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

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

"To sin by silence when they should protest makes cowards of men."
–Abraham Lincoln, 16th U.S. President

The October 2013 issue of the False Claims Act & *Qui Tam* Quarterly Review is the final issue of 2013—the year in which we celebrate the 150th anniversary of the False Claims Act. As we reflect on the remarkable success of the law over the past century and a half, I'd like to share with you a paper our friends at the Vogel, Slade & Goldstein law firm prepared, which sheds some light on the history of the FCA. Enjoy!

All the best,
Cleveland Lawrence III
Editor-in-Chief

Congressman Charles H. Van Wyck:
Anti-Fraud Warrior of the 37th Congress©

By:
Shelley R. Slade
Brad Leneis[1]

"Worse than traitors in arms are the men, pretending loyalty to the flag, who feast and fatten on the misfortunes of the nation, while patriot blood is crimsoning the plains of the south, and the bodies of their countrymen are mouldering in dust."[2]
–Congressman Charles H. Van Wyck (R–New York), 1863

On March 2, 2013, the federal False Claims Act celebrated its 150th birthday. As *qui tam* counsel and other False Claims Act practitioners pause this year to pay tribute to the law's resounding success, we may want to consider the contributions of Charles H. Van Wyck, a passionate, 19th century abolitionist and anti-fraud warrior who authored the words set forth above. As a member of the U.S. House of Representatives, Van Wyck spearheaded the investigative proceedings that exposed rampant fraud in government contracting and thereby set the stage for enactment of the False Claims Act, a law that to this day remains one of the most effective laws on the books. Van Wyck's success in shining the spotlight on the cronyism and corruption found in government procurement led his congressional colleagues within months to yank investigative powers from his hands and to take extreme measures to discredit him. We owe a debt to Van Wyck for the sacrifices he made for the national good.

Van Wyck's war against fraud commenced at the start of the Civil War, when the New York Congressman persuaded the U.S. House of Representatives to investigate the legality of government procurement activities and to appoint him to lead those efforts.[3] At the time, Union recruits, 500,000 strong, needed food, clothing, weapons, and shelter. While the army had acquired these basics through a competitive bidding process before the war,[4] demand now outstripped supply, and the army began purchasing on an emergency basis. As a result, the Union Army was vulnerable to unscrupulous government procurement agents and dishonest military suppliers. Indeed,

1. Ms. Slade is a partner in Vogel, Slade & Goldstein, LLP, a law firm with a nationwide practice representing qui tam plaintiffs in False Claims Act cases. Mr. Leneis, a recent graduate of Georgetown University Law Center, is a legal fellow at Vogel, Slade & Goldstein. This article is based on research conducted by Darius Massoudi, a former firm paralegal who is currently a second-year law student at the School of Law, University of California—Berkeley (Boalt). The article also includes contributions from Nicholas Mendoza, a paralegal at the firm.

2. H.R. Rep. No. 37-50, View of the Minority (Rep. Van Wyck), at 47 (1863).

3. *See* H. Journal, 37th Cong., 1st Sess. 45 (1861) (resolving to create the Select Committee on Government Contracts and appointing Van Wyck chairman); H. Journal, 37th Cong., 2d Sess. 365 (1862) (resolving to investigate the finances of the United States Custom House in New York).

4. See James F. Nagle, A History of Government Contracting 181–84 (1992).

at one point, General Fremont bought guns for $22 apiece only to discover that the guns were the very ones that the government recently had condemned as obsolete and sold at auction for $3 each. When fired, the guns blew off the soldiers' own thumbs.[5] Moreover, in violation of military specifications, uniforms and blankets sold to the Army were cobbled together from "shoddy," a trade term for scraps and old cloth that were ground up, glued together, and pounded into shape (and now a synonym for "cheap and poor quality").[6] The fraud and abuse were so blatant and so damaging to the war effort that, at Van Wyck's urging, Congress moved to stop it: in July of 1861, the House agreed to a resolution submitted by Van Wyck to establish a Select Committee on Government Contracts to investigate,[7] and then appointed Van Wyck as the Committee's chair.[8]

With an appetite for hard work and a fierce devotion to principle, Van Wyck seemed the right man for the job. Born in Poughkeepsie, N.Y., and educated at Rutgers, he entered state politics in 1850 as an anti-slavery Democrat.[9] But when Democrats engineered the possible expansion of slavery with the Kansas-Nebraska Act, which allowed those territories to determine whether to allow slavery by popular vote,[10] Van Wyck defected to the newly-formed Republican Party with its stronger anti-slavery platform.

The Congressmen who appointed Van Wyck as chair of the first Select Committee on Government Contracts had fair warning that Van Wyck had a way with words that raised the profile of his passions and that he would be dogged in the pursuit of his ideals. His speeches against slavery were so powerful that they led extremists among his opposition to attempt to assassinate him; his commitment while under attack was so unwavering that the pro-slavery forces could not defeat him.

Thus, in March of 1860, Van Wyck railed against slavery on the House floor in remarks aimed at his southern colleagues:: "One other gentlemen spoke of Massachusetts burning witches in the ancient times. Does he not know that your own people burn slaves at the stake, and it seems to awaken no horror in your minds?"[11] This charge drew the ire of southern congressmen: one called him "a liar and a scoundrel" and challenged him to a duel.[12] A year later, three men jumped him as he walked past the still unfinished capitol building on Washington's unlit dirt streets.[13] One man stabbed at Van Wyck's chest, but the knife was deflected: the congressman had an unusually thick notebook and a folded copy of the Congressional Globe in his coat pocket. Van Wyck had brought a gun to a knife fight; pulling his revolver, he shot

5. *Id.* at 199.

6. *Id.* at 205.

7. H. Journal, 37th Cong., 1st Sess. 45 (1861).

8. *Id.* at 72; see Nagle, *supra* note 4, at 263.

9. American National Biography, Vol. 22, at 263 (John A. Garraty and Mak C.Carnes, eds., 1999).

10. *Id.*

11. *See* Cong. Globe, 36th Cong., 1st Sess. 1032 (1860).

12. *Id.*

13. *Affairs of the Nation; Interesting News From Washington*, N.Y. Times, Feb. 23, 1861, *available at* http://www.nytimes.com/1861/02/23/news/affairs-nation-interesting-washington-better-feeling-peace-conference-murderous.html.

one attacker. The men fled. Van Wyck then calmly continued on to his room at the National Hotel—the same hotel where John Wilkes Booth would stay as he plotted another, more successful assassination attempt.

Van Wyck's committee investigated contractor fraud with admirable zeal. Published in December 1861, the first part of its first report ran to 1,100 pages.[14] The report presented the transcribed testimony of hundreds of witnesses that the Committee's members had examined, and it catalogued a litany of frauds: moldy blankets and dying horses purchased from unscrupulous vendors[15]; exorbitant rates charged to move men to the front lines by rail[16]; ships chartered at $2,000 per day that never set sail.[17] As Van Wyck explained to his congressional colleagues on the House floor, "[n]early every man who deals with the Government seems to feel or desire that it would not long survive, and each had a common right to plunder it while it lived."[18]

Like many fraud investigators who came before and after him, however, Van Wyck simply did too good a job, and, as a result, alienated many of those to whom he was beholden for his powerful position. Tensions in the Select Committee first emerged in early 1862 when Van Wyck sought to expand its investigations to examine the inner workings of the New York Custom House—notwithstanding the fact that this investigation would necessarily implicate powerful, well-established interests. At the time, the United States relied heavily on tariffs and duties to fill its coffers,[19] and New York was by far the nation's biggest and busiest port. This made its Custom House critical to the government's finances. But the city was also firmly in the grip of machine politics; and the Custom House, with its millions of dollars in annual revenues, was the system's crown jewel.[20]

Government jobs formed the backbone of the New York City machine's spoils system.[21] Once voted into power, party elites rewarded their friends and allies by appointing them to choice government positions.[22] In return, the elites exacted a percentage of each employee's salary—a mandatory assessment—which went back into the party's

14. *See* H.R. Rep. No. 37-2, pt. 1 (1861). The second part of the report added another 1,700 pages. *See* H.R. Rep. No. 37-2, pt. 2 (1862).

15. H.R. Rep. No. 37-2, pt. 2, at LVI, 33.

16. *Id.* at LII.

17. *Id.* at X–XI.

18. Cong. Globe, 37th Cong., 2nd Sess. 711 (1862).

19. *See, e.g.*, H. Journal, 37th Cong., 3rd Sess. 16 (message from the President) (1863) (noting that, of non-borrowing revenue, $49 million was derived from customs, while just $2.9 million was derived from other non-loan sources).

20. *See* Dorman B. Eaton, The "Spoils" System and Civil Service Reform in the Custom-House and Post-Office at New York (1881).

21. *See* Sean M. Theriault, *Patronage, the Pendleton Act, and the Power of the People*, 65 J. Pol. 50, 54 (2003).

22. *Id.*

war chest.[23] Employees recouped the money lost to assessments by taking bribes and stealing public funds.[24] With hundreds of available positions for inspectors, assessors, and collectors and plentiful opportunities for graft, the New York Custom House offered the party politician plentiful opportunities to consolidate power.

The beneficiaries of the New York City political machine predictably resisted Van Wyck's plan to expose the Custom House's inner workings. Roscoe Conkling, a machine Congressman from New York, bitterly opposed the Committee's work, charging that "the nation . . . had suffered in character . . . and that much harm had come, not from detecting or exposing fraud or extravagance, but from . . . charging and publishing to the world what had never happened at all."[25] Van Wyck's fellow Committee member Elihu Washburne, though not a machine politician himself, also came to oppose the Custom House investigation—possibly because a Custom House official falsely told him that Lincoln did not support it.[26] Washburne had replaced Van Wyck as chairman of the Committee in December of 1861[27]; and when Congress approved Van Wyck's resolution to investigate the Custom House on February 26, 1862,[28] Washburne quietly asked Van Wyck to refrain. Backed by the committee's other members, Van Wyck refused; he then went to New York and conducted hearings regarding the Custom House's activities.[29] In the space of a few weeks, he used committee resources to examine and document the testimony of 50 witnesses.[30]

Within a month, though, the rest of the Committee had been persuaded to turn on him, and on March 24, 1862, Washburne with the support of the rest of the committee ordered Van Wyck to stop investigating the Custom House.[31] Van Wyck now had no choice but to comply.

His investigative powers effectively removed, Van Wyck focused his energies on ending slavery and keeping the Union intact. In October 1861, he had raised a regiment of troops from New York,[32] and he now spent long stretches of time away from

23. *Id.*

24. *See* Eaton, *supra* note 20, at 14, 26.

25. 39 Bankers' Magazine and Statistical Register 744 (1885).

26. *See* Letter from Abraham Lincoln to Salmon P. Chase (Feb. 12, 1864), *in* 10 The Complete Works of Abraham Lincoln, at 6 (John. G. Nicolay and John Hay, eds., 1894) (discussing the Custom House official's attempt to "smother the investigation" by falsely representing that the president did not support it).

27. H.R. Rep. No. 37-2, pt. 2, at ii (1862).

28. H. Journal, 37th Cong., 2nd Sess. 365 (1862).

29. H.R. Rep. No. 37-50, View of the Minority (Rep. Van Wyck), at 1 (1863).

30. *Id.* at 1–2.

31. *Id.* at 2.

32. Nagle, *supra* note 4, at 263; *see* History, 56th Infantry Regiment, New York State Military Museum and Veterans Research Center, http://dmna.ny.gov/historic/reghist/civil/infantry/56thInf/56thInfMain.htm (last visited October 11, 2013).

the Congress commanding his regiment.[33] His long absences provided his opponents with plenty of time, unfortunately, to work at undermining his investigation of the Custom House. Starting in September 1862, other members of the Committee met with the Custom House officials that Van Wyck had already interviewed to take additional testimony—examinations that Van Wyck later maintained were designed solely to "exculpate and clear from the evidence taken in March last."[34] That December, under Washburne's leadership, the committee questioned Van Wyck's propriety in examining Custom House officials the previous February and March in the absence of a committee quorum.[35] Finally, while preparing the Committee's final report in early 1863, the Committee's other members prevented Van Wyck from accessing the testimony he himself had taken the previous year.[36] The feud culminated on the last day of the 37th Congress, March 3, 1863, when Van Wyck refused to join the Committee's majority report and instead published his own scathing report from the minority.

The majority report largely whitewashed the Custom House irregularities that Van Wyck's initial inquiries had unearthed. It admitted that an "occasional lack of vigilance" might have led to "some abuses" at the Custom House, but it concluded that there was "no proof to show that the abuses were more numerous now than they have been heretofore."[37]

In contrast, Van Wyck's rabble-rousing, withering minority report pulled no punches. He insinuated that the Committee members were beholden to the Custom House's powerful revenue officers, who had gotten the investigation called off with a "waive of the magic wand."[38] He set out in detail how the other Committee members had raised procedural barriers to hinder his investigation.[39] And he concluded the report with the famous quote at the start of this article—stirring words that are often misattributed to Lincoln:

> Worse than traitors in arms are the men, pretending loyalty to the flag, who feast and fatten on the misfortunes of the nation, while patriot blood is crimsoning the plains of the south, and the bodies of their countrymen are mouldering in dust.[40]

The Committee's other members did not want to see Van Wyck's report published; after Van Wyck filed it with the House clerk, they refused to give it their approval, call-

33. Nagle, *supra* note 4, at 263; *see* History, 56th Infantry Regiment, New York State Military Museum and Veterans Research Center, http://dmna.ny.gov/historic/reghist/civil/infantry/56thInf/56thInfMain.htm (last visited October 11, 2013).

34. *Id.* at 5.

35. H.R. Rep. No. 37-50, View of the Minority (Rep. Van Wyck), at 4–5.

36. *Id.*

37. H.R. Rep. No. 37-49, at 4 (1863).

38. H.R. Rep. No. 37-50, View of the Minority (Rep. Van Wyck), at 3.

39. *Id.* at 4–7.

40. *Id.* at 47.

ing it a personal diatribe unrelated to the Committee's business.[41] They also held off on filing their own report until the Congress's final hours, hoping to prevent the clerk from having time to print Van Wyck's minority report.[42] But at the eleventh hour Van Wyck's report disappeared from the clerk's office, and copies were somehow printed and ready to distribute when the majority report went out.

Van Wyck's success in educating the American public about the corruption within the Custom House, and the inclination of their elected representatives to whitewash it, enraged Washburne. On the floor of the House, on March 3, 1863, Washburne rose and accused Van Wyck of indolence and malfeasance, charging that "at the instigation of corrupt contractors" Van Wyck had interfered with the Committee's early investigations, and that Van Wyck had "never spent two hours in committee."[43] Washburne even claimed that Van Wyck only pursued the Custom House investigation because Van Wyck himself had "undertaken" to "get men into the custom-house" and been rebuffed.[44] Washburne insisted that a special committee be appointed to investigate the disappearance of Van Wyck's minority report from the clerk's office.[45] However, Congress adjourned shortly thereafter and no investigation was ever taken up.

President Lincoln eventually came to Van Wyck's defense—privately, at least. In a February 12, 1864 letter to his Treasury Secretary, Salmon Chase, the president admonished a special agent of the Treasury in New York for suggesting to Committee chairman Washburne that Lincoln had not supported the Committee's investigation of the Custom House.[46] In fact, from his early days in politics Lincoln had made known his contempt for government contracting fraud. As a state legislator in Illinois, he had condemned the Postmaster General for directing mail contracts to his friends and paying them "double, triple, and often quadruple what honest and fair bidders had proposed to take at it."[47] And Lincoln knew about the Committee's work[48] and agreed with its aims: "as to contracts and jobs," he wrote, "I understand that, by law, they are awarded to the best bidders: and if the government agents . . . do differently, it would be good ground to prosecute them upon."[49]

In the early months of 1863, vindicating Van Wyck's steadfast and courageous efforts, Congress was finally forced to take legislative action to redress the rampant fraud in government contracts. On February 6, 1863, Senator Fessenden introduced the bill

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41. *See* Cong. Globe, 37th Cong., 3rd Sess. 1550–51 (1863) (statement of Representative Van Wyck).

42. *See id.*

43. *Id.* at 1550 (statement of Representative Washburne).

44. *Id.*

45. *Id.* at 1551.

46. Letter from Abraham Lincoln to Salmon P. Chase (Feb. 12, 1864), *in* 10 The Complete Works of Abraham Lincoln, at 6 (John. G. Nicolay and John Hay, eds., 1894).

47. Abraham Lincoln, Speech to the Sub-Treasury (Dec. 26, 1839), *in* 1 The Complete Works of Abraham Lincoln, at 34.

48. Letter from Abraham Lincoln to George McClellan (Nov. 10, 1861), *in* Uncollected Letters of Abraham Lincoln, at 197 (1917).

49. Abraham Lincoln, Memorandum Concerning Patronage in St. Louis (Apr. 16, 1863), *in* 6 Collected Works of Abraham Lincoln, at 178 (2008)

that became the False Claims Act.[50] Designed to "prevent and punish frauds upon the Government of the United States," the bill outlawed the types of acts that the Committee's reports had brought to light: the presentation and procurement of false claims and statements; contracting by members of the armed forces for their own benefit; and the wrongful disposition of military supplies, to name a few.[51] The bill was reported to the House on February 13th, 1863—the day after Lincoln's 54th birthday.[52]

Some parts of the bill were contentious; in the Senate, members wrestled with the issue of scienter.[53] From the outset, though, legislators agreed on the need for a *qui tam* provision.[54] As one of the bill's principal authors, Senator Pomeroy, put it: "holding out a temptation . . . is the safest and most expeditious way I have ever discovered of bringing rogues to justice."[55] In the end, the final bill granted the whistleblower fifty percent of the recovery, which was set at twice the amount of damages plus a $2,000 fine.[56] The government's attorneys were required to be "diligent in inquiring into any violation of the provisions of this Act by persons liable to such suit" and to "cause him or her to be proceeded against in due form of law for the recovery of such forfeiture and damages."[57] Congress passed the Act on March 2, 1863, and President Lincoln signed it into law the same day.[58]

That summer, Union victories at Gettysburg and Vicksburg turned the tide of the war. When the war ended, Van Wyck returned to New York and to politics: he was elected to Congress twice more in 1868 and 1870.[59] He did not seek reelection in 1872, and he moved to Nebraska in 1874—possibly because of opposition from his old enemy, Roscoe Conkling, now a powerful senator with President Grant's ear.[60] In Nebraska, he served in the state senate before winning a seat in the United States Senate in 1881.[61] While nominally still a Republican, he declared that he represented Nebraska "without reference

50. S. 506, 37th Cong. (1863).

51. *Id.*

52. H. Journal, 37th Cong., 3d Sess. 391 (1863).

53. *See* Cong. Globe, 37th Cong., 3rd Sess. at 954 (statement of Senator Cowan); *id.* at 955 (statement of Senator Pomeroy).

54. As the Select Committee on Government Contracts noted, it was already a well-established practice to award part of the recovery to customs officials who discovered frauds and other violations. *See* H.R. Rep. No. 37-49, at 3 (1863) ("[S]timulus . . . has been found necessary to impel even the most conscientious officials to extraordinary vigilance in the detection of frauds.").

55. Cong. Globe, 37th Cong., 3rd Sess. 956.

56. S. 506, 37th Cong., 12 Stat. 696 (1863).

57. *Id.*

58. *Id.*

59. Nagle, *supra* note 4, at 263.

60. *Id.*

61. *Id.*

to party," and when he lost his seat in 1887 he joined the progressive People's party.[62] He never again held office. In 1895, at age 71, he died of a stroke.[63]

One hundred and fifty years after its passage, the False Claims Act preserves the legacy of Van Wyck's efforts on the Select Committee. Fundamentally, his efforts involved asking tough questions and printing the answers for all to see. The Committee's success in catalyzing the False Claims Act's passage showed that sunlight truly can be the most effective disinfectant. Strengthened by the 1986 and 2009 Amendments, the Act now shines a bigger and brighter light than ever. Van Wyck, one imagines, would be pleased.

62. *Id.*

63. *Id.* at 264.

Recent False Claims Act & *Qui Tam* Decisions

JULY 1, 2013–SEPTEMBER 30, 2013

Kellogg Brown & Root Servs., Inc. v. United States, 2013 WL 4749921 (Fed. Cir. Sept. 5, 2013)

A government contractor that provided dining facility services to the United States Army in Iraq sued the U.S. government, alleging that the government improperly withheld more than $40 million in payments. The government brought multiple counterclaims against the company, including claims under the False Claims Act (FCA) and the Anti-Kickback Act (AKA), in which the government alleged that the company's claims for payment under the contract were tainted by illegal kickbacks that company officials received from subcontractors in exchange for work on the government contracts. The U.S. Court of Federal Claims awarded the government a minimal award on its kickback counterclaim, finding that the company employees who allegedly accepted the kickbacks were not senior enough to impute vicarious liability to the company. The court, though, dismissed the government's FCA counterclaim. The United States appealed both rulings to the U.S. Circuit Court for the Federal Circuit.

The Federal Circuit reversed and remanded the Federal Claims court's ruling on the government's AKA counterclaim, finding that company should be held vicariously liable for the illegal kickbacks its employees accepted from subcontractors because the company benefitted from those kickbacks and because the AKA—with its double damages provision—is a "special statute" that is not subject to a heightened standard for vicarious liability. But the circuit court affirmed the claims court's dismissal of the government's FCA counterclaim. With respect to the FCA counterclaim, the government argued that the subcontract at issue was fraudulent from its inception and that any claims to the government resulting from the subcontract were "false" for FCA purposes. The appeals court rejected that argument, finding that the government failed to allege that any of the company's invoices themselves were actually false or fraudulent, which, the court declared "is required for a FCA claim to be successful." The circuit court held that since the government failed to plead "that a false or fraudulent claim was submitted and that [the company] knew of its falsity," the FCA counterclaim was properly dismissed. In reaching this holding, the court rejected the government's argument that the invoices at issue were presumably inflated at least by the amount of the amount of the invoice, and consequently, they were false. Instead, the court held that the government was required to comply "with ordinary rules of pleading and proof," and could not forgo actually alleging that the company's invoices were actually inflated.

Emanuele v. Medicor Assocs., 2013 WL 3893323 (W.D. Pa. July 26, 2013)

A cardiologist filed a *qui tam* suit against a group of eight corporate and individual healthcare defendants, alleging that the defendants entered into sham contractual arrangements with one another—in violation of the Stark Law and the Anti-Kickback Statute (AKS)—for the purpose of providing illegal kickbacks in exchange for patient referrals; he alleged that he was given such a contract himself. According to the relator, these alleged violations rendered the defendants' claims to the federal healthcare programs false under the False Claims Act. The relator also alleged that the defendants violated the FCA by submitting healthcare claims for unnecessary cardiac catheterizations and other surgical procedures. The government declined to intervene in the relator's suit. The U.S. District Court for the Western District of Pennsylvania held that some of the relator's claims were time-barred and limited the scope of the relator's claims. The relator amended his complaint and the defendants moved to dismiss, arguing that the relator failed to allege the fraud with particularity.

Holding: The Eastern District of Pennsylvania granted some of the defendants' motions to dismiss, but denied other defendants' motions.

Statute of Limitations

Before evaluating the defendants' motions, the court considered a supplemental pleading from the relator, regarding the court's prior statute of limitations ruling. The relator, relying on Fourth Circuit precedent, argued that his *qui tam* claims—which were filed in October 2010, but alleged a fraud scheme that began in 2001—were not time-barred. The relator asserted that due to the Wartime Suspension of Limitations Act (WSLA), the limitations period for *qui tam* claims extends back to October 2002, when the U.S./Iraq hostilities began. The district court, relying on the "well-reasoned dissent" in the Fourth Circuit opinion as well as the legislative history of the WSLA and the court's findings regarding Congress' intent, disagreed with the relator and held that only the government—as either a plaintiff or intervenor—can invoke the tolling provisions of the WSLA. Thus, the relator's pre-October 2004 *qui tam* claims were still time-barred.

Failure to Plead Fraud with Particularity

The court held that the relator's fraud claims against six of the eight defendants were pled with particularity, as the relator described that the contractual arrangements at issue were sham agreements because they provided significant compensation but required very little work; the relator further alleged that, because he performed work pursuant to such a contract, he observed numerous Stark Law and AKS violations, as well as illegal submissions for payments from the federal healthcare programs in violation of the FCA. Moreover, the court held that the relator properly pled the defendants' scheme to submit false claims for medically unnecessary services, as the relator offered examples of specific patients who underwent allegedly unnecessary procedures. Thus, those six defendants' motions to dismiss were denied.

For two defendants, though, the court held that the relator's fraud claims were not specific enough to be maintained. The relator merely pled that these defendants were "closely affiliated" with other defendants about whom the relator had pled particularized fraud claims, but he did not allege any specific facts regarding those two defendants' alleged involvement in fraudulent activities, such as sham contracts, illegal patient referrals, and false claims. The court granted these two defendants' motions to dismiss, with prejudice.

U.S. ex rel. Gale v. Omnicare, Inc., 2013 WL 3822152 (N.D. Ohio July 23, 2013)

A relator filed a *qui tam* action against his former employer, a pharmacy company, alleging that the company provided certain discounts on the price of Medicare Part A services to nursing homes in exchange for Medicare Part D patient referrals. The relator claimed that these discounts—which ultimately resulted in the defendant losing money on those services—constituted illegal kickbacks, in violation of the Anti-Kickback Statute (AKS), and that the defendant's Medicare reimbursement claims resulting from the kickback arrangement were false, in violation of the False Claims Act. The government declined to intervene in the relator's suit. The relator moved for summary judgment on the FCA claims. The defendant opposed the motion, arguing that there was no evidence of a *qui pro quo* arrangement and that the relator failed to establish the fair market value of the allegedly discounted Medicare Part A services. The relator also moved for summary judgment on the defendant's "unclean hands" affirmative defenses.

Holding: The U.S. District Court for the Northern District of Ohio denied the relator's summary judgment motion regarding the fraud claims. The court also granted the relator's motion for summary judgment with respect to the defendant's unclean hands affirmative defense.

The court held that "[c]ompliance with the AKS is a material term of Medicare reimbursement." The court determined that, to succeed on his summary judgment motion, the relator would need to show that the defendant violated the AKS and knew that it was in violation when it presented Medicare claims to the government and caused nursing homes to present Medicare claims to the government. The court held that the relator could not satisfy this requirement. First, the court determined that the defendant raised a triable issue of fact regarding whether or not any price reductions offered to nursing homes qualified as remuneration under the AKS, noting that both the relator and the defendants offered plausible methodologies and evidence in support of their respective valuations of the discounts.

Similarly, the court held that there were triable issues of fact regarding whether the defendant provided discounts in order to induce the referral of Medicare patients; buoyed by some of the relator's own statements, the defendant argued that the discounts were the result of corporate mismanagement, not improper inducements. Given the issues of material disputed fact, the court denied the relator's motion for summary judgment on the fraud claims.

The court, however, granted the relator's summary judgment motion regarding the defendant's unclean hands defense; the defendant noted that the FCA penalizes relators with unclean hands by permitting courts to reduce awards to relators who "planned and initiated" the fraud. The court agreed with the relator that the defendant did not have standing to assert this defense, since the determination of relators' awards does not involve *qui tam* defendants. The court held that only the United States has standing to participate in any proceeding concerning a reduction in a relator's award—the court noted that defendants are "free to assist the government" in determining whether to reduce a relator's award.

U.S. ex rel. Nehls v. Omnicare, Inc., 2013 WL 3819671 (N.D. Ill. July 23, 2013)

A *qui tam* relator brought an action against a pharmacy company and two individuals—a father and son—alleging that the defendants engaged in improper financial arrangements, in violation of the Anti-Kickback Statute (AKS). The relator further alleged that, because of the AKS violations, the defendants caused the submission of false claims to the federal, Illinois, and Florida Medicaid programs, in violation of the False Claims Act. Specifically, the relator alleged that the two individuals had ownership interests in nearly 30 nursing homes. One of those individuals—the son—also had an interest in a small pharmacy company that serviced the nursing homes. The relator alleged that the son received improper remuneration from his pharmacy in exchange for referring his family's nursing homes' business to the pharmacy. Likewise, the relator alleged that the father improperly contracted his nursing homes' business with his son's pharmacy and solicited other nursing homes to do the same, in order to benefit his son. Eventually, the defendant pharmacy company purchased the son's smaller company and continued the allegedly improper arrangement by entering into long-term contracts to provide services to the individual defendants' nursing homes. The relator also alleged that the father induced the owner of 17 other nursing homes to switch to the pharmacy.

The corporate defendant reached a settlement that resolved the relator's claims against it. The individual defendants moved for summary judgment on the relator's claims. In addition, the son filed a counterclaim, alleging that the relator—who had served as a vice president of the son's smaller pharmacy—breached her fiduciary duty to that company and its owners by failing to report the alleged AKS

violations to the company before filing her *qui tam* suit; the relator moved to dismiss the counterclaim.

Holding: The U.S. District Court for the Northern District of Illinois denied the defendants' summary judgment motions, and granted the relator's motion to dismiss.

Public Disclosure Bar

Before considering the defendants' summary judgment arguments, the court addressed their contention that the relator was not the original source of the information on which her fraud claims were based, and thus, the court lacked subject matter jurisdiction over the relator's fraud claims, due to the False Claims Act's public disclosure provision. The defendants claimed that the alleged fraud was disclosed to the FBI during an interview that occurred more than a year before the *qui tam* action was filed. The court rejected that argument, finding that the defendants failed to present any evidence that the interview was placed in the public domain. Moreover, the court held that even if the interview had been made public, the relator qualified as an original source, for FCA purposes. First, the court observed that the FCA refers to "an" original source, and not "the" original source, as the defendants construed the statute. The court then determined that the relator qualified as an original source, as she was a former employee of the son's pharmacy and gave deposition testimony detailing her claims of the defendants' improper financial relationships. Thus, the court held that it had subject matter jurisdiction over the relator's claims.

Alleged Violations of the Anti-Kickback Statute and the False Claims Act

The court then turned to the defendants' summary judgment motions, in which they asserted that the relator could not present sufficient evidence to create triable issues of fact regarding the alleged AKS violations and corresponding false FCA violations. The defendants pointed out that a heightened *mens rea* standard—knowingly and willfully—applies to AKS violations. Relying on decisions from the Tenth and Eleventh Circuits, they contended that the same heightened scienter standard should apply when an FCA claim is based on alleged AKS violations. The relator countered that AKS violations that serve as the predicate for FCA actions need only be made knowingly, not "knowingly and willfully." The court observed that the U.S. Court of Appeals for the Seventh Circuit has not opined on the issue, but ultimately held that it was unnecessary to resolve the disputed question, since the relator's FCA claims were sufficient to meet the heightened scienter requirement. The court separately evaluated the relator's claims against each defendant.

First, the court considered the relator's allegations that the son received improper remuneration in exchange for referrals of his family's business. The court held that the relator's allegations—which included assertions that the son received a 40% stake in the small pharmacy company by making a $4000 investment, and that his other partners brought him into the company to make use of his connections to nursing homes and acknowledged that he would be a "passive" owner who would not be involved in the company's operations—were sufficient to allow a reasonable jury to infer that the son largely paid for his stake in the pharmacy by delivering his family's nursing homes as customers. In addition, the court held that the relator's allegations were sufficient to create a factual dispute regarding whether or not the son received remuneration in exchange for securing contracts with his family's nursing homes in connection with the corporate defendant's acquisition of his pharmacy. The court noted that the corporate defendant's acquisition of the son's pharmacy was not completed until the son's pharmacy secured the contracts of the individual defendants' 27 nursing homes, as well as that of 17 additional nursing homes. The court determined that the relator's allegations satisfied the heightened "knowingly and willfully" scienter standard, as her complaint alleged that, before the son's smaller pharmacy was formed, the son, his business partners, his father, and the father's attorney held a meeting to discuss the new business venture. The father then commissioned a legal opinion from his attorney, with regard to potential AKS issues. The legal opinion cautioned the individual defendants not to create an arrangement in which remuneration was based on referrals. The court held that these allegations "serve as circumstantial evidence that [the son] acted with willfulness. Consequently, the court denied the son's motion for summary judgment.

