hundreds of pages of documents marked "attorney-client privilege," and his and his counsel's alleged use of confidential information obtained during the course of the litigation. The relator admitted that he was an attorney, but argued that he only served as a compliance officer for the defendant, and was not the defendant's attorney. He also argued that he did remove any of the defendant's confidential documents. At oral argument, the parties informed the court that they had reached a settlement agreement, in which: (1) the relator would withdrawal his pending appeal of the court's earlier rulings and would withdraw from any further participation as a relator in the *qui tam* case; (2) the defendant would withdrawal its motion for sanctions against the relator; (3) the parties would provide mutual releases to one another to preclude further litigation; and (4) the parties would seek a 30-day adjournment to execute the settlement agreement because it was based upon the relator's withdrawal of his appeal. Therefore, the court denied the defendant's motion for sanctions against the relator as moot.

The court then examined the defendant's motion for sanctions against the relator's *qui tam* counsel, in which the defendant argued that the relator's counsel knew or should have known that the relator had removed confidential documents from the defendant, and should have informed the defendant that this had occurred, and should have either sought a ruling from the court regarding the continued use of those documents, or simply returned the documents to the defendant. Instead, the defendant claimed, the relator's counsel continued to review documents it knew were privileged and pretended not to know which documents the defendant was referencing when the defendant asked about the privileged documents in the relator's counsel's possession. The relator's counsel countered that it had no duty to return the documents in question, as the documents did not seek legal advice, and therefore were not privileged; they were not meant to be kept confidential by the original intended recipients; and that they were not communicated to attorneys or used in any attorneys' discussions with the defendant.

The court observed that *qui tam* cases are a bit different than average civil actions, because the FCA requires relators to file their complaints under seal for at least 60 days and prohibits relators from serving the defendant with those complaints until the court so orders. Therefore, the court found that upon initial discovery of the alleged privileged documents, the relator's counsel could not reveal the existence of a potential *qui tam* lawsuit prior to the unsealing of the relator's complaint. Hence, the court held that the relator's counsel could not be sanctioned for failing to inform the defendant that they had potentially privileged documents at that stage of the litigation. However, the court continued, even after the *qui tam* complaint had been unsealed, the relator's counsel still failed to inform the defendant of the potentially protected documents, and still did not seek a ruling from the court on what to do with the documents. Consequently, the court held that the relator's counsel did breach an ethical duty. The court granted the defendant's motion for sanctions against the relator's counsel for the attorneys' fees and expenses incurred by the defendant in its attempt to retrieve its privileged documents back.

Award of Attorneys' Fees to Prevailing Defendant

Finally, the court examined the defendant's motions for attorneys' fees, pursuant to the False Claims Act's fee-shifting provision. The defendant argued that it was entitled to recover its attorneys' fees under the FCA, because the relator's claims were frivolous and had no reasonable chance of success, due to the relator's alleged abuse of his attorney-client relationship with the defendant. Additionally, the defendant argued that the relator's claims were vexatious because the relator wanted to tarnish the defendant's reputation. The relator, though, argued that there was no statutory prohibition on him becoming a relator in a *qui tam* action, even if he was the defendant's in-house counsel—which he claimed he was not. He also argued that although his *qui tam* complaint had been dismissed, it was not dismissed as frivolous, nor was there any evidence that he brought the action in an attempt to tarnish anyone's reputation. The court denied the defendant's motion as moot in light of the settlement agreement between the relator and the defendant.

D. False Certifications of Compliance

U.S. v. Luce, 2012 WL 2359357 (N.D. Ill. June 20, 2012)

The United States filed suit against an individual, alleging violations of the False Claims Act, among other things. The government alleged that the defendant defrauded the U.S. Department of Housing and Urban Development and the Federal Housing Administration. Specifically, the government claimed that the defendant operated an approved HUD/FHA loan correspondent business that originated HUD-insured mortgage loans for sale or transfer to other mortgagees. The government alleged that, for each loan it originated, the business was required to submit a form to HUD in which it certified, among other things, that its principals had not been criminally or civilly charged by a governmental entity with making false statements. The government stated that, for a three-year period, each of the business's certifications for more than 2500 HUD-insured loans was false, since the defendant had been indicted for wire fraud, mail fraud, making false statements, and obstruction of justice, and pled guilty to the obstruction charge. The government also noted that many of the loans had gone into default, requiring HUD to pay insurance claims. The defendant moved to dismiss the government's FCA claims, arguing that the certification at issue did not apply to him and his business, and that the government failed to state a claim with respect to any loans for which the HUD did not make an insurance payment.

The U.S. District Court for the Northern District of Illinois granted the defendant's motion in part, dismissing all claims based on certifications attached to loans that had not gone into default, and for which no "claim" for government money had been made. The court reasoned that "[i]f there is no 'claim' for the United States to pay or reimburse, then there is no basis for liability under the FCA." The court, though, made clear that even though neither the defendant nor his business actually submitted insurance claims for defaulted loans to HUD, they were still liable under the FCA for any such claims that they caused to be submitted. The court refused to dismiss all of the government's claims, rejecting the defendant's argument that the certification form at issue did not apply to him and his company, since it applied to "lenders" and "mortgagees," and they were neither. Instead, the court found that the defendant represented his business as the lender and mortgagee on the certification form—so either the certifications *did* apply to the defendant and his company, or the defendant misrepresented his company on the forms. Under either scenario, the court concluded, each certification form included a false statement to HUD.

U.S. ex rel. Washington v. City of New Orleans, 2012 WL 956497 (E.D. La. Mar. 19, 2012)

A relator brought an action against the city of New Orleans, alleging that the city submitted false statements to the U.S. Department of Housing and Urban Development (HUD) and falsely certified its compliance with fair housing guidelines in order to receive federal block grant funds. Specifically, the relator alleged that the city was required to conduct periodic investigations and make corresponding reports to HUD, as well as certify to HUD that its "grant will be conducted and administered in conformity with the Civil Rights Act of 1964 and the Fair Housing Act, and the grantee will affirmatively further fair housing." The relator alleged that the city did not analyze how its placement of affordable housing affected racial segregation or ethnic diversity and failed to take appropriate actions to overcome the effects of discrimination and segregation on fair housing choice. Both the defendant and the relator moved for summary judgment.

Holding: The U.S. District Court for the Eastern District of Louisiana granted the defendant's motion and denied the relator's motion.

False Certifications of Compliance

The court determined that the city's periodic reports to HUD identified racial impediments to fair housing, and summarized the city's efforts related to housing and community development. The court held that these documents outlined a wide spectrum of actions designed to overcome identified racial impediments. The relator relied on *U.S. v. Westchester County, N.Y.*, 668 F.Supp.2d 548 (S.D.N.Y.2009) to argue that the defendant made a false statement when it certified that it was advancing fair housing concerns. The court, though, did not find *Westchester* to be dispositive, finding that the facts of that case were different from the present case, since the defendant in the current case reported various racial factors that impeded fair housing and set forth specific plans to address those issues. Accordingly, the court held that the defendant was entitled to summary judgment because its actions had in fact promoted fair housing. The court also noted that the relator failed to provide any evidence of false statements, and thus, his complaint was deficient.

U.S. ex rel. Kappenman v. Compassionate Care Hospice of the Midwest, L.L.C., 2012 WL 602315 (D.S.D. Feb. 23, 2012)

A relator brought a *qui tam* action against her former employer, a hospice services provider, alleging that the defendant engaged in a conspiracy to defraud the government and submitted false claims to Medicare. She also brought a claim under the False Claims Act for retaliation, as well as numerous state law claims. With respect to the fraud claims, the relator alleged that while working for the defendant,

she audited patient medical files to ensure Medicare compliance and discovered that the defendant had submitted Medicare claims for patients for whom the defendant had insufficient documentation regarding those patients' Medicare eligibility. She alleged that she notified her direct supervisor and other employees of her concerns and reported the matter to the defendant's corporate headquarters when she was not taken seriously by her regional office. She alleged that upon her return from headquarters, her desk had been moved to a different location, her computer and telephone were gone, she was excluded from a private staff meeting, and was terminated within days. The defendant moved for summary judgment on the relator's fraud claims, arguing that the relator could not maintain a cause of action under the FCA because the conduct she complained about was not fraud, but merely regulatory noncompliance. The defendant also sought summary judgment on the relator's retaliation claim, arguing that the relator did not engage in any protected conduct under the FCA, that the defendant had no notice of any protected conduct she may have engaged in, and that her firing was for a legitimate, non-retaliatory reason.

Holding: The U.S. District Court of South Dakota granted the defendant's motion in part, dismissing the relator's conspiracy claim but allowing the relator's false certification theory of fraud liability and her retaliation claim to go forward.

False Certification of Compliance

The court began by analyzing the relator's allegation that the defendant's Medicare claims were false because they included false certifications of the defendant's compliance with underlying Medicare regulations. The relator argued that the defendant provided services to ineligible patients and knowingly presented false claims for Medicare reimbursement. The defendant argued that the relator only alleged regulatory noncompliance and failed to show that the alleged regulatory violations were conditions of payment under Medicare that would render its Medicare claims fraudulent. The relator countered that there was a causal link between the defendant's failure to report patients' ineligibility for Medicare and the defendant's Medicare claims, since the defendant's alleged noncompliance was directly related to federal reimbursements. The court found that Medicare contained an express condition that all services be reasonable and necessary, and held that if the defendant's patients were ineligible for Medicare services, then any services provided to them and billed to Medicare were not reasonable or necessary. The court also noted that the defendant's compliance director testified that the relator's concerns were reasonable because paperwork in the defendant's possession might not have supported some patients' eligibility. Ultimately, the court held that a dispute of material fact existed as to whether fraudulent claims were presented to the government and that an issue of material fact existed as to whether the defendant's claims were actually false. Moreover, the court determined that the evidence raised issues of material fact regarding the defendant's knowledge of any false claims that may have been submitted, as the defendant denied any such knowledge but the court concluded that many of the defendant's employees and supervisors knew of the allegations, but did nothing in response, and that the defendant admitted that it knew about the alleged claims, took them seriously, and investigated them. Thus, the court denied the defendant's motion for summary judgment on the relator's false claims that the defendant falsely certified its compliance with material underlying Medicare regulations.

Next, the court considered the relator's claim that the defendant conspired to defraud the government by getting fraudulent claims paid. The defendant argued that the relator failed to name the alleged conspirators and argued that it could not conspire with itself. The relator did not respond to the defendant's argument and the court granted the defendant's motion for summary judgment on the conspiracy claim.

Retaliation

The court then analyzed the relator's retaliation claim under the FCA. The defendant argued that the relator did not engage in any protected activity because her motivation for investigating the alleged fraud was not for the purpose of bringing an FCA claim, but rather was within the scope of her duties as the defendant's quality of care coordinator—a job that required her to review and audit patient medical files. However, the court held that the relator's whistleblowing conduct was not part of her employment duties and that she went above and beyond her job description when investigating and reporting the defendant's alleged Medicare fraud. Hence, the court held that the evidence created a genuine dispute of whether the relator was engaged in protected conduct. The court also found that a genuine issue of material fact existed regarding whether the defendant was on notice of any protected conduct by the relator, as the defendant had admitted that it took the relator's reports of the alleged fraud seriously and implemented changes as a result. Finally, the court examined the nexus between the relator's purported protected conduct and the defendant's decision to terminate her employment. The defendant argued that the relator was fired for insubordination and for harassing her co-workers, not in retaliation for raising concerns about Medicare fraud. The court determined that there was no evidence that the relator's co-workers felt harassed by her. Moreover, the court found that the relator's job description was revised, that there were closed-door meetings about her, and that she was fired shortly after her trip to company headquarters. The court held that there was a genuine dispute of fact regarding whether the relator was terminated because of her protected activity. Therefore, the court denied the defendant's summary judgment motion with respect to the retaliation claim.

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

The United States brought an action against a nursing home (Villaspring) and its CEO (Bortz). The case arose from a state attorney general's investigation of allegations of neglect at Villaspring. The state decided not to pursue criminal charg-

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

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

Standing Under the FCA

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

Estoppel Defense Against the Government's FCA Claims

Next, the court considered the defendants' argument that the government was estopped from bringing its FCA claims because CMS—the federal government agency that administers Medicare and Medicaid—allowed Villaspring to participate in the Medicare and Medicaid programs, even though CMS had knowledge of Villaspring's deficient care, and CMS did not declare the defendants' services to be worthless. In addition, the defendants argued that it would violate due process to allow CMS, representing the government, to authorize the payment of Medicare and Medicaid claims, and then allow the Department of Justice to allege that those same claims violated the FCA. The court disagreed with each of the defendants' arguments. First, the court found that the FCA's basis for liability is the <u>defendants'</u> knowledge of the falsity of the claim, which is not automatically exonerated by any overlapping government knowledge. Second, the court found that allowing defendants to rely on the government's payment of claims as evidence of compliance with payment conditions would have the effect of shielding defendants who engaged in intentional fraud from FCA liability, simply because the government did not inform them that their claims were false before bringing an action. Third, notwithstanding the fact that the FCA prohibits submitting false claims—even claims that are not actually paid—the court stressed that every case brought by the government under the FCA involves money paid by some federal government agency, and held that allowing a wrongdoer to rely on the initial payment of a false claim as a basis to believe that it is permitted to continue to submit false claims would undermine the entire purpose of the FCA. Therefore, the court held the government was not estopped from bringing its action.

Pleading Fraud with Particularity

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

Implied False Certification

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

Individual Defendant's Motion to Dismiss

Finally, the court considered defendant Bortz's individual motion to dismiss, in which he argued that the government did not allege that he personally violated the FCA. The court agreed, noting that Bortz was rarely mentioned in the government's complaint.

Further, even in the instances where an allegation against Bortz could be implied, the court found that the government's complaint only contained recitals of the elements of FCA liability and conclusory statements. Thus, the court held that government's complaint was factually insufficient with respect to its allegations against defendant Bortz, and granted his individual motion to dismiss.

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

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

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

False Certification

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

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

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

See *U.S. ex rel. Jamison v. McKesson Corp.*, 2012 WL 487998 (N.D. Miss. Feb. 14, 2012), at page 8.

See *U.S. ex rel. Purcell v. MWI Corporation*, 2011 WL 5517352 (D.D.C. Nov. 14, 2011), at page 69.

E. FCA Seal/Service Issues

Jacobs v. Lambda Research, Inc., 2012 WL 748578 (S.D. Ohio Mar. 8, 2012)

A relator brought a *qui tam* action against two research organizations and their president. The government declined to intervene in the relator's suit, but reserved its right to intervene at a later date. Although the relator's *qui tam* complaint had been filed under seal, once the government made its intervention decision, all case documents were filed in the public record. The defendants moved to dismiss the relator's complaint, but the U.S. District Court for the Southern District Ohio denied their motion. The defendants then moved to seal the entire record. Both the United States and the relator opposed this motion. The defendants also moved for a protective order, arguing that the specific documents contained trade secrets. The relator opposed this motion as well.

Holding: The U.S. District Court for the Southern District of Ohio denied the defendants' motion to seal the record, but granted their motion for a protective order in part.

FCA Seal

The defendants argued that re-sealing the entire case was necessary, because they would otherwise suffer direct harm as a result of unfounded statements and allegations made by the relator. The court stated that only "extraordinary circumstances or significant interests" could justify re-sealing the entire case. The court held that the defendants' fear of embarrassment or harm to its reputation could not overcome the strong presumption in favor of public access to judicial records. Thus, the court denied the defendants' motion to re-seal the entire record.

Protective Order

The court then turned to the defendants' motion for a protective order. The defendants argued that the protective order was necessary to protect their trade secrets and other confidential business records. The relator opposed the defendants' motion, arguing that a protective order was unnecessary. The court agreed with the defendants and granted the defendants' request for a protective order; the court, however, refused to enter the protective order submitted by the defendants and instead ordered the parties to submit an agreed upon order.

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

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

Holding: The U.S. District Court for the Eastern District of Missouri denied the defendants' motion.

FCA's Filing/Sealing Requirements

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

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

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

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

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

FCA Seal

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

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

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

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

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

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

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

Next, the court examined the relator's request to reseal the pertinent documents. The court found that the relator's concerns about continuing her private investigation misconstrued the seal provision's purpose—which the court determined was to allow <u>the government</u>—not relators—an adequate opportunity to fully evaluate *qui tam* allegations. The court then examined the relator's employment argument and held that the relator knew, or should have known, when she filed her *qui tam* claim that her identity would eventually be revealed and that her vague and hypothetical concerns about possible impairment of employment and negative health effects were not sufficient to justify resealing the complaint. As a result, the court held that the relator's concerns were insufficient to overcome the established presumption in favor of public access to court documents. The relator's request for resealing was denied.

U.S. ex rel. Littlewood v. King Pharm., Inc., 2011 WL 3805607 (D. Md. Aug. 29, 2011)

A relator brought a *qui tam* action against three pharmaceutical companies, alleging that the defendants engaged in an illegal scheme to promote an off-label use of a drug, which caused false claims to be presented to the federal government healthcare programs. The United States declined to intervene in the relator's case. Subsequently, the relator filed a voluntary dismissal without prejudice, to which the government consented. The government then requested unsealing the relator's complaint, its own notice of declination to intervene, and its proposed order. Additionally, the government requested that all other papers filed in the action, including the government's two motions for extension of time to keep the relator's complaint under seal, remain sealed, arguing that these documents were provided to the court alone for the sole purpose of evaluating whether the seal and time for making an election to intervene should be extended. The relator opposed the government's request to unseal her *qui tam* complaint, stating that the presumption of public access to judicial documents did not apply, since she voluntarily dismissed the action. She further argued that public interest and public policy considerations supported maintaining the seal and that unsealing the case would cause significant harm to her. In addition, she argued that unsealing the case would cause significant harm to the defendants and to others who were named in her complaint and accused of wrongdoing. In response, the government argued that maintaining the seal would violate the strong presumption in favor of the public's right to examine and copy judicial records, and that the relator failed to satisfy the burden to maintain her identity under seal. The U.S. District Court for the District of Maryland denied both parties' requests, and ordered that the case be unsealed in its entirety.

Keeping the *Qui Tam* Complaint Under Seal After Voluntary Dismissal

The relator argued that since she dismissed her complaint before serving it on the defendants, the case should remain sealed indefinitely. She argued that unsealing her complaint would result in serious harm to her, as she remained an employee of one of the defendants. The court held that the presumption in favor of public disclosure of court records can only be overcome by a significant countervailing interest, and concluded that the relator failed to demonstrate any relevant privacy right to overcome the public's right to access court documents. Additionally, the court found nothing in the FCA evincing a congressional intent to impose a permanent seal over all *qui tam* suits that were voluntarily dismissed by the relator after the government declined to intervene. Further, the court found that the relator's employment concerns were similar to those of the many other employee-relators who brought suits against their employers or former employers for various reasons, and for which the FCA provides a cause of action for retaliation. The court held that such fears were not sufficient to overcome the presumption of public access. Finally, the court found that the FCA's seal provision was implemented to allow the government time to investigate *qui tam* claims, not to protect the identity of relators. As a result, the court held that there was no basis to maintain the seal following the relator's voluntary dismissal of the *qui tam* complaint.

Keeping the Government's Requests for Extensions Under Seal

The court then examined the government's request to keep its two motions for extensions of time under seal. The court found that the government failed to present sufficient reasons to maintain the seal over those motions, stating that "the Government has not articulated any cognizable rationale to maintain the seal," since the motions for extensions of time did not contain information that would jeopardize an ongoing investigation, nor did they include confidential investigative methodology. As a result, the court denied the government's request to unseal those documents.

See *U.S. ex rel. Yannity v. J & B Med. Supply Co., Inc.*, 2011 WL 4484804 (E.D. Mich. Sept. 27, 2011), at page 177.

F. Government's Dismissal of *Qui Tam* Complaint

U.S. ex rel. Nicholson v. Spigelman, 2011 WL 2683161 (N.D. Ill. July 8, 2011)

A relator brought a *qui tam* action against a psychologist, a non-profit children's shelter, and a pharmacy, alleging that the defendants submitted false Medicaid reimbursement claims for prescriptions intended for "off-label" uses, in violation of the False Claims Act. The defendants moved to dismiss the relator's allegations for failure to state a claim, failure to plead with particularity, and for lack of subject matter jurisdiction. The United States also moved to dismiss the relator's complaint, arguing that allowing her case to proceed would be detrimental to the government's interests, since the actual damages alleged amounted to only a few hundred dollars and since, even if those damages were trebled and statutory penalties were added, the government would still incur more in litigation expenses than it could expect to recover. Moreover, the government argued that its participation in the case would divert its limited resources from more substantial and important investigations. The U.S. District Court for the Northern District of Illinois granted the government's motion, denied the defendant's motion as moot, and dismissed the relator's case with prejudice.

In opposition to the government's motion, the relator argued that the litigation costs to the government would be relatively small; she also offered not to seek discovery against the government without leave of court. However, the court found that the relator ignored the fact that the defendants would seek discovery that would burden the government and the government would further have to monitor the case and file briefs when necessary. In addition, the court found that the relator ignored the fact that she herself wanted to depose four Medicaid and Medicare officials in connection with her opposition to the government's motion. The court concluded that the government offered substantial reasons to show a legitimate purpose for dismissal. The relator argued that dismissal was arbitrary and capricious and that the government underestimated the financial upside of the litigation. The court, though, held that the government's cost-benefit calculation could not be deemed arbitrary. The court determined that the government would have an interest in pursuing the manufacturer of the drug, but not parties such as the present defendants. Additionally, the court found that the defendants lacked the resources to satisfy any reasonably substantial judgment, and that even if the relator correctly assessed the magnitude and legal merit of the case, the government's actual recovery was likely to be small.

Next, the relator argued that she had a right to an evidentiary hearing and discovery, including depositions of four Medicaid and Medicare officials. The court found that the relator failed to show why an evidentiary hearing was warranted. Further, the court observed that allowing the relator to conduct discovery or to

depose Medicaid and Medicare officials would lead to what the government was trying to avoid in moving to dismiss the action—namely, costly and time-consuming depositions and discovery with little prospect of significant recovery. The court found that the relator's opportunity to respond to the government's motion to dismiss in writing and at a hearing provided all the due process she was due under the FCA. Accordingly, the court granted the government's motion and dismissed the relator's *qui tam* action with prejudice. The defendants' motion was denied as moot.

G. Leave to Amend *Qui Tam* Complaint

U.S. ex rel. Tamanaha v. Furukawa Am., Inc., 2011 WL 3423788 (9th Cir. Aug. 5, 2011)

A relator brought a *qui tam* action against two corporations, alleging that the defendants violated the False Claims Act by submitting materially false information to the U.S. Customs Service in order to undervalue imported goods, which would reduce customs duties owed on those goods. The defendants moved to dismiss the relator's complaint for failure to state a claim and for failure to plead with particularity, and the U.S. District Court for the Central District of California granted the defendants' motion. The relator requested leave to amend his complaint, so as to allege more concisely that the defendants violated a preexisting obligation to pay customs duties established by the federal regulations. The court denied the relator's request. The relator then appealed to the Ninth Circuit, which reversed and remanded the district court's ruling, as it held that any amendment to the relator's complaint would be the first and would not be inherently futile, and that the relator could cure any defects by amending his complaint to allege the specific sources of the defendants preexisting obligation to pay customs duties and to plead with greater particularity. As a result, the court held that the district court abused its discretion in denying the relator leave to amend his complaint.

H. Relators' Share Issues

U.S. ex rel. Shea v. Verizon Commc'ns., Inc., 2012 WL 592047 (D.D.C. Feb. 23, 2012)

A relator brought a *qui tam* action alleging that a telecommunications company submitted false claims for illegal surcharges under two government contracts. The government intervened and settled the action for $93.5 million. The government then recovered an additional $3 million for State Universal Fund Surcharges (SUFS). The government also received about $1.3 million from the defendant after the defendant self-reported an additional violation (GMS recovery). The relator and the government then disputed the relator's share of the government's recovery. In the interim, the government paid the relator 15%—the statutory minimum—of the settlement amount as an advance on his ultimate share. The relator then moved for a total award of about 22% of the government's entire recovery. The government countered with offers of 16% of the original settlement and 15% of the SUFS recovery, with nothing from the GMS recovery.

Holding: The U.S. District Court for the District of Columbia held that the relator was entitled to 20% of the settlement, 15% of the SUFS recovery, and none of the GMS recovery.

Relator's Share

The court began by identifying two sets of guidelines for determining relator's share: the legislative history of the Senate's version of the 1986 amendments to the FCA, which set forth factors to consider when determining the relator's share; and the Department of Justice's (DOJ) relator's share guidelines. The court analyzed the Senate factors first. The Senate factors include: (1) the significance of the information provided by the relator; (2) the relator's contribution to the final outcome; and (3) whether the government previously knew of the relator's information. Applying the first two factors, the court found that the relator contributed significant information to the action and that the allegations he originally made served as the template for the government's complaint. The court also found that the relator and his experienced legal counsel worked extensively with the government during all aspects of its investigation and during the settlement, which saved a great deal of time and resources. Applying the third Senate factor, the court found that the government had no prior knowledge of the fraud scheme, as its auditors had never identified the alleged overcharges or even audited the relevant sections of the invoices or contracts.

The court then examined the fifteen DOJ guidelines—issued by the DOJ to assist its attorneys when trying to agree on relators' share. The court noted that although the DOJ guidelines are not official federal regulations and therefore are non-binding, courts often consider them when resolving disputes over relators' share. Applying these factors, the court determined that: (1) the relator reported the fraud promptly, and that his two-year delay was justifiable since the relator was conducting a thorough investigation of a complex fraud scheme; (2) the relator reported or tried to stop the fraud when he notified the government as soon as he was satisfied that he had sufficient documentation to support his claims; (3) it was unclear to what extent the relator's *qui tam* action halted the fraud; (4) there was no safety issue involved; (5) the relator's complaint exposed a nationwide practice; (6) the relator gave the government extensive first-hand details of the fraud when he conducted a thorough investigation of the defendant's "inside" information and, with the assistance of his counsel researched the applicable laws and regulations and provided comprehensive charts detailing why the defendant's surcharges were fraudulent under the law and helping the government refute the defendant's assertions; (7) the government had no knowledge of the fraud; (8) the relator provided substantial assistance to the government during the investigation and pre-trial phases of the case, as the relator spent hundreds of hours on the case, met with the government numerous times, aided government auditors in investigations of other possible illegal surcharges, attended status conferences, and made himself available to help the government analyze audit information; in addition, the relator's attorneys prepared legal memoranda for the government, helped the government draft proposed subpoena categories, hired a telecommunications to assist the team, and prepared comprehensive presentations for the government; (9) although the relator was not deposed, there was no reason to doubt his credibility; (10) the relator's counsel provided substantial assistance to the government, as already described; (11) the relator and his counsel supported and cooperated with the government throughout the proceeding, especially since the relator identified a category of damages the government had missed, resulting in an additional $5 million recovery to the government; (12) the case did not go to trial; (13) the FCA recovery was not relatively small, particularly when the government's future savings are considered; (14) filing the *qui tam* complaint had a substantially adverse impact on the relator, since he gave up his job and salary to invest hundreds of hours investigating the defendant's fraud and assisting the government in resolving the case; in addition, his counsel expended substantial resources while assisting the government in its investigation and settlement of the case; and (15) no factor weighed in favor of a decrease in the relator's share. Based on those findings, the court held the relator substantially contributed to the prosecution of the case and deserved more than the minimal 15% share of the government's recovery.

The government argued for a 15% relator's share, claiming that the relator had no first-hand knowledge of the defendant's billing practices and that his complaint was just an educated guess. The court rejected the government's assertions as an unfair characterization of the nature and extent of the expertise, experience, knowledge, analysis and hard work that the relator and his lawyers contributed. The government then noted that the action was settled while still under seal and without a trial, but the court determined that the relator deserved a substantial percentage of the government's recovery even though no trial was necessary. The government also argued that the relator's documents failed to disclose any new information, because the government already had the documents in its possession. But the court pointed out that the government had no understanding of the documents before the relator explained their significance. The government also argued that the relator's share depended only upon his own contributions and not those of his counsel. The court, though, held that the relator should be compensated for all the ways he contributed to the government's recovery, even through contributions from his attorneys. As the court held that the relator made a substantial contribution to the government's recovery of the settlement amount, it awarded the relator a 20% share of the recovery from the settlement.

Next, the government argued that the relator should receive 15% of the government's SUSF recovery. The court found that the defendant unilaterally disclosed and repaid this amount to the government, and that while the relator included this improper charge in his complaint, he made no substantial contribution to its recovery. Therefore, the court awarded the relator the minimum 15% share of the government's SUSF recovery.

Finally, the government argued that the relator should not receive any share of the government's recovery of GMS fees, since the defendant self-disclose those charges and the relator's complaint made no mention of them. The court agreed and denied the relator any share of the GMS recovery.

U.S. ex rel. Rille v. Cisco Sys., Inc., 2011 WL 4352309 (E.D. Ark. Sept. 19, 2011)

Two relators brought a *qui tam* action against a government contractor (Cisco), alleging that the company violated the False Claims Act, the Anti-Kickback Act, and other laws. The government did not intervene in the case immediately, and only joined the case after the relators had pursued it on their own for more than three years. Eventually, the government did intervene and filed a notice of settlement with Cisco and another company, Comstor, both of which the government alleged made inaccurate and incomplete disclosures and false statements, and both of which, according to the government, provided improper kickbacks. Although the settlement agreement disposed of the fraud claims (which were subsequently dismissed with prejudice), the matter of the relators' share of the government's settlement proceeds—which totaled about $48 million—was left unresolved. When the relators moved for a determination of relators' share, the government opposed their efforts with a cross-motion to dismiss the relators' claims for failure to plead fraud with particularity. The U.S. District Court for the Eastern District of Arkansas (which retained jurisdiction over the relators' share dispute following the settlement of the fraud claims) denied the government's motion and granted the relators'.

Relators' Share

In its cross-motion to dismiss the relator's *qui tam* allegations, the government argued that the relators failed to properly plead the fraudulent scheme that led to the settlement, pursuant to Federal Rule of Civil Procedure 9(b). In response, the court simply held that, given the fact that, at the time the government filed its cross-motion, the case had been settled and dismissed with prejudice, "[t]he time for pointing out deficiencies under Rule 9(b) has passed."

The government then claimed that the relators were not entitled to a share of the settlement proceeds because the government found no evidence of the kickback scheme as alleged by the relators and did not settle with the defendants in connection with any such alleged conduct; instead, the government asserted, the settlement resolved claims that Cisco and Comstor fraudulently induced the government to enter into a contract for the purchase of Cisco products by misrepresenting the nature of the commercial relationship between Cisco and Comstor. The government also argued that because the relators' complaint never mentioned Comstor, the relators were not entitled to recover any share of settlement proceeds paid by that defendant.

With regard to Cisco, the court found that the relators' *qui tam* allegations coincided with the fraud scheme alleged by the government. Moreover, the court noted that the relators pursued the case for a significant amount of time before the government intervened and that when the government finally chose to intervene, it needed to make a showing of good cause, which it did by stating that it had "received and considered additional information from the Relators." The court held that the relators' action was the catalyst that ultimately led to the government's settlement with Cisco. The court further determined that there was no evidence that the relators stopped participating in the prosecution of the case after the government intervened. Thus, the court held, the relators were entitled to a share of the government's proceeds following its settlement with Cisco. While the court acknowledged that the FCA is silent regarding relator's share calculations, it noted that a minimum 15% share of the government's proceeds "is generally viewed as a finder's fee," and observed that the U.S Department of Justice has created a list of guidelines that may be relevant to determining the extent to which any relator substantially contributed to the prosecution of a *qui tam* case. Applying those factors, and recognizing that the relators were more focused on an alleged kickback scheme for which the government found no evidence, the court concluded that the relators were entitled to a 17% share of the government's proceeds from its settlement with Cisco.

With regard to defendant Comstor, the court again rejected the government's arguments and awarded the relators a share of the settlement proceeds. The government had argued that the relators could not share in the proceeds received from Comstor because their *qui tam* complaint never even mentioned Comstor and the relators never provided any information or assistance with respect to the settlement with that defendant. In fact, the government argued that a government audit—not the relators' action—was the source of the government's claims against Comstor and that the government did not settle with Comstor based on any conduct alleged by the relators. The court, however, found that even though the relators' complaint did not mention Comstor directly, it alleged that Cisco had made alliances with other companies that resulted in fraud against the government. The court further found that the government intervened in the relators' action and that the action was settled with respect to conduct that the relators alleged. Therefore, the court held that the relators' failure to mention Comstor would only decrease their award, rather than eliminate it entirely. As a result, the court held that the relators were only entitled to the minimum 15% share of the government's settlement proceeds from Comstor.

I. *Res Judicata* and Collateral Estoppel

U.S. v. Honeywell Int'l., Inc., 2012 WL 210955 (D.D.C. Jan. 25, 2012)

The United States brought an action against a manufacturer of bulletproof vests, alleging that the company violated the False Claims Act and common law by knowingly allowed the government to purchase vests that contained a fiber that degraded quickly under certain circumstances and which should not have been used in the vests. The defendant moved to dismiss. The U.S. District Court for the District of Columbia denied the motion. The defendant then filed an answer to the government's complaint, asserting various affirmative defenses. The government moved to strike the defendant's first affirmative defense of waiver and estoppel. Relying on the Supreme Court's decision in *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414 (1990), the government argued that waiver and estoppel are legally invalid defenses when the government brings claims to recover funds improperly paid from the treasury. Although it recognized other district courts have used *Richmond* to strike estoppel and waiver defenses, the D.C. district court declined to adopt that interpretation of the Supreme Court's opinion. Furthermore, the court held that even if waiver and estoppel were available defenses, the defendant did not set forth the elements of those defenses. The defendant alleged that the government knew that the vests could degrade quickly in certain conditions and that the government had tested the vests itself. The defendant further alleged that it informed the government of its own testing and offered to share test data, but that the government failed to respond to the defendant's offer. The court held that the defendant's allegations failed to identify the necessary estoppel elements of a definite representation by the government, detrimental reliance by the defendant on the government's representation, or any government misconduct. The court also held that the defendant's waiver defense failed, as the defendant failed to identify any clear and intentional relinquishment of the government's rights to sue the defendant under the False Claims Act. Accordingly, the court granted the government's motion to strike the defendant's affirmative defenses of estoppel and waiver.

U.S. v. Mastellone, 2011 WL 4031199 (S.D.N.Y. Sept. 12, 2011)

The United States brought an action under the False Claims Act, alleging that an individual made false statements to the government in order to defraud the U.S. Department of Justice Victim Compensation Fund of 2001 (DOJ Fund), which was established to provide financial assistance to victims of the 9/11 terrorist attacks. The government alleged that the defendant applied for these funds and fraudulently stated that he was disabled and unable to perform any work. The government alleged that he received a monetary award based on his false statements. Later, in a criminal action, the defendant pled guilty to a felony charge of fraudulently stealing money, admitting that he was not permanently disabled and was able to work. He was sentenced to 30 months imprisonment and ordered to pay restitution. The government then brought this FCA action against him, based on the same factual allegations raised in the criminal case. The government moved for summary judgment and the defendant failed to file an opposition. The U.S. District Court for the Southern District of New York granted the government's motion. The court found that the defendant knowingly made false statements, which were material to the government's decision to pay out of the DOJ Fund. Further, the court found that, pursuant to the FCA and principles of issue preclusion, the defendant was estopped from denying the essential elements of the government claim, which involved the same transaction as the prior criminal action. The court awarded the government treble damages, but offset that amount by the amount recovered by the government in restitution in the criminal action.

U.S. v. Phung, 2011 WL 3584812 (W.D. Okla. Aug. 15, 2011)

The United States brought an action under the False Claims Act against a physician, alleging that the defendant improperly sought reimbursement for 74 upcoded Oklahoma Medicaid claims, presented two false claims and made a false record with respect to those claims, and cause 13 false claims for prescriptions to be presented. Before the government filed its civil suit, the defendant had been convicted of 51 counts of intentionally distributing a controlled substance, one count of health care fraud, and one count of altering records. The defendant was sentenced to a total term of imprisonment for 109 months. The government argued that the criminal conviction for health care fraud estopped the defendant from denying the existence of the Medicaid fraud scheme at issue in the civil FCA case, or from re-litigating that issue. Both the government and the defendant moved for summary judgment. The U.S. District Court for the Western District of Oklahoma granted the government's motion and denied the defendant's motion.

The court determined that the defendant was precluded from re-litigating the issue of the existence of the fraud scheme. First, the court noted that the defendant was a party to both the criminal and civil cases. Next, the court observed that the defendant had a full and fair opportunity to litigate the Medicaid fraud issues during the criminal trial, and that the criminal case had been finally adjudicated—the defendant's conviction was even upheld on appeal to the U.S. Court of Appeals for the Tenth Circuit. Finally, the court held that the Medicaid fraud issues in the criminal proceeding were identical to the Medicaid fraud issues presented in the civil case, since the essential elements of the Medicaid fraud count in the criminal case—namely, that the defendant knowingly devised a Medicaid fraud scheme based on upcoding; that he executed or attempted to execute that scheme; and that he did so with the intent to defraud Medicaid—were the same as the government's claims in the civil case. Moreover, the court held that the time frame in both

the criminal and civil cases overlapped, even though the civil case alleged fraud that occurred slightly before and slightly after the time frame at issue in the criminal case. Based on those factors, the court held that the defendant was estopped from contesting the Medicaid fraud and granted summary judgment in favor of the government.