The court also denied the father's summary judgment motion. First, the court noted that the father essentially admitted that his nursing homes contracted with his son's pharmacy in order to provide a financial benefit to his son. However, the father argued that this economic benefit did not violate the AKS, since he did not receive the benefit himself. The court rejected that argument and held that the alleged improper economic benefit to the son—who was also the father's business partner in numerous nursing homes—could constitute an indirect benefit to the father, in violation of the AKS, just as a bribe that results in a payment to a person's family member might constitute an illegal indirect economic benefit to the person who arranged for the payment. The court also mentioned that the Office of Inspector General for the Department of Health and Human Services issued an Advisory Opinion that also suggested that payments to family members can constitute remuneration under the AKS. Finally, the court again referenced the fact that the father sought a legal opinion on whether switching his nursing home business to his son's pharmacy would violate the AKS; participated in meetings regarding the corporate defendant's acquisition of the son's pharmacy; and assisted in delivering 17 additional nursing homes to the corporate defendant in order to finalize the acquisition deal. The facts, the court held, were sufficient to permit a reasonable inference that the father knowingly and willfully accepted remuneration in exchange for improper referrals. As a result of these findings, the court denied the father's motion for summary judgment.

Defendant's Counterclaim

The son filed a counterclaim against the relator, arguing that, as an officer of the son's pharmacy, the relator had a fiduciary duty to report the alleged AKS violations to the company before filing a *qui tam* action. While the court acknowledged that corporate officers generally owe a fiduciary duty to their corporations and shareholders and that a failure to report a compliance issue might constitute a breach of that duty, it ultimately concluded that the defendant could not establish damages. The defendant contended that he incurred substantial monetary damages, including litigation expenses in connection with defending the relator's *qui tam* suit and the relator's compensation after her alleged breach. The court, though, held that the defendant's contention "falters coming out of the gate," noting that the litigation expenses were not connected to the relator's alleged failure to report, since the relator could have reported the defendant's alleged violations and still filed her *qui tam* action. Moreover, the court held that any alleged damages in the form of the relator's compensation would belong to the son's pharmacy company; neither the son, nor any other single member of the company, had standing to recover expenses paid by the company.

Ultimately, however, the court held that the son's counterclaim was foreclosed under the FCA, since "an FCA defendant cannot seek contribution or indemnification from a relator;" otherwise, "relators would be discouraged from bringing suit." The court further noted that the FCA already reduces awards to relators with unclean hands, and that allowing claims against relators for contribution and indemnification would "upset the carefully calibrated framework under which relator compensation is to be figured." The court also reasoned that since the defendant's counterclaim was predicated on his own FCA liability—the relator could not have breached a fiduciary duty unless the defendant committed a violation—allowing the defendant's counterclaim to proceed would "shift the costs of [the defendant's FCA] violation to the relator in the event [the defendant] is found liable." Thus, the court granted the relator's motion to dismiss the defendant's counterclaim.

See *U.S. ex rel. Grenadyor v. Ukranian Vill. Pharm., Inc.*, 2013 WL 5408573 (N.D. Ill. Sept. 26, 2013), at page 66.

See *U.S. ex rel. Parikh v. Citizens Med. Ctr.*, 2013 WL 5304057 (S.D. Tex. Sept. 20, 2013), at page 74.

JURISDICTIONAL ISSUES

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

U.S. ex rel. Williams v. C. Martin Co., 2013 WL 4519324 (E.D. La. Aug. 23, 2013)

A relator alleged that a group of corporate and individual government contractors violated the False Claims Act by conspiring to defraud the United States and by submitting false claims to the Federal Emergency Management Agency (FEMA). The relator claimed that FEMA awarded the defendants various contracts to provide federal relief services in the aftermath of Hurricanes Katrina and Rita. The government's solicitation for proposals on the contracts made clear that preference would be given to small business firms located in the State of Louisiana. The relator alleged that one group of defendants worked together to misrepresent to the government that their proposal was from a small, local business. In addition, the relator alleged that these defendants overbilled the government, misrepresented that certain tasks under the contract were complete, billed the government while knowing that they lacked the resources to fulfill the contract's terms, and falsely indicated that they had performed certain inspections the contract required. The relator claimed that a second group of defendants bid on other FEMA contracts specifically set aside for service-disabled veteran-owned small businesses (SDVOB), even though they did not qualify; the relator alleged that these defendants agreed to a scheme to collude with a government employee to obtain a SDVOB certification. Similarly, the relator alleged that these defendants submitted claims under the contract with full knowledge that they did not have the resources to fulfill the contract's terms and falsely certified that they had completed certain inspections, as the contract required. According to the relator, the defendant's misconduct violated the False Claims Act. The defendants moved to dismiss the relator's suit, arguing that the False Claims Act's first-to-file and public disclosure provisions deprived the court of jurisdiction over the relator's claims.

Holding: The U.S. District Court for the Eastern District of Louisiana granted the motion as to one of the relator's claims; the defendants' respective motions to dismiss the remaining claims were denied.

First-to-File Bar

The defendants argued that the relator's allegations were identical to those raised in three previously-filed suits pertaining to their same narrow and readily identifiable group of companies. In addition, the defendants alleged that the previous suits were pending at the time the relator filed her *qui tam* action. Therefore, the defendant asserted, the relator's suit was barred. The court observed that the previous suits alleged that numerous government contractors defrauded the federal government in connection to FEMA contracts related to temporary homes for persons displaced by Hurricane Katrina. Specifically, the prior suits alleged: (1) that a group of government contractors—including one of the defendants named in the present *qui tam* action—fraudulently installed liquefied petroleum gas systems in homes for persons displaced by Hurricane Katrina, by failing to obtain the necessary permits or training as required by the defendants' FEMA contracts; (2) that government contractors submitted claims to FEMA for work that was never performed and made false records in order to get those claims paid or approved; and (3) that other government contractors, fearing they'd lose their FEMA contracts, falsified information on FEMA claims forms and submitted corresponding false claims—and even paid bonuses to employees who forged the claims forms. The court held that only the relator's claims alleging fraud with respect to the liquefied gas systems were barred under the FCA's first-to-file provision. The court found that the relator's gas systems claims "contain the same material elements of fraud as the allegations" in one of the previous cases, and that the prior case was pending at the time the relator's *qui tam* complaint was filed. Thus, the court ruled, the *qui tam* action was barred. The court rejected the relator's argument that the first-to-file bar was not implicated because the previous suit had since been dismissed. The court held that the allegations in the prior case served the FCA's purpose of "notifying the federal government of the potential existence of fraud in its contracts" with the defendants and that the relator's complaint did not alert the government to any additional potential fraud. As a result, the court dismissed the relator's claims regarding the gas systems. The court, though, held that the allegations in the other two previous actions "did nothing to put the government on the trail of fraud." Thus, the court denied the defendants' motions to dismiss the relator's remaining claims on the basis of the FCA's first-to-file rule.

Public Disclosure Bar

The court then considered the defendants' contention that the relator's claims were barred by the FCA's public disclosure rule. The defendants argued that, before the *qui tam* suit was filed, the relator's claims were publicly disclosed in newspaper articles, in a Congressional oversight hearing, in an inspector general's investigation and report, and in a bid protest filed by another contractor that submitted an unsuccessful bid to FEMA. The court concluded that the prior disclosures revealed the potential for fraud by companies bidding on post-Katrina FEMA contracts. Although the disclosures were generalized and did not identify any of the *qui tam* defendants, the court held that because only a small group of out-of-state companies was awarded the post-FEMA contracts, the public disclosures were sufficient to put the government on notice of potentially fraudulent activities by the defendants. But ultimately, the court held that the relator's *qui tam* allegations were not based upon the public disclosures, since the disclosures only described the potential for wrongdoing, but not the essential elements of a fraud scheme. Therefore, the court denied the defendants' motion to dismiss the relator's claims on the basis of the FCA's public disclosure bar provision.

See *U.S. ex rel. Ellis v. City of Minneapolis*, 2013 WL 5406625 (D. Minn. Sept. 25, 2013), at page 14.

See *U.S. ex rel. McLain v. Fluor Enters., Inc.*, 2013 WL 4721365 (E.D. La. Sept. 3, 2013); 2013 WL 4721367 (E.D. La. Sept. 3, 2013), at page 82.

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

U.S. ex rel. Ellis v. City of Minneapolis, 2013 WL 5406625 (D. Minn. Sept. 25, 2013)

Three relators filed a *qui tam* action against the cities of Minneapolis and St. Paul, as well as the agency receiving the cities' funds from the U.S. Department Housing and Urban Development (HUD), and multiple John and Jane Does, alleging that the defendants violated the False Claims Act by falsely certifying to HUD that they were acting to further fair housing when in fact they were reducing the availability of low-income housing. The relators claimed that they were all "original sources" of the information underlying their allegations. The U.S. District Court for the District of Minnesota ordered the relators to amend their original complaint, which the court found to be "interminably long and largely incomprehensible." Subsequently, the relators had a falling out, and one relator—Blodgett—separated from the other two—the Ellises. Both Blodgett and the Ellises retained separate counsel and submitted amended *qui tam* complaints. The Ellises continued to allege that all three relators were original sources, while Blodgett claimed that only he—and not the Ellises—was an original source, which contradicted the contention he made in the original complaint, under penalty of perjury. The court struck the amended complaints, noting that the parties did not have permission to split their joint action into two separate actions. The relators were granted an opportunity to file either a single amended complaint, or a motion to sever—but the court cautioned that, given the FCA's first-to-file provision, it was unlikely to allow the relators to file two separate lawsuits. Notwithstanding the court's warning, Blodgett moved to sever his *qui tam* complaint from the Ellises', arguing that he could not continue to claim that the Ellises' were original sources of the alleged fraud, without violating his obligation to plead only allegations that have a sufficient evidentiary basis. A magistrate judge denied that motion, citing the first-to-file rule. Blodgett objected to the magistrate judge's order.

The district court agreed with the magistrate's decision to deny Blodgett's motion to sever his complaint, finding that Blodgett's motion put it in "an impossible position," since it could not force Blodgett to continue litigating with the Ellises, but it could not disregard the FCA's prohibition against multiple relators pursuing separate *qui tam* actions simultaneously. As a result, the court dismissed Blodgett as a party pursuant to the first-to-file rule, holding that the relators' original joint *qui tam* action was the first-filed action that precluded Blodgett's subsequent action without the Ellises. The court rejected Blodgett's request to determine first the respective relators' original source status, before dismissing him the suit, stating that Blodgett was asking the court "to decide whether he was lying when he swore in his original complaint that the Ellises were 'original sources' or whether he was instead lying when he alleged in his amended complaint that the Ellises were not 'original sources.'" In addition, the court observed Blodgett's extensive prior litigation, noting that he had been reprimanded, enjoined, and sanctioned by the court in the past for his litigation practices, and concluding that he was "one of the most contumacious and abusive litigants in the [d]istrict." Moreover, the court stated that it could not determine any of the relators' original source status, since a comprehensible *qui tam* complaint had not yet been filed. The court noted that if the Ellises' complaint were to be dismissed on public disclosures grounds, then Blodgett would have an opportunity to bring his own *qui tam* action. Blodgett's objection to the magistrate judge's denial of his motion to sever was overruled. The Ellises were ordered to file a satisfactory amended *qui tam* complaint by a date certain, or to have their action dismissed.

U.S. ex rel. Carter v. Halliburton Co., 2013 WL 5306645 (E.D. Va. Sept. 19, 2013)

A *qui tam* relator filed suit, alleging that a group of affiliated government contractors violated the False Claims Act by fraudulently billing the United States military for water purification services in Iraq. The relator's suit was initially dismissed without prejudice, pursuant to the False Claims Act's first-to-file provision—a different *qui tam* case had been filed and was still pending in the same district court at the time the present relator filed his action. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit. A few weeks later, the prior pending suit was dismissed, and thus, was no longer "pending" for first-to-file purposes. The relator then filed a second *qui tam* action against the defendant, with a complaint identical to his previous complaint. Since the relator's appeal of the district court's dismissal of his first suit was still pending, the relator also moved to dismiss the appeal. But before the circuit court could enter the dismissal of the appeal, the district court again dismissed the relator's suit on first-to-file grounds—this time holding that the relator's own prior, still-pending *qui tam* suit barred his subsequent action.

After the circuit court dismissed the appeal, the relator then filed a third *qui tam* suit in the district court—identical to the prior two. The United States declined to intervene in the suit. The defendants moved to dismiss the suit, arguing that: (1) the suit was barred under the first-to-file rule; (2) the suit was barred by the FCA's public disclosure rule; and (3) the vast majority of the relator's claims were time-barred pursuant to the FCA's statute of limitations. This time, the district court dismissed the relator's suit with prejudice. The district court noted that two other *qui tam* actions—one in Texas and another in Maryland—had been filed and were pending at the time the relator filed his *qui tam* suit for the third time. As a result, the court held that the first-to-file rule barred the third *qui tam* suit. The district court also held that virtually all of the relator's claims were time-barred.

The district court did not consider the defendants' public disclosure bar argument. The relator then appealed the district court's rulings to the Fourth Circuit. The circuit court held that the district court erred when it dismissed the relator's third suit with prejudice on first-to-file grounds, noting that neither the Texas nor the Maryland *qui tam* actions was still pending, and therefore could no longer preclude the relator's suit. The circuit court also reversed the district court's statute of limitations ruling, finding that the FCA's six-year limitations period had been tolled, pursuant to the Wartime Suspension of Limitations Act. The Fourth Circuit, though, remanded the public disclosure issue to the district court.

First, the district court observed that the FCA's public disclosure bar provision was amended in 2010, as part of the Patient Protection and Affordable Care Act (PPACA). Relying on a U.S. Supreme Court decision announced contemporaneously with the amendment, the district court concluded that the amendment was not retroactive, and did not apply to the relator's claims, since the alleged fraud occurred before the amendment was enacted and since Congress did not express an intention for retroactive application. Again relying on Supreme Court precedent, the court rejected the relator's argument that since his most recent complaint was brought after the amendment, retroactivity was not required and the amended provision should simply apply. Instead, the court held that "the fact that the PPACA became effective before this suit was commenced will not alter [its] application of the pre-PPACA FCA."

The court then turned to the substance of the defendants' public disclosure argument, in which the defendants claimed that four previous disclosures barred the relator's present *qui tam* action: (1) testimony one of the relator's colleagues gave before the Senate Democratic Policy Committee; (2) the relator's own prior *qui tam* actions, in which complaints identical to the present complaint were filed; (3) the three *qui tam* complaints filed by other relators in California, Texas, and Maryland; and the California district court's opinion dismissing the relator's first *qui tam* action against the defendants. The district court held that, except for the Texas action—which was actually still sealed—all of the disclosures at issue satisfied the FCA's criteria for prior public disclosures. The court then evaluated whether the relator's allegations were "based upon" the prior public disclosures. Consistent with the Fourth Circuit's interpretation of "based upon," the district court stated that the public disclosure rule only bars *qui tam* claims "if the relator's allegations are actually derived from public disclosures." The defendants contended that because the relator's prior counsel also filed the previous California action on behalf of a different plaintiff, the present suit must have been based on the prior suit. But the court determined that the relator "prove[d] by a preponderance of the evidence that he did not derive his claims from the public disclosures from the previous California action," which generally alleged fraud over a larger time period, and which did not specifically allege FCA violations at the military bases in Iraq where

the present relator was stationed. The court also rejected the defendants' argument that the relator's own prior lawsuits served as public disclosures that could bar his present action—finding that treating the relator "as a parasite of himself . . . is illogical." As a result, the court then held that the relator demonstrated his "independent knowledge of the facts underlying his claim and that he derived his allegations from his own independent knowledge."

Finally, the court held that, even if the relator's allegations were even partially based upon the prior public disclosures, the relator qualified for the FCA's "original source" exception to the public disclosure rule, as he demonstrated direct and independent knowledge of the facts underlying his fraud allegations—"it is direct because [the relator] acquired it through his own efforts and without intervening agency, and it is independent because it is not dependent on public disclosure."

Based on these findings and conclusions, the court denied the defendants' motion to dismiss on public disclosure grounds.

U.S. ex rel. Newell v. City of St. Paul, Minn., 2013 WL 4529353 (8th Cir. Aug. 28, 2013)

A relator filed a *qui tam* suit alleging that a city defrauded the U.S. Department of Housing and Urban Development (HUD) by applying for—and receiving—HUD grant funds based on false certifications of the city's compliance with various HUD regulations requiring training and employment opportunities for low-income persons and businesses. The United States declined to intervene in the relator's suit. The U.S. District Court for the District of Minnesota dismissed the suit, finding that the relator's claims were barred by the False Claims Act's public disclosure bar provision. The district court also denied the relator's Rule 60(b) motion for relief from the district court's ruling, in which the relator argued that the federal government and the defendant reached a secret agreement whereby the defendant agreed not to take action in an unrelated suit in which the federal government had an interest in exchange for the federal government's agreement not to support the relator's suit—the relator claimed that this alleged agreement constituted an "alternate remedy" under the FCA, and that he was entitled to recover a relator's award and his attorneys' fees. The relator appealed both rulings to the U.S. Court of Appeals for the Eighth Circuit.

Holding: The Eighth Circuit affirmed the district court's rulings dismissing the *qui tam* complaint for lack of subject matter jurisdiction and denying the relator any recovery under the FCA.

Public Disclosure Bar

The circuit court reiterated its prior holding that "[t]he jurisdictional bar to an FCA claim arises 'only when the essential elements comprising the fraudulent transaction have been publicly disclosed so as to raise a reasonable inference of fraud." Based on that definition, the court declared that, in order to trigger the FCA's public disclosure bar provision, a disclosure must reveal "*both* the true state of facts (the City's non-compliance) and the misrepresentation of facts (the City certifying compliance to HUD)." (emphasis in original) The appellate court held that the disclosures at issue were sufficient to trigger the public disclosure bar. Specifically, the court noted that before filing his *qui tam* complaint, the relator obtained an internal memorandum drafted by one of the defendant's employees, which included details regarding the defendant's non-compliance with the HUD regulations at issue. Years before filing his *qui tam* suit, the relator publicized the memorandum at a city council hearing and joined a civil rights lawsuit against the defendant in which the memorandum was disclosed. In addition, the court observed that, prior to filing his *qui tam* complaint, the relator filed another suit against the defendant, alleging the same non-compliance with HUD regulations and seeking compensatory and injunctive relief; as part of that action, the relator produced information he obtained from HUD as a result of filing FOIA requests. The circuit court affirmed the district court's ruling that the relator's allegations had been publicly disclosed. The circuit court also agreed with the district court that the relator's fraud allegations were "based upon" the public disclosures. The relator argued that he was aware of the defendant's non-compliance before the city's internal memorandum was released; that the information he received through FOIA requests only confirmed that knowledge; and that he did not allege fraud in the prior lawsuits against the government. The circuit court held that, for purposes of the FCA's public disclosure bar provision, "[a] *qui tam* action is 'based upon' public disclosures when the allegations in the action and those in the public disclosures are substantially similar, *regardless of whether the relator may have had independent knowledge of the fraud*." (emphasis added). Therefore, the circuit court held that the relator's claims were based upon the public disclosure.

Finally, the appeals court turned to the question of whether the relator qualified as an "original source," capable of overcoming the public disclosure bar provision. The court agreed with the district court that the relator could not be an original source since he had not direct and independent knowledge of the alleged fraud. The court observed that the relator, "a private citizen, obviously had no direct or independent knowledge of the City's alleged misrepresentation of facts—that is the false certifications," and that the relator's allegations "were based on publicly-disclosed information, most likely HUD's FOIA responses," as well as information obtained from current and former city employees. The Fifth Circuit affirmed the district court's decision that it lacked subject matter jurisdiction over the relator's claim. That claim was dismissed.

Alternate Remedy

The circuit court also considered the relator's appeal of the district court's denial—without a hearing—of his Rule 60(b) motion for relief from the district court's ruling dismissing the *qui tam* suit. The relator argued that his *qui tam* suit was used as a bargaining chip during negotiations between the federal government and the defendant, in which the federal government allegedly agreed not to intervene in the relator's suit and the defendant allegedly agreed not to take action in an unrelated lawsuit that could jeopardize $750 million in recoveries from other suits. The relator argued that this alleged secret agreement enabled the federal government to obtain an "alternate remedy, which, under the False Claims Act, entitled him to a share of the government's proceeds. The Fifth Circuit rejected the relator's argument, finding that his allegations of a secret agreement had nothing to do with the district court's reasons for dismissing the relator's *qui tam* suit. The court noted that the relator was allowed to proceed with his suit, despite the federal government's decision not to intervene in the action. In fact, the court noted, "[h]ad he prevailed, he would have been awarded a larger percentage of the recovery than if the government had intervened." But the relator did not prevail in his suit, because the district court lacked subject matter jurisdiction over his claims—not because the federal government declined to intervene. Furthermore, the circuit court noted that the FCA's "alternate remedies" provision only applies when the federal government "elect[s] to pursue" a relator's *qui tam* claim in "another proceeding," but "does not include the government's settlement of unrelated claims against unrelated parties in unrelated lawsuits." But even if the federal government's alleged secret agreement with the defendant did constitute an alternate remedy under the FCA, the circuit court held that the relator would not be entitled to a reward, since his *qui tam* claims were dismissed for lack of subject matter jurisdiction. The court explained that the plain language of the FCA's alternate remedies provision specifies that relators only have "the same rights" in the alternate proceeding as they would have had if the government would have obtained a recovery under the FCA. Since the relator's *qui tam* action was dismissed on jurisdictional grounds, the circuit court reasoned that relator had no rights to a relator's award in that proceeding, and correspondingly, the relator would have no rights to a share of any alternate remedy the federal government might receive. The district court's denial of the relator's Rule 60(b) motion was affirmed.

U.S. ex rel. Cohen v. City of Palmer, 2013 WL 4510772 (D. Alaska Aug. 26, 2013)

A *qui tam* relator alleged that a U.S. city violated the False Claims Act with respect to its application for and use of American Recovery and Reinvestment Act grant funds from the federal government for use on public works and construction projects. The relator alleged that the defendant engaged in: (1) bid-rigging, whereby

the city refused to submit the ARRA projects to contractors for competitive bidding—as the grant required—and instead used its own employees; providing excessive employee compensation through enhanced wages and improper bonuses; (3) stockpiling, which involved purchasing excess building materials using government funds; and failing to create jobs, as the relator alleged the city guaranteed it would do when applying for the grant funds. The relator alleged that the defendant's misconduct resulted in False Claims Act liability. The defendant moved to dismiss the relator's claims, arguing that the court lacked subject matter jurisdiction pursuant to the FCA's public disclosure bar provision; the relator failed to state a claim under the FCA; and the relator failed to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the District of Alaska granted the defendant's motion to dismiss. The court, though, granted the relator leave to amend and re-file some—but not all—of her *qui tam* allegations.

Public Disclosure Bar

First, the court considered the defendant's jurisdictional argument under the FCA's public disclosure bar provision. The court noted that the provision was amended by Congress in 2010, "to render the public disclosure requirement non-jurisdictional." Consequently, the court held that "public disclosure no longer deprives the court of subject matter jurisdiction, [and] it is appropriate to apply the standard of [Federal Rule of Civil Procedure] 12(b)(6) to FCA claims that may be subject to the public disclosure rule." The court then determined that it was necessary to divide the relator's allegations into two categories—claims based on facts prior to the 2010 amendment and claims based on facts subsequent to the amendment. The former set of claims would be evaluated under Rule 12(b)(1) for lack of subject matter jurisdiction, while the latter set of claims would be analyzed under Rules 12(b)(6) and 9(b) for failure to state a claim and failure to plead fraud with particularity, respectively.

With respect to the pre-amendment claims, the court observed the relator's allegations that the defendant engaged in bid-rigging and excessive employee compensation, and failed to create jobs. The court noted that the relator's allegation that the defendant failed to create jobs was premised on the allegation that the defendant overpaid its own employees to perform the work, and therefore, the court's evaluation of the jobs-creation allegation would turn on its consideration of the other two allegations. The court then determined that the defendant presented a factual jurisdictional challenge in which it disputed the truth of allegations that, by themselves, would otherwise invoke federal jurisdiction. Consequently, the court concluded that it was allowed to consider materials outside the pleadings, including the purported public disclosures identified by the defendant. These disclosures consisted of several regional newspaper articles, the defendant's responses to the relator's public records requests for corroborating information, and the ARRA itself. The court determined that all three of these sources constituted public disclosures for purposes of the False Claims Act, finding that the newspaper articles were "news media," the city's responses to the public records were "administrative reports," and the legislation was a "congressional report."

While the court did not explain its rationale regarding the newspaper articles and the federal legislation, apparently concluding that the "public disclosure" nature of those materials was self-evident, it did elaborate on its reasoning regarding the government's responses to the relator's public records requests. The court recognized a recent U.S. Supreme Court decision in which the Court held that the preparation of responses to requests under the federal FOIA provisions involves government investigations and the production of government reports, and therefore results in public disclosures for FCA purposes. The district court similarly held that the present relator's public records requests to the defendant—a city—also resulted in a public disclosure under the FCA, since the city's response "appear[ed] to be an official or formal statement that gave information and notified [the relator] of the agency's resolution of her request."

The court then held that the public disclosures revealed the material elements of the fraud scheme alleged by the relator. First, the court determined that the newspaper articles referenced the fact that the defendant used its own workforce to complete work under the ARRA grant, even though the work should have been competitively bid. Thus, the court held, the articles disclosed the true state of facts—that the city used its own employees to work on ARRA projects. The court further determined that the ARRA itself revealed the remaining element of the alleged fraud—the fact that the defendant was required to engage in competitive bidding by law. The court mentioned that the relator offered an affidavit in support of her allegations, in which she "outlin[ed] her reliance on the responses to her public records requests" to confirm the defendant's alleged bid-rigging. The court therefore, held that the relator's re-amendment bid-rigging allegations were barred by the FCA's public disclosure provision. Next, the court found that the relator's pre-amendment excessive employee compensation allegations had been publicly disclosed through the defendant's public records request responses, which revealed the wages the defendant paid to the employees working on the ARRA projects. Again, the court noted that the relator admitted in her affidavit that through the public records requests, she acquired "direct proof of the payment of excessive wages." Thus, the court held that the excessive employee payments allegations were barred as well. Since the pre-amendment bid-rigging and excessive employee compensation allegations were barred, the court held that the pre-amendment jobs-creation allegations—which depended on those other claims—were barred as well.

Finally, the court considered whether or not the relator qualified as an "original source" under the FCA's pre-amendment public disclosure bar provision. The court noted that under that prior provision, an original source is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." While the court found that there was not dispute that the relator voluntarily informed the government about the alleged fraud prior to filing her *qui tam* action, ultimately the court held that the relator failed to meet her burden of demonstrating the existence of subject matter jurisdiction, since she did not adequately demonstrate her direct and independent knowledge of the fraud scheme she alleged. The court held that, even if the relator acquired first-hand knowledge of the alleged fraud through her own efforts, she failed to show that she knew about the defendants' alleged fraud before that information had been publicly disclosed; in fact, the court stated, to the contrary, that the record indicated that the relator only acquired her knowledge through the defendant's responses to her public records requests—which, the court already held were public disclosure. Accordingly, the court held that the relator was not an original source of her bid-rigging, excessive employee compensation, and jobs-creation claims. Those claims were dismissed.

Failure to State a Claim/Plead Fraud with Particularity

The court then turned to the relator's post-amendment claims, which consisted of allegations that the defendant continued to engage in bid-rigging, that the defendant's bid-rigging resulted in the defendant failing to create jobs, and that the defendant engaged in stockpiling. The court considered the defendant's motion to dismiss those claims for failure to state a claim and to plead fraud with particularity. The court held that the relator's post-amendment allegations did not "make particularized, plausible allegations that [the defendant] knowingly made palpably false statements to the federal government regarding its use of grant funds after [the effective date of the 2010 FCA amendments]." While the court acknowledged that the relator could bring her FCA claims based on an allegation that the defendant submitted claims for government funds based on its false certifications of compliance with applicable laws and regulations, the court held that the relator failed to plead the necessary elements of such a claim, as she did not identify any specific claim submitted by the defendant that was alleged to be false; instead, the relator merely alleged total sums the government allegedly granted and that the defendant allegedly misused. Moreover, the court determined that the relator failed to make particularized allegations regarding the "who, what, when, where, and how" of the defendant's reports to the government in which the false certifications were allegedly made. Additionally, the court observed that the relator's fraud allegations were "noticeably lacking in a distinct chronology," as it did not list when the defendant's work under the ARRA contracts took place, when the defendant began paying its own employees with ARRA funds, or when the defendant ordered excessive materials using federal dollars. Consequently, the court held that the relator's complaint failed to alleged with particularity that, during a specified time period, the defendant failed to comply with applicable obligations. This deficiency was fatal to the relator's post-amendment allegations, since, as an initial matter, the relator was unable even to show that the defendant's allegedly false certifications concerned post-amendment claims. As a result, the court dismissed the relator's post-amendment claims under Rules 12(b)(6) and 9(b).

U.S. ex rel. Whipple v. Chattanooga-Hamilton Cty. Hosp. Auth., 2013 WL 4510801 (M.D. Tenn. Aug. 26, 2013)

A relator filed a *qui tam* suit under the federal False Claims Act and the false claims laws of Tennessee, North Carolina, and Georgia, alleging that a hospital defrauded Medicare, Medicaid, Tricare/Champus, and other federal-funded healthcare programs, by manipulating claims for short stays, for same-day surgeries, for renal dialysis, and for other services. The defendant moved to dismiss the relator's claims, arguing that the court lacked subject matter jurisdiction over the claims, pursuant to the FCA laws' respective public disclosure bar provisions. The court allowed limited discovery regarding the jurisdictional issue, and after discovery was completed, the defendant moved for summary judgment, arguing that information regarding a subset of the relator's fraud allegations—the allegations regarding short stays, same-day surgeries, and renal dialysis—had been previously publicly disclosed during a three-year government audit and investigation that resulted in the defendant paying nearly $500,000 to the government.

Holding: U.S. District Court for the Middle District of Tennessee granted the defendant's summary judgment motion.

Public Disclosure Bar

First, the court noted that the federal FCA's public disclosure bar provision was amended by the Patient Protection and Affordable Care Act of 2010, and that the prior version of the law existed at the time of the alleged fraud, but the amended law was in place at the time the *qui tam* action was filed. The court held that "the alleged misconduct should be judged under the statute as it existed at the time of the alleged misconduct," but that "the jurisdiction of the Court should be determined under the statute as it existed at the time this action was filed."

The court then turned to the substance of the defendant's argument that the relator's complaint was based on publicly available information included in the government's audit and investigation. The relator countered that argument by asserting that the defendant's alleged fraud scheme was not revealed during the audit and investigation, and therefore, the fraud allegations could not have been based on that information; to be sure, the relator claimed to have direct and independent knowledge of the alleged fraud. Moreover, the relator argued that the defendant's disclosure of information to the government could not qualify as a public disclosure. The court rejected all of the relator's arguments. First, the court held that the information uncovered in the audit had been publicly disclosed. The court did not need to resolve the "conflict in the case law as to whether disclosure to the government is 'public disclosure,'" since the court concluded that the relevant disclosures regarding the defendant's billing for short stays, same-day surgeries, and renal dialysis were publicized beyond the government. The court determined that the audit information was shared with various contractors and outside counsel that assisted the government in its investigation. In addition, during the investigation, at least ten of the defendant's employees were interviewed by attorneys and auditors regarding the improper billing allegations. Thus, the court held that the disclosures were made "public." Additionally, the court held that the disclosures revealed enough information about the alleged fraud to trigger the public disclosure bar, noting that the government investigators consulted with the U.S. Attorney's Office about a "fraud case referral" regarding the defendant's billing. Moreover, the court held that the audit disclosed "the true set of facts (what should have been billed) and the false set of facts (what was actually billed)," and therefore, publicly disclosed the allegation of fraud—which the court stated "is implied" under these circumstances. The court disagreed with the relator's assessment that since the government did not conclude that the defendant's billing improprieties amounted to fraud, the *qui tam* suit could not have been based on the public disclosure. Instead, the court focused on the fact that the investigation produced sufficient information to "alert[] the government to potentially fraudulent activity and apprise[] the government of the discrepancies between what was billed and what should have been billed," and that it was this information—not the government's conclusion—that precluded the relator's suit.

The court then considered the relator's argument that he qualified for the "original source" exception to the public disclosure provision. The court rejected this argument, finding that the relator's knowledge of the alleged fraud was necessarily second-hand and could not have been "direct," since the relator did not work for the defendant during the time when the fraud was alleged to have occurred. Thus, the relator did not qualify for the pre-amendment version of the original source provision, which requires "direct and independent" knowledge of the fraud. Nor did the relator qualify for the post-amendment version of the provision, as the court held that he did not satisfy the requirement of "materially adding" something to the publicly disclosed information. The relator argued that his knowledge of the defendant's fraudulent intent materially added to the information the government uncovered, because had the government possessed the same knowledge, it too would have concluded that the defendant committed fraud. The court was not convinced, however, and stated that "[j]ust because Plaintiff does not agree with what those investigators found does not mean that he is an original source under the FCA . . .the issue is not whether the government could or should have done more to investigate these improper and allegedly fraudulent submissions."

Consequently, the court dismissed the relator's fraud allegations based on the defendant's billings for short stays, same-day surgeries, and renal dialysis, for lack of subject matter jurisdiction. Since the court held that the state FCA statutes at issue "basically mirror the federal law," the court applied the same reasoning and held that the state FCA claims were also barred.

U.S. ex rel. Zizic v. Q2 Admins., LLC, 2013 WL 4504765 (3d Cir. Aug. 26, 2013)

A relator filed a *qui tam* suit alleging that two government contractors—called qualified independent contractors (QIC)—violated the False Claims Act by fraudulently billing the Medicare program. The defendants were contracted to consider appeals of prior denials of Medicare benefits claims for various durable medical equipment (DME) that a Medicare administrative contractor (DMAC) had deemed not to be "reasonable and necessary." According to the relator, the defendants billed U.S. government for their services—which were required by applicable contractual, statutory, and regulatory provisions—even though the reviews of prior DMAC decisions were never actually performed. The relator was the former president and chief executive officer of a DME company, and Medicare claims for many of his company's DME devices were denied as not medically reasonable and necessary. The relator alleged that he participated in the appeals process, with the defendants serving as QICs, but discovered that the defendants were short-staffed, with only three or four doctors who were supposed to review appeals of hundreds of claims denials on a daily basis. The relator alleged that the defendants systematically denied all claims for the relator's DME, without conducting a review. Eventually, the relator's company declared bankruptcy, and the company's bankruptcy trustee sued the U.S. Department of Health and Human Services, seeking reversal of several groups of the company's DME claim denials. During the course of those proceedings, the government agency produced almost 35,000 pages of documents, and the trustee asserted that those documents provided evidence of unnamed QICs' failure to review DMAC denials for the relator's company's DME. Subsequently, the relator filed his *qui tam* action, alleging fraud claims against the defendants on behalf of the United States. The government declined to intervene in the suit. The U.S. District Court for the Eastern District of Pennsylvania granted the defendants' motion to dismiss the *qui tam* suit for lack of subject matter jurisdiction, pursuant to the FCA's public disclosure bar provision. The district court held that the prior bankruptcy proceeding publicly disclosed the allegations of fraud the relator later included in his *qui tam* suit. The relator's FCA claims were dismissed with prejudice. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Seventh Circuit.

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

Public Disclosure Bar

The circuit court first noted that since the defendants made a factual, rather than a facial, challenge to the district court's jurisdiction, the relator bore the burden of persuasion of establishing jurisdiction, and his jurisdictional allegations were not entitled to a presumption of truthfulness. The court then considered the relator's arguments on appeal, in which he asserted that the district court erred by applying the public disclosure bar to his suit, because his allegations were not based on prior public disclosures, and in the event that his allegations had been previously publicly disclosed, he qualified for the FCA's "original source" exception to the public disclosure rule. The circuit court quickly determined that the prior bankruptcy proceedings—in which the United States was a party—constituted a public disclosure for FCA purposes. The court then concluded that the public disclosure constituted allegations of fraud. In reaching that conclusion, the appellate court rejected the relator's argument that his *qui tam* allegations could not have been "based upon" public disclosures made in the bankruptcy proceedings since that prior litigation did not disclose the defendants' alleged fraud, but merely revealed that unnamed QICs had failed to perform the necessary review of DMAC denials. Instead, the circuit court held that the prior litigation did allege fraud, as it disclosed both the "true state of facts"—that QICs were required to review DMAC denials in accordance with the law and their contractual obligations—and the "misrepresented state of facts"—that QICs were compensated under government contracts for providing review services that were never actually performed. The appeals court agreed with the district court that the bankruptcy proceedings publicly disclosed the defendants' alleged fraud, because even though those defendants were not specifically identified in that earlier litigation, they were "directly identifiable" from the public disclosure, since they were the <u>only</u> QICs during their respective contractual terms, and their identities were publicly available on the Health and Human Services Department's webpage. Thus, the circuit court held, the district court properly concluded that the relator's fraud allegations were substantially similar to—and consequently, "based upon"—the prior public disclosure. The court also rejected the relator's argument that his *qui tam* action could survive the public disclosure bar because his fraud allegations included other additional information not contained in the bankruptcy proceedings; the court determined that the relator's "complaint does add some minor details to the trustee's description of the fraudulent transaction," but that the relator's additional information was "too insubstantial to prevent his otherwise substantially similar allegations from being based on the [bankruptcy] litigation." The Seventh Circuit affirmed the district court's ruling that the relator's claims were barred by the FCA's public disclosure provision.

Finally, the circuit court considered the relator's appeal of the district court's holding that he was not an "original source" of the information on which his FCA claims were based, because he did not have direct and independent knowledge of the alleged fraud. The appeals court agreed, and affirmed the district court's decision, noting that the relator's allegations included an affidavit from an individual who managed all DME appeals for one of the defendants during much of the relevant time period. The court determined that this affidavit did more than merely substantiate the relator's suspicions regarding one of the defendants, and instead was "the sole source of all the specific incriminating facts alleged against [that defendant] in the complaint." The court further noted that the relator did not allege facts regarding his investigation into the defendants' alleged fraud, and that the employee who provided the affidavit sought out the relator—not vice versa—and thus, the affidavit was not even acquired through the relator's own investigatory efforts. Thus, the circuit court held, the relator failed to establish that he had direct knowledge of the defendants' alleged fraud.

Similarly, the court held that the relator's knowledge of the alleged fraud was not independent. In doing so, the court rejected the relator's arguments that: (1) only he had the requisite medical expertise and experience to understand and review the files concerning the appeals of DMAC denials regarding his company's equipment, and the bankruptcy trustee relied on his knowledge to construct her claims; and (2) his knowledge was based on his direct involvement with the appeals process over multiple years and information produced during the course of such appeals is not publicly available. With respect to the first argument, the circuit court reiterated that a relator's knowledge of fraud is not deemed "independent" when the relator merely applies his/her own expertise to publicly disclosed information. The court further noted that the relator failed to explain how his expertise aided his analysis of information, stating that "[s]urely a member of the public could conclude, with minimal labor, that the absence of evidence [in the DMAC appeals files] of a required review indicates that such a review was never performed. Thus, the amount of deduction required to formulate the [*qui tam*] claims was very low." With respect to the second argument, the appeals court observed that the relator failed to allege facts showing his role in the Medicare appeals process or the manner in which he acquired first-hand knowledge of that process. The court further noted that while some aspects of the appeals process—namely, the process of appealing a DMAC denial to an administrative law judge (ALJ)—are not open to the general public, "numerous parties" are allowed access to the ALJ appeal files, including "persons the ALJ considers necessary and proper"—and open-ended term. Thus, the Seventh Circuit reasoned, many others "would have had a compelling interest in bringing FCA claims against HHS contractors like [the *qui tam* defendants]." Since the relator bore the burden of establishing jurisdictional facts, the circuit court held that he needed to discuss whether any additional parties were involved in the appeals regarding his company's equipment and to what extent those appeals files became part of the public domain. The relator's failure to do so was fatal to his original source argument. The court affirmed the district court's ruling that the relator was not an original source of the information on which his *qui tam* claims were based.

The court also affirmed the district court's decision to dismiss the relator's claims with prejudice, observing that the relator moved for leave to file an amended complaint without satisfying the procedural requirements of informing the district court of the particular grounds on which amendment was sought and attaching a draft amended complaint to his motion. Thus, the court of appeals held that the district court did not abuse its discretion when denying the relator's request.

U.S. ex rel. Chen v. EMSL Analytical, Inc., 2013 WL 4441509 (SDNY Aug. 16, 2013)

A relator brought a *qui tam* action against an asbestos testing company and a group of air monitoring companies, alleging that the defendants violated the federal, New York State, and New York City false claims laws. The relator claimed that the government entities retained the defendants to monitor the air quality at sites of asbestos-containing government buildings that were slated for demolition or renovation. According to the relator, the air monitoring defendants provided fraudulent "fake air samples, namely blank cassettes," to the asbestos testing defendant, and then billed the government—either directly or through other contractors that passed the defendants' charges on to the government entities—for the monitoring service. The relator further alleged that the asbestos testing company was aware of the other defendants' fake samples and conspired with those defendants by giving inaccurate testing reports and data for the government entities—and then invoicing the governments for their purported testing services. The governments declined to intervene in the relator's suit. The defendants moved to dismiss the relator's *qui tam* claims, arguing that they were precluded pursuant to the FCA's public disclosure bar; the defendants claimed that the relator's allegations had previously been disclosed in prior criminal proceedings against an asbestos air monitoring company and a New York State licensed asbestos air sampling technician that identified fraud occurring at numerous asbestos removal sites in New York, as well as in various news articles and a U.S. Attorney press release discussing the criminal proceedings. The defendants also argued that the relator's allegations failed to state a claim for relief under the False Claims Act and failed to plead the fraud with particularity. Two of the defendants also moved to recover their attorneys' fees, pursuant to the FCA's fee-shifting provision.

Holding: The U.S. District Court for the Southern District of New York granted the defendants' motions to dismiss.

Public Disclosure Bar

The court noted that the public disclosure bar was amended in 2010 by the Patient Protection and Affordable Care Act, and that since the relator's amended *qui tam* complaint was filed after the amendment, the amended version of the public disclosure bar applied. The court held that, after the amendment, "the public disclosure provision is no longer jurisdictional in nature, but rather provides a basis for dismissal." In light of that decision, the court determined that it could not refer to evidence outside the pleadings, and that the burden of proof did not rest with the relator. However, the court still held that the public disclosure provision barred the relator's claims. The court concluded that the disclosures identified by the defendants qualified as "public disclosures" for FCA purposes, and that those disclosures revealed substantially the same allegations as the relator's complaint—namely the scheme of preparing and providing fake air samples and corresponding false testing reports in connection with government abatement projects, and then billing the government for their services. The court concluded that, even though the prior lawsuits and the news articles that followed did not name any of the *qui tam* defendants, "it is simply not plausible that government officials conducting an investigation into the frauds carried out by [the criminal defendants] were not alerted by the information uncovered during those investigations to the prospect of wrongdoing by Defendants in this case," given the fact that the defendants were involved in numerous major government asbestos abatement projects in the New York area. After finding that the relator's suit was based upon publicly disclosed information, the court determined that the relator did not qualify as an original source who could maintain a *qui tam* complaint notwithstanding the rule. The court held that the relator did not satisfy either method for establishing original source status. He did not meet the requirements of the first method because he did not alert the government to the defendants' alleged fraud before the public disclosures occurred. Moreover, he did not satisfy the second method because he could not demonstrate that he had information that "materially add[ed]" to the information that was publicly disclosed, particularly since in the court's opinion, the relator's allegations did not differ much from the public disclosures.

The relator's federal FCA claims were dismissed, due to the public disclosure bar.

Pleading Fraud with Particularity

The court also held that dismissal of the *qui tam* suit was warranted because the relator failed to plead the alleged fraud with particularity. The court found that "[t]he Complaint contains general allegations that '[a]ll defendants have fraudulently obtained government funds in connection with federal, state, and NYC air monitoring projects," asserted "in repetitive fashion, that each of the Air Monitoring Defendants billed the government, directly or indirectly, for the samples they collected and were compensated for doing so," and asserted "similarly general allegations" against the asbestos testing company defendant. The court held that that since the relator did not identify, with any particularity, any actual false claims the defendant submitted to the government, his fraud allegations were deficient. Furthermore, the court held that the plaintiff failed to plead with particularity why the defendants' statements to the government were false. The court noted that the applicable regulations advise air monitoring companies to use blank samples to determine whether any contamination occurred. Thus, the court reasoned, the relator's allegations that the air monitoring defendants used blank cassettes as samples was not—in and of itself—sufficient to allege fraud. The court observed that the relator failed to allege fraud—namely, "that the relevant samples were 'blank' when they should have indicated the presence of airborne asbestos fibers." Similarly, the court held that the relator failed to allege that the asbestos testing company engaged in fraud. The court determined that the relator did not show why this defendant's test data evinced fake samples; in addition he did not plead the "who, what, when or why of the false claims themselves, [or] the precise manner in which Defendants' 'fake' samples and 'false' testing reports are linked to the 'false reports and invoices' allegedly submitted to the government." The court dismissed the relator's federal FCA claims for lack of particularity. And the dismissal was with prejudice, as the court held that the relator had already amended his complaint three times—and after being put on notice of the pleading deficiencies. Additionally, the court reviewed the relator's proposed amended complaint and determined that it did not cure those deficiencies.

State/City FCA Claims

After dismissing the relator's federal FCA claims, the court likewise dismissed his claims under the New York State and New York City false claims laws, noting that those laws "closely track their federal counterpart," and holding that the relator's allegations of violations of state and city law suffered from the same violations as did the federal allegations.

Defendants' Attorneys' Fees

Two of the defendants moved to recover their attorneys' fees from the relator under the FCA, arguing that the *qui tam* claims were frivolous, since the relator's allegations were publicly disclosed and not pled with the requisite particularity. The court denied the motions, finding that "these are bases for dismissal, not for an award of fees," and that the bases for dismissal were "not so staggeringly obvious" as to render the relator's claims objectively false.

U.S. ex rel. Stratienko v. Chattanooga-Hamilton County Hosp. Auth., 2013 WL 3912571 (E.D. Tenn. July 29, 2013)

A relator filed a *qui tam* complaint against a medical center, alleging that the defendant violated the federal False Claims Act and the Tennessee False Claims Act. Specifically, the relator claimed that the defendant violated the Stark Law by engaging in improper financial relationships with providers, and violated the Anti-Kickback Statute by providing kickbacks to providers in exchange for referrals—including kickbacks to a physician who was not properly credentialed. The relator argued that the defendant's reimbursement claims to Medicare, Medicaid, and TennCare were tainted by the Stark and Anti-Kickback violations, and thus, were false. In addition, the relator claimed that claims for services provided by the allegedly unqualified physician were false, and were based on false records. These allegedly false claims served as the basis for the relator's fraud claims. Additionally, the relator alleged a claim against the defendant for violating a prior corporate integrity agreement that the defendant entered into with the government as part

of a $40 million settlement. Both the United States and the State of Tennessee declined to intervene in the relator's suit. The defendant moved to dismiss, arguing that: (1) the court lacked subject matter jurisdiction over the relator's claims, pursuant to the FCA's public disclosure bar; and (2) the relator failed to state a claim.

Holding: The U.S. District Court for the Eastern District of Tennessee granted the defendant's motion to dismiss the FCA claims. The court found that the relator's fraud allegations had been publicly disclosed previously, which deprived the court of subject matter jurisdiction over the *qui tam* claims. The court denied the defendant's motion to dismiss the claim based on the alleged violation of the corporate integrity agreement. The court, though, held that the claim could only be maintained to the extent that it alleged a violation of the FCA—and the court gave the relator 14 days to submit a more clear amended complaint with respect to that claim.

Public Disclosure Bar

The defendant argued that, pursuant to the FCA's public disclosure bar provision, the court lacked subject matter jurisdiction over the *qui tam* claims, because the relator's allegations were based on information that had already been publicly disclosed in two media sources and in a prior litigation matter. The relator acknowledged that the disclosures were "public" for purposes of the FCA, but argued that the prior disclosures did not reveal the same type of fraudulent activity that she alleged in her complaint. The relator argued that none of the public disclosures referred to false Medicare claims, the False Claims Act, or the contracts and arrangements alleged in her complaint. In addition, she noted that the conduct alleged in her *qui tam* allegations occurred after the public disclosures.

The court observed that the public disclosures pertained to allegations that had been made by the relator's husband—a doctor who had previously worked for the defendant and claimed to have personal knowledge of the defendant's improper financial dealings and disregard for the fact that services were being provided by an unqualified physician. The relator's husband's allegations were at the center of multiple news articles, and the doctor made similar allegations and submitted similar information during the course of a lawsuit against the defendant for suspending his staff privileges at the defendant's facility. Although none of the prior public disclosures alleged fraud, the court held that the disclosures were sufficient to put the government on notice of the likelihood of fraud resulting from the alleged improper financial relationships. Additionally, the court held that the relator's claims were substantially similar to—and therefore, "based upon—the prior public disclosures. While the court noted that "the allegations in the amended complaint are not identical to the arrangements and transactions described in the public disclosures," ultimately, the court held that *qui tam* claims "substantially resemble[d]," and were "at least based in part on" the public disclosures. Thus, the court held that the *qui tam* claims were subject to dismissal.

Before dismissing the FCA claims, though, the court evaluated whether or not the relator qualified as an "original source" who could overcome the public disclosure bar provision. The court held that she did not, noting that she neither alleged that she voluntarily disclosed the information at issue to the government before filing her *qui tam* action, nor did she allege that her knowledge of the alleged fraud was "direct" or "independent" or "materially add[ed]" to the prior public disclosures. Instead, the court concluded that "[m]ost if not all of Relator's information appears to come from her husband who was extensively covered in the media and who was a party to the litigation discussed earlier."

Thus, the court dismissed the relator's *qui tam* claims—both federal and state—for lack of subject matter jurisdiction. The court did not address the defendant's other grounds for dismissal.

The court then turned to the relator's claim based on the defendant's alleged violation of the corporate integrity agreement. The defendant moved to dismiss that claim, arguing that the relator failed to state a claim under the FCA—at most, the defendant argued, the relator's allegation amounted to a breach of contract claim. The relator responded, arguing that the alleged breach of the corporate integrity agreement served as the basis for a *qui tam* claim under the FCA. Although the court observed that the plain language of the relator's complaint did not assert an FCA claim based on the defendant's corporate integrity agreement, it allowed the relator an opportunity to amend her complaint to clarify the allegation—and noted that it would then entertain new and/or re-asserted grounds for dismissing that claim.

Leveski v. ITT Educ. Svcs., Inc., 2013 WL 3379343 (7th Cir. July 8, 2013)

A relator filed a *qui tam* action against her former employer—a for-profit educational institution—alleging that the defendant violated the False Claims Act by submitting false claims to the U.S. Department of Education in order to receive federal student financial assistance funds. Specifically, the relator—who spent more than ten years working as a recruiter and as a financial aid administrator—alleged that, in order to receive the federal funds, the defendant was required to certify that it would not compensate recruiters, admission officials or financial aid staff based on their success in securing enrollments or financial aid. She claimed that the defendant violated this requirement by constantly encouraging recruiters to increase student applications and enrollments if they wanted increases in pay. She further alleged that although the defendant claimed to evaluate employees on a number of other criteria, in reality, only the recruitment and financial aid numbers mattered to the defendant—the other purported criteria were merely a sham to cover up the defendant's true compensation program. In addition, she claimed that financial aid administrators' compensation was based on the amount of federal financial aid funds they could secure.

Soon after the relator parted ways with the defendant, a private investigator contacted her with a message from an attorney. When she contacted the attorney, she learned for the first time that the defendant's alleged violations could serve as the basis for a *qui tam* suit under the False Claims Act; she and the attorney filed a *qui tam* suit. The United States declined to intervene in the suit. Eventually, the U.S. District Court for the Southern District of Indiana dismissed the relator's suit, finding that the fraud allegations had previously been publicly disclosed in a prior *qui tam* suit against the defendant. The district court also sanctioned the relator's counsel, finding that the *qui tam* suit was filed frivolously. The relator and her counsel appealed the district court's rulings to the U.S. Court of Appeals for the Seventh Circuit.

Holding: The Seventh Circuit reversed both district court rulings and remanded the case for further proceedings.

Public Disclosure Bar

The circuit court first addressed the district court's dismissal of the *qui tam* action for lack of subject-matter jurisdiction, pursuant to the False Claims Act's public disclosure provision. The appeals court also noted that the public disclosure provision was amended by Congress in 2010, during the pendency of the lawsuit. The court held that the version of the provision that "was in force when the events underlying this suit took place," would apply. Since the alleged fraud occurred before the statute was amended, the court applied to earlier version of the public disclosure provision, which bars *qui tam* suits that are substantially similar to previously publicly disclosed information. The district court had held that the relator's suit was substantially similar to an earlier *qui tam* complaint against the defendant, filed by two other former recruiters for the defendant. The district court concluded that both suits alleged that the defendant improperly compensated admissions and recruitment representatives based directly on the number of students they enrolled and held that, even though the present relator's allegations included additional allegations and spanned a longer period than did the first relator's, the present suit was still substantially similar to the prior suit. The court based its reasoning, at least in part, on the fact that the relator's attorney had brought other *qui tam* complaints against another non-profit educational institution on behalf of other realtors—relators whom the district court concluded were recruited by the attorney "to serve as makeshift and manufactured whistleblowers wielding generic and cookie-cutter complaints."

The circuit court reviewed the district court's ruling and concluded that the present relator's *qui tam* suit was not substantially similar to the prior *qui tam* suit, due to "four critical differences between the two cases:" (1) the relators in the prior *qui tam* suit had much shorter tenures with the defendant than did the relator in the present suit—nineteen months and eight months, as opposed to over a decade—and thus had greater potential than the prior relators to possess relevant evidence about the defendant's compensation scheme; (2) due to the present relator's longer span of employment with the defendant, the scope of her allegations was different than that of the prior relators, and thus, there was no "temporal overlap" between the allegations in the two suits; (3) the relator in the present suit alleged fraud both in the defendant's recruitment office as well as in the defendant's financial aid office, as she had been employed as both a recruiter and as a financial aid administrator—the prior relators could only allege fraud with respect to the defendant's recruitment office; and (4) the two *qui tam* suits alleged different violations within the defendant's recruitment office—the prior relators alleged a "more rudimentary scheme" involving flagrant violations of the applicable regulations, but the present relator alleged a "more sophisticated" fraud scheme in which the defendants created a sham compensation plan that supposedly based compensation on a variety of factors, while actually—and improperly—basing compensation on student enrollment. The circuit court held that the present suit was only similar to the prior suit "when viewed at the highest level of generality," and consequently, held that the present relator's suit was not based upon the prior suit, for purposes of the False Claims Act. Although the relator admitted to reviewing the prior suit before filing her own *qui tam* suit, the circuit court held that she did "more than just add a few allegations" to the prior complaint—particularly since she had inside information regarding the alleged fraud obtained during her decade-long employment with the defendant and described new tactics allegedly used by the defendant to commit fraud.

In addition, the circuit court determined that even though the relator's attorney first informed her of the possibility of a *qui tam* suit under the False Claims Act—and even though the attorney had filed other relators' similar *qui tam* suits against different defendants—the present relator could show through deposition testimony and her affidavit that she possessed knowledge of new facts and details regarding the defendant's alleged fraud scheme that were not known to her attorney or otherwise made public. The court stated that "[a]ttorneys are allowed to advise potential future clients of both the contents of the law and their rights under the law; it is upon that basis that attorneys are permitted to advertise their services. . .The fact that [the relator] first learned the potential value of her information from [her attorney] does not bar her claim." Moreover, the court held that even if the relator's allegations were substantially similar to publicly disclosed information, she qualified for the "original source" exception to the public disclosure rule, since she had direct and independent knowledge of the information on which her allegations were based, as a result of conversations she had during her employment with various supervisors.

As a result of the above findings, the Seventh Circuit reversed the district court's dismissal of the *qui tam* suit on public disclosure grounds.

Sanctions

After finding that the relator's lawsuit was filed frivolously, the district court awarded sanctions against the relator's counsel. But the circuit court, based on its earlier findings, concluded that the relator's case "appear[ed] to be substantial, not frivolous," and was not based on the previous *qui tam* action. Consequently, the Seventh Circuit reversed the district court's award of sanctions against the relator's counsel.

See *U.S. ex rel. Ketroser v. Mayo Found.*, 2013 WL 4733986 (8th Cir. Sept. 4, 2013), at page 80.

See *U.S. ex rel. Williams v. C. Martin Co.*, 2013 WL 4519324 (E.D. La. Aug. 23, 2013), at page 11.

See *U.S. ex rel. Ward v. Peck*, 2013 WL 4511634 (E.D.N.C. Aug. 23, 2013), at page 112.

See *U.S. ex rel. Nehls v. Omnicare, Inc.*, 2013 WL 3819671 (N.D. Ill. July 23, 2013), at page 6.

FALSE CLAIMS ACT RETALIATION CLAIMS

Roop v. Melton, 2013 WL 5349153 (N.D. Miss. Sept. 24, 2013)

A plaintiff filed an action against the drug company that previously employed him and his two former business partners, alleging among other things, violations of the False Claims Act's anti-retaliation provision. The plaintiff claimed that he entered into a partnership with the defendants, but that they eventually began billing Medicare and Medicaid fraudulently. He further alleged that when he questioned their practices, the defendants terminated his employment and converted his assets, among other retaliatory acts. The defendants moved to dismiss the FCA retaliation claim, arguing that the claim was frivolously brought for the purpose of establishing federal question jurisdiction over the plaintiff's pendent state law claims and that the relator failed to state a claim for relief under the FCA.

The U.S. District Court for the Northern District of Mississippi denied the defendants' motion to dismiss. The court did not reach the issue of whether or not the plaintiff's claim was frivolous, finding that it would be premature to resolve such a dispute of fact. The court then determined that the plaintiff adequately stated a claim for relief under the FCA's anti-retaliation provision, noting that his complaint satisfied each of the elements of liability, as he alleged that the defendants' retaliatory conduct was the result of his internal complaints about Medicare and Medicaid billing fraud and regulatory violations.

Lipka v. Advantage Health Group, Inc., 2013 WL 5304013 (D. Kan. Sept. 20, 2013)

A plaintiff sued two healthcare companies engaged in a joint enterprise and the two individuals who owned and operated the companies—alleging that the defendants wrongfully terminated her employment in violation of the False Claims Act's anti-retaliation provision. Specifically, the plaintiff claimed that the defendants hired her to serve as the director of nursing at an assisted living facility they managed, and that during the course of performing her job duties, she discovered that the defendants' practices for testing blood samples violated the Clinical Laboratory Improvement Amendments of 1988 (CLIA). The plaintiff stated that she informed the individual defendants of the CLIA non-compliance—and that they all recognized that the plaintiff had previously filed a *qui tam* action against a different employer over the same issue. She later contacted the appropriate state regulatory agency and reported that she had advised her superiors about their CLIA violations. Three days later, the plaintiff was terminated from her job. The defendants moved to dismiss the plaintiff's retaliation claim, arguing that

the plaintiff failed to state a claim under the FCA. According to the defendants, the plaintiff did not adequately allege that she put them on notice of any of her protected conduct in furtherance of an FCA fraud action, because her reports of CLIA violations were included within her job duties. In addition, the defendants contended that the plaintiff failed to establish causation by properly pleading that her termination was motivated by her reporting activities. Furthermore, the corporate defendants argued that the plaintiff did not allege sufficient facts to justify piercing the corporate veil, and the individual defendants argued that they did not meet the FCA anti-retaliation provision's definition of "employer," and therefore, the plaintiff failed to state a claim against them.

The U.S. District Court for the District of Kansas granted the defendants' motion in part and denied it in part. The court determined that the plaintiff's allegations against the corporate defendants were based on a joint enterprise theory—not an alter ego theory—whereby the plaintiff claimed that the corporate defendants were jointly managed and operated by the two individual defendants; the corporate defendants employed the same personnel; the corporate defendants jointly managed and supported the assisted living facility where she worked; and all of the defendants had the authority to direct and control her employment. Noting that the corporate defendants only challenged the alter ego theory and did not discuss the joint enterprise theory, their motion to dismiss on that basis was denied. The court, though, concluded that the FCA's anti-retaliation provision did <u>not</u> apply to the individual defendants. While the court acknowledged that years before the plaintiff was terminated from her job, the FCA was amended and the word "employer" was removed from the anti-retaliation provision. Notwithstanding this fact, and in contravention of decisions from "a handful of other district courts," the court held that the legislative history of the amendment demonstrated Congress' intent to expand the universe of potential plaintiffs—including independent contractors and agents—but not the universe of possible defendants. The court reasoned that since Congress was aware of the fact that district courts had uniformly rejected individual liability under the pre-amended version of the anti-retaliation provision, had Congress intended to expand the provision to cover individual liability, it would have explicitly said so. The claim against the individual defendants was dismissed.

The court then addressed the substance of the corporate defendants' arguments. The court began by examining the "protected conduct" argument. Accepting the plaintiff's allegations as true at the motion to dismiss stage, the court determined that it could neither infer that the plaintiff's job responsibilities included investigating fraud nor that her reporting activities stemmed solely from her job duties. The court also rejected the defendants' argument that their alleged CLIA violation was so minor—and was being taken care of—that it would not give rise to a viable FCA action. Instead, the court noted that plaintiffs are "not required to have developed a winning claim under the FCA at the time of the alleged retaliation." The court held that the plaintiff sufficiently pled facts that created an inference that she was investigating possible FCA violations. The court further held that the plaintiff properly pled that the defendants were on notice of her protected activity, noting that she claimed that she informed the two individual defendants of the CLIA violations—which she characterized as "illegal"—as well as her previous *qui tam* action against another former employer, alleging similar claims. Finally, the court held that the plaintiff pled facts sufficient to support an inference that her protected activity motivated the decision to terminate her employment—particularly given the temporal proximity of only a few days between the time the plaintiff allegedly informed the defendants of CLIA violations and the date of her termination.

Porch v. American K-9 Interdiction, LLC, 2013 WL 4804285 (E.D. Va. Sept. 6, 2013)

A plaintiff alleged various employment law claims against her former employer, a company that trained dogs for U.S. military purposes. Among her federal and state law allegations, the plaintiff claimed that the defendant violated the False Claims Act by retaliating against her in response to her protected whistleblower activity. Specifically, the plaintiff alleged that she was hired by the defendant to train dogs that were later sent to Afghanistan and other countries to detect explosive devices, but was discriminated against and sexually harassed by two of her co-workers—including one of her managers. She further alleged that she informed the manager that other co-workers—one of whom was also named as a defendant—failed to care for dogs properly and had verbally abused and bullied her. She said that her complaints were ignored, she was cautioned against making a report to the company's human resources department, and the harassment continued. Weeks later, the plaintiff became sick and reported to her manager that her doctor had directed her to take time off from work. That same day, the plaintiff's attorney contacted the company and reported the harassment and retaliation the plaintiff claimed she suffered. Over the next few days, the plaintiff was informed that her company housing was being terminated and that she was being terminated from her job because her "doctor's note" was signed by a nurse, not a doctor, and she failed to report to work after the company refused to accept the note. She alleged, though, that weeks before she was terminated from her job, her manager had told another employee that she would not be with the company much longer and that her termination was not due to the doctor's note issue. The defendants moved to dismiss the plaintiff's claims.

The U.S. District Court for the Eastern District of Virginia granted the defendants' motion in part and denied it in part. While some of the plaintiff's claims were allowed to go forward, the court dismissed the plaintiff's False Claims Act retaliation claim, finding that the plaintiff failed to state a claim. The court held that in order to establish the "protected activity" element of the FCA's anti-retaliation provision, she must show that she engaged in activity in opposition to conduct that could reasonably have led to a viable FCA action. The court determined that the plaintiff did not meet this standard, since she did not allege that the defendant defrauded the U.S. military. The court rejected the plaintiff's argument that her complaints to her supervisor about the mistreatment of dogs—dogs being trained to work on government contracts—constituted protected activity. Rather, the court observed that the plaintiff was unfamiliar with the terms of the company's government contract—she was waiting for a response to a FOIA request to obtain that information—and therefore could not allege the standard of care for the dogs required by the contract. The court concluded that the plaintiff's purported investigation into the defendant's possible fraud was irrelevant, since the plaintiff did not allege that the defendant actually committed fraud, and since she did not allege that she undertook the investigation in furtherance of a possible *qui tam* action.