In addition to the government's estoppel argument, the court held that summary judgment was proper because the evidence the government offered in the criminal case—in the form of affidavits from an expert witness and from a Special Agent—supported its civil claims. Consequently, the court granted summary judgment in favor of the government, and held that the defendant was liable for treble damages, plus statutory penalties for each false claim. When calculating the government's damages, the court offset the amount of damages to the state of Oklahoma, since Medicaid is a joint federal/state program, and the federal government could only recover its share of damages. After this adjustment was made, the United States' treble damages amounted to $4,800.48. The court then imposed statutory penalties, noting that, for each false claim, the penalty ranged between $5,500 and $11,000. Rather than seek penalties for each of the 74 false claims alleged, the government sought a statutory penalty for each of the 22 patients for which the defendant submitted false claims, which totaled $121,000. Although the amount imposed in statutory penalties far exceeded the United States' actual damages, the court acknowledged that the government sought less than 1/3 of the penalties it could have sought, which "alleviate[d] concern that imposition of statutory penalties in this case would violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution."

J. Settlement Issues

U.S. ex rel. Schweizer v. Oce N.V., 2012 WL 1372219 (D.C. Cir. Apr. 10, 2012)

A relator brought a *qui tam* action against her former employer, a copying and printing company. The relator alleged that she worked as a contracts manager for the defendant, which had two supply contracts with the government. One of those contracts required the defendant to provide the government with the same discounts it offered to private sector purchasers, and the other contract required the defendant to sell to the government only goods made in the United States or in other designated countries. The relator alleged the defendant both conspired to defraud and actually defrauded the government by knowingly breaching its promise to give the government the same discounts offered to private sector customers and by misrepresenting the origin of its products from non-designated countries. The government declined to intervene in the relators' fraud claims, but remained an active participant in her case. In addition, the relator alleged that the defendant terminated her employment in retaliation for her investigation of the alleged fraud and her complaints about the alleged fraud to her superiors. Eventually, the government reached a settlement agreement with the defendant in which the defendant agreed to pay $1.2 million, plus interest, to the government in exchange for the dismissal of the fraud claims. The settlement agreement did not reach the retaliation claim.

Pursuant to section 3730(c)(2)(B) of the False Claims Act, the relator objected to the proposed settlement and the government's motion to dismiss her fraud claims, arguing that the agreed-upon settlement amount understated the extent of the defendant's violations. In addition, the defendant moved for summary judgment on the relator's retaliation claim. The U.S. District Court for the District of Columbia granted the government's motion to dismiss the *qui tam* complaint. The court held that section 3730(c)(2)(A) of the FCA gives the government an unfettered right to dismiss *qui tam* claims. Additionally, the court granted the defendant's summary judgment motion, as it determined that the relator did not put the defendant on notice that she was engaging in protected conduct in furtherance of an FCA action.

The relator appealed the district court's ruling to the U.S. Court of Appeals for the District of Columbia Circuit.

Holding: The D.C. Circuit Court reversed and remanded the district court's rulings on both issues.

Government's Motion to Dismiss *Qui Tam* Claims

The circuit court first considered the relator's objection to the proposed settlement. The relator argued that the district court erred when it approved the settlement and dismissed her fraud claims, because the district court did not determine that the settlement was "fair, adequate, and reasonable," as required by section 3730(c)(2)(B) of the FCA. The government and the defendant countered that section 3730(c)(2)(A) of the FCA allows the government to dismiss a *qui tam* action over the relator's objections, as long as the relator receives notice of the government's motion to dismiss and an opportunity for a hearing on the motion. The circuit court agreed with the relator's position and concluded that the proposed settlement agreement fell squarely within section 3730(c)(2)(B), since both conditions of that section were satisfied: the government attempted to settle *qui tam* claims, and the relator who initiated those claims objected. The circuit court further noted that section 3730(c)(2)(B) references "proposed settlements," which signified to the court that judicial review of such settlements is required before the settlements can become effective. The court stated that "allowing dismissal without judicial review of the settlement would render § 3730(c)(2)(B) a nullity." Based on this finding, the appeals court held that the district court erred when it held that the government has an absolute right to dismiss *qui tam* claims. The court held that a relator who objects to the government's proposal to settle *qui tam* claims is entitled to a judicial determination that the proposed settlement is fair, adequate and reasonable. Since the relator in this case did not receive such a hearing, the circuit court reversed the district court's dismissal of the *qui tam* claims.

The D.C. Circuit rejected the government's argument that, notwithstanding the provisions of section 3730(c)(2)(B), the government has unfettered discretion to dismiss *qui tam* actions, pursuant to section 3730(c)(2)(A). The circuit court declared that section 3730(c)(2)(B) is clear and always requires a hearing, if a relator objects to the government's attempt to settle his/her claims.

The appeals court also rejected the defendant's argument that section 3730(c)(2)(B) is an unconstitutional violation of separation of powers principles, because it requires judicial interference with the executive branch's decision to settle FCA actions. Instead, the court observed that judicial scrutiny of settlement agreements is common. The court also noted that, by its terms, the proposed settlement included a provision that allowed the district court to retain jurisdiction over the matter, in order to enforce the terms of the settlement. Thus, the court reasoned, the executive branch consented to the judicial branch's involvement in the settlement process. Accordingly, the circuit court held that section 3730(c)(2)(B) was constitutional and that the district court erred when it approved the proposed settlement and dismissed the relator's *qui tam* allegations without first determining that the proposed agreement was fair, adequate and reasonable. The D.C. Circuit Court reversed the district court's ruling and remanded the matter for a proper hearing.

Retaliation

The circuit court then considered the defendant's motion for summary judgment on the relator's retaliation claim. The defendant argued that the relator did not engage in protected activity because she did not conduct her own investigation and simply made conclusory allegations of fraud. The appeals court, though, found that the relator alleged that she repeatedly disobeyed her supervisor's order to stop investigating the defendant's alleged fraudulent pricing and product-sourcing practices, and continued her investigation even after she was threatened with termination. Further, the court found that the relator contacted her supervisor's superior, alleging a variety of FCA violations and possible legal trouble for the defendant, and was terminated from her job two weeks later. The circuit court concluded that the relator had indeed engaged in protected activity, as she gathered evidence that the defendant defrauded the federal government, shared that evidence with her superiors, and warned them of potential FCA liability. Therefore, the court held the defendant was not entitled to summary judgment on the issue of whether or not the relator engaged in protected conduct. The defendant then argued that the relator was terminated from her job for legitimate, non-discriminatory reasons, which conflicted with the court's finding that the relator had stated a prima facie case of retaliation. The court remanded this issue of fact to the district court as well.

U.S. ex rel. Wickliffe v. EMC Corp., 2012 WL 1111242 (10th Cir. April 4, 2012)

Two relators brought a *qui tam* action alleging that a software company knowingly sold defective computers to government agencies and fraudulently concealed information about the defects. The government elected not to intervene in the relators's suit and asked the court to dismiss the *qui tam* complaint pursuant to Section 3730(c)(2)(A) of the False Claims Act, arguing that the relators' complaint was barred by the FCA's first-to-file bar, since an earlier-filed *qui tam* complaint alleged the same fraud scheme and material elements. The U.S. District Court for the District of Utah granted the government's motion. It held the government had sufficient support for its motion to dismiss, and alternatively, that the relators' complaint was barred by the first-to-file rule. The relators appealed the district court's ruling to the U.S. Court of Appeals for the Tenth Circuit.

Holding: The Tenth Circuit affirmed the district court's decision.

Government's Motion to Dismiss *Qui Tam* Complaint

The relators argued that the district court's dismissal of their complaint pursuant to the first-to-file bar was improper because the earlier-filed complaint at issue did not meet Rule 9(b)'s heightened pleading requirements and was barred by the FCA's public disclosure rule, and as such, was defective. However, the circuit court declared that it would not decide the heightened pleading issue because the district court dismissed the complaint pursuant to section 3730(c)(2)(A) of the FCA, and not pursuant to the first-to-file rule. The court noted that section 3730(c)(2)(A) "avoids a decision on the merits" and permits the government to move to dismiss a *qui tam* action "notwithstanding the objections of the relator" if the relator is given notice and an opportunity for a hearing. During the hearing, the government argued that it had already been made aware of the relators' fraud allegations against the defendant before the relators filed their suit. Furthermore, the government argued that it had settled those fraud allegations with the defendant and the previous relator.

The appeals court found that the settlement furthered the government's valid interest in ending duplicate litigation involving resolved claims. Since the government provided a rational reason for moving to dismiss the relators' action, the circuit court held that the burden to prove that dismissal would be fraudulent, illegal, arbitrary or capricious shifted on the relator. The relators argued that their *qui tam* action provided a catalyst for and/or evidence used in the government's settlement with the defendant and the previous relator. They further alleged that the previous relator was not the proper party and that instead, they were entitled to a share of the settlement. The court, though, held that the relators' speculation regarding the settlement was insufficient to show fraud, illegality, arbitrariness or capriciousness. The court also held that the potential merit of the relators' *qui tam* action was insufficient to overcome the government's rational reasons for seeking its dismissal. Accordingly, the Tenth Circuit affirmed the district court's decision.

K. Vicarious Liability

U.S. ex rel. Banignan v. Organon USA Inc., 2012 WL 1190826 (D. Mass. Apr. 9, 2012)

Two relators brought a *qui tam* action on behalf of the United States, 27 state governments, and one U.S. city government, alleging that an international pharmaceutical company (Akzo Nobel), its subsidiaries (collectively, Organon), the pharmaceutical companies that eventually acquired the subsidiaries (Schering-Plough and Merck), and a group of pharmacies (Omnicare and Pharmerica) engaged in a fraudulent scheme, whereby Organon promoted its drugs for off-label uses and offered improper remuneration to the pharmacies in exchange for converting patients from competitors' drugs to Organon's drugs—a process called "therapeutic interchange." The relators further alleged that Organon illegally reduced its rebate liability to state Medicaid programs by concealing from the government the true "best price" for its drugs; by improperly lowering its drugs' "average manufacturer price" and then failing to disclose the true AMP to the government; and by selling its drugs at a discount to entities that were not qualified to receive such discounts. The relators contended that the defendants' fraudulent schemes violated the False Claims Act, as the fraud resulted in the submission of false claims for Medicaid prescription drug reimbursements by the pharmacies. The relators also alleged that Organon, Omnicare and PharMerica violated the FCA by conspiring to defraud the United States. Finally, both relators alleged retaliation claims under the FCA against their respective former employers—Organon and Schering-Plough—claiming that the companies retaliated against them in response to the investigation and initiation of their fraud claims.

Defendant Akzo Nobel, a Netherlands corporation, moved to dismiss all of the relators' claims for lack of personal jurisdiction and improper service of process. The other defendants separately moved to dismiss the claims for failure to plead the alleged fraud with particularity and failure to state a claim under the FCA.

Holding: The U.S. District Court for the District of Massachusetts granted Akzo Nobel's motion. The court, however, decided that the remaining defendants' motions would be addressed in a subsequent order.

Personal Jurisdiction and Alter Ego Liability

In response to defendant Akzo Nobel's assertion that it was not subject to the court's jurisdiction, the relators argued that they satisfied the tests for both specific and general jurisdiction over Akzo Nobel. In the alternative, they argued that it would be appropriate to pierce the corporate veil in this instance, since Akzo Nobel controlled Organon. The court disagreed, finding that the relators failed to show that the court had specific jurisdiction over Akzo Nobel. The court noted that "[s]pecific jurisdiction exists when there is a demonstrable nexus between a plaintiff's claims and the defendant's forum-based activities." Based on that definition, the court held that it lacked specific jurisdiction over the claims against Akzo Nobel, the relators could not show that Akzo Nobel's relationship with Organon established contacts between Akzo Nobel and the United States. The court observed t hat "Akzo Nobel's approval of Organon's business plans does not establish that it was involved in creating the plans or implementing them, much less that it caused the specific harm alleged here." Ultimately, the court held that the relator failed to establish any link between Akzo Nobel and their fraud claims.

In addition the court determined that it lacked general jurisdiction over Akzo Nobel. The court rejected the relators' argument that the court could exercise general jurisdiction over Akzo Nobel because the U.S. market constituted a large portion of Akzo Nobel's pharmaceutical business, as evidenced by Akzo Nobel's listing on the NASDAQ stock exchange, Akzo Nobel's ownership of U.S. patents, Akzo Nobel's act of filing two patent infringement suits in U.S. courts to protect its patents, and Akzo Nobel's registration of a U.S. trademark that was used by its subsidiaries. Instead, the court held that the relators failed to cite any relevant authority to support their claim that any of Akzo Nobel's conduct constituted a continuous and systematic contact with the U.S., for general jurisdiction purposes.

Finally, the court considered the relators' alternative argument—that they were entitled to pierce the corporate veil, because Akzo Nobel and Organon lacked an arms-length relationship. They contended that the functions of Akzo Nobel's corporate center and business units overlapped; Akzo Nobel and Organon shared common employees; Organon's CEO reported to Akzo Nobel's CEO and sat on Akzo Nobel's board; and Akzo Nobel approved Organon's budgets and marketing plans, required regular sales updates from Organon, and regulated Organon's salaries. The court, though determined that none of the relators' allegations demonstrated anything more than a normal parent-subsidiary relationship. Accordingly, the court held that veil piercing was unwarranted. Therefore, the court granted Akzo Nobel's motion to dismiss the relators' claims for lack of personal jurisdiction. The court denied Akzo Nobel's supplemental motion to dismiss for improper service as moot.

The court also denied the relators' request for limited discovery on the jurisdiction questions, holding that the relators failed "to meet their obligation to present facts to the court which show why jurisdiction would be found if discovery were permitted."

See *U.S. ex rel. Jamison v. McKesson Corp.*, 2012 WL 487998 (N.D. Miss. Feb. 14, 2012), at page 8.

See *U.S. ex rel. Watine v. Cypress Health Sys. Fla., Inc.*, 2012 WL 467894 (N.D. Fla. Feb. 14, 2012), at page 163.

See *U.S. ex rel. King v. Solvay S.A.*, 2011 WL 4834030 (S.D. Tex. Oct. 12, 2011), at page 10.

Judgments & Settlements

JULY 1, 2011–JUNE 30, 2012

AHS Hospital Corp., Atlantic Health System, Inc. and Overlook Hospital (D.N.J. June 21, 2012)

AHS Hospital Corp., Atlantic Health System, Inc. and Overlook Hospital have agreed to pay the United States $8,999,999 to settle a False Claims Act lawsuit alleging that, from 2002 to 2009, the companies violated the federal False Claims Act by overbilling Medicare for patients who were improperly treated as inpatients when they should have actually been treated on an outpatient basis. The *qui tam* suit was filed by several former employees of Overlook Hospital. As part of the settlement, Atlantic Health System also entered into a five-year Corporate Integrity Agreement, under which Overlook Hospital will establish internal processes to comply with Medicare requirements.

Hospice Care of Kansas, LLC (D. Kan. June 21, 2012)

Hospice Care of Kansas, LLC and its parent company, Texas-based Voyager HospiceCare, Inc., have agreed to pay $6.1 million to settle a *qui tam* suit alleging that they violated the federal False Claims Act by submitting fraudulent claims to Medicare between 2004 and 2008. The company allegedly submitted Medicare claims for hospice benefits for patients who had life expectancies of more than six months, even though such patients are ineligible for hospice care under Medicare. The *qui tam* action was brought by Beverly Landis, a former nurse for Hospice Care of Kansas. She will receive an award of $1.3 million.

Bo W. Paik (C.D. Cal. June 15, 2012)

Bo W. Paik, a doctor practicing in Rancho Palo Verdes, California, agreed to pay $530,000 to resolve allegations that he received illegal cash payments and patient referrals in exchange for referring Medicare beneficiaries to a Los Angeles home health agency, GreatCare Home Health, Inc., which billed Medicare for thousands of medically unnecessary home health visits. These allegations arose in a False Claims Act *qui tam* lawsuit filed by GreatCare's former receptionist, Misha Kim. Kim's suit also named GreatCare and several doctors and nurses, as well as various unlicensed individuals as defendants. Paik is the first defendant to settle the allegations against him.

Christus Spohn Health System Corporation (S.D. Tex. June 14, 2012)

Christus Spohn Health System Corporation paid the United States $5.1 million to settle allegations that six of its hospitals in and around Corpus Christi, Texas violated the federal False Claims Act by submitting false Medicare claims that contained inpatient codes for procedures that should have been billed under less expensive outpatient codes. The lawsuit originated with a *qui tam* action filed by an unnamed relator, who will receive a 20% share of the government's recovery.

Longs Drugs/CVS Caremark Co. (N.D. Cal. June 8, 2012)

CVS Caremark Co., the parent company of Longs Drugs Stores Corp., has agreed to pay $975,000 to settle allegations made in a *qui tam* suit that the corporation violated the federal False Claims Act and similar laws in California and five other states, by fraudulently overbilling Medicaid. Longs Drugs is also alleged to have unlawfully fired the relator in the suit, Haroon Aziz, a former pharmacy technician, after he confronted his managers over these purported billing practices. Aziz's claims were pursued by TAFEF member Michael Hirst, of the Hirst Law Group, P.C. Aziz will receive $175,000 as his share of the recovery.

CMAI Industries, LLC (E.D. Mich. June 7, 2012)

CMAI Industries, LLC has agreed to pay the United States $6.3 million to resolve claims that, between 2004 and 2011, CMAI and its related companies violated the False Claims Act by knowingly misclassifying auto parts that were manufactured in China and imported to the United States in order to evade paying $2.5 million in duties. The companies allegedly sought to achieve a duty rate of zero for themselves by charging their customers the actual duty of 2.5%, but failing to remit those funds to U.S. Customs and Border Protection. These allegations were made by a relator, Theodore Ludlow, who received a $1.2 million share of the government's recovery. CMAI and its related companies also pled guilty to the federal charge of "entry of goods by means of false statement" and were sentenced to two years' probation a $25,000 fine.

Orthofix, Inc. (D. Mass. June 7, 2012)

Orthofix, Inc., a Texas-based manufacturer of medical devices, has agreed to pay the federal government $34 million to settle claims relating to the company's sale of bone growth stimulator devices. Allegedly, Orthofix improperly waived patient co-payments which resulted in overpayments from the federal health programs; paid kickbacks to physicians; and failed to advise patients of their right to rent, and not necessarily only own, its products. These claims originated with a *qui tam* lawsuit filed by Jeffrey Bierman, who will receive an award of $9.2 million. Bierman was represented by TAFEF members Neil Getnick and Lesley Skillen of Getnick & Getnick. Orthofix also agreed to plead guilty to obstructing a federal audit—a felony—and will pay a $7.7 million fine. The company also agreed to enter into a corporate integrity agreement with the Office of Inspector General of the U.S. Department of Health and Human Services.

Calnet, Inc. (E.D. Va. June 1, 2012)

Calnet, Inc. has agreed to pay the federal government $18.1 million to resolve allegations that it submitted false claims to the Department of Defense in 2005. At that time, Calnet provided translation and other linguistic services at Guantanamo Bay and several other facilities, and allegedly overstated its overhead rates on multiple contracts with the United States, and thus submitted inflated claims for payment to the DOD. The settlement resolves a *qui tam* lawsuit filed by a former Calnet employee, Kimthy Chao, who was represented by TAFEF member Zachary Kitts, of the K&G Law Group. Chao will receive $2,669,724, as her share in the settlement proceeds.

Hospice Family Care, Inc. (D. Ariz. May 31, 2012)

Hospice Family Care, Inc. of Arizona agreed to pay the United States $3.7 million to resolve claims that it submitted false bills to Medicare, causing the federal government to pay for hospice care for patients who were completely or partially ineligible for such care. As part of the settlement agreement, co-owners Nancy Smith and Nancy Turner will be immediately excluded from Medicare, Medicaid, and all other federal health programs for the next seven years.

St. Jude Medical, Inc. (D. Mass. May 31, 2012)

St. Paul, Minnesota-based St. Jude Medical, Inc. has agreed to pay the federal government $3.65 million to resolve claims that it inflated prices of replacement defibrillators and pacemakers sold to the Department of Defense and the Department of Veterans Affairs. The allegations were brought to the government's attention by two whistleblowers, who will jointly receive a reward of $730,000—20% of the total settlement.

Deutsche Bank and MortgageIT (S.D.N.Y. May 10, 2012)

Deutsche Bank and its subsidiary, MortgageIT, agreed to pay the United States $202.3 million to settle allegations that, during a ten-year period, the companies violated the False Claims Act by submitting various false certifications to the U.S. Department of Housing and Urban Development (HUD), including false certifications that MortgageIT had originated mortgage loans in compliance with HUD rules governing the Direct Endorsement Lender Program. As part of the settlement, the companies admitted and accepted responsibility for failing to conform to HUD regulations concerning quality control programs and certifications, as well as for failing to conduct full reviews on early payment loan defaults.

Direct Resource, Inc. (D.D.C. May 8, 2012)

Direct Resource, Inc., an office supply company, will pay the federal government $450,000 to settle claims that the company knowingly sold products to the United States that originated from China, in violation of the Trade Agreements Act (TAA). These allegations originally arose in a *qui tam* lawsuit filed by Louis Scutellaro, who alleged that Direct Resource, Inc. also violated the False Claims Act by submitting fraudulent claims to the General Services Administration for the products. Scutellaro will receive an award of $67,500.

Abbott Laboratories, Inc. (W.D. Va. May 7, 2012)

Abbott Laboratories, Inc., a Global Healthcare Company, has pled guilty and has agreed to pay $1.5 billion to resolve criminal and civil charges that, from 1998 to 2006, the company unlawfully promoted the prescription anti-seizure drug, Depakote, for uses not approved as safe and effective by the Food and Drug Administration. The resolution of these charges has criminal, civil, and administrative components. As part of its plea deal, Abbott will pay a criminal fine of $500 million, forfeit assets of $198.5 million, and submit to a term of probation for five years, under which it will be forced to report any probable violations of the Food, Drug, and Cosmetic Act to the probation office. The company will also pay $1.5 million to the Virginia Medicaid Fraud Control Unit. As part of the civil settlement, Abbott will pay $800 million to the federal government and to affected states to resolve claims that its unlawful marketing practices caused false claims to be submitted to government health care programs. This settlement resolves four *qui tam* lawsuits filed under the False Claims Act, and the whistleblowers who filed those lawsuits will jointly receive $84 million of the settlement proceeds. Finally, Abbott will also execute a Corporate Integrity Agreement with the Department of Health and Human Services, Office of Inspector General, to hold it accountable for any future infractions.

Lenox Hill Hospital (S.D.N.Y. May 4, 2012)

Lenox Hill Hospital in New York City agreed to pay the United States $11.75 million to settle allegations that it violated the False Claims Act by inflating charges for its services, as reported to Medicare. Allegedly, Lenox Hill inflated the cost of its room and board charges as well as manipulated its overall charge structure in order to make it appear as if patient treatments were unusually costly and to receive larger supplemental reimbursements and increased outlier payments from Medicare.

Apex Medical Group, P.C. (E.D. Tenn. May 3, 2012)

Apex Medical Group P.C., d.b.a. Nephrology Consultants, a nephrology physician practice group and group of six dialysis centers in various counties in Tennessee, agreed to pay $4.36 million to settle alleged violations of the federal False Claims Act, the Tennessee Medicaid False Claims Act, and other federal and state laws and regulations from 2001 to 2006. A government investigation revealed that Apex submitted numerous false claims for payment to government health care programs—including Medicare and TennCare—by upcoding for various physician services, while the dialysis clinics improperly submitted inaccurate claims to government health care programs for a variety of dialysis services, which caused those programs to make payments Apex was not entitled to receive. The relator in the case, Kristi Moore, was a former employee of Apex and was represented by TAFEF member David A. Burkhalter, of Burkhalter, Rayson & Associates, P.C. Moore will receive $347,300.00 as her share of the governments' recovery.

McKesson Corporation (D.N.J. April 30, 2012)

McKesson Corporation agreed to pay the United States more than $190 million to settle claims that it violated the False Claims Act by reporting inflated pricing information for a large number of brand-name drugs to a publisher of drug prices. Because this publisher was used by state Medicaid programs to set pharmaceutical payment rates, McKesson was alleged to have caused Medicaid to overpay for the drugs by millions of dollars. The settlement resolves a *qui tam* suit filed by relator David Morgan, a Pennsylvania pharmacist who conducted his own investigation into the matter as a healthcare auditor. Morgan was represented by TAFEF members David Stone, Robert Magnanini, Eric Jaso, and Jason Spiro from Stone & Magnanini LLP.

ATK Launch Systems, Inc. (D. Utah April 23, 2012)

ATK Launch Systems Inc. has agreed to pay $36,967,160 to the United States to resolve claims that it knowingly sold dangerous and defective illumination flares to the Army and the Air Force. The settlement also requires ATK to retrofit 76,000 defective flares that remain in the government's inventory. These large-area flares burn in excess of 3,600 degrees Fahrenheit for over five minutes, but are incapable of withstanding a 10-foot drop without exploding or igniting, as required by specifications. The government alleged that ATK was aware that the flares did not meet these specifications, but still submitted false claims for payment to the Department of Defense. The relator in the case, Kendall Dye, became the flare program manager for ATK Launch Systems in 2005. Dye was represented by TAFEF members Eric Havian and Claire Sylvia of Phillips & Cohen LLP.

Anthony Allega Cement Contractor Inc. (N.D. Ohio April 23, 2012)

Anthony Allega Cement Contractor Inc., a Cleveland construction firm, has agreed to pay the United States $500,000 to resolve allegations that it knowingly submitted false claims related to a federally-funded construction project. Allega was hired by the U.S. government to construct and pave a new runway at Cleveland's Hopkins International Airport. The company allegedly failed to comply with the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) program—although Allega claimed that materials and services were provided by a company called Chem-Ty Environmental, Chem-Ty was allegedly only used as a facade by Allega to make it appear as if a DBE had performed the work.

Walgreens (C.D. Cal. April 20, 2012)

Walgreens agreed to pay the United States and several states $7.9 million to resolve claims that it violated the False Claims Act by offering incentives such as gift cards and other similar promotions to beneficiaries of government health care programs—including Medicare and Medicaid—so that the beneficiaries would transfer their prescriptions to Walgreens pharmacies. A government investigation concluded that Walgreens had offered government health beneficiaries $25 gift cards when they transferred a prescription from another pharmacy to Walgreens, in violation of federal law. The relators, Cassie Bass, a pharmacy technician formerly employed by Walgreens, and Jack Chin, an independent pharmacist, brought separate actions under the *qui tam* provisions of the False Claims Act and will receive a total share of $1,277,172 of the settlement.

AmMed Direct LLC (M.D. Tenn. April 13, 2012)

AmMed Direct LLC has agreed to pay the United States and the state of Tennessee $18 million plus interest to settle allegations that it submitted false claims to both Medicare and Tennessee Medicaid between September 2008 and January 2010. The United States and Tennessee asserted that to circumvent rules prohibiting healthcare companies from calling beneficiaries to sell them products without their prior consent and instead to induce Medicare beneficiaries to contact the company of their own volition, AmMed engaged in a scheme to advertise free cookbooks. When AmMed was contacted about the free cookbooks, it sought to confirm that the person was a Medicare beneficiary. Once that information was confirmed, AmMed representatives tried to sell the beneficiary supplies that would be paid for by Medicare. But many Medicare beneficiaries who called the company to receive the advertised free cookbooks subsequently returned the additional supplies for which Medicare or TennCare had reimbursed AmMed. AmMed, however, failed to refund the money received to Medicare or TennCare, which cost both programs millions of dollars. The United States will receive $17,560,997 of the settlement, while Tennessee will receive $439,003. The settlement resolves a *qui tam* action filed by former AmMed Direct employee Bryan McNeese, who will receive an award of approximately $2.88 million.

Tenet Healthcare (N.D. Tex. April 10, 2012)

Tenet Healthcare agreed to pay the United States $42.75 million to settle claims that it violated the False Claims Act between 2005 and 2007 by overbilling the federal Medicare program. Medicare generally pays at a higher rate for rehabilitation care provided at inpatient rehabilitation facilities as opposed to other settings, and by over-admitting patients to such facilities (IRFs), Tenet was alleged to have fraudulently billed Medicare for millions of dollars' worth of unnecessary treatment. After discovering the overpayments during a 2007 internal review Tenet disclosed the matter to the U.S. Department of Health and Human Services' Office of the Inspector General, as required under a prior corporate integrity agreement. The settlement is the United States' single largest recovery pertaining to inappropriate admissions to IRFs.

Radiotherapy Clinics of Georgia LLC (N.D. Ga. April 3, 2012)

Radiotherapy Clinics of Georgia LLC and its affiliates (collectively, RCOG), a collection of radiation oncology practices, has agreed to pay $3.8 million to the United States in order to settle allegations of violating the False Claims Act by billing Medicare for medically unnecessary treatments and services, including additional X-ray images and physics consults. RCOG was named in two separate *qui tam* complaints filed by relators R. Jeffrey Wertz, a former employee of RCOG, and Rebecca S. Tarlton, a physician who also worked for the company. The whistleblowers' claims were later consolidated into one action, and they will jointly receive a $646,000 share of the government's proceeds. Relator Tarlton was represented by TAFEF member Raymond Moss.

Wellcare Health Plans, Inc. (M.D. Fla. April 3, 2012)

WellCare Health Plans, Inc. will pay $137.5 million to the federal government and nine states—Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Missouri, New York and Ohio – to resolve four lawsuits alleging that the company violated the False Claims Act by submitting false claims to Medicare and several Medicaid programs. Among other allegations, the lawsuits alleged that WellCare falsified data, retained overpayments it had received from Florida Medicaid, and engaged in various marketing abuses. The four lawsuits were filed separately by relators Sean Hellein, Clark Bolton, SF United Partners Inc., and Eugene Gonzalez. Hellein, a financial analyst formerly employed by WellCare, whose *qui tam* complaint initiated the government's investigation, will receive an award of $20.75 million, while the three other relators will split an award of approximately $4.66 million. WellCare may be forced to pay an additional $35 million if the company is sold or experiences a change in control within three years of the settlement—which would entitle the relators to a share of any additional contingency payment as well.

Universal Health Services Inc. (W.D. Va. March 28, 2012)

Universal Health Services Inc. (UHS) and subsidiaries, Keystone Education and Youth Services LLC and Keystone Marion LLC (which conducted business in Marion, VA as the Keystone Marion Youth Center), agreed to pay the United States and the Commonwealth of Virginia $6.85 million to resolve False Claims Act allegations. The organization allegedly provided substandard psychiatric counseling and treatment to adolescents in violation of Medicaid requirements, and also allegedly falsified records and submitted false claims to the Medicaid program. This settlement resolves a *qui tam* suit filed by Megan Johnson, Leslie Webb and Kimberly Stafford-Payne, former therapists at the now-closed Keystone Marion Youth Center. The relators were represented by TAFEF member Mark Hurt.

Cypress Pharmaceutical Inc., Hawthorn Pharmaceuticals Inc., and Max Draughn (E.D. Tex. March 28, 2012)

Cypress Pharmaceutical Inc., its subsidiary, Hawthorn Pharmaceuticals Inc., and its CEO, Max Draughn, have agreed to pay the United States $2.8 million to resolve allegations that, between 2003 and 2009, they violated the False Claims Act and caused the submission of false quarterly reports to the Centers for Medicare and Medicaid Services by improperly marketing three prescription drugs: Hylira, Zaclir and Zacare as being eligible for reimbursement by Medicaid and other government health care programs even though the drugs had not been approved as safe and effective by the Food and Drug Administration. This settlement resolves a *qui tam* suit filed by Robert Heiden, a former district sales manager for Hawthorn. Heiden, who was represented by TAFEF members Colette Matzzie and Stephen Hasegawa of Phillips & Cohen LLP, will receive a reward of more than $300,000.

Gary-Williams Energy (D. Colo. March 26, 2012)

Gary-Williams Energy agreed to pay $2,764,749 to settle allegations that, from October 2008 to September 2009, the company underpaid the U.S. Department of the Interior in connection with oil drilling on leased federal lands in the Gulf of Mexico. Specifically, the company claimed that it was entitled to certain price reductions and credits, based on the costs of shipping the acquired oil to various market centers. However, since the company did not actually transport the acquired oil, but instead transferred title to the oil at the wellhead to a third party, it was not entitled to the price reductions and credits that it claimed against the federal government.

LifeWatch Services Inc. (S.D. Ohio and W.D. Wash. March 23, 2012)

LifeWatch Services Inc. agreed to pay the United States $18.5 million to resolve allegations of improperly billing Medicare for Ambulatory Cardiac Telemetry services using a false diagnostic code. In addition to the monetary settlement, LifeWatch agreed to enter into a 5-year Corporate Integrity Agreement with the Office of Inspector General of the U.S. Department of Health and Human Services. This settlement resolves two *qui tam* suits filed by LifeWatch sales representatives: a 2009 suit filed by Ryan Sims in the U.S. District Court for the Western District of Washington, and a 2011 suit filed by Sara Collins in the U.S. District Court for the Southern District of Ohio. Sims and Collins will receive a total reward of about $3.4 million. Simms was represented by TAFEF member Mark Walters of Walters Law Firm PLLC and Dan DeLue of Ferring & DeLue, LLP. Collins was represented by TAFEF member Frederick M. Morgan, Jr. of Morgan Verkamp LLC.

EUSA Pharma (USA) Inc. (March 23, 2012)

EUSA Pharma (USA) Inc. agreed to pay the United States $180,000 to resolve claims that it violated the False Claims Act by encouraging doctors to submit improper claims to Medicare for imaging scans. EUSA Pharma, which makes and sells the radiopharmaceutical ProstaScint, allegedly advised health care providers to submit multiple claims for certain imaging scans performed following use of ProstaScint. This conduct occurred after the Society of Nuclear Medicine informed the company that only one claim should be submitted for these scans. This settlement resolves a *qui tam* suit filed by Ann-Marie Williams, a former EUSA Pharma employee. Williams will receive a $30,600 share of the federal government's recovery.

Lockheed Martin Corporation (N.D. Tex. March 23, 2012)

Lockheed Martin Corporation agreed to pay the United States $15.85 million to resolve two False Claims Act *qui tam* suits alleging that between 1998 and 2005, Tools & Metals Inc. (TMI)—a Lockheed Martin subcontractor—overcharged the federal government for perishable tooling kits and related products it used in military aircraft construction and maintenance. In addition, Lockheed Martin was accused of acting recklessly, by failing to adequately oversee TMI's charging practices and by mishandling information revealing those practices. The relators in this matter, Robert Spencer and John Becker, will receive a combined $2 million share of the federal government's recovery. Spencer was represented by TAFEF member Sam Boyd of Boyd & Associates.

Harbert Corporation, Harbert International, Inc., Bill Harbert International Constructions Inc., Harbert Construction Services (U.K.) Ltd. and Bilhar International Establishment (D.C. March 20, 2012)

Harbert Corporation, Harbert International, Inc., Bill Harbert International Constructions Inc., Harbert Construction Services (U.K.) Ltd., and Bilhar International Establishment agreed to pay the United States $47 million to settle allegations that they submitted false claims to the U.S. Agency for International Development (USAID), by conspiring to rig bids involving a USAID-funded construction contract to build a sewer system in Cairo, Egypt in the late 1980s and early 1990s. The settlement also resolves a *qui tam* suit filed in 1995 by Richard F. Miller.

Devon Energy Corporation (E.D. Tex. March 12, 2012)

Devon Energy Corporation and its affiliates agreed to pay the United States $3.5 million to resolve claims that PennzEnergy (a predecessor to Devon), violated the False Claims Act by knowingly underpaying royalties owed on natural gas produced from federal and Indian lands. PennzEnergy, formerly known as Pennzoil Company, was acquired by Devon in May 1999.

PennzEnergy allegedly improperly deducted from royalty values costs associated with boosting gas up to pipeline pressures and failed to report and pay royalties on gas used to fuel boosting compressors. This settlement resolves one of the last in a series of settlements arising out of a False Claims Act *qui tam* suit filed by Harrold Wright, who is now deceased. Wright's heirs will receive his relator's reward—a $908,040.38 share of the federal government's recovery.

Odyssey Healthcare Inc. (E.D. Wis. March 1, 2012)

Odyssey HealthCare Inc., a subsidiary of Gentiva, agreed to pay the United States $25 million to resolve two *qui tam* suits alleging that between 2006 and 2009, the company fraudulently billed Medicare for continuous home care services that were not covered, either because the services were unnecessary or because the services were not performed in accordance with Medicare requirements. In addition to the $25 million payment, Odyssey entered into a 5-year corporate integrity agreement with the United States Department of Health and Human Services Office of the Inspector General. The relators in this matter, who were represented by TAFEF members Nola Hitchcock of Cross Law Firm, S.C., and Marcella Auerbach, Ken Nolan, and Jeb White of Nolan & Auerbach, P.A., will receive a total award of more than $4.6 million.

Beth Israel Medical Center (S.D.N.Y. March 1, 2012)

Beth Israel Medical Center agreed to pay the United States $13,031,355 to settle allegations that, from February 21, 2002 through August 7, 2003, it received millions of dollars in improper Medicare payments by fraudulently inflating its fees for services provided to Medicare patients in order to obtain larger supplemental reimbursements, known as outlier payments. The medical center was also accused of intentionally manipulating its fee structure to make it appear as though certain patient treatments were unusually costly, when in fact they were not.