Elder v. DRS Techs., Inc., 2013 WL 4538777 (E.D. Va. Aug. 27, 2013)

A plaintiff filed a *qui tam* suit against his former employer, a defense technology company, alleging that the defendant violated the False Claims Act. He spent two years in Afghanistan, working on a defense contract the defendant had with the U.S. Army, and alleged that the defendant fraudulently billed the government under the contract. Specifically, he claimed that the defendant required all employees to charge 12 hours of work each day, even though employees actually only worked five or six hours/day. In addition, the plaintiff alleged that the defendant falsely claimed that its employees worked every Friday, even though the defendant's policy was that employees had every other Friday off from work. He also alleged that he investigated and documented the defendant's misconduct and on multiple occasions complained—both verbally and in writing—about the defendant's timekeeping policies. He stated that when he charged his own time accurately, his supervisor instructed him to go change his entries and to falsify his records in accordance with the defendant's policies. Within weeks, the plaintiff was deployed to Eastern Afghanistan—where an ongoing battle was occurring and where military personnel told him that the area was unsafe for unarmed civilians. He claimed that there was no work for him when he arrived and that his deployment was an act of retaliation. He stated that he was again asked to engage in the same improper billing and continued to complain. He claimed that after an extended period, he received a military escort out of the region and later received a special commendation from the Army for his bravery. Soon after the plaintiff returned to the United States, the defendant terminated his employment. The plaintiff alleged that his termination was another retaliatory act. About a year and a half after being fired, the plaintiff filed his original complaint, asserting False Claims Act *qui tam* claims alleging fraud against the government, as well as a claim under the False Claims Act's anti-retaliation provision. The United States declined to intervene in the

plaintiff's *qui tam* claims. About two years after the original complaint was filed, the plaintiff filed an amended complaint and dropped all of his *qui tam* claims. The defendant moved to dismiss the plaintiff's remaining retaliation claim, arguing that the claim was time-barred and that the plaintiff failed to plead necessary elements of the claim.

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

Statute of Limitations

The court noted that, before it was amended in 2010, the False Claims Act's anti-retaliation provision did not include a specific limitations period, prompting the U.S. Supreme Court to hold that FCA retaliation claims were subject to the "most closely analogous state statute of limitations." The parties agreed that the appropriate limitations period was two years. The defendant argued that the retaliation claim was untimely because it was raised for the first time in the plaintiff's amended complaint, which was filed nearly four years after the plaintiff's employment ended. The defendant argued that the FCA retaliation claim did not relate back to the date of the plaintiff's original complaint—which the defendant conceded was filed within the limitations period. The court disagreed, finding that the plaintiff's original complaint stated a valid claim under the FCA's anti-retaliation provision; the court quoted the plaintiff's allegation that he was "terminated for retaliatory reasons, in violation of subsection (h) of the [False Claims] Act," and observed that the plaintiff's original complaint included at least 25 paragraphs of factual allegations in support of that claim. Ultimately, the court held that the plaintiff's amended complaint did not assert a new cause of action, but only amplified the retaliation claim that was alleged in the original complaint. The court denied the defendant's motion to dismiss on the grounds that the retaliation claim was time barred.

Retaliation

The Virginia district court determined that "[i]n order to bring a FCA retaliation claim in the Fourth Circuit, a plaintiff must prove that: (1) he engaged in protected activity by taking action in furtherance of a *qui tam* suit; (2) his employer had notice of those acts; and (3) his employer took adverse action against him as a result of these acts." The defendant claimed that the plaintiff failed to allege the first and the third elements of an FCA retaliation claim. With respect to the first element, the defendant contended that the plaintiff's investigation into its alleged misconduct was not "protected activity" under the FCA. With respect to the third element, the defendant argued that the plaintiff failed to plead a causal link between any alleged protected activity and the alleged retaliation. The court rejected both arguments.

First, the court explained that, in order to be "protected" under the False Claims Act, a plaintiff's conduct must occur "in a context where litigation is a distinct possibility, when the conduct could reasonably lead to a viable FCA action, or when . . . litigation is a reasonable possibility." The court concluded that the plaintiff's alleged investigation into the defendant's timekeeping policies, as well as his alleged complaints to the defendant regarding those policies—policies he told the defendant were "illegal"—were sufficient to indicate that an FCA fraud suit was a distinct possibility. The court further noted that, if the plaintiff's allegations regarding the defendant's timekeeping and billing policies were true, then the defendant should have known that it was overcharging the government, and correspondingly, that its billing policies could lead to FCA liability.

Next, the court held that the plaintiff adequately pled that the defendant terminated his employment in retaliation for his protected conduct. The court held that, in order to satisfy this third element of his FCA retaliation claim, the plaintiff "must raise a reasonable inference that Defendant terminated Plaintiff because he made complaints and conducted investigations in furtherance of a potential *qui tam* action." The court observed that a "very close" temporal proximity between protected conduct and retaliation might be sufficient to raise such an inference. The defendant argued that the nearly two-year period between the time the plaintiff complained about its timekeeping practices and the day he was terminated destroyed any casual connection. The court, though, found that the plaintiff's *first* complaint was made two years before his termination, but that he alleged that he continued to complain after that time, both verbally and in writing. Thus, the court stated, "the time span between Plaintiff's latest instance of protected conduct and the adverse action of his termination may be much shorter." The court then recognized a second method of pleading causation, namely, "pointing to other circumstantial evidence of retaliation such as evidence of ongoing retaliatory animus or intervening antagonism during the period between the protected activity and the adverse action." The court concluded that, when viewed as a whole, the plaintiff's allegations of being unnecessarily and dangerously deployed to Kandahar and then terminated upon his return to the United States—even after receiving a commendation from the military—"provide circumstantial evidence of a pattern of antagonistic acts and recurring retaliatory animus during the intervening period which link Plaintiff's initial and subsequent protected activity to his termination." On this basis, the court held that the plaintiff adequately pled the causation element of his FCA retaliation claim. The defendant's motion to dismiss was denied.

Gronemeyer v. Crossroads Cmty. Hosp., 2013 WL 4510006 (S.D. Ill. Aug. 26, 2013)

A plaintiff sued her former employer—a hospital—alleging that the defendant violated the False Claims Act by terminating her employment in retaliation for her protected whistleblowing conduct. The plaintiff alleged that she had been employed by the hospital as a pathologist and that her job duties included reviewing records, approving transfusions, and conducting quality assurance assessments of the medical need for transfusions. She claimed that while performing these du-

ties, she came to believe that the defendant was submitting false Medicare and Medicaid reimbursement claims for unnecessary transfusions, and that when she repeatedly complained to her superiors about her findings, she was terminated from her job. The defendant moved to dismiss the plaintiff's claim, arguing that the complaint failed to state a claim for relief.

The U.S. District Court for the Southern District of Illinois granted the defendant's motion to dismiss. The court determined that the plaintiff "sufficiently alleged that: (1) the plaintiff in good faith believed, and (2) a reasonable employee in the same or similar circumstances might believe, that defendant was committing fraud against the government," and "[t]hus, an FCA action was a 'distinct' possibility' at the time of plaintiff's investigation." The court further found that the plaintiff repeatedly complained to her superiors that she believed the defendant was engaging in fraud. But the court ultimately held that the plaintiff "needed to go further than this, and plead with particularity exactly what was said when information related to defendant's alleged fraud was brought to her superiors. Notably, the court found that, because of her job duties, the plaintiff was deemed a "fraud-alert" employee, and therefore, she was subject to a heightened notice standard that required her to use one of a variety of "magic words"—such as "illegal," "improper," or "fraudulent"—when reporting her concerns to the defendant. Otherwise, the court held, the plaintiff could not establish that the defendant knew that her complaints raised the distinct possibility of a *qui tam* action; the defendant may have believed that the plaintiff was merely doing her job. The court found that even though the plaintiff conducted her own independent investigation of the defendant's alleged conduct—at her own expense—the defendant was still not put on notice of the distinct possibility of a *qui tam* action. Consequently, the plaintiff could not demonstrate that she was terminated from her job in retaliation for raising concerns about the defendant's billing practices.

The plaintiff's retaliation claim was dismissed. The court granted the plaintiff leave to amend her complaint to cure the pleading deficiencies.

Young v. CHS Middle East, LLC, 2013 WL 4498680 (E.D. Va. Aug. 20, 2013)

Two plaintiffs sued their former employer—a government contractor providing medical services in Iraq under a contract with the U.S. Department of State—alleging that the defendant violated the False Claims Act's anti-retaliation provision by terminating their employment in retaliation for their protected whistleblower activity. The plaintiffs—both of whom were employed by the defendant as surgery nurses—alleged that, pursuant to its contract with the State Department, the defendant was required to maintain written procedures and protocols governing the quality of the defendant's medical care. According to the plaintiffs, the defendant failed to maintain any such directives, resulting in unnecessary, serious complications—including near-death experiences—for some the defendant's patients under the contract. The plaintiffs claimed that the defendant failed to take any corrective measures to resolve the quality of care issues they identified, and after the plaintiffs contacted the State Department with their concerns, the defendant banned them from its medical facilities and assigned them a departure from Iraq. Upon returning to the United States, the plaintiffs continued to ask the defendant's officials about the lack of medical care protocols, and ultimately, the defendant terminated the plaintiffs' employment. The defendant moved to dismiss the plaintiffs' claims, arguing that the relator's allegations failed to state a claim under the FCA's anti-retaliation provision.

The U.S. District Court for the Eastern District of Virginia granted the defendant's motion. The court held that the plaintiffs failed to plead sufficient facts to demonstrate that they engaged in protected activity under the FCA. The court noted that the FCA's anti-retaliation provision was amended in 2009 to "substantively broaden[ ] the scope of activities that constitute protected activity." The amended FCA retaliation provision, the court stated, protects "not only acts in furtherance of an FCA claim but also 'efforts to stop' a violation." The court determined that protected conduct is that which could reasonably lead to a viable FCA action. The court found that the relators failed to plead that they complained about *fraudulent* conduct, and thus, their alleged conduct did not give rise to the objectively reasonable possibility of an FCA action. Rather than complain to the defendant about alleged fraud on the government, the relators complained about alleged substandard quality of medical care; they made the same complaints to the State Department. Regardless of the fact that the plaintiffs alleged that they reasonably believed that the defendant was presenting false claims to the government, the court held that since the plaintiffs did not engage in any protected conduct with respect to their complaints to the defendant, they could not establish that the defendant retaliated against them in violation of the False Claims Act. In reaching this holding, the court rejected the plaintiffs' argument that their conduct was protected under the FCA because they engaged in an "effort to stop" an FCA violation, which is protected under the 2009 amendments to the retaliation provision. The court concluded that the amended FCA "did not obviate the nexus of protected activity to fraudulent conduct;" otherwise, the court stated, "false claims" would be read out of the anti-retaliation provision, contrary to Congress's intent. Since the plaintiffs only complained about patient care, without any connection to fraudulent conduct, the court held that they did not adequately allege an FCA retaliation claim. Consequently, their claim was dismissed. However, the court granted the plaintiffs leave to amend their complaint and address the court's concerns.

Vasile v. Flagship Fin. Group, LLC, 2013 WL 4482914 (E.D. Cal. Aug. 19, 2013)

Two plaintiffs sued the mortgage company they'd previously worked for, as well as their direct supervisors—each of whom owned a company affiliated with the corporate defendant. The plaintiffs, who worked as mortgage loan processors, alleged that the defendants forged and falsified loan documents that were submitted to obtain federally-backed mortgage loans. The plaintiffs claimed that they told their supervisors that this conduct was illegal and refused to participate. One of the plaintiffs claimed that one of the individual defendants intimidated her with implied threats of physical harm. Months after they began working for the defendants, the plaintiffs were terminated from their jobs. According to the plaintiffs, they were fired in retaliation for refusing to break the law. They filed various claims under federal, state and common law—including claims alleging retaliation and conspiracy to retaliate, under the False Claims Act. The plaintiffs also sought punitive damages. The defendants moved to dismiss the plaintiffs' conspiracy to retaliate claim, arguing that the claim was not valid. In addition, the defendants moved to strike the plaintiffs' allegations that the defendant violated the False Claims Act, arguing that those allegations were irrelevant to the plaintiffs' other employment law claims.

The U.S. District Court for the Eastern District of California granted the defendants' motion to dismiss the conspiracy to the retaliate claim. The court concluded that the False Claims Act limits conspiracy claims to its fraud sections, and as a result, agreed with the defendants that the plaintiffs' conspiracy to retaliate claim was not valid. The court noted that the statute does not mention retaliation in its conspiracy section, nor does it discuss conspiracy in its retaliation section. Thus, the court dismissed the plaintiffs' conspiracy claim with prejudice.

The court then turned to the defendants' motion to strike the plaintiffs' references to their alleged violations of the FCA's anti-fraud provisions. The court rejected the defendants' contention that allegations that they defrauded the government was irrelevant to the plaintiffs' personal claims. Instead, the court held that the fraud allegations "bear an important relationship to the claims in the action. To sustain their retaliation claim, plaintiffs must at minimum show they suspected defendants submitted a false claim. . . . Therefore, allegations that defendants attempted to require plaintiffs to submit false claims are relevant." Thus, the court denied the defendants' motion to strike.

Vander Boegh v. EnergySolutions, Inc., 2013 WL 4105648 (6th Cir. Aug. 14, 2013)

A plaintiff, who had been employed as a landfill manager at a gaseous diffusion plant, alleged that a group of his former employers violated the False Claims Act by retaliating against him after he engaged in protected whistleblower conduct. The plaintiff claimed that, as a certified landfill manager, he was responsible for the disposal of nuclear waste, in accordance with applicable laws. He asserted that he worked for a defendant government contractor the U.S. Department of Energy (DOE) hired to handle waste management at the plant, and later transitioned to that contractor's subcontractor. He claimed that on several occasions he notified his employers about storage capacity problems, leakage issues, and misidentifications of hazardous waste at the landfill; he also filed multiple complaints with the DOE. The plaintiff alleged that as a result of these actions, one of his co-workers began threatening him and trying to have him removed from his job. Subsequently, DOE solicited new bids for the contract. Another government contractor—also named as a defendant—brought in its own subcontractor (yet another defendant), and submitted a bid on the new contract. This new subcontractor hired an employee from the original prime contractor to prepare the bid—the same employee who had allegedly threatened the plaintiff after he complained about problems under the original contract. The new prime contractor won the bid and tasked the new subcontractor with hiring a landfill manager. The DOE contract included a "grandfathered employees" provision that granted existing non-managerial employees on the prior contract a right of first refusal for substantially similar vacancies under the new contract. But the plaintiff alleged that because of his prior complaints, the new subcontractor sought to remove him from the bid entirely, by describing a landfill manager with credentials that matched the plaintiff's former co-worker, not the plaintiff. Ultimately, the plaintiff was never interviewed for the new landfill manager job, and instead was terminated from his job by the subcontractor and replaced him with someone else. The new landfill manager was an entirely new person, however, as the plaintiff's former co-worker decided to leave the company before a hiring decision on a new landfill manager was made.

The plaintiff asserted several employment claims against the defendants, including a claim under the False Claims Act's anti-retaliation provision. The defendants moved for summary judgment on the FCA claim and the U.S. District Court for the Western District of Kentucky granted the motion, finding that the person who made the decision to fire the plaintiff had no knowledge of the plaintiff's prior protected activity, and therefore, could not have retaliated against the plaintiff. The plaintiff appealed the district court's ruling to the U.S. Court of Appeals for the Sixth Circuit.

The circuit court affirmed the district court's grant of summary judgment in favor of the original prime contractor, finding that there was "scant evidence in the record that [the original prime contractor] influenced" its successors' decision to hire a new landfill manager. In support of his allegation against the original prime contractor, the plaintiff offered statements from the chief executive officer of the original subcontractor, in which the CEO presumed that the original prime contractor discussed the plaintiff's complaints with the subsequent prime contractor, as part of the transition to a new contractor. The plaintiff also alleged that a representative from the original prime contractor spread a rumor that the plaintiff's security clearance had been revoked, and that the company failed to identify the plaintiff as a "grandfathered employee" who should have received preferential consideration for the landfill manager job under the new contract. The circuit court rejected these assertions as "largely speculative," and held that they were insufficient to create a genuine issue of material fact. Moreover, the court observed that the plaintiff alleged that the rumor was spread about him after the decision to hire a new landfill manager was made, and thus, the alleged rumor could not have influenced the hiring decision. In addition, the appeals court noted that the landfill manager position was, not surprisingly, a "managerial" position, and thus, not encompassed within the "grandfathered employee" provision. Summary judgment in favor of the first prime contractor was affirmed.

Similarly, the appellate court affirmed the district court's ruling in favor of the successor prime contractor, finding that the plaintiff could not establish a prima facie case against that defendant, based on its subcontractor's decision to terminate the plaintiff's employment. The court held that the plaintiff failed to create a genuine issue of fact regarding whether or not the new prime contractor's bid language was materially adverse to the plaintiff, since the plaintiff did not submit the actual terms of the bid stated that he claimed mirrored his former co-worker's qualifications. Additionally, the court found that "insufficient evidence exists that [the second prime contractor's] officials had any influence" over its subcontractor's decision to hire a different landfill manager. The court held that "[t]he involvement of [the second prime contractor's] management was far too tenuous to create a question of fact for a jury." Thus, summary judgment in favor of the second prime contractor was affirmed.

Finally, the circuit court reversed the district court's grant of summary judgment in favor of the second subcontractor—the defendant that ultimately decided to fire the plaintiff and to bring in a new landfill manager. Consistent with the analysis above, the court held that the plaintiff failed to create an issue of fact regarding whether or not the bid the subcontractor prepared, which allegedly described a new landfill manager, constituted retaliatory conduct, since the plaintiff failed to provide sufficient information regarding the terms of the bid and since the defendant argued that the language in the bid merely tracked the DOE's requirements.

However, the court held that genuine issues of fact did exist regarding whether or not the subcontractor defendant was aware of the plaintiff's protected whistleblowing activity prior to reaching the ultimate decision to terminate his employment. While the court noted that much of the evidence relied on by the plaintiff to establish this defendant's knowledge of his protected conduct occurred after the decision to hire a new landfill manager had been made, the court determined that information regarding the plaintiff's complaints to DOE was easily accessible on the DOE website, and that a reasonable jury could infer that the person responsible for hiring the new landfill manager—a person who never even interviewed the plaintiff for the job—may have referenced that publicly-available information or otherwise acquired information regarding the plaintiff and his job performance. The district court's ruling granting summary judgment in favor of the subcontractor was reversed. Notably, the circuit court remanded the question of whether or not the plaintiff—who was never employed by the subcontractor—could maintain an FCA retaliation claim against that defendant, acknowledging the subcontractor's argument that the FCA's anti-retaliation provision only provides relief to employees, contractors and agents.

Saunders v. District of Columbia, 2013 WL 3964123 (D.D.C. Aug. 2, 2013)

A plaintiff filed suit against the District of Columbia, alleging a claim under the False Claims Act's anti-retaliation provision. She alleged that the defendant terminated her employment as the chief financial officer for D.C.'s Office of the Chief Technology Officer after she reported numerous deficiencies and regulatory violations in connection with her office's management of federal "Y2K" funds. The defendant moved for summary judgment on the relator's claim.

The U.S. District Court for the District of Columbia granted the defendant's motion. The court held that the relator failed to establish that any protected activity she engaged in was a motivating factor in her termination. Instead, the relator claimed that her termination was due to various political connections between and among several D.C. officials—including the D.C. mayor—and her successor to the CFO position. The court stated that the plaintiff "fail[ed] to articulate any theory as to how the political connections emphasized in her brief led to her termination." Moreover, the court held that the relator failed to establish that the individuals who made the decision to terminate her employment had knowledge of her purported protected activity. Consequently, the relator could not establish causation.

As a result of the above findings, the court granted the defendant's summary judgment motion.

Abou-Hussein v. Mabus, 2013 WL 3753553 (D.D.C. July 17, 2013)

A *pro se* plaintiff filed suit against his employer—the U.S. Department of Labor—as well as multiple, unknown agents of the Naval Criminal Investigative Services. The plaintiff claimed that after he settled an Equal Employment Opportunity Commission complaint with the Navy, he was falsely accused of sexual harassment and was repeatedly subjected to false and espionage and terrorism allegations, based on his Arabic national origin. He further claimed that during this time, he discovered rampant contract fraud within the government agency. He alleged that once his superiors realized that he was gathering information regarding the fraud, they humiliated him with "busy work," refused to fund his training, attempted to have him shipped to combat zones, and made snide comments about him behind his back. Eventually, he was transferred to another facility and claimed that he was required to obtain a higher-level security clearance, in an attempt to disqualify him from further service. He filed a complaint with the U.S. Office of Special Counsel, which he claimed led to additional retaliation, in the form of death threats, humiliation, discrimination, and an unfounded criminal investigation. He subsequently filed additional administrative and court actions, including the present suit, which alleges civil rights violations, in addition to violations of the False Claims Act and other whistleblower protection laws. The Navy moved to dismiss the complaint, or alternatively, for summary judgment.

The U.S. District Court for the District of Columbia dismissed the plaintiff's retaliation claim under the False Claims Act, finding that the suit was barred due to principles of sovereign immunity. The court held that the exclusive statutory remedies for federal employees who allege retaliation as a result of whistleblowing activity are contained in the Civil Service Reform Act. Thus, the FCA claim was dismissed.

Elkharwily M.D. v. Mayo Holding Co., et al., 2013 WL 3338731 (D. Minn. July 2, 2013)

A plaintiff brought various employment law claims—including a claim under the False Claims Act's anti-retaliation provision—against his former employer, a healthcare company, and several affiliated entities and individuals. The plaintiff alleged that he witnessed multiple instances of comprised patient safety and fraudulent billing at one of the defendants' facilities, including two emergency room patients in "near death conditions" who did not receive proper treatment. He further alleged that the next day, after he reported the facility's medical director's negligence to an administrator and refused an order from the director regarding a patient's care, he was placed on administrative leave. Two days later, he was terminated from his job, after he refused to resign. He filed an administrative appeal, but the termination decision was upheld. He then filed his employment law ac-

tion, alleging violations of federal and state law. The defendants moved to dismiss the retaliation claim under the False Claims Act, arguing that the plaintiff did not allege the necessary elements of that claim.

The U.S. District Court for the District of Minnesota denied the defendant-employer's motion, but granted the motions of the other defendants. The court determined that the plaintiff's argument that the additional defendants "caused" the employer defendant to terminate his job and later to affirm his dismissal was too vague to state a claim for relief under the FCA. Moreover, the court held that the plaintiff could not maintain FCA retaliation claims against individual defendants, since "the FCA does not allow retaliatory discharge actions against individual defendants."

The court, however, denied the employer-defendant's motion. The court determined that retaliation claims under the False Claims Act involve four elements: "(1) the plaintiff was engaged in conduct protected by the FCA; (2) the plaintiff's employer knew that the plaintiff engaged in the protected activity; (3) the employer retaliated against the plaintiff; and (4) the retaliation was motivated solely by the plaintiff's protected activity." The court considered each element in turn.

First, the court determined that the plaintiff adequately pled the first two elements—that he engaged in protected activity, and that the defendants were aware of his protected activity. The court observed that the plaintiff alleged that the defendant violated Medicare and Medicaid regulations by billing the government for unnecessary emergency room and hospital admissions and by manipulating billing codes to overbill the government. He claimed that he reported the violations to numerous supervisors—an act the court determined was outside the plaintiff's job description and was in furtherance of a *qui tam* action.

The court then held that the plaintiff pled facts sufficient to establish the remaining two elements—that the defendant retaliated against him and that the retaliation was solely due to his protected activity. With respect to the "solely" element of causation, the court noted that even though the plaintiff pled alternative bases for relief, "at the motion to dismiss stage, a plaintiff need only plead facts that would allow the court to conclude that he was terminated for engaging in protected activity." Thus, the court held that by pleading that he was terminated within days of engaging in protected activity, the plaintiff's allegations were sufficient to withstand the defendants' motion to dismiss.

See *U.S. ex rel. Prime v. Post, Buckley, Schuh & Jernigan, Inc.*, 2013 WL 4506357 (M.D. Fla. Aug. 23, 2013), at page 88.

See *U.S. ex rel. Klein v. Empire Educ. Corp.,* 2013 WL 4068237 (N.D.N.Y. Aug. 13, 2013), at page 115.

See *U.S. ex rel. Schweizer v. Oce' North Am., Inc.*, 2013 WL 3776260 (D.D.C. July 19, 2013), at page 126.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Anonymous Relator

See *U.S. ex rel. McLain v. Fluor Enters., Inc.*, 2013 WL 4721365 (E.D. La. Sept. 3, 2013); 2013 WL 4721367 (E.D. La. Sept. 3, 2013), at page 82.

B. Breach of Contract/Fiduciary Duty

U.S. ex rel. Wildhirt v. AARS Forever, Inc., 2013 5304092 (N.D. Ill. Sept. 19, 2013)

Two relators filed a *qui tam* complaint alleging that two companies—their former employers—violated the federal False Claims Act and the Illinois Whistleblower Reward and Protection Act. The defendants answered the relators' complaint and counterclaimed, alleging breach of the relators' employment agreements—including provisions that specified that the relators would not accept any monetary reimbursement for their involvement in *qui tam* actions against the defendants, and that required the relators to report any alleged suspect business practices to the defendants. The defendants alleged that the relators removed and retained confidential, HIPAA-covered documents and disclosed the content of those files to their counsel, the government, and the public. The defendants claimed that the relators also tortiously interfered with their business relationships by making false, disparaging remarks about them and their business practices to various federal and state government entities. The relators moved to dismiss the counterclaims, arguing that the employment agreements at issue were contrary to public policy and thus, unenforceable; that the defendants could not support their allegation of disparaging remarks with any false statements the relators made; and that any such statements were protected under Illinois law by an absolute privilege that extends to statements made preliminary to judicial proceedings—such as the relators' *qui tam* suit.

The U.S. District Court for the Northern District of Illinois granted the relators' motion to dismiss the counterclaims in part and denied the motion in part. The defendants' counterclaims were dismissed to the extent that they sought a recovery from the relators in the event the relators prevail on their *qui tam* claims. With respect to the relators' public policy argument, the court recognized "well-developed jurisprudence" establishing that *qui tam* defendants can maintain "independent" counterclaims—those whose success is not dependent on outcome of the FCA action. The court noted two types of "independent" counterclaims: counterclaims involving conduct that is distinct from the conduct underlying the FCA case; and counterclaims—such as defamation, malicious prosecution, and abuse of process—in which the underlying conduct is the same, but in which the defendant prevailed in the FCA case. The court concluded that the defendants' counterclaims were independent of the FCA claim, given the defendants' contention that the relators removed, retained, and disclosed confidential and HIPAA-protected documents with no intention of using the information in connection with their *qui tam* suit. However, the court acknowledged that the defendants' request for damages "could be read to seek indemnification or contribution in the event Defendants are found liable under the FCA." Thus, the court dismissed the counterclaims, to the extent that they sought such indemnification or contribution. With respect to the tortious interference counterclaim, the court determined that the defendants adequately pled the nature of the relators' alleged misrepresentations, identified to whom the alleged false statements were made, and offered a basis for why the statements were false. Thus, the court concluded, the defendants sufficiently pled the tortious interference claim. The court refused to consider the relators' absolute privilege argument, finding that, at the motion to dismiss stage, it was not possible to determine whether or not the privilege applied, since the court could not establish the point at which the relators first contemplated filing their *qui tam* suit.

See *U.S. ex rel. Nehls v. Omnicare, Inc.*, 2013 WL 3819671 (N.D. Ill. July 23, 2013), at page 6.

C. Personal Jurisdiction

See *U.S. ex rel. Barko v. Halliburton Co.*, 2013 WL 3369074 (D.D.C. July 8, 2013), at page 98.

D. *Pro Se* Relator

U.S. ex rel. Hadi v. Pinal County Cmty. Coll. Dist. Governing Bd., 2013 WL 4834020 (D. Ariz. Sept. 10, 2013)

A *pro se* relator filed a *qui tam* suit and after the government declined to intervene in the suit, the U.S. District Court for the District of Arizona gave the relator an opportunity to obtain counsel. The relator moved the court to appoint counsel, seeking to proceed *in forma pauperis*. The court denied that request, finding that the relator failed to establish the requisite "exceptional circumstances" for the appointment of counsel. The court also granted the government's motion to dismiss the *qui tam* complaint, in which the government argued that the relator could not represent the United States as a *pro se* litigant. The court denied the relator's request to quash the government motion, in which the relator argued that he should be permitted additional time to obtain counsel. Instead, the court refused to give the relator additional time to find counsel, noting that he had already been given more than 100 days to do so. The relator's complaint was dismissed.

Hopson v. Cunningham, 2013 WL 3790908 (W.D. Ky. July 19, 2013)

A *pro se* plaintiff alleged that a group of defendants—including a judge, a child protective services agency, a public defenders' office, several government attorneys, a police department, and multiple additional individuals—engaged in a conspiracy to imprison the plaintiff, whereby the defendants fabricated documents and staged a false hearing regarding an emergency order of protection involving a domestic dispute. The U.S. District Court for the Western District of Kentucky dismissed the suit, finding that the plaintiff failed to cite any specific statute in support of his contention that his was a "whistleblowing action." In addition, the court noted that the plaintiff could not maintain his suit as a *pro se* litigant.

Georgakis v. Illinois State Univ., 2013 WL 3600739 (7th Cir. July 16, 2013)

A *pro se* relator filed a *qui tam* action against a university and nine of its chemistry professors, alleging that the defendants fraudulently obtained federal grant funds on the basis of plagiarized research papers. The U.S. District Court for the Northern District of Illinois dismissed the relator's suit, finding that, as a *pro se* litigant, he could not act as the government's lawyer; the district court also held that the relator had no standing to pursue claims for which he suffered no injury, and concluded that the *qui tam* suit was frivolous and failed to state a claim for relief. The district court did not state whether or not the dismissal was with or without prejudice. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Seventh Circuit.

The Seventh Circuit affirmed the district court's decision, and further clarified that the dismissal of the suit was with prejudice. The appeals court observed that the district court gave four separate grounds for dismissing the suit. Two of the grounds were jurisdictional—the relator lacked standing and the suit was frivolous. One ground was procedural—the relator's *pro se* status. And one ground was merits-based—the relator's complaint failed to state a claim. The circuit court held that dismissal for jurisdictional reasons and for lack of proper representation are normally without prejudice, while dismissals based on the merits are generally with prejudice. Although the circuit court could not definitively determine whether the district court intended to dismiss the relator's suit with prejudice or without prejudice, it concluded that the relator's complaint was "intended to harass the defendants," noting that this was the relator's seventh suit against chemistry professors at universities in the state—and that each of the prior six complaints had been dismissed. The circuit court held that the district court had compelling reasons to dismiss the relator's suit with prejudice, and that doing so "was the right course, because of the frivolousness of the suit and the strong inference that the plaintiff is engaged in a campaign of harassment." Thus, the Seventh Circuit affirmed the district court's judgment, and dismissed the action with prejudice.

See *U.S. ex rel. Walker v. Community Educ. Ctrs., Inc.*, 2013 WL 4774778 (D. Ariz. Sept. 5, 2013), at page 122.

E. *Res Judicata* and Collateral Estoppel

U.S. ex rel. Akl v. Virginia Hosp. Ctr.-Arlington Health Sys., 2013 WL 5182682 (D.D.C. Sept. 16, 2013)

A relator filed a *qui tam* action, alleging that a hospital violated the False Claims Act by filing false cost reports with the U.S. government. The relator had previously practiced medicine at the defendant hospital until the hospital revoked his medical staff privileges. Before filing the *qui tam* suit, the relator filed a state court action alleging that the hospital engaged in a fictitious peer-review process before terminating his privileges, and thereby violated his due process rights, tortiously interfered with his contractual and business relationships with patients, breached its own peer-review policies and procedures, and defamed him. After conducting an *in camera* review of privileged documents regarding the defendant's decision to terminate the plaintiff's staff privileges, the state court concluded that the evidence refuted the doctor's claims. The court ruled in favor of the hospital and ordered the plaintiff to pay the hospital's attorneys' fees and costs. Both the Virginia Supreme Court and the U.S. Supreme Court refused the plaintiff's appeals of the state court's decision. The plaintiff filed a second state court action against the hospital, again challenging the revocation of his medical staff privileges, among other things. The state court again dismissed the plaintiff's claims and the Virginia Supreme Court again denied his appeal. The plaintiff then filed suit against the hospital in federal court in Virginia, yet again alleging due process violations, as well several other causes of action; he asked the district court to void the hospital's revocation of his staff appointment. The district court denied that request and dismissed the plaintiff's claims instead. The plaintiff appealed that ruling to the U.S. Court of Appeals for the Fourth Circuit, which affirmed the district court's decision. In all, the plaintiff filed twelve previous suits against the hospital in federal and state courts in Maryland, Virginia, and the District of Columbia.