Mylan Inc. (D. Mass. Feb. 28, 2012)

Mylan Inc. agreed to pay $57 million to settle claims made in a *qui tam* action that the company caused the United States and the State of California's Medicaid program to overpay for drugs by reporting inflated drug prices, while knowing that the government entities would use those false reports to set higher reimbursement rates for Medicaid. The *qui tam* case was filed by Ven-A-Care of the Florida Keys Inc., which was represented my James Breen of The Breen Firm, P.A. The United States will receive $22.2 million from the settlement, the State of California will receive $26.3 million, and the relator, Ven-A-Care will receive a reward of $8.5 million.

Total Fina S.A., Total Minatome Corporation, Total Exploration Production USA Inc., Fina Oil and Chemical Company, Elf Exploration Inc., and Total E&P USA Inc. (E.D. Tex. Feb. 22, 2012)

Total Fina S.A., Total Minatome Corporation, Total Exploration Production USA Inc., Fina Oil and Chemical Company, Elf Exploration Inc., Total E&P USA Inc., and their affiliates agreed to pay the United States $15 million to resolve claims that they violated the False Claims Act by knowingly underpaying royalties owed on natural gas produced from federal and Indian leases. Specifically, the companies allegedly improperly deducted from royalty values the cost of boosting gas up to pipeline pressures and improperly reported processed gas as unprocessed gas in order to reduce royalty payments. This settlement resolves claims brought in a *qui tam* suit filed by Harrold Wright. Wright's heirs will receive a reward of $23,000 plus interest.

CitiMortgage, Inc. (S.D.N.Y. Feb. 15, 2012)

CitiMortgage, Inc., a subsidiary of Citibank, N.A., agreed to pay the United States $158.3 million to settle allegations of more than six years of misconduct against the Department of Housing and Urban Development (HUD) and the Federal Housing Administration (FHA), which caused HUD to pay millions of dollars to CitiMortgage when mortgage loans defaulted. Specifically, CitiMortgage allegedly failed to meet all of the HUD-FHA requirements for certain loans, failed to fully review loans that it endorsed for FHA insurance under the Direct Endorsement Lender Program, endorsed FHA insured loans that were ineligible under the program, and submitted false certifications to the federal government involving these ineligible loans. This settlement resolves allegations that arose in a *qui tam* suit brought by Sherry Hunt, a CitiMortgage employee in Missouri.

Gunnison Energy Corporation, SG Interests I Ltd. and SG Interests VII Ltd. (D. Colo. Feb. 15, 2012)

Gunnison Energy Corporation (GEC), SG Interests I Ltd. and SG Interests VII Ltd. (SGI) agreed to pay the United States a total of $550,000 to settle antitrust and False Claims Act violations related to an agreement not to compete in bidding for four natural gas leases sold at auction by the U.S. Department of Interior's Bureau of Land Management (BLM). In 2005, GEC and SGI entered into a written agreement in which they agreed that only SGI would bid at the auctions and then assign an interest in the acquired leases to GEC. As a result of this agreement between GEC and SGI, the United States received less revenue from the sale of the four leases than it would have, had SGI and GEC competed with one another at the auctions. In addition, GEC and SGI were alleged to have made false statements to the government in connection with the agreement not to compete.

Rhode Island Hospital (D.R.I. Feb. 13, 2012)

Rhode Island Hospital (RIH) agreed to pay the United States $5.3 million to settle allegations that from 2004 to 2009 the hospital ordered medically unnecessary overnight admissions for about 260 patients who underwent stereotactic radiosurgery (otherwise known as Gamma Knife treatment), but fraudulently billed Medicare and Medicaid as if the overnight stays were medically necessary. The hospital will reimburse Medicare and Medicaid $2.6 million and will pay the federal government an additional $2.7 million in damages.

Capmark Finance LLC (C.D. Cal. Feb. 10, 2012)

Capmark Finance LLC agreed to pay the United States $3.9 million to resolve allegations that the company made false statements in connection with two nursing home mortgage loans insured by the U.S. Department of Housing and Urban Development (HUD). The two nursing homes were Canoga Care Center in Canoga Park, California and Hudson Valley Care Center in Ghent, New York. An investigation and audit by the HUD Office of Inspector General concluded that Capmark misrepresented material facts critical to the borrowers' creditworthiness in the two nursing home mortgage loan applications, which induced HUD to insure the loans—when the nursing homes later defaulted on the loans, it caused a loss to the government.

Bank of America Corporation, JPMorgan Chase & Co., Wells Fargo & Company, Citigroup Inc. and Ally Financial Inc. (Feb. 9, 2012)

The federal government and 49 state attorneys general reached a landmark $25 billion agreement with the Bank of America Corporation, JPMorgan Chase & Co., Wells Fargo & Company, Citigroup Inc., and Ally Financial Inc. (formerly GMAC) to address allegations in six *qui tam* suits of mortgage loan servicing and foreclosure abuses, including: using "robo-signed" affidavits in foreclosure proceedings; engaging in deceptive practices when offering loan modifications; failing to offer non-foreclosure alternatives before foreclosing on borrowers with federally-insured mortgages; and filing improper documentation in federal bankruptcy court. The joint federal-state agreement also requires the loan servicers to implement comprehensive new mortgage loan servicing standards. The relators involved in the *qui tam* suits were: Gregory Mackler, Lynn Szymoniak, Sherry Hunt, Kyle Lagow, Victor Bibby and Brian Donnelly.

Dava Pharmaceuticals Inc. (D. Md. Feb. 8, 2012)

Dava Pharmaceuticals Inc. agreed to pay the United States $11 million to settle allegations of underpaying its rebate obligations under the Medicaid Prescription Drug Rebate Program. The settlement also resolves allegations that between October 1, 2005 and September 30, 2009, Dava incorrectly classified certain pharmaceuticals and used incorrect methodologies in calculating average manufacturer prices for certain pharmaceuticals. These allegations were made in a *qui tam* action brought by Jim Conrad, who was represented by TAFEF members Marcella Auerbach and Kenneth Nolan, of Nolan & Auerbach, P.A.

Fourteen Hospitals (W.D.N.Y. Feb. 7, 2012)

A group of fourteen hospitals located in New York, Mississippi, North Carolina, Washington, Indiana, Missouri and Florida agreed to pay the United States over $12 million to settle allegations that they submitted false claims to Medicare from 2000 to 2008 by overcharging for kyphoplasty procedures. Kyphoplasty can be performed safely as a less-costly outpatient procedure, but the hospitals performed the procedure on an inpatient basis to increase their Medicare billings. The facilities involved are: Plainview Hospital, Plainview, N.Y. ($2,307,265); North Shore Syosset Hospital, Syosset, N.Y. ($192,735); North Mississippi Medical Center, Tupelo, Miss. ($1,894,683.30); Mission Hospital, Asheville, N.C. ($1.5 million); Wenatchee Valley Medical Center, Wenatchee, Wash. ($1,224,709.96); Community Hospital Anderson, Anderson, Ind. ($500,561.36); St. John's Mercy Hospital, Creve Coeur, Mo. ($365,000); Gulf Coast Hospital, Fort Myers, Fla. ($173,005.86); Lee Memorial Hospital, Fort Myers, Fla. ($159,571.87); and Cape Coral Hospital, Cape Coral, Fla. ($73,279.47). The settlement also involves four hospitals affiliated with Adventist Health System/Sunbelt Inc. in Florida. These four hospitals include: Florida Hospital Orlando; Florida Hospital-Oceanside; Florida Hospital Fish Memorial; and Florida Hospital Heartland Medical Center. The settlement resolves claims raised in a *qui tam* suit filed in 2008 by Craig Patrick and Charles Bates. Patrick is a former reimbursement manager for Kyphon, and Bates is a former regional sales manager for Kyphon. The relators will receive a $2.1 million reward from the total settlement amount. The relators were represented by TAFEF member Mary Louise Cohen of Phillips & Cohen LLP.

Mylan Laboratories, Inc. and Mylan Pharmaceuticals, Inc. (Idaho Jan. 30, 2012)

Mylan Laboratories, Inc. and Mylan Pharmaceuticals, Inc. agreed to pay the State of Idaho $625,000 to resolve claims that they published inflated average wholesale drug prices, which caused the State's Medicaid program to overpay for drugs. For example, in 2003, one unit of Mylan's pharmaceutical product, Bumetanide, had a published average wholesale price of $0.752, but an investigation revealed that the actual average wholesale price in 2003 was only $0.191. More than $460,000 of the settlement amount will be deposited in the state's general fund and $50,000 will be placed in the state's consumer protection account to reimburse the office for investigative and legal costs.

Cayuga Medical Center (N.D.N.Y. Jan. 25, 2012)

Cayuga Medical Center agreed to pay the United States and the state of New York $3.5 million to resolve allegations that the medical facility submitted false claims to Medicare and Medicaid in connection with improper physician recruitment agreements entered into between Cayuga Medical Center and various medical practices. The State of New York will receive $426,305.00 from the settlement and the federal health care programs will receive $3,149,751.00. This settlement resolves a *qui tam* lawsuit filed by Daniel S. Jorgenson, M.D., a plastic surgeon who formerly practiced in Ithaca, NY. Jorgenson will receive a $566,955.18 reward.

The Boeing Company (E.D. Pa. Jan. 20, 2012)

The Boeing Company agreed to pay the United States $4,392,779.74 to resolve allegations that the company improperly billed the Department of Defense for work at Boeing's facility in Ridley Park, Pennsylvania, under a government contract to produce, maintain, repair and modify the Chinook CH-47D and MH-47 helicopters. The settlement resolves claims brought in a *qui tam* suit by current Boeing employee Vincent A. DiMezza, Jr. DiMezza was represented by TAFEF members Marc S. Raspanti and Michael A. Morse and their co-counsel, Christopher A. Iacono, all of Pietragallo Gordon Alfano Bosick & Raspanti, LLP.

Cancer Genetics, Inc. (D. Mass. Jan. 19, 2012)

Cancer Genetics, Inc. agreed to pay the United States $1 million dollars to settle allegations that from July 2003 to March 2005 the company improperly billed Medicare for chromosome karyotyping studies that were not medically necessary and as a result, the company received higher reimbursements than it should have.

Johnson & Johnson and Janssen Pharmaceuticals Inc. (W.D. Tex. Jan. 19, 2012)

Johnson & Johnson and one of its subsidiaries, Janssen Pharmaceuticals Inc., agreed to pay the United States $158 million to settle a *qui tam* lawsuit alleging that from 1994 to 2008 the companies defrauded Texas Medicaid by overstating the safety of the anti-psychotic drug, Risperdal, and by improperly influencing officials and doctors to prescribe the drug for unapproved uses. The *qui tam* suit was filed in 2004 by relator Allen Jones.

Eastern Connecticut Hematology and Oncology, P.C. (E.D. Conn. Jan. 13, 2012)

Eastern Connecticut Hematology and Oncology, P.C. (ECHO) agreed to pay $316,513 to resolve allegations that it fraudulently billed Medicare, Medicaid, and TRICARE from January 1, 2001 through March 31, 2008. ECHO alleged billed the healthcare programs for injections of medications (including Epogen, Neupogen, Neulasta and Aranesp) administered by medical assistants, even though Medical assistants are not authorized to administer medication in Connecticut. The matter was investigated by the Office of Inspector General for the Department of Health and Human Services; the Federal Bureau of Investigation; the Defense Criminal Investigative Service; the United States Food and Drug Administration, Office of Criminal Investigations; the United States Railroad Retirement Board, Office of Inspector General; and the Medicaid Fraud Control Unit, Office of the Chief State's Attorney.

Denver Health and Hospital Authority (D. Colo. Jan. 5, 2012)

Denver Health and Hospital Authority (DHHA), doing business as Denver Health Medical Center, agreed to pay the United States and the State of Colorado $6.3 million to settle allegations of overbilling Medicare and Medicaid by misclassifying patients as inpatients when they were more appropriately classified as outpatients or observation patients. The State of Colorado will receive $1,106,608 of the settlement funds, while the United States will receive $5,193,192. The settlement resolves a *qui tam* suit filed by Joanne Curren, who was represented by TAFEF member Eric L. Young of Egan Young, Attorneys-at-Law. Curren will receive an $817,959 share of the settlement funds.

Actavis Mid-Atlantic, LLC and Actavis Elizabeth, LLC (D. Mass. Jan. 4, 2012)

Actavis Mid-Atlantic, LLC and Actavis Elizabeth, LLC agreed to pay the United States and the States of New York, Florida, South Carolina and Iowa $118.6 million to resolve allegations that they committed fraud by reporting inflated pharmaceutical prices. The U.S., Florida and Texas allegations were contained in *qui tam* cases filed by Ven-A-Care of the Florida Keys Inc. Ven-A-Care was represented by TAFEF member James Breen of The Breen Law Firm P.A., and was awarded a $15.6 million share of the recovery.

Maersk Line Ltd. (N.D. Cal. Jan. 3, 2012)

Maersk Line Ltd. agreed to pay the United States $31.9 million to resolve allegations of overcharging the Department of Defense in connection with cargo transportation contracts. Maersk was contracted to transport thousands of containers from ports to destinations in Iraq, Pakistan, and Afghanistan, and allegedly actively overcharged the government for these services by inflating and tampering with its invoices in various ways, including: billing over the contractual rate for refrigerated containers; billing for excessive late fees; failing to account for cargo transit times and a contractual grace period; billing for container GPS-tracking and security services that were not provided or only partially provided; and failing to credit the government for rebates of container storage fees received by Maersk's subcontractor at a Kuwaiti port. The settlement resolves a *qui tam* suit filed by former industry insider, Jerry H. Brown II. Brown will receive a $3.6 million share of the settlement amount.

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

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

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

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

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

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

CVS Caremark Corporation (Dec. 16, 2011)

CVS Caremark Corporation agreed to pay $19.9 million to Illinois, California, and Florida to settle three separate *qui tam* suits. The suits alleged that CVS Caremark defrauded the states' prescription drug plans by reselling returned drugs, altering prescription orders to make them more expensive, and submitting false reports about prescription filling time. Of the $19.9 million settlement, almost $7 million will go to the State of California, with $4 million being paid to the State of Illinois, and $3 million going to the State of Florida. Attorneys Michael Leonard and TAFEF member Jonathan D. Lichterman of Meckler Bulger Tilson Marick & Pearson represented the relators. Walter Lack and Paul Traina of Engstrom, Lipscomb & Lack served as their co-counsel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Point Blank Solutions Inc. (formerly DHB Industries Inc.), Point Blank Body Armor Inc. and Protective Apparel Corporation of America Inc. agreed to pay the United States $1 million to resolve allegations that they violated the False Claims Act by knowingly manufacturing and selling defective bulletproof vests containing Zylon fiber. The companies allegedly manufactured and sold bulletproof vests containing despite possessing information showing that the Zylon fiber degraded quickly over time and was not suitable for ballistics uses. These vests were purchased by the federal government and by various state, local, and tribal law enforcement agencies. This settlement is part of a larger investigation into the use of Zylon in the body armor industry, in which the United States has settled with nine other participants in the Zylon body armor industry for more than $61 million.

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

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

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

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

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

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

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

The City of New York agreed to pay the United States $70 million to settle a False Claims Act lawsuit alleging that the city overbilled Medicaid and improperly administered the Medicaid personal care services program by authorizing personal care services for elderly and disabled Medicaid beneficiaries without the legally required assessments and approvals. This settlement resolves a *qui tam* suit filed by Dr. Gabriel Feldman, an independent medical reviewer from a private agency that was under contract to the city. Dr. Feldman will receive a $14.7 million share of the settlement payment. TAFEF member Alan Konigsberg of Levy Phillips & Konigsberg, LLP represented Dr. Feldman.

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

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

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

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

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

MedQuest Associates, Inc., BioImaging at Charlotte, Inc., BioImaging of CoolSprings, Inc., and BioImaging at Harding, Inc. were ordered to pay $11.1 million after the U.S. District Court for the Middle District of Tennessee granted summary judgment to the United States in a False Claims Act *qui tam* action. The companies submitted claims for payment to Medicare for diagnostic testing conducted without the required physician supervision, and caused the submission of false Medicare claims in which another Medicare provider's billing number was improperly used. The *qui tam* suit was filed by Karen Hobbs, a former employee of MedQuest Associates. TAFEF member Marlan Wilbanks of Wilbanks & Bridges, LLP represented the relator.

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

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

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

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

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

Select Medical Corporation and its subsidiary, Select Specialty Hospital-Columbus, Inc., agreed to pay the United States $7.5 million to resolve a False Claims Act suit alleging that Select entered into Medical Director Agreements in which it made unlawful referral arrangements and excessive fee arrangements with area physicians in Columbus, Ohio, in violation of the federal Anti-Kickback Statute and the Stark Law. In addition, the entire Select Specialty Hospital System agreed to enter into a Corporate Integrity Agreement with the U.S. Department of Health and Human Services. This settlement resolves a *qui tam* suit filed by relator Beatrice Maitland. Maitland, who was represented by TAFEF members from Nolan & Auerbach, P.A. and Morgan Verkamp LLC, will receive a $1.35 million share of the government's recovery.

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

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

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

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

LHC Group Inc. (W.D. La. Sept. 30, 2011)

Home health provider LHC Group Inc. (LHC) agreed to pay the United States $65 million plus interest, to resolve allegations that, between 2006 and 2008, LHC improperly billed Medicare, TRICARE and the Federal Employees Health Benefits program for services that were not medically necessary and for services rendered to patients who were not homebound. In addition to the civil settlement agreement, the company agreed to enter into a Corporate Integrity Agreement with the Department of Health and Human Services, Office of Inspector General. The settlement resolves a *qui tam* case filed by Judy Master, who will receive over $12 million as her share of the federal government's recovery.

Science Applications International Inc.; Applied Enterprise Solutions LLC; Dale Galloway; Stephen Adamec; and Robert Knesel (S.D. Miss. Sept. 29, 2011)

Science Applications International Inc. (SAIC); Lockheed Martin; Applied Enterprise Solutions LLC (AES); AES CEO Dale Galloway; and former government employees Stephen Adamec and Robert Knesel agreed to pay the United States over $22 million to resolve bid rigging allegations. SAIC agreed to pay $20,400,000 and AES and Dale Galloway agreed to pay $2,166,000. Adamec and Knesel agreed to pay $110,000. These defendants resolved allegations that they knowingly submitted or caused the submission of false claims and conspired to submit such claims under a contract with the General Services Administration (GSA) in support of the Naval Oceanographic

Major Shared Resource Center (NAVO MSRC). In addition, Adamec and Knesel, allegedly shared advance procurement information with SAIC and took other measures to bias the contract selection in favor of SAIC. In January 2011, Lockheed Martin reached a $2 million settlement with the United States to settle related allegations. The allegations were originally brought by a *qui tam* relator, David Magee, who is a former computer scientist at the U.S. Naval Oceanographic Major Shared Resource Center in Mississippi. Magee was represented by the law firms of Helmer, Martins, Rice & Popham; Galiher, DeRobertis, Ono; and Owen, Galloway & Myers. TAFEF member Paul B. Martins, of Helmer, Martins, Rice & Popham, was lead attorney in this matter.

Dr. Steven H. Stern and Kentuckiana Center for Better Bone and Joint Health PLLC (W.D. Ky. Sept. 27, 2011)

Dr. Steven H. Stern and his practice, Kentuckiana Center for Better Bone and Joint Health PLLC (KCB), agreed to pay the United States $349,860 to settle allegations that from December 2003 through December 2006, they double-billed Medicare for Infliximab, a drug used to treat rheumatoid arthritis. Specifically, Stern and KCB were accused of splitting vials of Infliximab across multiple patients, and then billing Medicare as though whole vials were used for each patient. The claims arose in a *qui tam* complaint filed by former KCB employee Suzette L. Sewell-Scheuremann. She will receive a relator's share of $70,000, plus attorney's fees, costs and expenses.

Hill-Rom Company, Inc. (E.D. Tenn. Sept. 27, 2011)

Hill-Rom Company, Inc., a durable medical equipment supplier, agreed to pay the United States $41.8 million to resolve Medicare fraud allegations. Hill-Rom allegedly knowingly submitted numerous false claims to the Medicare program for certain specialized medical equipment for patients who did not qualify for the equipment and for patients who had died or were no longer using the equipment. Hill-Rom also allegedly submitted claims for medically unnecessary equipment. In addition to the settlement, Hill-Rom also entered into a five-year Corporate Integrity Agreement with the U. S. Department of Health and Human Services, Office of Inspector General.

Guidant LLC (M.D. Tenn. Sept. 26, 2011)

Guidant LLC, a subsidiary of Boston Scientific Corp., agreed to pay the United States $9.25 million to resolve allegations that it caused the Veterans Affairs Department, Defense Department, Medicare and Medicaid to overpay for implantable cardiac devices. From 1981 to 2007, the company allegedly inflated the cost of replacement pacemakers and defibrillators and failed to grant appropriate credits for devices that failed while under warranty. The case was brought by relator Robert Fry, who will receive a $2.3 million share of the federal recovery. Fry is a former Guidant sales agent.

Abri Health Plan Inc. and Universal American Financial Corp. (Sept. 25, 2011)

Abri Health Plan Inc. and parent company Universal American Financial Corp. agreed to pay the United States $4.8 million to settle health care fraud allegations that Abri sales agents misled customers about the scope of the Medicare Part C coverage plans and sometimes enrolled them without their consent. Additionally, Abri allegedly paid doctors for referrals and paid customers to sign up for Medicare Part C coverage plan. This settlement resolves a 2008 *qui tam* action filed by relators James Mlaker and J.D. Webb. The relators, former Abri employees, will receive a combined relator's share of more than $900,000. Mlaker was an Abri sales agent, and Webb was a manager for Abri. The relators were represented by TAFEF member Nola Hitchcock Cross of the Cross Law Firm, S.C.

CH2M Hill Hanford Group Inc. (E.D. Wash. Sept. 22, 2011)

CH2M Hill Hanford Group Inc., a wholly-owned subsidiary of CH2M Hill Companies Ltd., agreed to pay the United States $1.5 million to resolve False Claims Act and Anti-Kickback Act allegations that the company knowingly submitted false claims and paid kickbacks in connection with a contract to operate and manage mixed radioactive waste at the Department of Energy's (DOE) Hanford Nuclear Site in Washington State. Between 2003 and 2005, two company employees responsible for purchasing supplies were alleged to have improperly made over 200 purchases from companies owned and run by their spouses and then charged the costs to DOE. CH2M allegedly failed to address these improper purchase schemes even though annual internal audits alerted the company to weaknesses in its purchase card controls.

Lydia Demski; Deerpath International Inc.; Scope Services Inc.; and American Nuclear Resources Inc. (N.D. Ohio Sept. 21, 2011)

Lydia Demski agreed to pay the United States $800,000 to resolve allegations that she and her companies, Deerpath Corp., Scope Services Inc. and American Nuclear Resources Inc., falsely participated in a veterans' preference contract program. Demski was accused of knowingly causing the submission of false claims relating to a contract to refurbish equipment at the National Aeronautics and Space Administration's (NASA) Plumbrook facility in Sandusky, Ohio. The re-furbishment contract at the facility was set aside by NASA for a Service-Disabled Veteran-Owned Small Business (SDVOSB). Demski was alleged to have organized and controlled a fraudulent SDVOSB under the name Deerpath International, Inc., as a means of directing contract work to her other businesses. The fraud allegations were brought by relator, Greg Fones, who will receive a $140,000 share of the settlement amount. Fones was represented by TAFEF members David L. Haron and Mercedes Varasteh Dordeski of the Frank Haron Weiner firm.

Marci Taylor; Treehouse Behavioral Services, PLLC; Treehouse Pediatric Center, PLLC; and The Autism Clinic of Texas (W.D. Tex. Sept. 21, 2011)

Marci Taylor, owner of Treehouse Behavioral Services, Treehouse Pediatric Center and The Autism Clinic of Texas, agreed to pay the United States $1.4 million to settle allegations involving the submission of false claims for payment to the TRICARE program. From January 1, 2005, to December 31, 2009, Taylor and her companies allegedly billed TRICARE for applied behavior analysis (ABA) services that were not rendered by certified therapists; overcharged TRICARE for ABA services; billed TRICARE for services that were not eligible for reimbursement as ABA therapy; and submitted other false records to TRICARE. The relators in this case were Dr. Raymond G. Good and Darlene J. Good.

Jesse Nunn and Future Research Corporation (Sept. 21, 2011)

Future Research Corporation and its president, Jesse Nunn, agreed to pay the United States $200,000 to settle claims that they improperly obtained contracts from the Department of the Navy that had been set aside for companies that qualified for the Small Business Administration's (SBA) Historically Underutilized Business Zone (HUBZone) program—which requirements companies to meet certain criteria, such as maintaining their principal office in a designated HUBZone and employing 35 percent of their workforce from a HUBZone. Future Research Corp. allegedly bid on and received the Navy HUBZone contracts based on false certifications that the company and Nunn made to the Navy. This settlement was the result of the collaborative efforts of the Civil Division of the Department of Justice, the SBA Office of General Counsel, the SBA Office of Inspector General and the Department of the Navy.

Tamimi Global Company Ltd. (C.D. Ill. Sept. 16, 2011)

Saudi Arabia-based Tamimi Global Company Ltd. (TAFGA) agreed to pay the United States $13 million to resolve civil and criminal allegations related to kickbacks the company allegedly paid to a Kellogg Brown & Root Inc. (KBR) employee, and illegal gratuities allegedly given to a former U.S. Army sergeant, both in connection with contracts involving the Army's operations in Iraq and Kuwait. TAFGA employees allegedly paid kickbacks to the KBR employee in order to obtain subcontracts awarded under LOGCAP (Logistics Civil Augmentation Program) III. In addition, TAFGA employees allegedly paid illegal gratuities to Army Sergeant Ray Chase, who was responsible for certain Army food services at camps in Kuwait in 2002 and 2003. In addition to the civil settlement, the company agreed to enter into an 18-month deferred prosecution agreement.

BP Amoco Corporation; Amoco Production Company; BP Exploration & Oil Inc.; BP America Inc.; Atlantic Richfield Company; and Vastar (E.D. Tex. Sept. 16, 2011)

BP Amoco Corp. (formerly Amoco Corp.), Amoco Production Company, BP Exploration & Oil Inc., BP America Inc., Atlantic Richfield Company, and Vastar agreed to pay the United States $20.5 million to settle claims that the companies violated the False Claims Act by knowingly underpaying royalties owed on natural gas produced from federal and Indian leases. The companies were alleged to have improperly deducted certain costs from the royalty values they reported and to have improperly reported processed gas as unprocessed gas, which resulted in a reduction of their royalty payments on federal and Indian leases. The estate of the deceased relator, Harold Wright, will receive a $5.3 million share of the federal recovery. This is the latest in a series of settlements arising from Wright's False Claims Act *qui tam* cases against various natural gas company defendants, which have returned about $270 million to the federal government.

Watson Pharmaceuticals Inc. and Sandoz Inc. (D. Mass. Sept. 15, 2011)

Generic drug makers Watson Pharmaceuticals Inc. and Sandoz Inc. agreed to pay the United States $145 million to resolve two False Claims Act cases alleging that they defrauded U.S. and state governments by causing Medicaid to overpay for drugs. Watson agreed to pay $79 million and Sandoz—Novartis AG's generic unit—agreed to pay $66 million. Both suits were filed by Ven-a-Care of the Florida Keys, which was represented by TAFEF member James Breen of The Breen Law Firm, PA.

Accenture LLP (D. Ark. Sept. 12, 2011)

Accenture LLP agreed to pay the United States $63.675 million to resolve False Claims Act *qui tam* allegations that the company submitted or caused the submission of false claims for payment in connection with numerous U.S. government information technology contracts. Accenture allegedly received kickbacks for recommending certain hardware and software vendors to the government, improperly inflated prices, and fraudulently rigged bids. The relators in this case were former Accenture employees Norman Rille and Neal Roberts, who were represented by the Jeffers Mangels Butler & Mitchell firm.

Maxim Healthcare Services Inc. (D.N.J. Sept. 12, 2011)

Maxim Healthcare Services Inc. agreed to pay the United States and 43 states a combined $150 million to settle claims that it falsely billed home healthcare claims to Medicaid and to the Veterans Affairs program for services that were not rendered, services that were not properly documented, and services that were performed by 13 unlicensed offices. Maxim agreed to pay a criminal penalty of $20 million and to pay $130 million in civil penalties. Maxim also agreed to enter into a deferred prosecution agreement, to enter into a corporate integrity agreement, and to accept a corporate monitor. The relator in this case, Richard West, will receive a $15.4 million share of the recovery. West was represented by TAFEF member Robin Page West, of Cohan & West, P.C.

TriWest Healthcare Alliance Corp. (N.D. Cal. Sept. 9, 2011)

Arizona-based TriWest Healthcare Alliance Corp. agreed to pay the United States $10 million to resolve allegations concerning the Department of Defense's TRICARE medical benefits program. Between 2004 and 2010, TriWest allegedly signed letters of agreement with health care providers for service discounts and then failed to give TRICARE the benefit of the negotiated discounts. This settlement resolves a False Claims Act *qui tam* suit filed by four former TriWest employees: Judi Jerdee, Deborah Thornton, Linda Glassgow and Paige Fiorillo. The relators will receive a combined $1.7 million share of the federal recovery.

Janzen, Johnston & Rockwell Emergency Medicine Management Services Inc. (M.D. La. Sept. 1, 2011)

Janzen, Johnston & Rockwell Emergency Medicine Management Services Inc. (JJ&R) agreed to pay the United States $4.6 million to settle allegations that it submitted inflated claims to Medicare and to Louisiana's Medicaid program. JJ&R provides billing services for physicians, hospitals and other health care providers, and, from 2000 through 2007, the company allegedly utilized an improper coding formula that generated claims for a marginally higher level of service than the physicians actually provided. JJ&R also was alleged to have routinely added charges for minor services. In addition, JJ&R allegedly often failed to comply with Medicare's coding rules governing the submission of claims for teaching physicians. This settlement is the result of a *qui tam* suit filed by Le Jeanne Harris, a former JJ&R employee. Harris will receive a $774,450 share of the federal recovery.

Noble Jewelry Ltd. (S.D.N.Y. Sept. 1, 2011)

Noble Jewelry Ltd., an international jewelry company based in Hong Kong, and certain of its New York affiliates, agreed to pay the United States $3.85 million to resolve allegations involving false customs declarations and false shipment invoices. The companies allegedly engaged in a scheme involving the submission of false customs declarations and false jewelry shipment invoices and defrauded the government by under-reporting the value of imported goods on falsified documents, thereby reducing customs duties owed. The relator in this case, who was represented by Kirby McInerney LLP, will receive a 19% share of the $3.85 million settlement.

Minnesota Transit Constructors Inc. (D. Minn. Aug. 24, 2011)

Minnesota Transit Constructors Inc. (MnTC) agreed to pay the United States $4.6 million to settle allegations involving a federally-funded transit construction project in Minneapolis, Minnesota. MnTC is a joint venture comprised of Granite Construction, C.S. McCrossan Inc., Parsons Transportation Group and a number of subcontractors. MnTC was the prime contractor on a project to design and build the Hiawatha Light Rail Transit System in Minneapolis. Under the contract, MnTC and its subcontractors were required to use Disadvantaged Business Enterprises (DBEs) for part of the work on the project. They were also required to comply with the DBE regulations and to accurately report their DBE contracting. MnTC allegedly claimed that materials and services for the project were provided by DBEs, when in fact they were provided by non-DBE subcontractors. MnTC also allegedly misrepresented the actual participation of DBEs, which were allegedly hired merely as extra participants in order to appear as if a DBE had performed the work. This matter was investigated by the Department of Justice's Civil Division, the U.S. Attorney's Office for the District of Minnesota, the Department of Transportation's Office of Inspector General and the Federal Transit Administration.

Par Pharmaceuticals, Inc. and Par Pharmaceuticals Companies, Inc. (D. Mass. Aug. 24, 2011)

Par Pharmaceuticals, Inc. and Par Pharmaceuticals Companies, Inc. agreed to pay the United States and the states of Texas, Florida, Alaska, South Carolina, and Kentucky $154 million to resolve Medicaid fraud claims that the companies reported inflated average wholesale pricing information that caused government entities to pay inflated reimbursements for drugs under Medicare and Medicaid. The United States will receive $90,950,000 from the settlement. The relator in this matter, Ven-A-Care, will receive $9,009,000 of the federal recovery. Ven-A-Care was represented by TAFEF member James Breen of The Breen Law Firm, PA.

Red River Computer Co., Inc. (D.N.H. Aug. 18, 2011)

Red River Computer Co., Inc. agreed to pay the United States $2.3 million to resolve allegations that it defrauded the U.S. Department of Defense, the U.S. Department of Commerce, the U.S. Department of Interior, the Environmental Protection Agency, the Library of Congress, and the General Services Administration, by failing to follow equipment and support provisions contained in contracts it had with those agencies. Among its alleged offenses, Red River failed to obtain and/or provide agreed-upon services from specific vendors like Sun Microsystems and Panasonic—despite being paid for those services, the company allegedly provided substituted services and withheld that information from the government.

Taleo Corporation (D.D.C. Aug. 16, 2011)

Taleo Corporation agreed to pay the United States $6.49 million to resolve allegations that it knowingly caused false claims to be submitted to the Transportation Security Administration (TSA) of the Department of Homeland Security (DHS). Taleo subcontracted with CPS Human Resource Services—a company that contracted with TSA to perform human resource services—and agreed that it would charge TSA a discounted commercial list rate for its services. However, Taleo allegedly failed to use its normal procedure to calculate the commercial list rate, which resulted in a higher rate and inflated charges to TSA. This settlement resolves a *qui tam* action filed by Gary Hetland, a former Taleo employee.

The Walgreen Co. (D. Conn. July 27, 2011)

The Walgreen Co. agreed to pay $140,000 to resolve allegations that it violated the False Claims Act by fraudulently billing Medicare/Medicaid and the Connecticut ConnPACE Program for prescription drugs. From June 1, 2006 through August 31, 2006, the company allegedly submitted duplicate claims to the respective federal and state healthcare programs for patients who were dually-eligible for Medicare Part D as the primary payor, and who were eligible for Medicaid or ConnPACE as the secondary payor. After the alleged billing errors were detected by the pharmacy unit at the Department of Social Services, the matter was investigated by the Office of Inspector General for the Department of Health and Human Services.

CHI Institute (E.D. Pa. July 24, 2011)

CHI Institute agreed to pay the United States $1.6 million to settle allegations that it misled students and the federal government about the availability of promised educational programs. CHI allegedly failed to provide sufficient externships necessary for students to graduate from the surgical technology program, and a majority of those students received some form of federal student financial aid. CHI is part of Kaplan Higher Education Corporation, a subsidiary of Kaplan, Inc. This settlement resolves a False Claims Act *qui tam* suit.

Laboratory Corporation of America (E.D. Cal. July 21, 2011)

Laboratory Corporation of America, also known as LabCorp, agreed to pay the State of California $49.5 million to settle claims that the company violated California's False Claims Act by overcharging California's Medicaid program and by giving doctors kickbacks for patient referrals. LabCorp was accused of charging laboratory tests at rates that exceeded the maximum amounts permitted by law. Additionally, LabCorp allegedly offered discounted or free testing to doctors, hospitals and clinics that referred Medi-Cal patients and other business to the labs. The allegations were brought by relators Hunter Laboratories, LLC and its CEO, Chris Riedel.

PRIDE Industries (E.D. Cal. July 11, 2011)

PRIDE Industries and its subsidiary, PRIDE Industries One, agreed to pay the United States $400,000 to resolve allegations that it knowingly submitted false claims relating to a contract to provide maintenance services at the Department of the Army's Ft. Bliss Army Base in El Paso, Texas. The alleged contract violation involved the AbilityOne Program, which procures contracts for goods or services in order to provide employment opportunities to people who are blind or have other significant disabilities. Between 2007 and 2010, PRIDE employed a number of temporary, non-disabled employees as part of its maintenance staff, but allegedly reported false ratio numbers to the government agency designated to help oversee the program. In addition, PRIDE was accused of overcharging the Department of the Army under its maintenance contract by including unallowable costs and by overcharging for labor. This settlement resolves a False Claims Act *qui tam* suit filed by Timothy Hediger and Lois Perez, who will receive $68,000 as their share of the settlement.

Joseph Ubaghs (D. Conn. July 8, 2011)

Joseph Ubaghs, a New Milford clinical social worker, agreed to pay $210,000 to resolve allegations that, from January 2006 through December 2007, he fraudulently billed Medicaid by overbilling for individual and group psychotherapy services and by billing for counseling sessions that never occurred. Under the terms of the settlement, he is excluded from Medicare, Medicaid, and all other federal health care programs for a period of five years.

ArmorGroup North America Inc. (D.D.C. July 7, 2011)

ArmorGroup North America Inc. (AGNA) and its affiliates agreed to pay the United States $7.5 million to resolve allegations that AGNA submitted false claims for payment involving a State Department contract. AGNA was contracted to provide armed guard services at the U.S. Embassy in Kabul, Afghanistan, and at a Naval Support Facility in Bahrain. AGNA guards allegedly violated the Trafficking Victims Protection Act and misrepresented the prior work experience of numerous individuals it had hired to guard the Embassy. The settlement resolves a False Claims Act *qui tam* suit filed by James Gordon, a former director of operations for AGNA. Gordon will receive a $1.35 million share of the settlement amount. Gordon was represented by TAFEF members Janet Goldstein, Rob Vogel and Debbie Katz of the Vogel, Slade & Goldstein firm.