The plaintiff then filed the present *qui tam* action, alleging that, in its costs reports, the hospital falsely certified its compliance with various conditions of participation in the Medicare program, rendering its Medicare reimbursement claims false under the FCA. The United States declined to intervene in the *qui tam* action. The hospital moved to dismiss the suit on the basis of *res judicata*, contending that it arose from the same nucleus of common fact as his prior claims, and arguing that the relator brought the *qui tam* action in an attempt to re-litigate claims that were previously adjudicated on the merits and dismissed. The relator countered that his FCA claim could not have been litigated earlier, because those claims arose, at least in part, from events that took place after the prior lawsuits had been filed. The U.S. District Court for the District of Columbia rejected that argument, finding that the relator had sufficient information to bring his *qui tam* claims at the time he brought the earlier lawsuits against the hospital. The court then compared the

complaints filed in each of the relator's lawsuits against the hospital and concluded that the suits all shared a common factual predicate—that the hospital engaged in a sham peer-review process that resulted in his staff privileges being terminated. Based on its finding that all of the lawsuits were "related in time, space, origin and motivation," the court held that the *qui tam* action was precluded under *res judicata* principles. The relator's FCA claim was dismissed with prejudice.

U.S. ex rel. Jones & Wert Constr. Specialties, Inc., 2013 WL 4883152 (S.D. Cal. Sept. 12, 2013)

A construction company filed a *qui tam* complaint against another construction company, alleging that the defendant violated the False Claims Act by installing defective materials, making unauthorized changes to building plans, falsely certifying to the U.S. Army that its work on two military construction projects complied with contractual terms. The United States declined to intervene in the *qui tam* suit. The defendant moved to dismiss the relator's action, arguing that the *qui tam* claims were barred by principles of *res judicata* and that the fraud claims were not pled with particularity, as required by Federal Rule of Civil Procedure 9(b).

Holding: The U.S. District Court for the Southern District of California granted the defendant's motion to dismiss. While the court rejected the defendant's *res judicata* argument, it ultimately held that the relator's *qui tam* claims were not pled with the requisite particularity.

Res Judicata

The defendant claimed that the relator filed a prior lawsuit, pursuant to the Miller Act, alleging similar allegations to those raised in the *qui tam* suit. The parties resolved that dispute and jointly moved to dismiss the prior case. According to the defendant, the prior suit precluded the present *qui tam* suit. The court, though, noted that "[d]ue to the unique characteristics of *qui tam* litigation," in which the government is always the real party in interest, "the resolution of a private suit never, or rarely, precludes a subsequent *qui tam* action." The court further observed that the relator could not have reasonably combined his personal claim with his *qui tam* claim, even though the two claims arose from the same nucleus of operative fact. Since the United States was not a party to—and had no control over—the relator's prior suit under the Miller Act, the court held that the government's interest in the relator's *qui tam* allegations should not be "snuffed out." In addition, the court held that, notwithstanding the fact that the government declined to intervene in the *qui tam* suit, were the court to dismiss the relator's action with prejudice on the basis of *res judicata*, then the government and all other relators would also be precluded from alleging the same FCA violations against the defendant. Consequently, the court denied the defendant's motion to dismiss on *res judicata* grounds.

Failure to Plead Fraud with Particularity

The court then turned to the defendant's Rule 9(b) argument. The court concluded that the relator made "general allegations that [the defendant] failed to inform the Army Corps of Engineers of [ ] material and structural deviations from the building plans and instead presented claims to the United States to be paid while representing that the projects had been completed in accordance with plans and specifications." The court, though, held that these allegations were insufficient to state a claim under the FCA, since the relator did not offer any particularized facts or details regarding the defendant's alleged submission of false claims to the government, and did not allege details of a fraudulent scheme along with some indicia of reliability that would lead to an inference that false claims were actually submitted to the government. In reaching this ruling, the court rejected the relator's argument that it should be allowed discovery regarding the specifics of the defendant's claims to the government; the court held that relators are not entitled to proceed to discovery in order to satisfy a "basic pleading requirement." The relator's complaint was dismissed without prejudice.

Nguyen v. City of Cleveland, 2013 WL 4436535 (6th Cir. Aug. 20, 2013)

A relator filed a *qui tam* action alleging that the environmental practices of an airport and the municipal authorities that jointly owned and operated it were fraudulently. More specifically, the relator alleged that the defendants failed to obtain necessary environmental permits, in violation of the Clean Air Act, and that subsequently, the defendants falsely certified their compliance with the Clean Air Act to the U.S. Federal Aviation Administration. The U.S. District Court for the Northern District of Ohio dismissed the relator's fraud claim, finding that the claim was barred by issue preclusion. The relator had initially filed an earlier *qui tam* suit against operators of numerous American airports, including the two defendants in the present suit. The district court granted the defendants' summary judgment motion on that claim, finding that no reasonable juror could have concluded that the defendants knowingly made false certifications of compliance with environmental laws. The relator appealed that decision, but not before filing a voluntary petition for bankruptcy—which resulted in the relator's *qui tam* claim becoming part of his bankruptcy estate. The bankruptcy trustee settled with the defendants and, although the relator initially objected to the settlement—which also included a release and covenant not to sue—he withdrew his objection and the settlement was finalized. Subsequently, the relator filed the present *qui tam* suit. The district court held that the settlement of the prior suit precluded the present suit and it was dismissed on issue preclusion grounds. The relator appealed the district court's ruling to the U.S. District Court for the Sixth Circuit.

The circuit court affirmed the district court's ruling. The appeals court rejected the relator's argument that his complaint was not barred by issue preclusion, since the same issue was not raised and litigated in the first proceeding; determination of the issue was not necessary to the outcome of the prior proceeding; and the relator did not have a full and fair opportunity to litigate the issue in the prior proceeding. The court held that the same issue—whether the defendants knowingly presented false information to the government regarding their environmental compliance—was being litigated in both suits. The appeals court further noted that, in granting summary judgment in the prior *qui tam* suit, the district court specifically mentioned that no reasonable juror could hold the defendants liable under the False Claims Act. Thus, the same issue regarding the defendants' FCA liability was litigated in both proceedings. Next, the court held that determination of the summary judgment issue was necessary to the district court's judgment, and in fact constituted "the court of its holding." Finally, the circuit court held that the relator had a full and fair opportunity to litigate the issue. The circuit court acknowledged that the relator's appeal was never heard, since his claim was resolved when the bankruptcy trustee reached a settlement with the defendants. However, the court held that "the ability to appeal is not a necessary prerequisite." The appellate court noted that the relator voluntarily availed himself of the protections of the bankruptcy court, and thereby subjected his assets—including his *qui tam* claim—to the bankruptcy process. Moreover, the relator agreed to the terms of the settlement and did not allege that the bankruptcy trustee agreed to the settlement in bad faith or drastically undervalued the claim.

As a result of these findings, the Sixth Circuit affirmed the district court's dismissal of the present *qui tam* suit, on issue preclusion grounds.

See *United States v. Americus Mortgage Corp.*, 2013 WL 4829271 (S.D. Tex. Sept. 10, 2013); 2013 WL 4829284 (S.D. Tex. Sept. 10, 2013); 2013 WL 4829269 (S.D. Tex. Sept. 10, 2013), at page 78.

F. Sovereign Immunity

U.S. ex rel. Jones v. University of Utah Health Sciences Ctr., 2013 WL 5372609 (Sept. 24, 2013 D. Utah)

Two *qui tam* relators alleged that a state university's health sciences center, the university's orthopedic surgery department, and one of the university's teaching physicians violated the False Claims Act. According to the relators, the physician performed three surgical procedures on one of the relators' children but failed to manage or participate in the patient's post-operative care, in violation of applicable Medicare and Medicaid regulations. Thus, the defendants' corresponding Medicare and Medicaid reimbursement claims were false. The United States declined to intervene in the relators' suit. The defendants moved to dismiss the action, arguing that, as state agencies, they were immune from the relators' FCA suit. The defendants also argued that the relators failed to plead the alleged fraud scheme with particularity.

The relators conceded that, in accordance with Supreme Court authority, since the university health sciences center and the orthopedic surgery department were state agencies, they were not *persons* subject to suit under the FCA. Thus, the U.S. District Court for the District of Utah dismissed the *qui tam* claims against those two defendants. The relators did not concede to the dismissal of the claims against the physician, though, and sought leave to amend their complaint to sue him in his individual capacity. As a result, the court also dismissed the relators' claims brought against the physician in his official capacity. The physician opposed the relators' motion, arguing that allowing the relators to amend their complaint would permit an end-run around the Supreme Court's ruling and the Eleventh Amendment, since he was a state employee acting in his official capacity and within the scope of his authority when he performed the surgical procedures at issue. The Utah district court recognized a split of authority on the issue, and noted that the Tenth Circuit has not ruled. The court examined the plain language of the FCA and concluded that state employees fall within the statute's definition of "persons" who may be sued; the court also noted that the FCA does not exempt state employees from liability. The court further reasoned that, consistent with another Supreme Court ruling on public-employee-immunity, absolute immunity for public employees acting in their official capacities only extends to an extremely limited class of high-ranking officials, such as the President of the United States, legislators carrying out legislative functions, and judges performing judicial functions. Since the physician did not fall within that limited class, he was not entitled to absolute immunity; the court noted that he might be entitled to qualified immunity, but that no such affirmative defense had been raised. Ultimately, the court held that state employees are subject to suit in their individual capacities under the FCA for actions taken in the course of their official duties, and thus, granted the relators' motion to amend their *qui tam* complaint.

See *U.S. ex rel. Parikh v. Citizens Med. Ctr.*, 2013 WL 5304057 (S.D. Tex. Sept. 20, 2013), at page 74.

G. Statute of Limitations

See *U.S. ex rel. Dale v. Abeshaus*, 2013 WL 5379384 (E.D. Pa. Sept. 26, 2013), at page 63.

See *U.S. v. Wells Fargo Bank, N.A.*, 2013 WL 5312564 (S.D.N.Y. Sept. 24, 2013), at page 71.

See *Elder v. DRS Techs., Inc.*, 2013 WL 4538777 (E.D. Va. Aug. 27, 2013), at page 40.

See *Emanuele v. Medicor Assocs.*, 2013 WL 3893323 (W.D. Pa. July 26, 2013), at page 4.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Dale v. Abeshaus, 2013 WL 5379384 (E.D. Pa. Sept. 26, 2013)

A *qui tam* relator filed suit on behalf of the United States; the states of Delaware, Florida, Illinois, Indiana, Louisiana, New York, Tennessee and Virginia; and the District of Columbia, alleging federal and state False Claims Act violations against a group of individuals who operated an athletic equipment reconditioning company. The relator claimed that over the course of seven years, the defendants provided football helmets to numerous federally-funded schools and public school districts that did not satisfy the testing and reconditioning standards mandated by their contracts with the respective government entities. The relator alleged that, in order to be paid under those contracts, the defendants falsely certified to the governments that the helmets met the required standards—and even affixed stickers to that effect to the helmets. Moreover, the relator alleged that the defendants manipulated the contract bidding process by: (1) submitting "phantom" bids from fictitious companies; (2) submitting fake bids from real companies without their knowledge of consent; and (3) providing kick-backs to companies in exchange for those companies' fake bids. In addition, the relator claimed that the defendants fraudulently obtained a contract with the State of New Jersey by falsely claiming that it maintained an office in that state. Finally, the relator alleged that the defendants fraudulently billed the governments, by submitting multiple billing documents for the same work and by billing for helmets and equipment that was never provided. The relator asserted that all of these actions constituted FCA violations. Eventually, three of the four defendants were indicted by the federal government and charged with multiple counts—all stemming from the conduct alleged by the relator.

The relator named the defendants' company—and its two parent companies—in her original *qui tam* complaint. Subsequently, each of the companies filed suggestions of bankruptcy, which placed the *qui tam* action in civil suspense. The bankruptcy proceedings persisted for more than a year, prompting the relator to file an amended complaint naming only the individuals as defendants. The federal government, the state governments, and the D.C. government all declined to intervene in the relator's suit. The defendants moved to dismiss the relator's complaint, on several grounds. First, the defendants argued that the relator's allegations failed to state a claim or to plead fraud with particularity. Second, they claimed that a portion of the relator's claims was time-barred; they also contended that the relator

alleged fraud during a one-year period after their employment with the company had ceased and argued that they could not be held liable for any alleged fraud during that period. And third, the defendants claimed that the government entities did not rely on the reconditioning standards when awarding contracts, and therefore, the defendants' alleged false certifications to the government were not material to their contracts. In the alternative, the defendants argued that the corporate defendants that had previously been dismissed from the suit were necessary parties and requested that the court order the relator to join those defendants.

Holding: The U.S. District Court for the Eastern District of Pennsylvania granted the defendants' motion in part—by dismissing the relator's claims under the Delaware False Claims and Reporting Act—and denied the motion in all other respects.

Failure to State a Claim/Plead Fraud with Particularity

Addressing the defendants' argument that the *qui tam* allegations failed to state a claim, the court first noted that the relator's complaint implicated both the "factually false" claims and the "legally false" claims theories of FCA liability. The court explained that "[a] claim is factually false when a government payee has submitted an incorrect description of goods or services provided, or a request for reimbursement for goods or services never provided. A claim is legally false when a government payee has certified compliance with a statue or regulation as a condition to government payment, yet knowingly failed to comply with such statute or regulation." The court further noted that legally false claims can arise both from expressly false certifications, as well as from false certifications that are implied by virtue of the fact that the defendant submitted the claim for payment without disclosing violations of regulations that would affect the defendant's eligibility for payment. The court concluded that the relator's allegations stated a claim for relief. The court held that, at the pleading stage, the relator was not required to present evidence of specific false claims submitted by the defendants, noting the relator's contention that the defendants were the decision-makers who caused the company to commit fraud, and only they had unrestricted access to such detailed information. The court determined that the relator provided enough "indicia of reliability" that the defendants submitted false claims, as she alleged the defendants' routine fraudulent billing practices, detailed how the defendants established a "slush fund" to keep account of the funds they fraudulently received, and identified the schools that received the defendants' helmets—as well as the average number of helmets the schools received each year.

In addition, the court held that the relator adequately pled that the defendants' certifications of compliance with reconditioning standards was material to the government entities' decisions to pay the defendants' claims, as she alleged that the governments' bid requirements specified that reconditioned helmets would meet the standards at issue. The court held that, at the pleading stage, it would not attempt to determine whether or not the government entities would have paid the defendants' claims, had they known that the reconditioning standards had not been met.

Based on these findings, the court denied the defendants' motion to dismiss for failure to state a claim.

Statute of Limitations

Next, the court considered the defendants' statute of limitations argument. The court determined that the relator alleged a fraud scheme that occurred between 2001 and 2008 and that her initial *qui tam* complaint was filed in 2006. Thus, the court concluded that the initial complaint was filed within the FCA's six-year limitations period. The defendants, however, argued that the relator's third amended complaint, in which they were named for the first time, was the operative pleading for statute of limitations purposes. That complaint was filed in 2010. Therefore, the defendants contended, the realtor could not allege fraud prior to 2004. In addition, the defendants argued that the relator could not base any claims on conduct after 2007—when their employment with the company ended. The court first noted that the statute of limitations is an affirmative defense that places the burden on the defendants to show that the relator's claims were time-barred. The court then held that the defendants did not meet their burden. The court declared that "in the context of a claim under the False Claims Act, providing a range of time during which the events giving rise to the claim occurred is sufficient to withstand a motion to dismiss." Thus, the court reasoned, the relator's allegation of fraud occurring over a seven-year period was sufficient to overcome the defendants' motion. Further, the court noted that the defendants failed to cite any authority in support of their claim that the relator's third amended complaint did not relate back to the date of her initial complaint. The defendants' motion to dismiss on statute of limitations grounds was also denied.

State FCA Claims

The court stated that its rulings denying the defendants' motion to dismiss applied to the relator's *qui tam* allegations under federal, state, and DC law. The court, though, dismissed the relator's claim under the Delaware false claims law. The Delaware statute requires that, before a *qui tam* suit can proceed, the state attorney general must issue a written determination that *qui tam* claims are supported by substantial evidence. Since the relator did not offer any evidence regarding whether or not she received such a determination from the state attorney general, the court dismissed the claim under Delaware law.

Failure to Join a Necessary Party

Finally, the court considered the defendants' argument that the corporate entities involved in the alleged fraud must be joined as parties to the *qui tam* action. The defendants argued that they would be subject to additional litigation risks and inconsistent obligations; that the court would not be able to afford complete relief in the *qui tam* suit; and that the corporate entities' interest in the litigation would be impaired, unless those additional defendants were joined. The court rejected each of those arguments, stating that the fact that the defendants might have, or face, an indemnification or contribution claim from the corporate entities did not make those companies necessary parties. The court further held that since there was no evidence that the defendants were involved in litigation with the corporate entities, the litigation risks about which the defendants complained were purely speculative. The court denied the defendants' motion to dismiss on the basis that the corporate entities had not been joined as necessary parties.

U.S. ex rel. Grenadyor v. Ukranian Vill. Pharm., Inc., 2013 WL 5408573 (N.D. Ill. Sept. 26, 2013)

A pharmacist filed a *qui tam* action against the pharmacy that previously employed him, several individuals who jointly owned that pharmacy, and multiple other pharmacies and companies that purchased pharmaceuticals for the other pharmacy defendants, alleging violations of the federal False Claims Act and three state FCAs. Specifically, the relator claimed that the defendants engaged in a fraud scheme that involved providing improper inducements to customers (including expensive food and waived co-payments)—in violation of the Anti-Kickback Statute (AKS). The relator alleged that the defendants falsely certified to the government that they had complied with the AKS, and that those false certifications gave rise to FCA liability. Additionally, the relator claimed that the defendants fraudulently billed the Medicare and Medicaid programs for medicine that was never provided to intended recipients. The relator acknowledged that neither his former employer nor the individual defendants who owned that company had any direct parent/subsidiary relationship with any of the other corporate defendants, but he argued that the individual defendants controlled all of the corporate defendants—through threats and intimidation—to the extent that each of the corporate defendants was an alter ego of the individual defendants, and was liable for their actions, and vice-versa. The U.S. District Court for the Northern District of Illinois dismissed the relator's second amended *qui tam* complaint, finding multiple pleading deficiencies, including: (1) failing to allege that, before billing Medicare and Medicaid, the primary pharmacy defendant made written certifications that it would comply with the AKS; (2) failing to plead the alleged billing fraud with particularity; and (3) failing to allege clearly the relationship between the primary pharmacy defendant and the other defendants. The relator was granted leave to amend his complaint again, but was cautioned that repeated failures to cure the pleading deficiencies was grounds to deny further opportunities to amend. The relator then filed a third amended complaint, containing the same kickback and fraudulent billing allegations.

The defendants moved to dismiss the complaint. The court granted the motion and dismissed the complaint with prejudice. First, the court held that the relator's allegations—made "upon information and belief"—that the defendants made false certifications on enrollment applications to the Centers for Medicare and Medicaid Services—without factual support—were insufficient to meet the particularity requirement. In addition, the court held that any certifications the defendants made in their applications would constitute forward-looking statements—promises—not false representations. Since the court determined that the relator failed to allege that the defendants falsely certified past compliance with the AKS, the court held that the kickback allegation was still deficient and should be dismissed. Turning to the relator's claim that the defendants billed the government for medicine that was never provided, the court observed that the relator offered two specific examples of the individual defendants directing the pharmacy defendants to submit fraudulent Medicare and Medicaid claims for prescription refills that were never requested by a doctor or patient. However, the court ultimately held that the examples were too generalized to satisfy the particularity standard, since the relator did not provide details regarding the particulars of the alleged fraudulent activity, such as who actually perpetrated it, why the healthcare claims were knowingly false, or even whether the claims at issue were submitted to the government after the patient should have retrieved any medicines prescribed. Thus, the court dismissed the relator's fraudulent billing claim as well.

Finding that the relator's state FCA claims should be evaluated in a manner consistent with the federal FCA claims, the court also dismissed the relator's causes of action under the state law provisions. The court also determined that dismissal with prejudice was warranted, noting that the relator had already been given four opportunities to plead his claims and concluding that any additional amended complaints would be futile.

U.S. ex rel. ProTransport-1, LLC v. Kaiser Found. Health Plan, Inc., 2013 WL 4605096 (N.D. Cal. Aug. 28, 2013)

A relator filed a *qui tam* suit alleging that a healthcare service provider refused to pay for the relator's patient transportation services to and from the defendant's dialysis treatment centers; instead of paying the relator, the defendant allegedly directed the relator to seek reimbursement from the Medi-Cal program. The relator claimed that the defendant's alleged conduct amounted to fraud, and violated the False Claims Act. The United States declined to intervene in the relator's suit. The defendant moved to dismiss the *qui tam* claim, arguing that the relator's allegations failed to state a claim.

The U.S. District Court for the Northern District of California granted the defendant's motion to dismiss. The court first noted that the relator was paid for

its services, albeit by Medi-Cal and not by the defendant. The court made clear that the relator's fraud claim on behalf of the government was distinct from any personal claim the relator may have had against the defendant. Consequently, the court rejected the defendant's argument that the relator's suit failed to exhaust all administrative remedies before filing its *qui tam* suit.

The court, though, agreed with the defendant that the relator's fraud claim—under an implied false certification theory of FCA liability—was not pled with particularity. The court stated that the relator failed to identify the law, rule or regulation the defendant violated upon which Medi-Cal reimbursement was conditioned. In addition, the relator did not specify which of the defendant's Medi-Cal claims were impliedly false. Consequently, the court held that the *qui tam* complaint failed to allege the "who, what, when, where, and how of the asserted implied false certification claim to allow [the defendant] to defend. The court dismissed the relator's complaint, but without prejudice; the relator was granted an opportunity to file an amended complaint.

United States ex rel. O'Donnell v. Countrywide Fin. Corp., 2013 WL 4437232 (S.D.N.Y. Aug. 16, 2013)

The United States intervened in a *qui tam* suit and brought claims against a group of banks and financial institutions and one individual, alleging that the defendants defrauded the federal government by employing an expedited approval method—designed for low-risk mortgage loans—for riskier "subprime" loans that were sold to Fannie Mae and Freddie Mac. According to the government, the defendants' alleged misconduct ensured that the government agencies purchased loans that were of lower quality than the defendants had represented. Moreover, the government alleged that the defendants exasperated this problem by offering compensation incentives for loan specialists and funders who processed loans quickly, by suppressing internal reports that revealed that numerous loans being sold to the federal government were ineligible for sale to any investor, and by compensating employees who rebutted the internal reports. The government claimed that the defendants' mortgage loan practices violated the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) and the False Claims Act, and that when the loans at issue defaulted, the government lost more than a billion dollars, which led to Fannie Mae's and Freddie Mac's insolvency and eventual conservatorship.

The defendants moved to dismiss all of the government's claims. With respect to the FIRREA claims, the defendants argued that the government failed to state a claim, since: (1) their sales and representations to Fannie Mae and Freddie Mac did not "affect [ ] a federally insured financial institution," as FIRREA specifies; and (2) the government failed to plead with particularity FIRREA's predicate of-

fenses of mail fraud and wire fraud. The defendants also moved to dismiss the FCA claims, arguing that the alleged fraud was not pled with particularity.

Holding: The U.S. District Court for the Southern District of New York denied the defendants' motion to dismiss the government's FIRREA claims, but granted the motion to dismiss the FCA claim—those claims were dismissed with prejudice.

The district court rejected the defendants' FIRREA arguments, agreeing with the government that even though neither Fannie Mae nor Freddie Mac qualifies as a "federally insured financial institution," the defendants' alleged misrepresentations still "affected" federally insured financial institutions, including the corporate defendants themselves—which the government referred to as "self-affecting." Since the court determined that the effect of the defendants' conduct on the financial institution defendants and their shareholders was sufficient to create liability under FIRREA, the court found it unnecessary to evaluate the government's "derivative" theory, whereby the defendants' alleged misconduct affected other federally insured financial institutions whose investments in Fannie Mae and Freddie Mac were wiped out as a result of the defaulted loans at issue. In addition, the court held that the government adequately pled the mail fraud/wire fraud component of FIRREA liability. In fact, the court concluded that the defendants' argument with respect to this issue was not that the government failed to plead mail/wire fraud with particularity, but rather that the defendants' allegedly fraudulent representations amounted to a breach of contract claim—but not a fraud claim. The court rejected this argument, relying on U.S. Supreme Court precedent from 1896. Thus, the court denied the defendants' motion to dismiss the government's FIRREA claims.

Finally, the court considered the defendants' argument that the government did not allege its FCA claims with particularity. Ultimately, the court agreed with the defendants and dismissed the government's FCA claim. The court noted that in 2009 the FCA was amended to clarify that the word "claim" under the statute includes requests for money made to federal government contractors and grantees. The court held that any claims the defendants submitted to Fannie Mae and/or Freddie Mac prior to those amendments were not actionable—notably, the court stated that even the amended version of the FCA only "arguably extends the FCA to false claims made to Fannie Mae and Freddie Mac." The court then held that the government failed to allege with particularity any allegedly false claims submitted to either of the government agencies after 2009. The court determined that dismissal of the FCA claims with prejudice was warranted, since the government had already been allowed to amend its complaint twice before—and after the defendants had already put the government on notice of the particularity issue by raising it in an earlier motion.

Driscoll v. Todd Spencer M.D. Med. Group, Inc., 2013 WL 3367568 (E.D. Cal. July 5, 2013)

A relator brought a *qui tam* action against a group of healthcare provider defendants, alleging violations of the False Claims Act. Specifically, the relator alleged that the defendant performed unnecessary procedures and inflated medical bills, resulting in the submission of false claims for payment to Medicare and Medi-Cal. The defendants moved to dismiss the relator's claims, arguing that the alleged fraud was not pled with particularity, as required by Federal Rule of Civil Procedure 9(b).

The U.S. District Court for the Eastern District of California granted the defendants' motion, finding that the relator's claimed were deficient. The court determined that the relator's allegations were based on a false certification theory of liability, whereby the relator claimed that the defendants falsely certified that the accuracy and necessity of their healthcare claims. However, the court held that the relator failed to allege sufficient facts to support that theory, since he did not allege "the who, what, when, where, and how" of the alleged fraud scheme. Notably, the relator did not specify who performed the alleged unnecessary services, nor did he identify who submitted the allegedly false bills. In addition, the relator failed to allege specifically when the fraud scheme took place. And while the relator identified several locations where the fraud allegedly occurred, he did not specify which allegedly unnecessary services were performed at which locations, nor did he identify the locations where the inflated bills were generated. Finally, the court held that the relator failed to plead sufficient facts to "flesh out how the scheme worked." Moreover, the court found that the relator's allegations did not adequately plead that false claims were actually submitted to the government, since he did not allege the "dates and descriptions of the unnecessary services [or] a description of the billing system that the records were likely entered into." Consequently, the court dismissed the relator's claims, but granted him leave to amend his *qui tam* complaint.

See *U.S. ex rel. Cohen v. City of Palmer*, 2013 WL 4510772 (D. Alaska Aug. 26, 2013), at page 19.

See *U.S. ex rel. Chen v. EMSL Analytical, Inc.*, 2013 WL 4441509 (SDNY Aug. 16, 2013), at page 28.

See *Emanuele v. Medicor Assocs.*, 2013 WL 3893323 (W.D. Pa. July 26, 2013), at page 4.

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

U.S. v. Wells Fargo Bank, N.A., 2013 WL 5312564 (S.D.N.Y. Sept. 24, 2013)

The United States filed a civil action against a bank, alleging violations of the False Claims Act (FCA) and the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), among common law claims. Specifically, the government claimed that the bank defrauded the U.S. Department of Housing and Urban Development (HUD) and the Federal Housing Administration (FHA) by falsely certifying that tens of thousands of home mortgage loans were eligible for FHA insurance. The government alleged that the certifications were false because the bank failed to conduct proper quality control procedures and then sold the federally-backed loans to third parties, knowing that those parties would submit claims to HUD if the loans defaulted. In addition, the government claimed that the bank knew that the quality of its loans had dropped precipitously, as the bank reviewed random samples of loans which revealed that nearly a third of the loans suffered from material violations of HUD regulations; the government alleged that the bank ultimately identified more than 6000 loans with materials violations. Notwithstanding this knowledge, the bank only reported 238 loans to HUD, in direct violation of its obligation to report any material risks to the FHA.

The bank moved to dismiss the federal statutory claims, arguing that the government had already released those claims as part of a consent judgment entered in a previous suit; the government failed to state a claim and plead fraud with particularity; and that many of the FCA claims were time-barred.

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

Consent Judgment

The court first considered the defendant's argument that the government was barred from pursuing its claims by a consent judgment from a prior lawsuit in the U.S. District Court for the District of Columbia, in which the federal government—joined by 49 state attorneys general and the District of Columbia attorney general—alleged that the bank engaged in misconduct related to its originations of FHA-insured home mortgage loans. The court agreed with the D.C. district court's earlier holding (the defendant sought an order from the D.C. court enjoining the present suit) that the consent judgment did not release the bank from the present claims, and instead involved different allegations. The New York district court denied the defendant's motion to dismiss due to the consent judgment.

Statute of Limitations

The court also rejected the defendant's motion to dismiss the FCA claims on statute of limitations grounds, finding that at the motion to dismiss stage, there was no basis to dismiss the FCA claims. The court noted that the FCA allows the government to bring claims "within three years of the date that DOJ learned of the relevant facts underlying the claims, so long as they are brought within ten years of the date of the violation." The court further clarified that the FCA's three-year tolling provision only applies when the U.S. Attorney General is made aware of facts relevant to the government's fraud claim. In reaching that holding, the court rejected the defendant's assertion that the HUD Inspector General—who audited the banks mortgage loan origination practices several years before the present suit was filed—put the Attorney General on actual notice, at least constructive notice, of the facts underlying the present suit. The court, though, accepted as true the government's representation that it did not become aware of the alleged fraud until seven years after the HUD audit, and further determined that it could not determine the factual question of whether DOJ knew about the audit and if so, when. The court also observed that the parties entered into a tolling agreement, which essentially set the parameters for the government's claims. The government, though, argued that it could bring claims even beyond the tolling agreement, pursuant to the Wartime Suspension of Limitations Act (WSLA). The court agreed, finding that the WSLA applied and that the Act "suspends the statute of limitations for offenses involving fraud against the United States when the country is at war or Congress has enacted a specific authorization for the use of the Armed Forces." The court held that the WSLA, in combination with the FCA's limitations period of up to ten years, negated the defendant's statute of limitations defense.

Failure to State a Claim/Plead Fraud with Particularity

The court held that the government properly stated claims for relief under the FCA, finding that the government alleged two claims under two theories of FCA liability—false certifications and fraudulent inducement. The false certification allegations stated a claim because the government claimed that the defendant's reckless underwriting practices and knowingly false certifications to HUD rendered its loans ineligible for HUD mortgage insurance; yet the defendant knowingly submitted claims to HUD for payment, when those loans defaulted, or sold the loans to third parties that did so. Since the government alleged that the defendant falsely certified that its loans satisfied the criteria upon which FHA insurance is conditioned, the court held that the false certification allegation was sufficient to state a claim under the FCA. The court similarly held that the government's fraudulent inducement allegations also stated a claim. First, the court stated that "implicit in the submission of a claim for payment on a defaulted loan is a certification that the loan complies with the core eligibility requirements of HUD insurance." The court then held that the government stated a claim by alleging that the defendant failed to report material violations concerning thousands of its loans, even though it knew that the violations rendered the loans ineligible for HUD insurance payments.