Legal Analysis

A Practitioner's Update: Recent *Qui Tam* Fee Awards

A PRACTITIONER'S UPDATE: RECENT *QUI TAM* FEE AWARDS[1]

By Marc S. Raspanti, Esquire,[2] Martha S. Helmreich, Esquire,[3] and Sonia S. Shariff, Esquire[4]

INTRODUCTION

Qui tam fee cases decided in the last two years do not break any new ground, but continue along already-established lines of decision. Below, we discuss *Perdue v. Kenny A.* and two other Supreme Court fee award cases, *Astrue v. Ratliff* and *Fox v. Vice*, as well as the recent crop of prevailing plaintiff and prevailing defendant cases.

A. Supreme Court Fee Cases

1. *Perdue v. Kenny A.*—The Lodestar Method Revisited.

The most significant fee award case in the past two years is probably *Perdue v. Kenny A.*, 130 S. Ct. 1662, (2010). Although a 42 U.S.C. § 1988 and not a *qui tam* fee award case, *Perdue v. Kenny A.* will undoubtedly influence how courts approach fee awards in *qui tam*, prevailing plaintiff cases.

The most widely used method to calculate a fee award under federal fee-shifting statutes is the "lodestar." To determine the lodestar, a court multiplies the prevailing hourly rates of an attorney by the hours worked. The Supreme Court has stated that the virtues of the lodestar method are that it is administrable, and "objective" as it limits the discretion of trial judges and permits meaningful judicial review.

In *Perdue*, the Supreme Court was asked to answer what appeared to be a straightforward question: whether the calculation of an attorney's fee based on the lodestar may be increased because of the attorney's superior performance and the results obtained? The Court, citing its precedent, answered in the affirmative, but then proceed-

1. This article is designed to be a practitioner's update of the article published in the April 2009 False Claims Act and *Qui Tam* Quarterly Review.

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ed to significantly limit the scope of its holding by stating that such an increase in an attorney's fee is permitted only in extraordinary or rare circumstances because there is a strong presumption that the lodestar is sufficient.

Specifically, the Court held that fee enhancements may be appropriate for superior attorney performance, in the following circumstances: 1) "where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation," e.g. if the hourly rate takes into account only a single factor such as years since the attorney's bar admission; 2) "if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted;" or 3) "where the attorney's performance involves an exceptional delay in the payment of fees." 130 S. Ct. at 1674.

In keeping with both its narrow holding and precedents, the Supreme Court also rejected the possibility of an enhancing a fee award because of the novelty and complexity of a case. The Court stated that these factors are already reflected in the billable hours recorded by the attorney and therefore, do not support an increase in the fee award.

Moreover, the Supreme Court held that a party seeking the fee enhancement must produce "specific evidence" which supports an enhanced fee so that the trial court's decision to increase the fee award is "reasonable, objective, and capable of being reviewed on appeal."

Thus, because of *Perdue's* holding, *qui tam* attorneys can expect that in their typical cases, fee enhancements are not likely because a federal district court judge's ability to exercise his or her discretion to adjust the lodestar upwards is now severely curtailed. Similarly, neither the novelty nor the complexity of a *qui tam* case will result in a prevailing plaintiff's attorney recouping a fee award greater than a lodestar.

2. *Astrue v. Ratliff*—Fee Awards Belong to the Plaintiff.

The second fee case decided by the Supreme Court in 2010 was *Astrue v. Ratliff*, 130 S. Ct. 2521. Ratliff, an attorney, filed a motion on behalf of her client for fees and costs under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). The district court granted the unopposed fee request, but the United States then filed an action seeking an administrative offset against the fee award pursuant to 31 U.S.C. § 3716. The government asserted that Ratliff's client owed the United States the administrative offset amount because of a pre-existing debt which was completely unrelated to the underlying social security case on which the client had prevailed. Ratliff then attempted to personally intervene in the United States action to challenge the offset. She asserted that the fee belonged to her and not her client, and therefore could not be subject to the government's offset.

The district court held that Ratliff lacked standing to challenge the proposed offset, but the Eighth Circuit Court of Appeals reversed, based on its precedent which recognizes that EAJA fee awards belong to a party's attorney. The Eighth Circuit did, however, acknowledge that its precedent was at odds with decisions of the other circuits.

The Supreme Court unanimously reversed the Eighth Circuit's holding. All of the Justices agreed that fees awarded to prevailing plaintiffs under the EAJA and similar statutes belong to plaintiffs, not their counsel. Therefore, the Court held it was proper for the government to seek an administrative offset against the EAJA fee award. Interestingly, although Justice Sotomayor, who wrote a concurring opinion in which Justices Ginsberg and Stevens joined, agreed that the Court's precedents and the text of the EAJA compelled the conclusion reached by the Court, she noted that it was not clear that Congress intended that the party rather than the attorney be awarded the fees under the EAJA. Justice Sotomayor in effect urged Congress to revisit the language of the statute authorizing the government's offsets to avoid impeding the purpose of fee award statutes—to help plaintiffs obtain counsel to challenge government action.

Therefore, following *Ratliff*, an argument that a *qui tam* fee award is the "property" of counsel, as a matter of statutory right, is unlikely to be successful. The FCA clearly provides that an award of fees is part of the relief a court can award to a *qui tam* plaintiff. 31 U.S.C. § 3730(d). Accordingly, any representation of a *qui tam* plaintiff, or defendant, should be structured on the assumption that any fee awarded by a court is payable to the client, not to his or her counsel. Therefore, counsel should be vigilant that they need to protect their entitlement to payment and should negotiate a contingency contract with their clients at the inception of the representation.

3. *Fox v. Vice*—Fee Awards to Prevailing Defendants in Mixed Success Cases.

In *Fox v. Vice*, 131 S.Ct. 2205 (2011), a § 1988 case, the Court was presented with the issue of what fees, if any, should be awarded to a prevailing defendant where the plaintiff's suit involved both frivolous and non-frivolous claims. In an unanimous opinion the Court, led by Justice Kagan, held that in such a case, the defendant was entitled to fees, but only for work that he would not have incurred "but for" the frivolous claims. Although this is a stricter standard than the one the Court has set for fee awards to plaintiffs in "mixed" cases, it is consistent with the rationale for fee shifting—to prevent frivolous litigation.

The Court noted that use of a "but for" standard might, in some instances, allow compensation for work that relates to both frivolous and non-frivolous claims. A lawyer may for example, do more work on the plaintiff's frivolous claim because of the defendant's greater financial exposure on that claim. According to the Court,

> the dispositive question is not whether attorney costs at all relate to a non-frivolous claim, but whether the cost would have been incurred in the absence of the frivolous litigation. The answers to those inquiries will usually track each other, but when they diverge, it is the second that matters.

The Court also reiterated its pronouncement in *Hensley v. Eckerhart* that the determination of fees "should not result in a second major litigation," and that "[t]he essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection." Interestingly, unlike in *Perdue*, where the Court took pains to limit the discretion of district courts, here the Court acknowledged that district courts have significant discretion to determine the reasonable fees. Specifically, the Court stated that the "trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorneys' time," and that appellate courts must defer to the lower court's "superior understanding of the litigation."

B. A Survey of Recent Prevailing Plaintiff *Qui Tam* Fee Cases

1. *United States ex rel. Rille v. Hewlett Packard Co.*, 2011 WL 4625646 (E.D. Ark. October 5, 2011).

This case, which terminated in a Stipulation of Dismissal filed by the government and HP, was one of eight cases filed against about 30 defendants by the same relators, all involving the same general allegations of defective pricing, kickbacks and other violations, carried out through strategic alliances. Work on these cases began in 2002. The cases were consolidated for case management purposes pursuant to a joint motion filed by the relators and the United States, and all settled. In four the settlement included negotiated statutory fees. In the other three cases, including this one, the parties could not agree on fees and costs.

In their § 3730(d) motion filed in this case, plaintiffs sought $2,430,983 in fees and $269,424 for costs. The fee request was divided into two categories: general fees and HP-specific fees. Plaintiffs arrived at the general time figure for which they sought fees in this case by subtracting the recoveries from the four negotiated fee cases, specifically the amount remaining after allocating each of those recoveries first to case-specific time. Plaintiffs then proposed that the "unpaid balance" of general time be divided among the remaining three defendants, including HP.

The court rejected this proposal, finding no support for it in case law or principles of fairness, and held that HP would be responsible for 1/8 of the general hours, multiplied by a reasonable rate.

With respect to HP-exclusive time, the court found three categories of problems with the amounts billed: 1) an excessive amount billed to recovery of fees; 2) hours spent on a collateral issue—relator's conflict with the United States over relator's share of the settlement with HP; and 3) the existence of entries that were vague or otherwise inappropriate. Citing to *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 601 F.Supp. 2d 45, 50 (D.D.C. 2009),[5] for the proposition that a court was not required to provide a line-by-line accounting or reduce an award by specific amounts in response to specific objections, the court made an across-the-board 15% reduction in HP-exclusive hours. It also reduced the requested rates for out of state counsel to a number closer to "the prevailing market

5. Discussed in paragraph 3 below.

rates in the relevant (local) community." Thus top partner rates went from $650 to $375 an hour; other rates were similarly reduced.

Although the court talked about the possibility of a lodestar enhancement or reduction based on plaintiff's "degree of success," citing to *Hensley v. Eckhart*, it did make such an adjustment. Curiously, the court's opinion does not cite to *Perdue v. Kenny A.*, which was decided in 2010, on the subject of a possible enhancement. Ultimately, the court awarded plaintiffs $861,485 in fees, as compared to $2,430,983 sought, and $78,542 in costs, some of which it also found excessive and/or not properly the subject of a petition for costs, compared to $269,424 sought.

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

This case, in which the government did not intervene, involved royalty reports filed by the defendant with the Minerals Management Service (MMS) for oil and gas leases on government land. The relator, Maxwell, was an auditor for the MMS. Although MMS disagreed with Maxwell's conclusions that the defendant had filed false royalty reports, he went forward with a *qui tam* action, which resulted in a jury verdict of $7,555,886 in damages, trebled to $22,667,658, pls penalties. Maxwell then sought attorneys' fee pursuant to 31 U.S.C. § 3730(d)(2) in the amount of $2,178,632.25. He also sought an enhancement of one-third of this amount "to account for the risk of non-payment given his attorneys' contingent fee."

Although the defendant did not dispute the reasonableness of the hours worked by Maxwell's attorneys or the reasonableness of their hourly rates, the defendant argued that the total amount of fees was excessive given the contingent fee agreement between Maxwell and his attorneys. The court rejected this argument. It held that the existence of a contingent fee agreement between Maxwell and his attorneys does not justify reducing the lodestar under 31 U.S.C. § 3730(d)(2) because this statute mandates the award of attorney fees as a part of a fee-shifting policy regardless of the fact that the prevailing party's attorneys' might receive compensation from another source such as a contingent fee agreement.

The defendant also argued that Maxwell's "degree of success" should result in a reduction of the award of attorneys' fees. The court rejected this argument as well. The court noted that unlike other cases, where "degree of success" involves a relator asserting both frivolous and non-frivolous claims, here, Maxwell pursued only one claim for which the jury returned a favorable verdict. The court held that the mere fact that the jury did not award the full extent of the damages Maxwell sought did not make his case a partial success. Similarly, the court stated that the mere fact that it had calculated the civil penalties differently than what was stated in Maxwell's petition did not mean that his case was only moderately successful.

The court granted Maxwell's request for $2,178,632.25 in attorneys' fees. In so doing, it held that this amount was 28.8% of the damages awarded by the jury and

9.5% of the total award and therefore, was reasonably proportionate to the amount that Maxwell had recovered.

However, the court denied Maxwell's request for a fee enhancement. In accordance with well-established Supreme Court precedent, the court held that there was no need to compensate Maxwell's counsel for the risks associated with undertaking his representation because Maxwell's contingency fee agreement as well as the statutory fee award have already subsumed this risk.

3. *United States ex rel. Miller v. Bill Harbert International Construction, Inc.*, 786 F.Supp.2d 110 (D.D.C., 2011 (on remand from appeal of prior decision styled *Miller v. Holzmann*, 575 F.Supp. 2d 2 (D.D.C. 2008)).

This non-intervened, *qui tam* case has a complicated procedural posture. In 1995, the relator, Miller, brought a claim under the FCA that the defendants were conspiring to rig the bidding process for development projects in Egypt which were funded by the USAID. Miller identified a number of development projects or contracts in his complaint, but his allegations focused on one contract in particular, "Contract 20A," which involved the installation of large-diameter sewer pipes throughout Cairo. Two other contracts that Miller identified in his complaint were Contracts "29A" and "07."

The jury returned a verdict against all the defendants, finding that they had "conspired to defraud the government." The jury also specified damages for contracts 20A, 29A, and 07. However, because of personal jurisdiction issues that came to light late in the case, the court was only able to enter a judgment against the defendants with respect to contract 20A. The jury had specified damages of $29,920,000 with respect to contract 20A, which the court then trebled under 31 U.S.C. § 3729(a) before entering a final judgment. Following this judgment, Miller requested fees' and costs, expenses, and supplemental awards for additional attorneys' fees and costs. The court awarded Miller more than $7 million in attorneys' fees and almost $300,000 in expenses and costs.

Defendants then appealed to the D.C. Circuit both on the merits of the case as well as on the fee award issues. The D.C. Circuit reversed the district court's judgment with respect to certain defendants on claims related to Contract 20A and directed the lower court to "consider the appellants' requests for vacatur of fees and costs in a manner consistent with this court's opinion and judgment." This case then is the district court's attempt on remand to follow the D.C. Circuit's directive to resolve the fee dispute.

Miller agreed that for those defendants for whom the D.C. Circuit reversed the judgment on all claims, vacatur of fees was appropriate. However, he disagreed that a vacatur of fees was appropriate for the remaining defendants. The Court ultimately agreed with Miller. In reaching this conclusion, the Court first found that Miller remained a prevailing party and that the remaining defendants were jointly and severally liable for the entirety of the fee award less any necessary reductions.

The district court next turned to the question of whether any reductions to the fee award were necessary. Defendants argued that the claims which were dismissed with respect to contracts 29A and 07 required a reduction of the fees. The district court applied the two step *Hensley v. Eckerhart* analysis to determine Miller's award for "partial success." Under the first prong, the court held that the dismissed claims relating to contracts 29A and 07 were inter-related to the successful claims relating to contract 20A. Thus, the court held that it could not simply exclude the fees on time spent on the unsuccessful claims. The district court then moved on to the second prong of *Hensley* under which it is required to determine whether "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." The court considered two figures under this prong. First, it noted that Miller's counsel had invested approximately 70% of their efforts to support claims related to contract 20A and the overall conspiracy. Second, the court noted that Miller had achieved tremendous success because nearly 88% of the original damage award remained available to him after the D.C. Circuit's reversals. The court found that in light of Miller's considerable success, he was entitled to 80% of the original fee award.

4. *United States ex rel. LeFan v. General Electric Company*, 397 Fed. Appx. 144 (6th Cir., September 3, 2010).

This case was before the Sixth Circuit on cross-appeals from the district court's order of January 15, 2008, and was reported in our previous article on fees, "How Best to Get Paid After a Successful *Qui Tam* Case" (April, 2009). As stated in that article, following the settlement of this *qui tam* case, the District Court for the Western District of Kentucky awarded attorneys' fees to relators' counsel.

One of the issues raised in this case was whether relators' lead counsel was properly awarded a higher, non-local, "out-of-town specialist" rate. The Sixth Circuit concluded that the district court did not abuse its discretion by calculating the relators' lead counsel's award at a higher rate. Specifically, the Sixth Circuit held that although the lower court had not per se determined that (i) the hiring of an out of town specialist was reasonable; and ii) the rates sought by this out of town specialist were reasonable, the district court's decision and order did in effect comport with these two requirements.

Another issue raised in this case was whether the remaining attorneys were paid at the correct local rate. Specifically, the defendant, General Electric, argued that the district court abused its discretion by awarding the remaining attorneys' fees at their 2007 hourly rates. The Sixth Circuit affirmed the district court's decision by agreeing that the 2007 rates were necessary to "compensate the law firms for their delay in receiving payments" and because these rates adequately compensated the attorneys without giving them a windfall.

The third major issue was raised by relators' law firm, regarding the district court's failure to award it fees for work performed on a related first-to-file challenge involving a third party. The Sixth Circuit held that the district court properly subtracted $10,967.75 from the fee award on the first-to-file issue because this action "did not directly involve the *qui tam* defendants." The Sixth Circuit noted that General Electric had no participation in, or apparently any knowledge of this related first-to-file dispute.

Relators' attorneys also argued that the district court abused its discretion by failing to appropriately compensate them for fees incurred in litigating the attorneys' fee issue. At the outset the Sixth Circuit held that absent unusual circumstances, in cases that settle without trial, the hours for preparing and litigating the attorneys' fee case that are compensable should not exceed more than 3% of the hours spent on the main case. Because the Sixth Circuit determined that the district court had not followed this rule, it remanded this issue to the district court and directed it to first determine the hours spent by relators' attorneys on the underlying FCA claim alone and then apply the 3% cap with respect to the fee-related litigation.

The final issue that relators' attorney raised was that the district court improperly calculated the interest owed on the attorneys' fee award in setting a supersedeas bond amount. The Sixth Circuit held that the date on which interest begins to accrue is the date on which the court issues a final order that entitles the relator to a share of the government's recovery, which will necessarily also entitle the relator to a fee award "[i]n light of the FCA's mandatory fee-shifting provision." It held that the district court had applied the wrong standard by finding that the relators did not become entitled to an award until it was quantified. Accordingly, the Sixth Circuit vacated the district court's order of March 28, 2008, approving a supersedeas bond in the amount of $2.4 million and directed it to recalculate the interest owed in this case.

5. *United States ex rel. Ellison v. Visiting Physicians Association, P.C.*, 2010 WL 2854137 (S.D. Ohio, July 19, 2010).

This case, which settled in 2009, included in the Stipulation of Dismissal that the relator, Ellison, was a prevailing party for purposes of his allegations that defendant violated §§ 3729(a)(1) and (2) of the FCA. Plaintiff then filed a petition for attorneys' fees for the time period of February 2004 through March 2005.

The court cited to *Perdue v. Kenny A.* and *Burlington v. Dague* in support of the proposition that the lodestar is presumed to equate to a reasonable fee. In calculating the lodestar, the court, over the defendant's objection, calculated fees using current rather than historical rates to adequately compensate relators' attorneys for their delayed payment. The defendant also challenged the reasonableness of the hours, but the court held the time spent performing preliminary research, preparing and filing the Complaint and Disclosure Statement and preparing a fee agreement were all reasonable amounts of time. Accordingly, the Court refused to cut any of these hours. Following Sixth Circuit precedent however, the court did limit the award for time spent litigating the fee petition to 3% of the total hours spent on the underlying FCA claim.