The court also held that the government pled its fraud claims with particularity. With regard to the loan underwriting and false certification claims, the court stated that "it would be impractical, if not impossible, to require that the Government plead the details of each and every false claim." The court then held that the government's pleading was sufficiently particular, since the government specifically described the defendant's loan origination practices and the defendant's knowledge of the material violations resulting from those practices, and provided detailed examples during the relevant time period of insurance claims paid by HUD when such loans defaulted. Next, the court determined that the government's failure to report claims were also adequately pled, as the government described the bank's quality control and reporting obligations, its process for reviewing loans and its deliberate refusal to report to HUD loans with material violations of applicable regulations; the government event provided a list of <u>all</u> the federally-backed loans that allegedly contained material violations. The court held that, due to the scope of the alleged fraud, the government was not required to plead the details of every false claim, such as the name of each employee responsible for submitting or certifying each of the loans at issue.

The court also held that the United States properly pled all the elements of its FIRREA claims. The motion to dismiss the FCA and FIRREA claims was denied.

U.S. ex rel. Dyer v. Raytheon Co., 2013 WL 5348571 (D. Mass. Sept. 23, 2013)

A relator filed a *qui tam* action alleging that his former employer—a government contractor—violated the False Claims Act by fraudulently charging the government for artificially-inflated bonuses paid to its executives that were originally classified as other expenses. The parties filed cross-motions for summary judgment, with the defendant arguing that the accounting reclassification of its executive compensation payments complied with applicable regulations and did not contradict any of its statements to the government, and that the relator could offer no evidence that the defendant had knowledge of the alleged falsity of any of the claims at issue. The U.S. District Court for the District of Massachusetts granted summary judgment in favor of the defendant. While the court determined that the question of whether the defendant's accounting reclassifications complied with the law could not be decided on summary judgment, it found that the relator did not adduce sufficient evidence to allow a reasonable jury to conclude that the defendant knowingly made any false claim to the government. The court held that the relator was "unable to show any of the classic indicia of fraud," as he did not produce evidence from anyone aside from himself to support his allegation that the defendant believed that its claims for government funds were false. The relator alleged that the defendant knew that its charges were fraudulent because the rela-

tor personally reported that information to the defendant numerous times, among other reasons. The court, though, concluded that the relator's reports of concerns about the defendant's executive compensation payments were not sufficient to establish that the defendant's knowledge that its claims were false. Instead, the court found that the defendant addressed the relator's claims multiple times, but simply disagreed with his conclusions. The court ultimately held that the relator's reports evinced his own perspective, but could not serve as evidence of the defendant's knowledge. The court similarly rejected the relator's other arguments, finding that none of the relator's assertions demonstrated that the defendant knew that its accounting reclassification of executive compensation expenses paid by the government constituted false claims. Consequently, the court granted the defendant's motion for summary judgment.

U.S. ex rel. Parikh v. Citizens Med. Ctr., 2013 WL 5304057 (S.D. Tex. Sept. 20, 2013)

Three relators brought a *qui tam* action against a county-owned hospital, its administrator, and one of its cardiologists, alleging that he defendants violated the False Claims Act by submitting false Medicare and Medicaid claims. The relators—all of whom were previously employed by the hospital defendant—claimed that the claims were false because they were tainted by: the defendants' illegal kickbacks to physicians in exchange for referrals, the defendants' practice of employing physicians in violation of state law, and the fact that the claims were for worthless and unnecessary services. The defendants moved to dismiss the relators' claims, arguing that the allegations failed to state a claim under the FCA.

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

Failure to State a Claim/Plead Fraud with Particularity

The court rejected the defendants' contention that the relators' kickback allegations were deficient because the relators did not plead with particularity that the hospital certified its compliance with the Anti-Kickback Statute (AKS) and the Stark law when it submitted claims to Medicare and Medicaid. Instead, the court determined that the relators' complaint "provides extremely detailed allegations concerning how [the hospital] allegedly certified its compliance with the AKS and Stark," including explaining how the defendants falsified a number of different Medicare and Medicaid applications, agreements, cost reports, and other certification forms. The court also held that the relators were not required to allege that the defendants' illegal kickbacks actually induced physicians to refer patients to the hospital; the relators were only required to allege that the defendants provided kickbacks with the intent of inducing referrals, to plead particular details of the alleged fraud scheme, and to provide reliable indicia that lead to a strong inference that the defendants actually submitted false Medicare and Medicaid claims. The court held that, with only a few exceptions, the relators' allegations satisfied these criteria by providing specific details regarding the defendants' alleged respective kickback arrangements with over two dozen physicians, from at least six different specialties and practice groups. These details included the types of kickbacks provided (including substantial bonus payments and fringe benefits, paid advertising, rental space at below-market rates, and free transportation services), the value of the kickbacks and the resulting referrals. The court rejected the defendants' various arguments that the conduct alleged by the relators did not violate the AKS and Stark law, finding that the relators properly pled violations of those statutes and/or that the defendants' arguments were affirmative defenses for which the defendants failed to meet their burden of proof. The only exceptions to the court's findings concerned the relators' allegations of illegal kickbacks to hospitalists and to four individual doctors. The allegations of illegal kickbacks to hospitalists only cited two specific instances of referrals in exchange for kickbacks and did not describe how those examples fit within a larger healthcare fraud scheme. Thus, the court held that those allegations were deficient. The allegations of illegal kickbacks to the four physicians—while specific—did not explain how the kickback scheme was alleged to have worked, as they did not discuss to whom these physicians referred patients, the services for which the referrals were made, or the benefits the hospital received from the referrals. As a result, the court dismissed the relators' kickback claims regarding the hospital's financial relationships with the hospitalists and with the four specific physicians the relators' identified; the court denied the defendants' motion to dismiss the remaining kickback claims.

The court then turned to the relators' allegation that the defendants' practice of hiring ER physicians, cardiologists and hospitalists violated Texas's ban on the corporate practice of medicine. The court held that, even assuming that the relator's charge was true, the state law violation would only give rise to FCA liability if the defendants' compliance with that law was a condition of payment under applicable Medicare and Medicaid rules—the court observed that the FCA does not impose liability for violations of conditions of <u>participation</u> in the Medicare and Medicaid programs (only conditions of <u>payment</u>). The court determined that the relators failed to cite any authority or evidence in support of their arguments that FCA liability can be predicated on violations of the ban on the corporate practice of medicine, or that the defendants certified to the federal government that were operating in compliance with that state law provision. Consequently, the court dismissed those claims.

The court denied the defendants' motion to dismiss the relators' "worthless services" claims, finding that the relators properly pled the particulars of a scheme in which the hospital directed a physician to provide services that they knew were medically unnecessary and worthless, solely to increase the hospital's revenues and the physicians' own income. As the court determined that the Fifth Circuit "has made clear that claims for medically unnecessary treatment are actionable under the FCA," it held that the relators could maintain their worthless services claims.

Next, the court evaluated the relators' conspiracy claim under the FCA, in which the relators alleged that the defendants conspired with the physicians engaged in the kickback scheme and others to violate the FCA. The defendants argued that the conspiracy claim should be dismissed because all of their alleged co-conspirators were employees or agents of the hospital, and therefore could not engage in a conspiracy with the defendants. The court rejected that argument, finding that the relators' conspiracy allegations included nonemployees, and that it was inappropriate at the motion to dismiss stage to attempt to determine whether any of those individuals was an agent of the hospital. The court allowed the conspiracy claim to move forward without prejudice to the defendants' ability to raise their defense again at the summary judgment stage.

Qualified Immunity

The two individual defendants moved to dismiss the claims against them arguing that, as employees of county-owned hospital, they were public officials entitled to a qualified immunity defense. While the court acknowledged that "[t]here are very few cases examining whether qualified immunity is available as a defense for government officials accused of violating the FCA," it recognized that the Fifth Circuit is one of the courts that has addressed the issue—and the Fifth Circuit held that qualified immunity does not apply to FCA actions. Although the circuit court's ruling was in the context of the FCA's anti-retaliation provision, the district court found no reason not to extend that reasoning to fraud claims brought under the FCA. The court noted that the defendants offered no historical common law basis for such immunity under the FCA, nor did they demonstrate that qualified immunity from the relators' suit was necessary to allow them to continue to serve the public. The court further noted that, pursuant to Federal Rule of Civil Procedure 9(b), FCA fraud claims must be pled with particularity. The court held that this requirement serves to shield public officials from vexatious and frivolous litigations, thereby reducing the need for qualified immunity. The court also observed that, unlike qualified immunity, which protects public officials who must make "split-second" decisions during the course of performing their job responsibilities, the FCA only imposes liability for "knowing" violations, which "serves to eliminate the prospect of liability in cases where the legality of the defendant's actions is open to debate. The court denied the individual defendants' motion to dismiss on qualified immunity grounds.

U.S. ex rel. Zeman v. USC Univ. Hosp., 2013 WL 5230657 (C.D. Cal. Sept. 16, 2013)

A *qui tam* relator alleged that a university hospital violated the False Claims Act when one of its physicians performed eight outpatient orthopedic surgeries on her and the hospital then billed Medicare for follow-up visits within 90 days of those surgical procedures. According to the relator, Medicare's "global surgery rule" ap-

plied, by which Medicare pays a single amount for all typical services related to a major surgical procedure—including related post-operative visits. Consequently, the relator alleged that the hospital was not permitted to bill for post-operative visits related to her surgeries. The defendant moved to dismiss the *qui tam* complaint, arguing that the relator failed to state a claim under the FCA. According to the hospital, the global surgery rule only applies to surgeons and not to the "facility fees" it charged. The U.S. District Court for the Central District of California agreed with the defendant's assertion, finding that the applicable regulations and the Medicare Claims Processing Manual supported the defendant's argument that the hospital's facility charges in connection with a physician's services were properly billed to Medicare.

However, the relator alleged that the hospital charged Medicare for "clinic services" and "office visits," not for "facility fees," and, as a result, the court denied the defendant's motion to dismiss. The court stated that "[a]t this stage, it is unclear to the court what these visits entailed and whether physicians' services falling under the 90-day rule bar were provided." The court determined that such a determination was better resolved at the summary judgment stage, and consequently, denied the defendant's motion to dismiss.

Davis v. HHS, 2013 WL 5134410 (D.D.C. Sept. 16, 2013)

A plaintiff sued the U.S. Department of Health and Human Services and the U.S. Department of Justice, alleging that the defendants failed to enforce the law and committed a fraud on the court by declining to intervene in, or to provide evidence for, his two unsuccessful *qui tam* actions in which he claimed that the District of Columbia engaged in Medicaid fraud. The *qui tam* suits were dismissed for lack of subject matter jurisdiction, pursuant to the False Claims Act's public disclosure bar provision. The defendants moved to dismiss the plaintiff's allegations for failure to state a claim. The U.S. District Court for the District of Columbia granted the defendant's motion, finding that the government's intervention decisions are committed to agency discretion—regardless of the strength of a relator's allegations. Based on the plaintiff's contentions, the court concluded that the Department of Justice satisfied its obligation to investigate his fraud allegations diligently, and that the defendants' failure to join his *qui tam* suit did not provide a sufficient basis for his claims of regulatory violations. The court also rejected the plaintiff's claim that the defendants committed a fraud on the court by withholding material information during the *qui tam* proceedings that would have supported his claims. The court determined that the plaintiff did not specifically allege any improper influence directed at the tribunal, and held that "the mere fact that the government did not tell the court everything it knew about [the plaintiff]'s claims in the *qui tam* actions does not mean that there was fraud on the court"—particularly since the United States was not a party to those actions, as a result of its non-interven-

tion decision. Moreover, the court observed that the plaintiff did not adequately explain what evidence the defendants failed to disclose, nor did he allege that the court was somehow misled by the defendants. Regardless of those facts, the court also noted that the *qui tam* actions were dismissed for lack of subject matter jurisdiction, and concluded that any evidence the government could have provided during those proceedings "would not have been relevant in any case." The court held that once the government declined to intervene in the *qui tam* suits, "[the relator] was responsible conducting the *qui tam* litigation, and the government cannot be held liable for not providing evidence to the court that [the relator] had ample opportunities to provide himself. The defendants' motion to dismiss was granted.

United States v. Americus Mortgage Corp., 2013 WL 4829271 (S.D. Tex. Sept. 10, 2013); 2013 WL 4829284 (S.D. Tex. Sept. 10, 2013); 2013 WL 4829269 (S.D. Tex. Sept. 10, 2013)

The United States intervened in a *qui tam* against two residential mortgage lending companies and two executives of those companies, and alleged that the defendants defrauded the government, in violation of the False Claims Act (FCA) and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). Specifically, the government claimed that the defendants fraudulently procured home mortgage insurance from the U.S. Department of Housing and Urban Development (HUD) by making numerous false statements in loan applications and other documents. The government contended that HUD paid over $150 million in insurance proceeds to the defendants for loans that defaulted. The defendants moved to dismiss the government's claims, arguing that the government failed to state a claim for relief under the FCA and failed to allege the fraud scheme with particularity. In addition, one of the defendants—the successor entity to one of the mortgage companies the government alleged was engaged in fraud—argued that the government was collaterally estopped from arguing that it was liable for its predecessor's acts and omissions under a successor liability theory.

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

Failure to State a Claim/Plead Fraud with Particularity

The court concluded that the government properly pled its FCA and FIRREA claims. With respect to the FCA claims, the court noted that the government satisfied the particularity requirement by describing each defendant's role in the alleged fraud scheme. The court noted that "[f]or complaints asserting claims under the FCA, the 'time, place, contents, and identity standard is not a straitjacket for Rule 9(b),' and the Government is not required to plead facts with exacting detail. The court held that the government's allegations of a fraud scheme—in which the defendants falsely certified to HUD that loans originated in particular, approved branch locations when in fact the loans originated from unapproved and prohibited "shadow branches;" and in which the defendants falsely certified to HUD that they were not subject to state sanctions, did not employ convicted felons, and maintained proper quality controls—were sufficient to satisfy Rule 9(b) since the government provided specific, detailed examples for each of these allegations.

Moreover, the court held that the government's allegations stated a claim under the FCA, noting that the government alleged that the defendant's wrongdoing was part of a "course of fraudulent conduct." The court concluded that the government properly alleged the scienter element of FCA liability, noting the government's proffer of email evidence in support of its assertion that the individual defendants engaged in behavior to conceal the fraud. In reaching its holding on the defendants' knowledge, the court rejected the defendants' argument that, since HUD was aware of the alleged wrongdoing, the scienter element was negated. Instead, the court, relying on Fifth Circuit precedent, declared that "the inaptly-named government knowledge defense is not a statutory defense to FCA liability." Regardless, the court stated, there was no evidence that HUD was aware of the defendants' alleged false statements and approved their practices. The court also rejected the defendants' argument that the U.S. Supreme Court, in its decision in *Allison Engine Co. v. United States*, altered the FCA's scienter requirement and now requires plaintiffs to show intent to defraud the government. The court again turned to Fifth Circuit precedent, noting that the circuit court had previously addressed this argument and concluded that the FCA does not require proof of specific intent to defraud. Moreover, the district court determined that *Allison Engine* was not on point, since that case dealt with false claims subcontractors submitted prime contractors and other private entities; the defendants were alleged to have directly submitted false claims to the government. The court also noted that the government adequately pled the materiality element of FCA liability, as the government alleged that HUD based its decisions to insure loans based on the defendants' false certifications that the loans originated in compliance with HUD regulations. The court further rejected the individual defendants' arguments that since they were not alleged to have personally submitted any false claims to the government, they were absolved of FCA liability. The court instead determined that "[t]he FCA applies to anyone who knowingly assists in causing the government to pay claims grounded in fraud," and held that the government's allegations against the individual defendants met that threshold.

The court also rejected the defendants' argument that some of the government's claims were time-barred. The defendants argued that, pursuant to the FCA's statute of limitations provision, the government could not only maintain a cause of action regarding allegedly false claims that were more than six years old at the time the government filed its complaint-in-intervention. The court recognized the FCA's six-year limitations period, but also noted that the statute includes a three-year tolling period that ran from "the date upon which the appropriate government official knew (or should have known) of facts material to the fraudulent claim." Since determining when the "appropriate" government official first should have known about the alleged fraud involves a fact-intensive analysis, the court declined to dismiss any of the government's claims on statute of limitations grounds.

Similarly, the court held that the government properly pled its FIRREA claims. The court held that the defendants were subject to certain FIRREA provisions that apply to "whoever"—a term the U.S. Supreme Court opined should be interpreted liberally. The court then held that the government's particularized allegations of fraud and false statements supported a claim under FIRREA as well as the FCA.

Collateral Estoppel

One of the named corporate defendants was a successor to one of the defendants alleged to have engaged in the fraud. This successor company argued that the government was estopped from trying to hold it liable for the acts of its predecessor, because, pursuant to Texas law, it did not purchase the liabilities of the predecessor company. The defendant argued that HUD had previously been enjoined from suspending the successor company's approval to originate loans due to the alleged acts of its predecessor. In the injunction proceeding, the court determined that the successor company was not a mere continuation of the predecessor and that, pursuant to Texas law—which was adopted in the transaction in which the successor took ownership of the predecessor—successor liability is not recognized. Thus, the successor company, argued, the government was precluded from asserting claims against the successor. The district court rejected the estoppel argument, noting that the government did not have an opportunity to fully and vigorously litigate the merits of HUD's claim during the injunction proceeding. The court, though, ultimately dismissed the government's claims against the successor, finding that Texas law governed the purchase of the predecessor company, and Texas law generally does not recognize successor liability, and none of the exceptions to that basic rule applied. Thus, the court held, the successor company did not purchase the liabilities of the predecessor company, and could not be held liable for that company's conduct. The government was granted leave to amend its pleadings against the successor company.

U.S. ex rel. Ketroser v. Mayo Found., 2013 WL 4733986 (8th Cir. Sept. 4, 2013)

Four relators filed a *qui tam* action against a group of related surgical pathology services facilities, alleging that the defendants violated the False Claims Act by billing Medicare for services that were never provided. Specifically, the relators claimed that the defendants' pathology practices—which the government approved as medically necessary—consisted of analyzing all samples taken during

surgeries using two methods: first, "frozen" pathology slides are examined while patients were still in surgery and an initial report is created; and second, "permanent" slides made from patients' remaining tissue samples are read after surgery to determine whether or not any amendments to the initial reports are required—usually, no amendment to the original report was required. Each slide that is read by a pathologist is billed as a separate service, and the relators alleged that the defendants improperly billed Medicare in connection with their review of permanent slides. The United States partially intervened in the relators' suit and the parties settled the plaintiffs' claims alleging that the defendants falsely billed Medicare for permanent slides that they did not create or examine. The relators then filed an amended complaint, alleging that the defendants also defrauded Medicare by submitting claims for pathology services even though they failed to prepare separate reports for permanent slides. The defendants moved to dismiss the relators' remaining claim, arguing that the court lacked subject matter jurisdiction over that claim, due to the False Claims Act's public disclosure bar provision, and that the relators failed to state a claim under the FCA. The U.S. District Court for the District of Minnesota first concluded that it had subject matter jurisdiction over the relators' claim, and then dismissed those allegations for failing to state a claim. The district court determined that the relators failed to establish that the billing codes associated with the defendants' Medicare claims for reviewing permanent surgical pathology slides did not explicitly require written reports, and thus, the defendants' alleged failure to provide such reports did not amount to fraud. The relators appealed the district court's ruling to the U.S. Court of Appeals for the Eighth Circuit. The defendants appealed the district court's denial of their motion to dismiss on public disclosure grounds.

Public Disclosure Bar

The Eighth Circuit affirmed the district court's rulings. The circuit court first re-visited the subject matter jurisdiction issue. The defendants argued that the relators' allegations had been previously disclosed in a medical study, during Social Security Administration proceedings, and in a prior lawsuit in which the relators litigated wrongful death and medical malpractice claims against the defendants on behalf of former patients. The circuit court agreed with the district court—and the relators—that neither the medical study nor the agency proceedings revealed the alleged fraud scheme. The relators conceded that they first realized that the defendants often failed to prepare reports after reviewing permanent slides while litigating the prior lawsuit on behalf of former patients of the defendant. However, they successfully argued that the discovery materials that revealed that information were never filed in court, and therefore, were not "publicly" disclosed. As a result, the circuit court affirmed the district court's ruling that it had subject matter jurisdiction over the relators' fraud claims.

Failure to State a Claim

The appellate court then considered the relators' appeal of the district court's dismissal of their fraud allegations for failing to state a claim under the FCA. The court first noted the relators' "failure to put in the record even one example of a claim [the defendants] submitted to a Medicare paying agent seeking payment for surgical pathology services." Consequently, the court concluded that the relators' allegations amounted to nothing more than regulatory non-compliance, which is not actionable under the FCA. The court, though, still reviewed the relevant Medicare provisions to determine whether or not the defendants' practice of submitting reimbursement claims for examining permanent slides for which no report was prepared constituted fraud under the FCA. The Eighth Circuit concluded that none of the regulations at issue explicitly requires the creation of a written report for each permanent pathology slide. The court observed that other regulations specifically provide for "written narrative reports," which strongly suggested that no such requirement had been imposed on the defendants. To the extent that the regulations at issue were ambiguous with respect to any written report requirement, the appeals court held that since the defendants' interpretation of the regulations was reasonable, any ambiguity would negate the FCA's scienter requirement. Moreover, the court noted that the relators did not produce any evidence showing that the creation of written reports following the defendants' review of permanent pathology slides was material to Medicare's decision to pay the defendants' claims. Thus, the Eighth Circuit affirmed the district court's dismissal of the relators' *qui tam* claims for failure to state a claim under the FCA.

U.S. ex rel. McLain v. Fluor Enters., Inc., 2013 WL 4721365 (E.D. La. Sept. 3, 2013); 2013 WL 4721367 (E.D. La. Sept. 3, 2013)

Three *qui tam* relators—two of whom were listed as "John Doe and Jane Doe"—filed suit against a group of government contractors, alleging violations of the False Claims Act. The relators claimed that in the aftermath of Hurricanes Katrina and Rita, the Federal Emergency Management Agency (FEMA) contracted with the defendants to provide various services in connection with the transportation and installation of tens of thousands of temporary housing units for Gulf Coast residents. According to the relators, the defendants: (1) billed the government multiple times for the same housing units, resulting in double- and triple-billing; and (2) fraudulently billed the government for housing units that did not comply with Louisiana law. The defendants moved to dismiss all of the relators' *qui tam* claims, arguing that the alleged fraud was not pled with particularly and that the relators' complaint failed to state a claim under the False Claims Act. The defendants also moved to dismiss the relators' allegation that they failed to comply with Louisiana law for lack of subject matter jurisdiction, arguing that the relators were precluded from bringing the claim due to the FCA's first-to-file provision. Finally, one of the defendants moved to dismiss the complaint unless the two unnamed relators were identified.

Holding: The U.S. District Court for the Eastern District of Louisiana denied the defendants' motion to dismiss.

Failure to State a Claim/Plead Fraud with Particularity

The court determined that the relators adequately pled each element of FCA liability, regarding both of their fraud claims. With respect to the relators' first claim—that the defendants over-billed the government—the court determined that the relators properly pled that the defendants acted "knowingly," since in fraud cases, the knowledge element may be alleged generally, and since the relators alleged that the defendants were aware that they were double- and triple-billing the government and even created billing systems that made it impossible for FEMA to cross-check the defendants' actual work. The court also held that the relators sufficiently pled that the defendants' claims to the government were "false" under the FCA, as the relators alleged that defendants billed the government multiple times for the same work by issuing work orders for placement of the same housing units at multiple locations. In support of those allegations, the relators identified specific "work order numbers, dates, and locations." The court held that the relators were not required, at the pleading stage, to establish the nexus between specific work orders and invoices that reflected over-billing. Rather, the court stated that the relators would be given an opportunity to acquire those documents, which the relators argued were within the defendants' exclusive control. Finally, the court held that the relators properly pled the materiality element of their first claim. The court determined that the relators' allegations satisfied the materiality standard, since the complaint alleged that the information included in the defendants' invoices had the potential to influence the government's contracting and payment decisions.

Similarly, the court held that the relators properly pled the elements of their second claim—that the defendants falsely billed the government for housing units that failed to comply with relevant state laws, codes, and regulations. The *qui tam* complaint satisfied the minimal requirement of pleading generally the defendants' knowledge of their violations of the FCA and Louisiana law. In addition, the court held that the relators adequately pled that, during the relevant time period, the defendants were required to inspect and test gas systems installed on housing units under the FEMA contract; that the defendants failed to do so; and that the defendants' corresponding invoices to the government were false. The court held that these allegations were sufficient to state a valid FCA claim with particularity.

First-to-File Rule

The defendants argued that the relators' second count should be dismissed pursuant to the FCA's first-to-file provision. According to the defendants, the relators' allegations mirrored those brought in an earlier *qui tam* suit. The prior suit alleged that the defendants failed to abide by state and local laws by installing housing units and gas systems before obtaining the proper licenses from the State. The court held that the allegations in the prior suit did not bar the current suit, since the fraud schemes alleged in the two actions was slightly different; the prior relators alleged that the defendants failed to obtain necessary certifications before installing gas systems in their housing units, while the present relators alleged that the defendants failed to conduct required inspections and testing after the gas systems were installed.

John/Jane Doe Relators

Finally, the court considered the argument that the relators' claims should be dismissed if the John Doe and Jane Doe relators remained anonymous. The court noted that Federal Rule of Civil Procedure 10(a) provides that complaints "must name all the parties" in the caption. The court also stated that "parties must generally identify themselves in their pleadings rather than proceeding under fictitious names." The court, though, recognized that certain "exceptional cases"—including matters of a highly-sensitive or personal nature; matters that could involve real danger or physical harm; and matters that, by their nature, would lead to an injury upon disclosure of the plaintiff's identity—might warrant allowing a plaintiff to proceed anonymously, and that the interest in having all parties identify themselves can be outweighed by a substantial privacy right. Ultimately, the court held that the unnamed relators could not establish that any exceptional circumstances or substantial privacy rights would arise in the event that their identities were revealed. The court ordered the relators to amend their complaint within seven days to identify all three relators, or the complaint would be dismissed, without prejudice to the United States.

U.S. ex rel. Health Dimensions Rehab., Inc. v. RehabCare Group, Inc., 2013 WL 4666338 (E.D. Mo. Aug. 30, 2013)

A relator filed a *qui tam* action against a group of affiliated therapy service providers, alleging that the defendants' Medicare and Medicaid claims were false, because the services being billed for were the result of illegal kickbacks. The United States joined the relator's False Claims Act suit. Specifically, the plaintiffs alleged that two of the defendants had a contractual relationship with more than 60 skilled nursing facilities. The third defendant expressed an interest in acquiring the other two companies, but only if the nursing home contracts could be extended from one-year to five-year agreements that could only be terminated for cause. Eventually, the nursing homes entered into new agreements that reflected those changes. Months later, the defendants entered into a "subcontract agreement" with one another, whereby the defendants that previously held the nursing homes contracts would receive a one-time payment as well as a percentage of the profits from the therapy services, in exchange for supervising the other defendant's therapy services at the nursing homes and providing administrative services in connection with those services. The plaintiffs asserted that these payments constituted illegal

kickbacks that were actually paid in exchange for referrals of the nursing homes' Medicare and Medicaid patients; the defendants countered that the agreement was a valid subcontract. Subsequently, the government moved for partial summary judgment on liability, as well as the defendants' affirmative defenses. The defendants also moved for summary judgment.

In their motion, the plaintiffs claimed that, aside from facilitating the relationship with the nursing homes, the two companies that purportedly provided supervisory and administrative services did nothing in exchange for its profit-sharing and other payments—in fact, the plaintiffs alleged that those companies did not even have any employees. The plaintiffs also sought summary judgment on the defendants' affirmative defense that the government's damages should be reduced by the value of the therapy services that were provided to Medicare/Medicaid patients; since the defendants actually provided those services—albeit allegedly as a result of an illegal kickback arrangement—they argued that the government received a benefit and that the government's damages should be reduced by the amount of that benefit. The government argued that the full value of each of the defendants' "tainted" claims should be the proper measure of damages. The defendants also moved for summary judgment, claiming that the plaintiffs failed to present sufficient evidence to prove their FCA claims—including facts to show that the payments between the defendants were not for fair market value or were in exchange for improper referrals, or that the supervisory and administrative services outlined in the subcontract were never provided; instead, the defendants argued that the plaintiffs' claims were based on speculation.

The court held that "a rational jury could come out on either side's favor on the material questions of whether Defendants paid remuneration in exchange for referrals, and if so whether this wrongful conduct was willful." Thus, the court denied the parties' motions for summary judgment on the liability issues. With respect to the government's summary judgment motion on the issue of damages, the court held that since the parties did not address that issue at oral argument, the government's motion would be denied without prejudice.

U.S. ex rel. Watson v. King-Vassel, 2013 WL 4532140 (7th Cir. Aug. 28, 2013)

A relator filed a *qui tam* suit against a psychiatrist, alleging that the defendant illegally prescribed nearly fifty drugs to a minor Medicaid patient for off-label uses not approved by the FDA. The relator alleged that because Medicaid does not pay for medications prescribed for non-approved uses, the defendant's Medicaid reimbursement claims were false, and gave rise to liability under the False Claims Act. The U.S. District Court for the Eastern District of Wisconsin entered summary

judgment in favor of the defendant, finding that the relator failed to offer expert testimony to prove essential elements of his case. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Seventh Circuit.

The Seventh Circuit reversed the district court's ruling. Before reaching the substance of the appeal, the court expressed serious concerns about the relator's method of finding the patient whose Medicaid claims were at the heart of his *qui tam* suit—which consisted of consulting with a *qui tam* lawyer; placing a newspaper advertisement seeking minor Medicaid patients who had been prescribed any of a number of psychotropic drugs; entering into an agreement with the minor patient's mother (who responded to the advertisement) to share any proceeds from the lawsuit; and, in concert with the mother, obtaining the minor patient's medical records by misrepresenting to the defendant that the relator needed copies of the records in order to treat the patient—even though the relator had no intention of treating the patient and only wanted to use the records as evidence in his *qui tam* suit. The circuit court observed that the district court sanctioned the relator and his counsel, and described their conduct as "borderline-fraudulent." The circuit court agreed with the district court and stated that it "hope[d] that the district court's sanction will dissuade professionals from stooping to such unsavory tactics in the future."

The circuit court, though, reversed the district court's summary judgment ruling in favor of the defendant. The district court had held that the relator failed to present expert witnesses regarding: (1) whether or not the defendant's Medicaid claims were "knowingly" false, given the complex Medicaid claim process; and (2) whether or not the defendant's Medicaid claims were "false" under the False Claims Act. The circuit court reversed both rulings. With respect to the first issue, the Seventh Circuit noted that the district court referred to the Medicaid claims process as a "black box" and as a "grand mystery." The district court reasoned that, without expert testimony, the relator could not establish that the defendant knowingly caused the submission of false Medicaid claims for drugs prescribed for off-label uses. The circuit court disagreed, finding the district court's interpretation of the causation and knowledge elements of the False Claims Act "overly rigid." The circuit court observed that the FCA's scienter elements includes acting with "actual knowledge," with deliberate ignorance, or with "reckless disregard" of the possibility that a false claim was submitted to the government. The Seventh Circuit held that the relator did not need an expert to establish this element, as he "need only show that [the defendant] had reason to know of facts that would lead a reasonable person to realize that she was causing the submission of a false claims or that [the defendant] failed to make a reasonable and prudent inquiry into that possibility." The court then determined that the relator's allegations satisfied the FCA's scienter requirement. The court noted that the relator presented an affidavit from the minor patient's mother, asserting facts that would lead a reasonable

juror to conclude that the defendant knew that her prescriptions would lead to the submission of false Medicaid claims. More specifically, the affidavit indicated that the defendant had the patient's Medicaid information; the patient's mother never paid out of pocket for the patient's appointments with the defendant; the mother always used her medical assistance card to pay for the patient's medications; and the defendant had been compensated by the Medicaid program for her prescription to the patient. While the court concluded that these facts could not serve as irrefutable proof of the defendant's state of mind, it was sufficient for a reasonable jury to conclude that the defendant recklessly disregarded the fact that the patient received Medicaid benefits and that Medicaid claims would be submitted to cover the costs of his prescriptions. The appeals court recognized that expert testimony may have been useful to help demonstrate scienter, but ultimately, the court held that it was not required. Thus, the circuit court determined that the district court's ruling with respect to the FCA's knowledge requirement was incorrect.

The Seventh Circuit similarly disagreed with the district court's reasoning with respect to the FCA's causation element. The district court held that the Medicaid claims process is so complicated that the relator needed expert testimony to explain why the defendant's off-label prescriptions caused the submission of false Medicaid claims. While the circuit court acknowledged that "the statutes and regulations describing the Medicaid process are dense," it also observed that the provisions are less of a "grand mystery," since the public, at least theoretically, has access to them. Moreover, the appeals court concluded that the basic mechanics of the Medicaid claims process—whereby a Medicaid patient fills a prescription at a pharmacy, and "various clerks push various papers to ensure that the claim proceeds through proper channels," are completely foreseeable and therefore, do not break the chain of causation. The court likened causation in the context of the Medicaid claims process to causation in the context of starting a car, stating, that "while most people could not explain every step between key-turn and ignition, the cause-effect relationship is commonly appreciated. An expert might be required in some cases to explain the process (of both Medicaid and the car), but not testify about the existence of the relationship." Consequently, the court held that the district court's ruling with respect to the causation element was also incorrect. Based on those findings, the circuit court reversed the district court's summary judgment ruling on the basis that the relator failed to offer expert testimony that the defendant knowingly caused false claims to be submitted to Medicaid.

The circuit court then turned to the district court's ruling that the relator failed to name a medical expert to establish that the Medicaid claims for the defendant's prescriptions were "false" for FCA purposes. The district court held that without expert testimony, the relator was unable to show that Medicaid could not legally pay for the drugs prescribed by the defendant. The district court noted that Medicaid only provides reimbursements for "covered outpatient drugs"—drugs prescribed for a medically-accepted indication. The district court further determined that "medically accepted indication" is defined by the Food, Drug, and Cosmetic Act, as well as several identified compendia—"large reference books that contain a variety of information about prescription pharmaceuticals currently available on the American market . . . [which] were specifically incorporated by Congress into the statutory standard for a 'medically accepted indication.'" According to the district court, these materials are not readily understandable to the general public. Again, the circuit court acknowledged that "scientific evidence can be beyond the competence of a lay jury to understand," but ultimately, the circuit court again held that the district court committed error. The appellate court noted that the relator alleged that the compendia did not support <u>any</u> indication for certain drugs the defendant prescribed to the relator—simply due to the relator's age—interpreting the compendia for purposes of this suit was not as difficult a task as the district court believed it to be. Taking all allegations in favor of the relator—the non-moving party—the circuit court held that the district court's grant of summary judgment in favor of the defendant was improper. The district court's ruling was reversed and the matter was remanded for further proceedings.

U.S. ex rel. Prime v. Post, Buckley, Schuh & Jernigan, Inc., 2013 WL 4506357 (M.D. Fla. Aug. 23, 2013)

A relator filed a *qui tam* suit alleging that two architect/engineering companies violated the False Claims Act. The defendants jointly submitted a proposal to the U.S. Army Corps of Engineers (USACE) to provide services on a project to restore the Everglades. The proposal included man-day labor rates for various categories of workers, as well as overhead costs, as well as a "certificate of current cost or pricing data," in support of those figures. Before beginning contract negotiations with the defendants, the USACE prepared its own estimates of labor and overhead rates, and the government's estimates were generally lower than the defendants' proposed rates. The USACE requested—and the defendants submitted—a revised proposal with lower rates. The defendants, though, were not required to submit a new certification of the cost and pricing data. The relator, who served as a senior vice president for one of the defendants, conducted negotiations with the USACE on behalf of the defendants. He claimed that the defendants agreed to a fixed-price indefinite delivery/indefinite quantity contract with the USACE for architect/engineering services related to the Everglades project. The relator alleged that the defendants' profits on the contract were three times as high as projected, because the defendants were using lower-cost labor than the rates listed in the contract. He claimed that this went on for nearly a decade, over the course of several contract renewals, and thus, the defendants were aware of their actual labor rates when renewing the contract with the USACE. The relator alleged that he eventually reported his concerns to his superiors, who replied that no over-

charging had occurred and who instructed him not to bring up the matter again. Soon after, the plaintiff was re-assigned to a lower-paying position and was eventually laid off from his job. Subsequently, the plaintiff filed a *qui tam* complaint, alleging that both defendants defrauded the government and that his former employer retaliated against him in response to his protected whistleblower activity, all in violation of the False Claims Act. The United States declined to intervene in the relator's suit.

The defendants moved for summary judgment on the relator's claims. With respect to the relator's fraud claims failed because the defendants did not submit—and were not required to submit—any certifications to the government regarding their actual labor costs; they contended that since they entered into a "fixed-price" contract, they were entitled to keep any profits earned by reducing labor costs, and thus, the relator could not establish that they submitted any false claim or made any false statement to the government. With respect to the retaliation claim, the relator's former employer argued that the relator could not establish that he was engaged in protected conduct or that his termination was due to retaliation or was based on a non-retaliatory reason.

Holding: The U.S. District Court for the Middle District of Florida granted the defendants' motion to dismiss.

Failure to State a Claim

The court agreed with the defendants that since the contract with the USACE was a fixed-price contract, the government knew that the defendants could increase their profits beyond the contract's estimates by performing their services more efficiently and/or by using lower-priced labor. Conversely, the defendants took on the risk of any labor costs that exceeded the contract's projects. Thus, the court stated, the defendants "could either make money or lose money based on how [they] chose to complete the work." The court observed that USACE representatives testified that the defendants were not required to report any additional profits beyond those contemplated by the contracts and that the government never inquired about the defendants' actual profits. As a result, the court held that the relator could not show that the defendant violated the contract or made any false statement—including an impliedly false statement—to the government regarding its labor rates or actual profits. The court granted summary judgment in favor of the defendants on the relator's fraud claims.

Retaliation

The court also granted the motion to dismiss the retaliation claim, finding that the relator failed to establish that his discussions with his former employer regarding the contract would have put that defendant on notice of the "distinct possibility" of an FCA claim. While the court acknowledged that the relator informed the defendant that he felt the rates included in the contract were misleading and that he expressed concerns about whether the defendant complying with applicable requirements, it concluded that there was no "evidence that Plaintiff characterized the alleged overbilling as unlawful or fraudulent," or that he contacted the defendant's legal representatives or the USACE regarding his concerns. Thus, the court held that the plaintiff did not put the defendant on notice of any protected conduct. But even if the relator had done so, the court would have ruled against him, as the court determined that there was no evidence showing that the defendant terminated the relator's employment for a retaliatory reason. Notably, the relator did not allege that the person who made the decision to terminate his employment had knowledge of his discussions with other employees regarding his concerns about the USACE contract. Moreover, the defendant offered a documented non-retaliatory reason for the relator's firing, asserting that the relator had not reached certain productivity goals and that he was "laid off" due to a lack of work. The court also noted that the defendant also documented its offer to re-hire the relator in the event that additional work became available. As a result of these findings, the court granted summary judgment in favor of the defendant on the retaliation claim.

Si v. Laogai Research Found., 2013 WL 4478953 (D.D.C. Aug. 21, 2013)

A *qui tam* relator filed suit against two non-profit organizations that received federal grant funds, as well as the organizations' director and his wife. Specifically, the relator alleged that, in violation of the False Claims Act, the defendants conspired and defrauded the government over a seven-year period by: providing false information in order to induce the government to award grants; reporting salaries for individuals who never performed any work; using grant funds for personal expenses; and violating grant requirements by engaging in lobbying activity. Additionally, the relator claimed that the defendants retaliated against him, in violation of the FCA's anti-retaliation provision. The defendants moved to dismiss the relator's complaint, arguing that the court lacked subject matter jurisdiction over the claims, that the relator failed to state a claim for relief under the FCA, and that the claims were not plead with sufficient particularity.

The U.S. District Court for the District of Columbia held that the relator's allegations were not pled with particularity, as required by Federal Rule of Civil Procedure 9(b). The court stated that the relator's complaint failed to plead specific fats pertaining to each claim, against each defendant, and instead by "reallege[d] and incorporate[d] by reference all sixty-three paragraphs of factual background." Notably, the court did not discuss the affect—if any—Rule 9(b) has on the relator's retaliation claim. The court then granted the relator leave to amend the complaint "to make clear which legal theory applies to each count and which facts serve as the basis of each claim." The court did not address the defendants' alternate grounds for dismissal, as it held that those arguments were moot.

U.S. ex rel. McLain v. Fluor Enters., Inc., 2013 WL 3899889 (E.D. La. July 29, 2013)

Two *qui tam* relators filed suit against a group of construction companies, alleging that the defendants violated the False Claims Act. More specifically, the relators claimed that the defendants were contracted by the Federal Emergency Management Agency (FEMA) to install trailers in the aftermath of Hurricanes Katrina and Rita. According to the relators, the defendants failed to comply with various Louisiana gas safety statutes—in violation of the government contract—and therefore, when the defendants submitted claims to FEMA for payment that in which they certified that the work being billed for was performed in accordance with the terms of the contracts, they violated the FCA by making false statements and submitting false claims. The relator also alleged that the defendants conspired to defraud the government. The United States declined to intervene in the relators' suit. The defendants moved to dismiss the relators' complaint, arguing that the relators failed to state a claim for relief under the FCA, and/or that the fraud claims were not pled with particularity. The relators also sought to dismiss one of their claims against one of the defendants voluntarily.

Holding: The U.S. District Court for the Eastern District of Louisiana denied the defendants' motions to dismiss the relators' claims alleging that the defendants presented false claims to the government and made false statements to the government in support of those false claims. The court, though, granted the defendants' motion to dismiss the conspiracy claim. Finally, the court reserved judgment on the relators' request to dismiss one of the claims voluntarily.

Failure to State a Claim/Plead Fraud with Particularity

The court first considered the relators' allegation that the defendants submitted false claims to the government. The court noted that such claims do not require a showing of government reliance or of actual or specific damages to the government, stating that "[i]t is adequate to allege that a false claim was knowingly presented regardless of its exact amount." The court held that the relators' claim was properly pled, since the relators alleged, against each defendant, "multiple claims for payment submitted to FEMA;" the alleged falsity of those claims;" and "the defendant's knowledge that it had presented those false claims." The court observed that the relators' claim established that "[a]ll three defendants allegedly had contractual obligations to research and comply with State laws, but allegedly did not comply, knew they did not comply, yet invoiced FEMA without regard to this non-compliance." The court rejected the defendants' arguments that their alleged failure to comply with various gas safety requirements would not have impacted FEMA's obligation to make payments under the contracts. Instead, the court determined that the record was not developed enough to make such a factual finding, and denied the defendants' motion to dismiss the relators' "presentment" claim.

Similarly, the court refused to dismiss the relators' claim alleging FCA violations based on the defendants' alleged use of materially false records to support their allegedly false claims. The court held that the relators adequately pled each element of that claim. First, the court noted that the *qui tam* complaint alleged that the defendants falsely certified their compliance with contract terms, thereby pleading the defendants' alleged false statements. Next, the court found that the relators pled the scienter element by alleging that the defendants sent or received emails that gave rise to the inference that they had actual knowledge of their non-compliance with the contract, but continued to submit claims for payment to FEMA. The court then determined that the relators properly pled that the defendants' alleged false statements were material to the government, finding that the *qui tam* complaint alleged that the defendants' false statements were included as part of their claims to FEMA, and were not made independent of the claims for payment. The court held that the relators' allegation made it "reasonable to infer that FEMA would have refused to process the payment," if the defendants had not certified their compliance with the contract. Consequently, the court held that the allegedly false statements "had the tendency to influence payment by FEMA and [therefore] were material to the allegedly false claims for payment."

The court, though, granted the defendants' motion to dismiss the relators' conspiracy claims. Unlike the prior claims, the conspiracy claim was not pled with particularity, as the relators failed to allege an agreement between and among the defendants to enter into the alleged conspiracy. The court held that the relators' allegations "point to little more than the possibility of an agreement among the stated parties," which was inadequate to plead a conspiracy under the FCA.

Finally, the court reserved judgment on the relators' voluntary request to dismiss the claims against one of the defendants—a claim the relators conceded they could not support with sufficient facts, without the benefit of discovery. Rather than rule on that request, the court, in recognition of the United States' request that the court obtain the government's written consent before granting any dismissal proposed by the relator, decided to "order[] the United States to provide the Court with written notice of its intent to either object or consent to the [voluntary] dismissal, along with reasons for objecting or consenting." The court gave the government three weeks to respond, after which time, the court would construe the government's silence as its consent to the relators' voluntary dismissal of that claim. Notably, the court rejected the government's request that the court also obtain its consent before granting any motions to dismiss filed by the defendant. Instead, the court held that "the Attorney General's consent to the Court's involuntary dismissal . . . is not required."

Gudzelak v. PNC Bank, 2013 WL 3949526 (D. Del. July 29, 2013)

A *pro se* plaintiff filed suit against a bank, alleging mortgage fraud. Specifically, the plaintiff alleged that the defendant—his mortgage lender—forced him into foreclosure through fraud. He alleged a claim on behalf of the government because the defendant received federal "bailout" funds from the Troubled Asset Relief Pro-

gram (TARP). He sought a temporary restraining order against the defendant and relief from further mortgage payments, as well as compensatory and treble damages. The U.S. District Court for the District of Delaware determined that the plaintiff alleged four claims: (1) a violation of TARP; (2) mortgage fraud; and a violation of the False Claims Act. The defendant moved to dismiss the allegations, arguing that the complaint failed to state a claim.

The Delaware district court dismissed the plaintiff's claims. First, the court noted that TARP does not include a private right of action, and thus, the plaintiff could not assert a claim under that statute. Similarly, the court dismissed the mortgage fraud claim, finding that the plaintiff failed to allege the elements of fraud, and that his allegations were not pled with particularity. Finally, the court dismissed the FCA claim, again, finding that the alleged fraud scheme was not pled with particularity.

United States v. Science Applications Int'l Corp., 2013 WL 3791423 (D.D.C. July 22, 2013)

The United States brought an action under the False Claims Act, alleging that a government contractor failed to disclose multiple organizational conflicts of interest, as required under two contracts the defendant entered into with the Nuclear Regulatory Commission (NRC). After a trial in the U.S. District Court for the District of Columbia, the jury returned a verdict for the government, which consisted of $78 in damages for the breach of contract claim, and more than $6 million in damages and civil penalties under the False Claims Act. The defendant appealed the verdict to the D.C. Circuit Court, which affirmed the district court's judgment on the breach of contract claim, but vacated the verdict and remanded the FCA issues to the district court. The defendant subsequently moved for summary judgment on the government's FCA claims, arguing that the government could neither establish that the defendant knowingly failed to disclose alleged conflicts of interest, nor could the government allege any FCA damages that arose from the alleged non-compliance. The government also moved for partial summary judgment on the issue of the falsity of the defendant's claims for payment, under the FCA.

Holding: The D.C. district court denied both parties' summary judgment motions.

Scienter

First, the court determined that the government's FCA claims were based on an implied false certification theory of liability, whereby the defendant's claims for payment under the contract were false because they included a false representation—through alleged omissions of material information—of the defendant's compliance with applicable statutes, regulations and/or contractual terms. The defendant moved for summary judgment, arguing that the government could not establish an essential element of FCA liability, namely, that the defendant knowingly withheld material information from the government and knowingly submitted false claims for payment. The government countered by arguing that the D.C. circuit court had already determined that the defendant acted knowingly. The district court disagreed, though, finding that although the circuit court determined that a reasonable jury could have found that the defendant knew that some of its relationships created conflicts, the court did not address the question of whether or not the defendant knew that the conflict of interest provision in the contract was material. Thus, the district court held, the circuit court did not decide whether the defendant met both prongs of the scienter inquiry; the government could not establish the defendant's knowledge based on the circuit court's prior ruling.

The district court also rejected the government's argument that to establish knowledge, to government only needed to show that one of the defendant's employees knew that the defendant was subject to a conflict of interest provision and that one of the defendant's employees—possibly a different employee—knew that the conflict of interest obligation was material. Although the D.C. circuit court did not address this question on appeal, the district court noted that the circuit court rejected a "collective knowledge" jury instruction and explained that in order to establish a corporation's scienter under an implied certification theory of FCA liability, the government must show that an individual employee knew both that the defendant had not complied with its contractual obligations to disclose conflicts of interest and that the that those obligation were material. The district court held that basing a corporation's scienter on its collective, constructive knowledge would allow for a company to be found liable under the FCA "where its employees were merely negligent."

The court observed that the government offered evidence and arguments in support of the scienter argument, by alleging that several of the defendant's employees had actual knowledge of the defendant's contractual obligations and of the fact that those obligations were material. While the court discounted most of the government allegations, it concluded that the allegations regarding one of the defendant's employees were sufficient to create a triable issue of fact regarding the defendant's level of knowledge. The government also argued that, based on prior rulings in the case, there was sufficient evidence for a reasonable jury to find that, because of deficiencies in the defendant's conflicts system, the defendant could not determine the truth or falsity of its statements regarding conflicts. The district court agreed, and held that the government created a triable issue of fact regarding whether or not the defendant acted "knowingly" by recklessly disregarding or deliberately ignoring the truth or falsity of its statements to the government. Consequently, the defendant's summary judgment motion was denied.

Damages

The court also denied the defendant's motion for summary judgment on the damages issue. The defendant argued that, due to the prior litigation and jury verdict, the government's single damages with respect to one of the two contracts at issue were capped at $78—the amount the jury awarded to the government to cover its breach of contract claim—since the "benefit of the bargain" methodology the jury used to calculate the government's breach of contract damages would also apply when calculating the government's FCA damages. The government responded that the FCA damages and breach of contract damages were not the same, and therefore, the government was not limited to $78 in FCA damages. The court seemingly agreed with the government. The court declared that damages for breach of contract must be foreseeable at the time the contract was made, and include the plaintiff's loss in value due to the defendant's breach, <u>plus</u> incidental and consequential losses caused by the breach, <u>minus</u> any loss that the plaintiff may have avoided by not having to perform. The court noted that the defendant failed to address why FCA damages would be the same as breach of contract damages, as the defendant did not argue that FCA damages must be foreseeable and did not "address whether FCA damages also include incidental and consequential damages and whether they are reduced by any avoidance costs."

The court then turned to the government's damages argument with respect to the second contract, in which the government argued that it was entitled to the full value of the contract, as single damages. The defendant responded, arguing that the government was not due any damages on the second contract, since it could not show that the value of the defendant's work was any less than what the government paid for. The court held that, in order to recover the full value of the contract from the defendant as FCA damages, "the government show by a preponderance of the evidence that that value of [the defendant]'s advice and assistance was completely compromised by the existence of undisclosed conflicts, making the full amount paid to [the defendant] the proper measure of damages. Both sides presented evidence supporting their arguments and ultimately, the court held that there were issues of disputed material fact regarding the value of the defendant's services, in light of the alleged conflicts of interests. Therefore, the court denied the defendant's motion for summary judgment on the damages issue.

Falsity

Finally, the court considered the government's partial motion for summary judgment with respect to the falsity of the defendant's claims. The government contended that the prior jury verdict established the "law of the case" that the defendant submitted false claims and made false statements to the NRC, and that the defendant could not re-litigate that issue. However, the district court held that since the circuit court vacated the prior judgment as to liability and damages, the jury's verdict was not the law of the case. The government also argued that five of the defendant's business relationships—four of which were with companies regulated by the NRC—created conflicts of interest, and that it was undisputed that the defendant failed to disclose those relationships to the NRC. Thus, the government argued, there was no issue of disputed fact regarding the falsity of the defendant's claims to the NRC. The court, though, determined that the falsity issue was not fully resolved, noting that the defendant offered evidence upon which a reasonable jury might conclude that the companies that created the defendant's alleged conflicts either did not work with the defendant on NRC-related issues or otherwise did not create actual conflicts of interest with respect to the defendant's NRC contracts. Moreover, the court determined that "there is evidence that [the defendant] did not understand that payment from the NRC was conditional on [the defendant]'s compliance with its conflict of interest obligations," and this, "there are genuine disputes of material fact regarding whether [the defendant]'s conflict of interest obligations were material." As a result, the court denied the government's motion for summary judgment and opted to submit the falsity issue to a jury.

U.S. ex rel. Winkler v. BAE Sys., Inc., 2013 WL 3724784 (E.D. Mich. July 15, 2013)

A *qui tam* relator filed suit against a defense contractor, alleging that the defendant submitted false claims for payment to the U.S. Army in connection with the sale of tactical vehicles. The relator claimed that the defendant's claims were false because the defendant knew that the vehicles had defective braking systems that violated the specifications of its contract with the government, but did not notify the government of the extent of the problems—and instructed the relator (who was employed by the defendant) not to disclose the problems to the government either. Instead, the relator alleged, the defendant began working on design solutions. After two months, the defendant developed a partial fix for the defect, but did not update some 5000 vehicles that had already been sold to the government, resulting in the government having to order replacement parts for those vehicles, when necessary. The relator claimed that since the defendant's vehicles did not satisfy the terms of the government contract, every invoice or other claim for payment the defendant submitted to the government in connection with the contract—which, according to the relator, contained representations that the vehicles conformed to all regulatory and contractual requirements, and that the defendant had complied with its obligation to disclose any overpayments it received from the government—was false. He claimed that the defendant violated four sections of the False Claims Act, by knowingly presenting false claims to the government; knowingly making false statements to the government material to false claims; conspiring to defraud the government; and knowingly concealing an obligation to repay money to the government—a "reverse" false claim allegation. The defendant moved to dismiss the relator's allegations, arguing that the relator failed to state a claim and failed to plead the alleged fraud with particularity.

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

Failure to State a Claim/Plead Fraud with Particularity

The court examined each of the relator's allegations in turn. First, the court considered the relator's claim that the defendant presented false claims for payment to the government. The court noted that—unlike the jurisprudence in other circuits—in the Sixth Circuit, relators "must identify specific false claims with particularity, and cannot just aver the existence of a fraudulent scheme." Since the relator did not identify actual, specific false claims the defendant allegedly presented to the government, the court held that his "presentment" claim was not pled with particularity. Moreover, the court held that the relator failed to establish his theory of FCA liability—the false certification theory. Notably, the relator was unable to rely on an express false certification theory of liability, since the defendant was not required to make any affirmative certifications of compliance concerning the performance of the vehicles' brakes. Instead, the court determined, the relator relied on an implied false certification theory, "based on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a condition of payment. The court held that, in accordance with Sixth Circuit precedent, in order to maintain his allegation of an implied false certification, the relator must be able to show "the express conditioning of payment on compliance with a specific statute or regulation." Ultimately, the court held that the relator was unable to satisfy this requirement. Although the relator did cite federal guidelines in support of his allegations, he did not allege "that any statute, regulation or contractual provision expressly stated that compliance with the stated standards by [the defendant] was required to obtain payment." Instead, the court observed, the contract at issue "appears to contemplate the Government's acceptance and payment for non-conforming vehicles in that it places the obligation for correcting defects" on the defendant. The court held that the relator's allegations, at best, might serve as the basis for a breach of contract claim by the government against the defendant, but not FCA liability. The relator's "presentment" claim was dismissed.

Next, the court dismissed the relator's "false statement" claim. Although the court acknowledged that the relator was not required to show that a false claim was actually presented to the government in order to maintain this claim, the court noted that the relator was still obligated to establish a connection between the alleged fraud and some actual claim made to the government. Since the relator was unable to plead any claims made to the government—whether by the defendant or anyone else—he could not demonstrate a connection between the defendant's allegedly false statements and any such claim. Thus, his false statement allegation was dismissed.

Finally, the court dismissed the relator's conspiracy and "reverse" claim allegations, finding that the relator failed to plead the elements of those causes of action. With respect to the conspiracy claim, the court held that the relator failed even to allege the "bare bones facts, let alone the specific facts, that are required under the statute to state a conspiracy claim, such as who conspired to violate [the FCA] or what acts were taken in furtherance of the conspiracy and when. With respect to the reverse false claim allegation, the court held that the relator failed to allege "that the defendant owed the government a debt at the time of the alleged false statement.

U.S. ex rel. Barko v. Halliburton Co., 2013 WL 3369074 (D.D.C. July 8, 2013)

A *qui tam* relator filed suit against a group of affiliated defense contractors and two of their subcontractors, alleging that the defendants violated the False Claims Act by using a subcontracting double-billing procedure to vastly inflate the costs of constructing laundry facilities on military bases in Iraq. Both the prime contractors and the subcontractors moved to dismiss the relator's complaint, arguing that the relator's allegations failed to state a claim. One of the subcontractors also moved to dismiss on the basis that the court lacked personal jurisdiction over it and that the law at the time of the alleged FCA violations shielded subcontractors from FCA liability.

Holding: The U.S. District Court for the District of Columbia denied both parties' motions.

Failure to State a Claim

The defendants argued that the relator's allegations were deficient, claiming that the relator did not allege the fraud scheme with particularity, and did not allege facts to show that the defendants knowingly violated the FCA. According to the defendants, at best, the relator's complaint alleged poor contract performance, but not false claims. The court disagreed, finding that the relator "provide[d] a great deal of factual allegations to support his fraud claims," including describing the applicable terms of the government contract at issue, describing the defendants' alleged manipulation of the contract bidding process, and describing the specific contracts and subcontract work that was alleged to be fraudulent, as well as the individuals who worked on the projects and caused the submission of false claims to the government. The court also rejected the subcontractors' argument that subcontractors cannot be held liable under the FCA. The court noted that, contrary to the defendants' characterization, the U.S. Supreme Court has held that "a subcontractor can violate the False Claims Act if it presents false documents to a contractor so that the Government approves a claim . . . The False Claims Act thus covers both direct and indirect attempts to defraud the government." The district court concluded that the relator had alleged that the subcontractor defendants engaged in that exact type of conduct—submitting false documents to inflate claims for government money. The court noted that the relator did not allege that the subcontractors attempted to defraud the prime contractor; rather, the relator alleged that both groups of defendants sought to defraud the government. Therefore, the court held that the *qui tam* complaint stated a claim under the FCA.

Personal Jurisdiction

One of the subcontractor defendants—which was located in Jordan and primarily did business in the Middle East—argued that the district court lacked personal jurisdiction over it, since it lacked the minimum contacts with the United States as a whole to be subject to an action in an American Court. The district court disagreed, finding that the subcontractor had enough contact with the United States to reasonably expect to be haled into U.S. courts. Specifically, the court found that the defendant had been registered as a subcontractor and had worked on projects for the U.S. Government since 1999; the defendant's employees had traveled to the U.S. on at least one occasion to meet with officials for one of the prime contractor defendants; the subcontractor performed more than $150 million worth of U.S. Government subcontracts while working with the prime contractor defendants; and the subcontractor had worked with other American companies as well, and created an English-language website to increase its business with American companies. In addition, the district court observed that the subcontractor defendant had already been subjected to the personal jurisdiction of another U.S. district court, only a year earlier. The district court also rejected the subcontractor's insufficient service of process argument. Although the defendant was served by electronic mail, and argued that Jordanian law generally does not permit service by email or fax, the district court held that Federal Rule of Civil Procedure 4(f)(3) authorizes courts to permit service on parties in foreign countries "by other means not prohibited by international agreement, as the court orders." The Jordanian defendant conceded that Jordan was not a signatory to the Hague Service Convention, and thus, the method of service was not prohibited by international agreement. Moreover, since the district court was not subject to any international agreement to the contrary, it held that—after taking foreign law into consideration and minimizing any offense to it—it was free to authorize the relator to serve the defendant pursuant to Rule 4(f)(3).

Finally, the court considered the subcontractor's argument that prior to being amended in 2009, the False Claims Act did not impose liability on subcontractors. While the amendment included a retroactivity provision, the defendant claimed that retroactive application would violate its Ex Post Facto and Due Process Rights. Although the court took no position on the defendant's characterization of the effect of the law pre- and post-amendment, it agreed with the defendant that the amendment would not apply retroactively. Rather than apply constitutional principles, the district court held that the plain language of the amendment states that the amended law would apply retroactively to "all <u>claims</u> under the False Claims Act . . . that are pending on or after" a particular date. (emphasis added) The district court concluded that "claims" as used in the retroactivity provision, should be given the same meaning as "claims" under the False Claims Act—a request or demand for government money or property. Since the relator's *qui tam* complaint did not allege that any of the defendants' allegedly false claims for payment were still pending at the time of the amendment to the FCA, the court held that the prior version of the FCA applied to the relator's allegations.

As a result of the above findings, the district court denied all the defendants' motions to dismiss the relator's *qui tam* complaint.

U.S. ex rel. Hoffman v. National Coll., 2013 WL 3421931 (N.D. Ind. July 8, 2013)

A *qui tam* relator filed suit against a for-profit higher educational institution that owns and operates approximately thirty college campuses—including the campus that employed the relator. He alleged that, in order to receive federal loan and grant funds through the Higher Education Act, the defendant was required to maintain accreditation through a nationally-recognized agency. The relator alleged that the accreditation was based on the defendant's agreement to provide "adequate consultation between team members and the faculty," during the agency's on-campus visits. The relator claimed that the defendant violated that obligation by requiring its faculty to sign a confidentiality and non-disparagement agreement which, according to the relator, was designed to intimidate the defendant's faculty into withholding truthful, negative information about the defendant to the agency. As a result, the relator alleged, the defendant violated the False Claims Act by submitting false claims for government funds, making false statements in support of false claims, and conspiring to defraud the government with numerous John Doe defendants. The United States declined to intervene in the relator's suit. The defendant moved to dismiss the *qui tam* complaint, on the grounds that the fraud allegations were not pled with particularity and the complaint failed to state a claim under the False Claims Act.

Holding: The U.S. District Court for the Northern District of Indiana granted the defendant's motion to dismiss, but granted the relator leave to file an amended complaint.

The court determined that the relator did not state a claim under the False Claims Act, since the relator did not allege "any statement that he or any other faculty member of the Defendant made to an accreditor which was false because of the [confidentiality] Agreement. He does not allege who made false statements to [the accreditation agency], the substance of any such statement, when such statements were made, where they were made, or the means by which they were communicated. He does not allege what specific Government money was paid as a result" of the accreditation, nor did he identify any specific claim by the defendant for government funds. Moreover, the court rejected the relator's two theories of FCA liability: the promissory fraud theory and the false certification theory. With respect to the promissory fraud theory—which involves knowingly making

a promise that one intends not to keep, the court observed that the relator did not allege that the defendant applied for federal funds while knowing that it would violate the accreditation requirement by forcing its faculty to sign the confidentiality agreement. Additionally, the court determined that the relator failed to allege that the defendant made any claim that was knowingly false, since the basis of the relator's allegation—the confidentiality agreement—did not prevent the defendant's faculty from providing truthful, negative information about the defendant to the accreditation agency. Thus, the court rejected the relator's promissory fraud theory of FCA liability. The court then turned to the relator's false certification theory—which involves a knowingly false express or implied certification of compliance with applicable regulations. The court declared that an essential element of the false certification theory is that the payment of the federal funds at issue was conditioned on compliance with the regulation at issue. The court held that the relator failed to plead this element, agreeing with the defendant that compliance with the "adequate consultation" accreditation requirement was only a condition of participation—since a violation of the requirement would result in a review, not immediate revocation of accreditation—and not a condition of payment. The court also noted that the relator failed to "identify a single piece of truthful, negative information that he or any other faculty member would have expressed to [the agency] but for the [confidentiality] agreement," and therefore, could not allege that anything about the defendant's claims to the government was materially false. Thus, the court rejected the false certification theory as well.

Although the court dismissed the relator's allegations for failing to state a claim and failing to plead the alleged fraud with particularity, the court granted the relator leave to amend the complaint.

U.S. ex rel. Ellsworth v. United Bus. Brokers of Utah, LLC, 2013 WL 3357576 (D. Utah July 3, 2013)

Two relators filed a *qui tam* suit alleging that a group of defendants falsified corporate and financial information provided to the Small Business Administration (SBA). The defendants moved for summary judgment on the relators' claims. The U.S. District Court for the District of Utah granted the defendants' motion, finding that the undisputed facts did not support FCA liability. Specifically, the court noted that the relators failed to present any evidence showing that the defendants made false representations to the SBA or that they falsified any documents. Instead, the court determined that the relators' allegations were based on speculation, and therefore, summary judgment should be granted in the defendants' favor.