6. *Thompson v. Quorum Health Resources, LLC,* 2010 WL 2044542 (W.D. Ky., May 21, 2010).

This was a retaliation case brought under 31 U.S.C. § 3730(h), with fees being awardable under § 3730(h)(2) which, like § 3730(d), provides for an award of "reasonable fees" as part of the relief afforded to a successful plaintiff.

The district court followed the lodestar model to calculate the fee award. With respect to the "reasonable billing rate" component of the lodestar calculation, the court refused to award plaintiff's counsel the rates they were seeking because it found that these rates were not supported by counsel's evidence, including affidavits, and exceeded the market rate for lawyers of comparable skill and experience in the Western District of Kentucky for similar cases. Interestingly, in determining the market rate for plaintiff's counsel, the court looked to the rates of employment discrimination/retaliation lawyers rather than the rates involved in typical FCA cases.

With respect to the hours worked by plaintiff's counsel, the court reduced these hours by 25% because it found that there was inadequate documentation, potential duplication and excessive time billed. Although the court awarded fees to plaintiff's counsel for time spent on the fee application, and defendant's motion for a new trial, it reduced these post-trial hours by 25%. The court also held that under Sixth Circuit precedent plaintiff's counsel was not entitled to a fee enhancement for "exceptional success."

7. *United States ex rel. Kimball v. Cathedral Rock Corp.*, 2010 WL 147810 (E.D. Mo., Jan. 11, 2010).

In this case, the defendant had submitted false claims for reimbursement to federal and state Medicare and Medicaid programs. The court awarded plaintiff the full amount of attorneys' fees sought, despite defendant's objections that plaintiff's counsel had spent excessive time on research. Specifically, defendant argued that because plaintiff's counsel was familiar with *qui tam* actions, the time billed for research was unreasonable. In response, the court stated that the amount of time spent on research by plaintiff's counsel was not only reasonable but also "prudent, as the law may have changed since the inception of the case." The court reminded defendant that the "assumption that the law has remained stagnant is neither wise nor satisfies on attorney's ethical obligation to his client." The court did, however, make some reductions in plaintiff's cost requests.

8. *United States ex rel. Herndon v. Appalachian Community Head Start, Inc.*, 674 F.Supp.2d 773 (W.D. Va. 2009).

In this case, the relator, Herndon, alleged that the defendant filed false claims with HHS and also fired him in retaliation for his investigation of those claims. A jury trial resulted in a verdict for *Herndon*. In the fee award portion of its decision on the parties' post-trial motions, the court awarded Herndon the full amount of fees sought using the lodestar method. Although the defendant did not object to the number of hours or the rates claimed by Herndon's attorneys, it did object to the inclusion of paralegal time. Pursuant to *Richlin Sec. Service Co. v. Chertoff*, 553 U.S. 571, 128 S. Ct. 2007 (2008), the court however, refused to exclude paralegal time.[6]

9. *United States ex rel. MacKay v. Touchstone Research Laboratories*, 2009 WL 3150385 (S.D. Ohio, September 30, 2009) and 2010 WL 58267 (S.D. Ohio, January 5, 2010).

This case involved allegations of inappropriate billing practices on the part of the defendant. After the relator, MacKay, discovered these practices and resigned, defendant sued him in state court for defamation, interference with contractual relations and unfair competition as a result of MacKay's accessing a Department of Defense website which contained confidential information concerning defendant's contract proposals. The defendant continued to pursue these state law claims even after MacKay filed his FCA case, which also included a retaliation claim. The FCA case ultimately settled; part of the settlement included an agreement on MacKay's part to not seek fees "segregable to the retaliation claim."

MacKay then petitioned for attorneys' fees. The court awarded what was essentially the full amount of the fees sought by three law firms who had worked on this case. However, consistent with Sixth Circuit precedent, the court did cut some of the fees for preparing and litigating the fee petition because the total time spent was more than 3% of the total time spent on the underlying FCA case.

10. *United States ex rel. Longhi v. Lithium Power Technologies*, 575 F.3d. 458 (5th Cir. 2009), *cert den.*, 130 S. Ct. 2092 (2010).

The relator, Longhi, had initially alleged, in a case in which the United States intervened, that twenty-one contracts solicited under the federal Small Business Innovation Research Program were used as part of a scheme to defraud the government, but ultimately failed to prove a violation with respect to each of these contracts. Following a partial summary judgment the parties cross-moved for partial summary judgment on damages.

The fee section of this case does not discuss the actual amount of fees awarded but only whether the plaintiff's counsel should be compensated for the total amount of the time spent on the case.

The Fifth Circuit applied *Hensley's* two prong test and affirmed the lower court's determination that all of the claims involved "a common core of facts," and that most of counsel's time was spent on the litigation as a whole, making it both inappropriate and unpractical to make any reductions based on "lack of success." Therefore, the Fifth Circuit held that the lower court did not abuse its discretion when it determined that Longhi's counsel was entitled to a "full attorneys' fee award."

6. In *Richlin*, an EAJA case, the Supreme Court held that paralegal time is not only compensable, but compensable at prevailing market rates.

11. *United States ex rel. Thompson v. Walgreen Co.*, 621 F.Supp.2d 710 (D. Minn., May 18, 2009).

In this case, plaintiffs, a group of pharmacists, alleged that Walgreen submitted erroneous bills for prescription drugs to Medicaid on behalf of individuals who were dually insured by Medicaid and third-party insurance. The United States intervened and the action eventually settled. As part of the settlement, Walgreen agreed to pay $9.9 million with respect to claims filed against it in four states.

Plaintiffs then petitioned the district court for $448,234.36 in fees and $24,041.72 for costs. The district court, applied the lodestar method to determine the fee award. The court ultimately reduced the fee request by $83,622.00 and the cost request by $6,661.68 because in its lodestar analysis it found that there was excessive billing, and incomplete or imprecise billing. The court also found that some of the work performed was redundant or unnecessary, or was performed on unrelated claims.

C. Summary of Prevailing Plaintiff Cases

These cases highlight that district courts are usually willing to award prevailing plaintiffs the full amount of fees sought based on the lodestar as long as the attorneys properly document and can justify the time they have spent working up their cases. Interestingly, and contrary to popular belief that research time is often found to be excessive, the above cases show that courts are willing to factor in research time when calculating fees because they understand that the law with respect to the FCA is constantly evolving.

D. A Survey of Prevailing Defendant Cases

1. *United States ex rel. Schweizer v. OCE North America, Inc.*, 772 F.Supp. 2d 174 (D.D.C. 2011).

This case started out as a three-count FCA claim; the first two counts were dismissed, following intervention by and an agreement between the United States, the defendants and one of the plaintiffs. Following the court's grant of defendants' motion for summary judgment on the third claim, a retaliation claim, the defendants sought fees under § 3730(d)(4). Citing to *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1006-07 (9th Cir. 2002) for the proposition that "[t]he award of fees under the False Claims Act is reserved for rare and special circumstances," the district court denied the request. It found that plaintiff's FCA claim was not "clearly frivolous" or "brought primarily for purposes of harassment." In addition, the United States did eventually intervene after it reached an agreement with the defendants with respect to plaintiff's allegations of fraud.

2. *Cafasso, United States ex rel. v. General Dynamics Systems*, 637 F.3d 1047 (9th Cir. 2011).

This case, brought by a former employee of General Dynamics, purported to state a claim under FCA § 3729(a) and for retaliation. General Dynamics counterclaimed alleging breach of a confidentiality agreement. The district court granted judgment on the pleadings in favor of defendant on the *qui tam* claim and summary judgment in its favor on plaintiff's retaliation claim as well as on its breach of contract claim. Thereafter, General Dynamics filed a motion for an award of fees under state contract law, and the court's statutory and inherent sanctioning power. It did not seek fees specifically under § 3730(d)(4). The court ultimately made an award of fees in the amount of $300,000 under state law, after considering, *inter alia*, plaintiff's financial circumstances, which it did take into account, and plaintiff's chilling effect on future *qui tam* plaintiffs argument, which it did not.

On plaintiff's appeal to the Ninth Circuit, which included a fees issue, the panel held that the district court did not abuse its discretion in making the award. It addressed plaintiff's concern about the chilling effect of such an award as follows: "This consideration generally counsels against a fee award, and courts should not reject such arguments out of hand. However, relators and their attorneys are not free to engage in misconduct without consequences merely because these consequences might chill others. Further the awarded fees cover [defendant's] successful contract claim not Cafasso's FCA claim. We are confident that future litigants will appreciate the difference." 673 F.3d at 1062-63.

3. *United States ex rel. Ubl v. IIF Data Solutions*, 650 F.3d 445 (4th Cir. 2011).

Plaintiff, Ubl, alleged that its former employer, IIF Data Solutions ("IFF"), had made false representations both when it applied for government contracts and when it submitted invoices pursuant to those contracts. After settlement negotiations fell through, the case went to trial and Ubl lost. The trial court granted IIF's motion for an award of fees under § 3730(d)(4) in the amount of $501,546.00. Ubl filed an appeal.

The Fourth Circuit held that the district court had abused its discretion by awarding IFF the fee award. It held that Ubl's claims were not "clearly frivolous," a term which the Fourth Circuit defines as "whether the relator's claim, when viewed objectively, clearly had no chance of success."

Here, the Fourth Circuit found Ubl's claims were not "clearly frivolous" because the district court had denied several pre-trial motions to dismiss the case, and the documentary evidence presented by Ubl at trial could have supported a verdict in Ubl's favor. The Fourth Circuit further stated that it was likely, based on its review of the record, that the jury had returned a favorable verdict for IFF because it had found that IFF lacked the *scienter* necessary to violate the FCA. Thus, for all of the foregoing reasons, the Fourth Circuit concluded that the district court was clearly wrong and had abused its discretion by awarding attorneys' fee to IFF.

4. *United States ex rel. Bahrani v. Conagra, Inc.*, 2011 WL 198189 (D. Colo. January 20, 2011).

This ten-year long, reverse false claims action was based on allegations that defendant materially altered hide and meat export certificates issued by the United States Department of Agriculture to avoid having to pay for replacement certificates. This case was before the Tenth Circuit twice, and on the initial remand, a jury found that plaintiff was not an "original source" with respect to his meat export certificate claims. A separate jury found in plaintiff's favor on only one of five of the hide certificate export claims and awarded him damages of $107.50. The district court trebled the damages and imposed statutory penalties of $5,500 per claim and entered a judgment of $27,822.50. Following the entry of this judgment, plaintiff moved for an award of attorneys' fees and costs in the amount of $3,449,469 and was awarded $9,724.16 in fees and expenses.

Plaintiff then appealed to the Tenth Circuit, asserting that the district court made a number of errors in resolving the meat and hide export certificate claims. The defendant cross-appealed, alleging that the district court had erred with respect to the claim involving hide export certificates on which plaintiff had prevailed. Plaintiff also filed a separate appeal challenging his fee award. The Tenth Circuit affirmed the district court's judgment with respect to the meat export certificate claims because plaintiff was not an "original source." However, the Tenth Circuit reversed the district court's judgment on the hide certificate issue on which plaintiff had prevailed and directed the district court to enter a judgment in the defendant's favor. The Tenth Circuit also reversed on the award of fees to plaintiff.

Following this second remand, the defendant applied to the district court for costs under Rule 54(d). The district court reluctantly granted this motion because it found defendant was ultimately the prevailing party. The district court also had some harsh words for the plaintiff; specifically it stated that "the relator should not have brought this case" and to the extent that the plaintiff had to pay the defendant's costs, the court stated it may "disincentivize" future relators from bringing similar FCA reverse false claims actions which are lacking in merit.

4. *United States ex rel. Gonzalez v. Fresenius Medical Care N.A.*, 761 F.Supp.2d 442, (W.D. Tex., August 11, 2010).

Here, the relator had alleged that her former employers, a medical clinic and a doctor, had violated the FCA. She later amended her complaint to allege a FCA retaliation claim. The case went to trial and ended in defendants' favor. Following the trial, the defendants moved for an award of attorneys' fees under § 3730(d)(4) or under 28 U.S.C. § 1927[7] as well as for costs under Fed. R. Civ. P. 54(d)(1).

In the attorneys' fees section of its opinion, the district court found that the plain-

7. Sanctions under § 1927 are punitive in nature and require evidence of "bad faith, improper motive, or reckless disregard of duty owed to the court." *Edwards v. General Motors, Corp.*, 153 F.3d 242, 246 (5th Cir. 1998).

tiff's FCA underlying claim was not so clearly frivolous, vexatious, or brought for the purpose of harassing the defendants. The district court, however, held that the medical clinic defendant, Fresenius Medical Care, was entitled to recover attorneys fees' incurred in defending the retaliation claim from the relator's counsel *personally* pursuant to § 1927. The court stated that "as of a certain point in the progression of the case, counsel for relator unreasonably and vexatiously multiplied proceedings in the retaliation action."

The court refused to award fees under § 3730(d)(4) for just the retaliation claim because it found that no court had awarded fees for the defense of a retaliation case without a finding that the accompanying FCA claim was clearly frivolous, vexatious, or brought for the purpose of harassing defendants.

With respect to the other defendant, Dr. Chavez, the court found that he was not entitled to fees either under § 3730(d)(4) or § 1927 because the FCA claims brought against him were not clearly frivolous, vexatious, or brought for the purpose of harassing him and relator's counsel had not unreasonably and vexatiously multiplied the retaliation proceedings against him.

5. *United States ex rel. Cullins v. Astra, Inc.*, 2010 WL 3008833 (S.D. Fla., July 28, 2010).

After this case, in which the government did not intervene, was dismissed on a Rule 12(b)(6) motion, the defendant filed a motion for attorneys fees under § 3730(d)(4) and for costs pursuant to 28 U.S.C. § 1920, Fed. R. Civ. P. 54, and a local rule.

The district court held that the defendant was not entitled to a fee award. Although plaintiff's claims were not ultimately successful, the court found that "they were not so lacking in arguable merit to be clearly frivolous." To reach this conclusion, the court looked to *Sullivan v. Sch. Bd. of Pinellas Cnty.*, 773 F.2d 1182, 1189 (11th Cir. 1985), a 42 U.S.C. § 1988 case, for a definition of "frivolous." The court also found that plaintiff's action was neither vexatious nor brought primarily for the purpose of harassing defendant. The court did however, award costs to defendant under Rule 54.

6. *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161 (10th Cir. 2009).

In this case the relator, a terminated employee, brought a FCA suit against his former employer, Lockheed Martin ("Lockheed"), alleging that it had submitted false claims to the Air Force and had also retaliated against her. The district court granted Lockheed's motion for summary judgment because it found that the prior releases signed by the relator following a mediated settlement of her retaliation claims barred her FCA claims. The district court also awarded costs to Lockheed pursuant to Rule 54(d). Relator then filed an appeal challenging both the district court rulings on Lockheed's summary judgment motion and award of costs.

With respect to the costs issue, the relator argued on appeal that because § 3730(d)(4) precludes an award of costs in an FCA case unless the claim was clearly frivolous, vexatious or brought for the purposes of harassment, an award of costs pursuant to Rule 54(d) is contrary to the FCA. The relator also argued that the district court should have refused to award costs because this discourages potential relators from bringing *qui tam* suits. The Tenth Circuit held that the district court had not abused its discretion by awarding Lockheed costs under Rule 54(d). The Tenth Circuit stated that § 3730(d)(4) of the FCA does not govern the recovery of costs by a prevailing defendant, rather its speaks only to awarding a prevailing party reasonable attorney's fees and expenses. Therefore, the Tenth Circuit concluded that the district court applied the proper standard, Rule 54(d), in awarding Lockheed costs. The Tenth Circuit also rejected relator's argument that forcing relators to cover the costs of prevailing defendants would be a disincentive to potential relators. The court held that if it were to hold otherwise, "it would effectively legislate a per se rule preventing prevailing FCA defendants from recovering costs" which would become applicable in every FCA case.

7. *United States ex rel. Rosner v. WB/Stellar IP Owner*, L.L.C., 739 F.Supp.2d 396 (S.D. N.Y. 2010).

Plaintiff, a tenant, brought a FCA claim against a housing complex and the City of New York, alleging that the complex made fraudulent reports to the Department of Housing and Urban Development to obtain tax benefits as well as § 8 federal housing assistance payments. He also alleged that the city was a knowing participant in the scheme. The district court granted defendants' motion to dismiss on jurisdictional grounds because the information on which the suit was based had already been publicly "disclosed" and plaintiff was not an original source. One of the defendants sought to recover fees under § 3720(d)(4) on the basis that plaintiff's claim was frivolous. The court, in refusing the fee request, held that its lack of subject matter jurisdiction was "not so staggeringly obvious that it renders plaintiff's action 'objectively frivolous.'" In addition, the court found that there was no evidence that the tenant's suit was primarily for the purpose of vexing or harassing any of the defendants.

8. *Wood v. Applied Research Associates, Inc.*, 328 Fed. Appx. 744 (2d Cir., July 16, 2009), cert. den., 130 S.Ct. 1285 (Jan. 25, 2010).

The plaintiffs sued various entities which had provided services to the government in connection with an investigation of the World Trade Center collapse.[8] The district court dismissed the case after finding that the complaint had failed to meet the pleading requirements of Fed. R. Civ. P. 9(b) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). The district court also denied the plaintiff's request to file a second amended complaint. Following the dismissal of plaintiffs' case, the district court

8. According to the plaintiffs, the collapse of the WTC was actually caused by the use, on 9/11/2001, of exotic weaponry known as directed energy weapons.

also denied the defendants' § 3730(d)(4) fee request and instead warned plaintiffs and their counsel about the consequences of filing a frivolous action. The plaintiffs then appealed.

On appeal, the Second Circuit affirmed both the district court's dismissal of the case and its ruling disallowing plaintiffs' to file a second amended complaint. Although the defendants had not formally appealed, they attempted to argue that the district court should have awarded them fees. In response, the Second Circuit held that the district court had not abused its discretion by warning rather than sanctioning the plaintiffs.

9. *United States ex rel. Dodge v. ACS State & Local Solutions, Inc.*, 2009 WL 1748540 (M.D. Fla., June 18, 2009).

This case, which was dismissed on jurisdictional (not original source) grounds, involved false claims related to services provided by the defendant under contract with the Department of Labor and Department of Health and Human Services. Defendant then petitioned for fees under 31 U.S.C. § 3730(d)(4). The court, however, refused to award defendant fees because it found that plaintiff's claims "were not clearly frivolous, clearly vexatious or brought primarily for purposes of harassment," and because the original source issue was "a close call for the court."

E. Summary of Prevailing Defendants' Cases

These cases highlight that district courts continue to closely examine whether a plaintiff's claims were clearly frivolous, or brought for the purpose of harassment and, more often than not, find that the defendant has failed to meet this standard. The district courts, however, are more willing to award costs to a prevailing defendant under Rule 54(d).