U.S. ex rel. International Brotherhood of Elec. Workers, Local Union No. 98 v. Fairfield Co., 2013 WL 3327505 (E.D. Pa. July 2, 2013)

A labor union filed a *qui tam* suit against an electrical contractor, alleging that the defendant failed to pay the appropriate "prevailing wage" to certain union workers on five federally-funded construction projects with the States of Pennsylvania and Delaware. According to the relator, the prevailing wage provision was a regulatory requirement of the federal grants, pursuant to the Davis-Bacon Act. In addition, the relator alleged that the defendant was contractually required to submit certified payrolls and certificates of compliance to the state agencies on a weekly basis—and that those certifications were subsequently passed on to the federal government. The relator claimed that, after the defendant completed three of the five projects, the U.S. Department of Labor conducted an audit of the defendant's payment practices. The relator then conducted its own independent audit of the defendant's bidding and payment practices on the government contracts, which revealed that the defendant: (1) misclassified a significant number of its electrical workers on the projects as laborers, so that it could pay those gain a bidding advantage against competitors and pay those employees a lower rate than was required; and (2) continued to misclassify the electrical workers when it regularly submitted its certified payrolls to the government. The United States declined to intervene in the relator's suit and the defendant subsequently moved to dismiss the *qui tam* complaint for failure to state a claim. In the alternative, the defendant moved for summary judgment.

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

Failure to State a Claim

The defendant argued that the False Claims Act did not apply to the contracts at issue, since those contracts were between the defendant and state transportation agencies—not with the federal government. The defendant claimed that, in *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, the U.S. Supreme Court held that the False Claims Act did not apply to claims that were not submitted directly to the federal government. The court disagreed, and determined that, in accordance with the Supreme Court's opinion, "as long as a defendant makes a false statement that is material to the Federal Government's payment of funds and the defendant is aware that the government would potentially rely upon the defendant's statement, a fact finder may find that the statement was made with the purpose of inducing payment of a false claim by the government, even if the defendant does not submit the claim directly to the Federal Government."

Next, the court considered the defendant's "primary jurisdiction" argument, in which the defendant contended that the court lacked jurisdiction over the parties' dispute, since disputes concerning the Davis-Bacon Act are committed to the discretion of an administrative agency, namely, the U.S. Department of Labor. While the court noted that the Davis-Bacon Act does not pre-empt the False Claims Act, it agreed that "the Department of Labor has exclusive authority to establish minimum wages for particular classifications of laborers and mechanics in particular localities and to define the work that is included within each classification where there is any ambiguity." The court, though, ultimately held that the parties' dispute was not over the defendant's misrepresentation of wages—an issue that might be committed to the discretion of the Labor Department—but rather, the dispute concerned the defendant's alleged misclassification of workers into incorrect categories—and the Department of Labor had already made a determination regarding the type of work involved within each category. Thus, the court held that "the alleged falsity of the [defendant's] false statement is not dependent on interpretation of classifications and wage determinations. Therefore, jurisdiction is appropriate."

The court then turned to the defendant's argument that the FCA did not apply to the contracts at issue, since the alleged false claims were not submitted directly to the government. The defendant argued that the False Claims Act was amended in 2009 to impose liability on those who submit false claims for government money, regardless of whether the claim was submitted directly to the government. But the defendant contended that the 2009 amendment was not retroactive, and thus, did not apply to the allegedly false claims submitted under the defendant's contracts. Again, the court disagreed with the defendant's characterization. The court first acknowledged that Congress amended the FCA liability provision as a <u>clarification</u> of the existing law. Thus, the court held, even before the amendment, "subcontractors faced liability for false claims submitted to prime contractors when those claims were passed on to the government or caused the prime contractor to submit a false claim to the government." The court concluded that the FCA applied to the defendant's contracts and denied its motion to dismiss on that basis.

Next, the court considered the defendant's argument that the court lacked jurisdiction over the *qui tam* claims because the FCA specifically bars *qui tam* actions based on allegations or transactions that have already been pled by the government. The defendant pointed to the FCA's language that precludes *qui tam* actions "based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." According to the defendant, the Labor Department's prior audit constituted an "administrative civil money penalty proceeding," which would bar the relator's complaint. The relator countered that a government audit is not the same as an administrative civil money penalty proceeding, noting that the FCA's public disclosure bar provision separately lists "administrative hearing" and "suit" as sources of public disclosures under the FCA. Notably, the defendant did not argue that the relator's allegations had been previously publicly disclosed, and were therefore barred under the FCA's public disclosure provision. The court side-stepped the "administrative civil money penalty proceeding" question and held that even if the audit was encompassed within the definition of that term, the relator's allegations were not "based upon" the audit information. Although the defendant asserted that the government auditors "specifically questions why employees were listed as 'Laborers' and requested clarification about their Class determinations," the audit involved different allegations than did the *qui tam* suit, since the audit did not consist of a fraud allegations, while the *qui tam* complaint specifically alleged fraud. The court observed that the defendant paid no penalty as a result of the government audit, and thus, the relator's *qui tam* suit would not result in a second recovery for the government—which is the purpose of the FCA provision precluding *qui tam* suits based on existing government administrative proceedings. Moreover, the court held that the relator's suit was not derived from information contained in the government audit, stating that the *qui tam* complaint "does not rely on the same facts and evidence included in the DOL's investigation," since the government's requests were very broad and could not have revealed the basis for the defendant's classification of its workers.

Finally, the court made clear that the relator's fraud allegations were pled with particularity, as required by Federal Rule of Civil Procedure 9(b). The court stated that the *qui tam* complaint "adequately alleges the 'who, what, when, where, and how'" of an FCA claim, by pleading—with specific examples of the people who engaged in the conduct at specific locations, and with some specific dates and a general time period—that the defendant submitted false payroll and compliance certifications with the intention that the false statements would be material to the government's approval and payment of its false claims. Although the relator did not identify specific false claims for payment submitted by the defendant, the court held that the relator's allegations were sufficient to place the defendant "in a position to answer and defend against the alleged claims." Thus, the court held that the fraud claims were pled with particularity.

The defendant's motion to dismiss was denied.

See *U.S. ex rel. Jones & Wert Constr. Specialties, Inc.*, 2013 WL 4883152 (S.D. Cal. Sept. 12, 2013), at page 58.

See *Kellogg Brown & Root Servs., Inc. v. United States*, 2013 WL 4749921 (Fed. Cir. Sept. 5, 2013), at page 3.

See *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 2013 WL 4436264 (5th Cir. Aug. 20, 2013), at page 114.

See *U.S. ex rel. Thomas v. Black & Veatch Special Projects Corp.*, 2013 WL 3878168 (D. Kan. July 26, 2013), at page 118.

See *Georgakis v. Illinois State Univ.*, 2013 WL 3600739 (7th Cir. July 16, 2013), at page 55.

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

See *United States ex rel. O'Donnell v. Countrywide Fin. Corp.*, 2013 WL 4437232 (S.D.N.Y. Aug. 16, 2013), at page 68.

See *U.S. ex rel. Barko v. Halliburton Co.*, 2013 WL 3369074 (D.D.C. July 8, 2013), at page 98.

B. Bankruptcy Proceedings

U.S. ex rel. Minge v. Hawker Beechcraft Corp., 2013 WL 3831671 (Bankr. S.D.N.Y. July 24, 2013)

Two relators filed a *qui tam* action against a manufacturer of military aircraft, alleging that the defendant made false representations to the United States regarding certain components that were incorporated into aircraft sold to the U.S. Government. The components were manufactured by the relators' former employer—one of the defendant's subcontractors—which was also named as a defendant. After trebling the government's alleged damages and seeking a maximum $11,000 civil penalty for each of the defendant's allegedly false certifications to the government regarding nearly 350 aircraft, the relators sought a total of approximately $2.6 billion on behalf of the government, plus their own costs and attorneys' fees. The prime contractor defendant subsequently filed a chapter 11 case that stayed the relators' *qui tam* action. The relators commenced an adversary proceeding to determine the dischargeability of their *qui tam* claims, arguing that their *qui tam* claims created both a debt owed to a domestic governmental unit and a debt owed to the relators. The bankruptcy defendant moved to dismiss the relators' proceeding, arguing in part, that: (1) the relators did not have standing to seek nondischargeability of their *qui tam* claim on behalf of the government; (2) even if the relators had standing, their *qui tam* complaint failed to plead the heightened scienter standard applicable to fraud claims under the Bankruptcy Code; and (3) the relators did not assert any claims that constituted debts "owed to a person" under the Bankruptcy Code.

The U.S. Bankruptcy Court for the Southern District of New York noted that the Bankruptcy Code specifies that an adversary proceeding to determine the dischargeability of a debt owed to a domestic governmental unit must be filed within

60 days of the first meeting of the defendant's creditors. The relators' proceeding was not filed within the 60-day time limit, and consequently, the court held that the relators' *qui tam* claims were time-barred. In reaching that conclusion, the court rejected the relators' contention that their fraud claims asserted a debt "owed to a person," and therefore, were not subject to the 60-day deadline. While the court recognized that relators have standing to prosecute FCA *qui tam* claims, it held that, for bankruptcy purposes, relators' "standing does not change the nature of the underlying debt. The debt is owed to the Government and not to the relator." As a result, the court held that relators' *qui tam* claims are not debts owed to a person, under the Bankruptcy Code. The court observed that "the FCA identifies certain claims that are owed to the relator rather than the Government," such as the successful relator's reasonable attorneys' fees, costs, and expenses. The court reserved judgment on the question of the dischargeability of the relators' potential claim for these expenses—given the fact that the *qui tam* claims had not been resolved—but noted that the relators filed a proof of claim to recover their *qui tam* claim, and that "nothing in this opinion affects the allowance of that claim."

As a result of these findings, the bankruptcy court held that relators' *qui tam* claims were dischargeable—and actually were discharged under the defendant's confirmed plan. The court did not reach a decision on the dischargeability of any personal claims the relators might have against the defendant.

C. Calculating Damages and Civil Penalties

U.S. ex rel. Howard v. Urban Inv. Trust, Inc., 2013 WL 4501422 (N.D. Ill. Aug. 22, 2013)

A plaintiff sued her former employer—a real estate investment company—and three of the company's principals, alleging that the defendants embezzled money from properties owned by the City of Chicago and the U.S. Department of Housing and Urban Development. She further alleged that the defendants forced her to falsify documents in an attempt to conceal the fraud. In addition, she claimed that the defendants violated the False Claims Act by harassing and constructively discharging her employment after she engaged in protected whistleblower activity. Following a jury trial, the plaintiff was awarded a total of $125,000 in back pay on her FCA retaliation claim. The jury awarded damages as follows: the corporate defendant was ordered to pay $62,500; two of the individual defendants were each ordered to pay $28,125; and the award against the third individual defendant totaled $6,250. The plaintiff moved to amend the judgment, seeking double the award for back pay as well as prejudgment interest, and arguing that the judgment should be amended to reflect that the individual defendants were jointly and severally liable for the award against the corporation. Two of the individual defendants opposed the plaintiff's motion.

The U.S. District Court for the Northern District of Illinois granted the plaintiff's motion in part; the court granted the plaintiff's request for double back pay and prejudgment interest, but rejected her argument that the defendants were jointly and severally liable for her damages.

The court first noted that the False Claims Act's anti-retaliation provision specifically provides for relief that includes "reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages …." Then the court observed that the jury awarded the plaintiff $125,000 in back pay, but without first doubling that amount or adding prejudgment interest. One of the defendants argued that the jury failed to subtract the plaintiff's mitigation pay from other employment—which totaled more than $86,000—before awarding back pay. The other defendant argued that the plaintiff waived her right to double back pay by not raising the argument sooner. The court rejected both defendants' arguments. First, the court determined that the jury was explicitly instructed to subtract the plaintiff's mitigation pay into account when determining the back pay award. Next, the court observed that the plaintiff did not voluntarily relinquish her right to double back pay; instead the plaintiff had requested double back pay in her pretrial order.

Next, the court stated that prejudgment interest "is available generally to victims of federal law violations. The purpose of prejudgment interest is to provide a complete remedy. Essentially, it takes into account the fact that the prevailing party would have had access to the money had it not been for the actions of the offending party, and would have invested the money or otherwise obtained some return on it." The court determined that the prime rate is the appropriate measure for computing prejudgment interest. Finally the court, acting in its discretion, opted to award compound prejudgment interest rather than simple prejudgment interest, finding that compound prejudgment interest is the norm. As a result of these findings, the court calculated that the corporate defendant would pay $162, 170.23; two of the individual defendants would pay $72,976.60 and the third individual defendant would pay $16,217.02, for a total of more than $324,000.

Lastly, the court considered the plaintiff's motion to amend the judgment to make the individual defendants jointly and severally liable for the damages assessed against the corporation. Although the court acknowledged that the corporate veil was pierced, it held that the defendants were not automatically jointly and severally liable. Instead, the court held that the jury's instructions were "not indicative of joint and several liability," and instead, "the verdict form clearly apportioned the responsibility for each Defendant." Thus, the court denied the plaintiff's request to make the individual defendants jointly and severally liable for the damages assessed against the corporate defendant.

D. Costs and Attorney's Fees

U.S. ex rel. Singh v. Bradford Reg. Med. Ctr., 2013 WL 5467107 (W.D. Pa. Sept. 30, 2013)

A group of four relators commenced a *qui tam* action against two healthcare facilities, as well as two doctors who were owners and principals of one of the facilities. The relators alleged that the defendants engaged in a healthcare fraud scheme, in violation of the False Claims Act. The U.S. District Court for the Western District of Pennsylvania granted partial summary judgment in favor of the relators. The United States later intervened in the action and reached a settlement with one of the defendants. The parties sought to reach a global settlement—one that would resolve the issue of attorneys' fees for the relators' counsel, pursuant to the FCA's fee-shifting provision—but when no global settlement was reached, the relators' counsel sought to recover fees from the settling defendant. That defendant opposed the relators' fee application, raising several arguments. The court rejected each of the defendant's arguments. First, the court observed that the FCA's fee-shifting provision in favor of successful relators is mandatory, and therefore, the court could not reduce the amount to be paid, notwithstanding the defendant's claims of extreme hardship or the fact that the relators' counsel also received a contingency fee payment from the relators. Next, the court rejected the defendant's argument that a reduction of the fee award was warranted because there were multiple defendants. Instead, the court held that "[t]he fact that there are multiple Defendants in a civil case means that an award of fees would be made jointly and severally against all Defendants." Since the court determined that the relators' claimed attorneys' fees were reasonable, the court granted the relators' fee application.

U.S. ex rel. Liotine v. CdW-Gov't, Inc., 2013 WL 5366960 (S.D. Ill. Sept. 25, 2013)

A *qui tam* relator filed suit against a government contractor, alleging violations of the False Claims Act. The defendant reached a settlement with the United States to resolve the relator's claims. The relator's attorneys—from two different law firms—then filed a petition to recover their fees, in accordance with the FCA's fee-shifting provision. A magistrate judge issued a report and recommendation providing for more than $2 million in fees and expenses to one of the law firms, and more than $1.6 million in fees and expenses to the other firm. The magistrate arrived at that decision after considering the defendant's objections to the fee petition and reducing the amounts attributable to clerical work and travel time. However, the magistrate also increased one of the firm's claimed hours, based on that firm's report of additional time spent working on the case. The defendant objected to the magistrate's report.

The U.S. District Court for the Southern District of Illinois adopted the magistrate's report and recommendation. The district court held that the two law firms established that their actual billing rates were reasonable. The court noted that, as is common practice, one of the firms submitted a declaration as evidence of its actual hourly rates. While the court recognized that the reasonableness of an attorney's fees is determined by reviewing prevailing market rates in the community, it also noted that "[a]n attorney's actual billing rate for comparable work is presumptively appropriate to use as the market rate in determining an award of attorney's fees." Therefore, with respect to the first law firm and its declaration, the court stated: "there is no need for the [ ] firm to submit third party affidavits, invoices, or any other record. The inquiry ends there." The second law firm did not submit a declaration of its own in support of its fee petition, but the court concluded that, based on its holding that the first firm's rates were reasonable, the second firm's similar hourly rates were also reasonable, since the two law firms were located in the same relevant community—one firm was located in Cincinnati and the other was located in Southern Illinois. Moreover, the court noted that the second firm submitted a third party affidavit from another FCA specialist based in Southern Illinois to demonstrate the reasonableness of its hourly rates. The court also agreed with the magistrate's statement that the defendant's request to reduce the relator's second firm's hourly rate seemed incredulous, given the fact that the defendant's counsel's rates were 148% higher than the second relator's firm's rates. The court also held that the relator's counsel's claimed number of hours were reasonable—rejecting the defendant's request for a 40% reduction for all partner-level attorneys. The court noted that the relator's attorneys affirmed that they tried to exercise billing judgment and that they submitted billing statements that tracked their hours to one-tenth of an hour. The court again compared the relator's counsel's claimed hours to the defendant's counsel's hours and concluded that the defendant's attorneys "spent 2,486 hours or 62 full weeks more than [the relator]'s counsel on this case. The court, however, did make slight adjustments to the relator's counsel's hours—both adding and reducing hours in various places.

The relator's second firm requested an upward adjustment of 15% on its claimed fees, pursuant to the 12 factors outlined in *Hensley v. Eckerhart*. Conversely, the defendant requested a downward adjustment of 15%, arguing that the relator recovered only a small percentage of the damages it alleged and did not prevail on 8 of 11 of its claims. Applying the *Hensley* factors, the court declined to exercise its discretion to adjust the fees upward or downward. While the court recognized that the relator did not prevail on all of the claims and damages he alleged, it also noted that he still succeeded in helping the government achieve a $7 million settlement—and that his *qui tam* action had other implications, and "help[ed] the Government police fraudulent conduct." The court also addressed the relator's counsel's request for interest on the entire attorneys' fees award, from the date of the settlement. The court denied that request, citing Seventh Circuit precedent es-

tablishing that "post-judgment interest on attorney's fees is allowed only from the date that judgment is entered regarding the specific amount awarded." Since the court had not yet entered judgment on the fee petition, no interest on the claimed attorneys' fees was due.

U.S. ex rel. Howard v. Urban Inv. Trust, Inc., 2013 WL 4804832 (N.D. Ill. Sept. 9, 2013)

A plaintiff sued the company that formerly employed her, as well as three individuals who served as principals of the organization, alleging that the defendants violated the False Claims Act's anti-retaliation provision. After a jury trial, the plaintiff was awarded a total of $125,000 in back pay—the U.S. District Court for the Northern District of Illinois added prejudgment interest to that amount and doubled it, in accordance with the False Claims Act. The relator's attorneys—from two law firms—subsequently moved to recover their fees and costs, pursuant to the FCA's fee-shifting provision. The defendants opposed the motion, arguing that the plaintiff was not the prevailing party and that her "*de minimis*" award did not warrant a fee award. In addition, one of the individual defendants sought to recover her attorneys' fees and costs.

The Illinois district court stated that it was "undeniable" that the jury ruled in the plaintiff's favor, and that the jury's award "change[d] the legal relationship between the parties and this change directly benefit[ted] the plaintiff." Thus, the court held, the plaintiff was the prevailing party and her attorneys were entitled to recover their fees and costs from the defendant.

The court then evaluated the reasonableness of the claimed attorneys' fees and costs. Even though the plaintiff did not prevail on all of her claims—including claims alleging violations of the FCA's anti-fraud provisions, which the court dismissed on summary judgment—the court concluded that the number of hours the attorneys claimed were reasonable, since the unsuccessful fraud claims were related to, and analyzed the same core set of facts as, the successful retaliation claim. The court then considered the relators' attorneys' hourly rates. The court concluded that the rates for lawyers from one of the law firms were reasonable, as those attorneys submitted declarations as well as third-party affidavits stating that their rates were in accordance with those in the community. The attorneys also submitted an updated version of the Laffey Matrix—the guideline created by the U.S. Attorneys' Office for the District of Columbia to estimate reasonable attorneys' fees—in support of their fee petition. The court, though, reduced the rate for one of the attorneys from the other law firm, finding that the rate exceeded the suggested rate in the Laffey Matrix and the attorney's only evidence to support the increased rate was his assertion that he had been engaged in FCA litigation for a long time. After multiplying the numbers of hours by the reasonable hourly rate and arriving at the "lodestar figure" of nearly $2 million, the court reduced that figure to account for the plaintiff's limited success in light of the discrepancy between her initial demand of more than $2 million in damages and her actual award of $250,000 plus prejudgment interest. While the court acknowledged the principle that fees should not be calculated proportionally to damages, it also recognized the Seventh Circuit's instruction that courts should at least take into account whether fee awards are disproportionate to damages awarded. For this reason, the court reduced the lodestar figure by 60% and apportioned the respective attorneys' fees accordingly.

Next, the court evaluated the relators' attorneys' claimed costs. The court found that one attorney included impermissible costs in her petition, including costs for travel expenses and personal expenses. That attorney was ordered to submit a revised bill of costs listing only allowable costs.

Finally, the court turned to the petition for attorneys' fees and costs filed by one of the defendants. This defendant argued that, pursuant to the Equal Access to Justice Act (EAJA), she was entitled to recover these expenses. The court agreed with the government—which filed a response to the defendant's request—that the EAJA was inapplicable, since the government did not intervene in the plaintiff's case and thus, took no position at all with respect to her claims. Moreover, the court held that the defendant was not entitled to fees and costs pursuant to the FCA's fee-shifting provision, since the plaintiff's *qui tam* claims were not "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."

U.S. ex rel. Ward v. Peck, 2013 WL 4511634 (E.D.N.C. Aug. 23, 2013)

A *qui tam* relator filed suit against an attorney, alleging that the defendant violated the False Claims Act by fraudulently qualifying clients for Medicaid benefits by involving the clients' respective assets in transactions that would create the appearance that the clients were indigent. The United States intervened in the relator's suit and the two sides reached a settlement. While the settlement provided that the defendant would pay $100,000 to resolve the case, the agreement did not address whether or not the relator was entitled to recover attorneys' fees pursuant to the FCA's fee-shifting provision. When the relator moved for her attorneys' fees, the defendant objected. The government filed its own brief in support of the relator.

The U.S. District Court for the Eastern District of North Carolina granted the relator's motion. The court rejected the defendant's argument that the relator should be dismissed from the suit by virtue of the FCA's public disclosure bar provision. While the court agreed with the defendant that the bar can apply and preclude an award to a relator—even if the government intervenes in the rela-

tor's suit—ultimately the court held that the relator's allegations had not been previously publicly disclosed. The court determined that while newspaper articles referring to a "Medicaid loophole" had been published before the relator's *qui tam* suit was filed, those disclosures did not allege fraudulent activity and did not mention the defendant or his clients. Thus, the court held, the public disclosures did not reveal the fraud scheme alleged by the relator. The court also rejected the defendant's argument that the relator was not entitled to recover attorneys' fees because the government's complaint-in-intervention focused on different clients of the defendant that did the relator's *qui tam* complaint. The court, though, held that since the relator's disclosures to the government included information about these other clients, and since that information formed the basis of the government's intervention and eventual settlement, the relator was entitled to recover attorneys' fees under the FCA. The court further rejected the defendant's argument that the relator's contingency fee agreement with her attorneys precluded her from also recovering attorneys' fees from the defendant. Therefore, the court granted the relator's motion for attorneys' fees, finding that the attorneys' hourly rate and the number of hours they claimed were reasonable.

See *U.S. ex rel. Chen v. EMSL Analytical, Inc.*, 2013 WL 4441509 (SDNY Aug. 16, 2013), at page 28.

E. False Certifications of Compliance

U.S. ex rel. Steury v. Cardinal Health, Inc., 2013 WL 4436264 (5th Cir. Aug. 20, 2013)

A *qui tam* relator alleged that a group of healthcare companies defrauded the government by submitting false claims to the U.S. Department of Veterans Affairs in connection with the sales of a pump that regulates the flow of patients' intravenous fluids. The relator claimed that the pumps were defective and could lead to patient deaths, and alleged that the defendants' sales of the pumps to the federal government constituted fraud under the False Claims Act—under an implied false certification of compliance with the warranty of merchantability and under a worthless goods theory. The United States declined to intervene in the relator's suit. The U.S. District Court for the Southern District of Texas dismissed the relator's complaint for failure to plead the alleged fraud with particularity. That ruling was affirmed by the U.S. Court of Appeals for the Fifth Circuit, but the appellate court remanded the case to the district court to allow the relator an opportunity to file an amended *qui tam* complaint. The relator filed an amended complaint, which focused on the implied false certification theory of liability. The defendant again moved to dismiss the action, arguing that the complaint failed to state a claim and failed to plead the alleged fraud with particularity. The district court again dismissed the suit, finding that the implied false certification theory of FCA liability had been rejected in the Fifth Circuit and that the relator still failed to state a claim under that theory because she did not allege that payment for the pumps was conditioned on the defendant's certification that the pumps complied with the warranty of merchantability. The relator again appealed the dismissal to the Fifth Circuit.

The Fifth Circuit again affirmed the dismissal of the relator's suit. First, the court noted that the relator's amended complaint did not specify the worthless goods theory of FCA liability, leaving only the implied false certification theory. Although the court did not definitively adopt the implied false certification theory, it considered the relator's claims under that theory and determined that the claims were deficient. The relator contended that the sales of the pumps to the government were conditioned on the pumps' merchantability, since the government would not have paid for the pumps had it known that they were defective. The court, though, held that this allegation was conclusory, since the relator did not identify a contractual provision regarding merchantability. The circuit court stated that "here, the essence of the fraudulent activity of implied false certification of compliance cannot be gauged unless [the relator] reveals how the [ ] pumps deviated from the government's specifications." The court further deduced that the relator was apparently relying on an implied warranty of merchantability. The court noted the relator's failure to allege why such a warranty should be read into government contracts, and ultimately held that the relator's allegation of "an implied certification of an implied contract provision that is an implied prerequisite to payment" was a leap too far. Consequently, the Fifth Circuit affirmed the district court's dismissal of the relator's implied false certification claim.

Likewise, the circuit court affirmed the dismissal of the worthless goods claim, in which the relator alleged that the pumps the government purchased were worthless because the costs in terms of exposure to potential liability to patients exceeded any expected benefit to be gained from purchasing the pumps. The court held that, to the extent the relator intended to maintain the worthless goods claim, she failed to do so because her amended complaint did not allege that fraud scheme with particularity. In particular, the court noted that the complaint failed to allege that any of the pumps sold to the government had been found to be defective or had harmed any patient or resulted in any lawsuit against the Veterans Affairs Department. The relator's *qui tam* complaint was dismissed.

U.S. ex rel. Klein v. Empire Educ. Corp., 2013 WL 4068237 (N.D.N.Y. Aug. 13, 2013)

A relator filed a *qui tam* action against his former employer—an education corporation—and numerous individual, "John Doe" defendants—all of whom were alleged to have served as the defendant's "managerial employees"—alleging that the defendants violated the federal False Claims Act and the false claims act laws of New York and Massachusetts by presenting false claims for student loan funds that were guaranteed by the U.S. Department of Education, the Commonwealth of Massachusetts, and the State of New York. The relator claimed that in order to be eligible to receive student loan funds from the federal and state government entities, the corporation was required to enter into a "Program Participation Agreement" with the U.S. Secretary of Education that reflected its promise to comply with various federal and state statutes and regulations. The relator asserted that this defendant falsely certified to the federal, Massachusetts and New York governments that it was in compliance with the applicable laws and regulations, and therefore, the defendant was ineligible to receive student loan funds. Specifically, the relator alleged that the corporate defendant's certifications were false because the defendant: (1) misrepresented its credit transfer policies; (2) misrepresented the nature of its educational programs, employment and graduation statistics; (3) fraudulently certified grade point averages to secure federal and state funding for ineligible students; and (4) unlawfully linked student recruitment to adverse employment actions. In addition, the relator claimed that the defendant unlawfully terminated his employment in retaliation for engaging in protected activity under the False Claims Act.

The corporation moved to dismiss the relator's claims, arguing that the fraud claims were not pled with particularity and did not state a claim for relief under the FCA. The relator countered that his claims were viable, and that to the extent that they were not, that he should be granted leave to file an amended complaint.

Holding: The U.S. District Court for the Northern District of New York dismissed the relator's federal and state fraud claims for lack of particularity, but denied the motion to dismiss the relator's retaliation claim.

False Certifications of Compliance

The corporate defendant first argued that the relator's fraud claims were based on an "implied false certification" theory of FCA liability, whereby the defendant—by virtue of submitting claims for government funds—impliedly certified its compliance with applicable federal and state laws and regulations. Since, according to the relator, those implied certifications were false, the relator claimed that the defendant's claims for government funds were fraudulent. The defendant, relying on Second Circuit precedent, argued that the program participation agreement only created a condition of participation, not a condition of payment, and therefore, any allegedly false certifications made in those agreements could not serve as the basis for FCA liability. The relator—as well as the United States, which filed a Statement of Interest in the suit—countered that the Second Circuit's reasoning was limited to healthcare claims. The district court sidestepped that question, as it determined that the relator's fraud claims were deficient because they were not pled with particularity.

With respect to the particularity issue, the court first observed that the relator failed to allege "any specific conduct of an individual John Doe or managerial employee," or to link any of those unidentified defendants to the defendant's allegedly false claims. Thus, the court dismissed all federal and state FCA claims against the John Doe defendants. The court then turned to the relator's specific fraud claims. The defendant argued that none of those claims was pled with particularity, since the defendant did not allege the particulars regarding the purportedly false claims to the government, including the dates or amounts of the claims, or the individuals who submitted them. In addition, the court noted that the relator did not provide a factual basis to suggest that he personally observed the defendant submitting fraudulent claims for student financial assistance. The relator argued that the particularity requirement should be relaxed, since the alleged fraud scheme was complex, involved a large number of occurrences, and took place over an extended time period; and since he was employed by the corporation for less than two years. The court, though, held that since the relator had been employed as the corporate defendant's Director of Career Services—"a relatively high-ranking position where he was likely privy" to many of the corporation's internal operations—he was "in a position to plead the fraudulent scheme in detail." Consequently, the court refused to relax the heightened pleading standard.

The court then determined that each of the relator's fraud claims were deficient, finding that: (1) with respect to the claim that the corporation misrepresented its credit transfer policies, the relator failed to identify any specific course to which the alleged misrepresentation applied, failed to identify any individual who misrepresented the corporation's policy, and failed to specify any student to whom the alleged misrepresentation was made; (2) with respect to the claim that the corporation misrepresented educational programs, and employment and graduation statistics, the relator failed to identify who made the alleged misrepresentations, when and where any such misrepresentations were made, how the representations were fraudulent, or any resulting false claim for payment that was submitted; (3) with respect to the corporation's alleged grade point average manipulation, the relator failed to identify any student whose grades were inflated or anyone who participated in the alleged grade inflation, and did not allege the time, location, amount of inflation, or course(s) involved; and (4) with respect to the claim that the corporation took adverse employment actions against employees who failed to meet student enrollment quotas, the relator failed to allege any specific instance of any such occurrence. As a result of these findings, the court dismissed all of the relator's fraud claims—both federal and state—for failure to plead the alleged fraud with particularity.

The court did grant the relator leave to file an amended complaint to cure the pleading deficiencies in connection with his fraud claims.

Retaliation

Accepting the relator's retaliation allegations as true, the court held that the relator properly stated a retaliation claim under the FCA. The court observed that the relator alleged that he was placed on probation and eventually terminated from his job because he notified the corporation that it was not being truthful to the government entities about its alleged falsification of student grades in order to receive government-backed financial aid funds for those students. As a result, the court denied the corporation's motion to dismiss the retaliation claim.

U.S. ex rel. Comeaux v. W&T Offshore, Inc., 2013 WL 4012644 (E.D. La. Aug. 6, 2013)

A *qui tam* relator alleged that an oil and gas drilling company violated the False Claims Act by failing to meet obligations under federal leases to record oil discharges into the Gulf of Mexico and by submitting false water samples and lab reports to the Environmental Protection Agency (EPA). The relator claimed that the defendant took these actions in order to continue its drilling operations on federal property, without paying for associated remediation costs, civil fines, penalties, and royalties. The defendant moved to dismiss the relator's claims, arguing that the *qui tam* complaint failed to state a claim under the False Claims Act and failed to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Eastern District of Louisiana granted the defendant's motion to dismiss. The court dismissed the suit without prejudice, however, and granted the relator leave to file an amended complaint.

The court determined that the relator's fraud allegations were based on a "false certification" theory of FCA liability, whereby the defendant falsely represented to the government that it was in compliance with the terms of the drilling lease agreements, and that its EPA reports were accurate. The court held that the relator's allegations were insufficient to support this theory, since the relator did not allege that the defendant's benefit from the government—the ability to conduct its drilling operations on federal property—was conditioned on its accurate certifications of compliance and/or EPA reports. The court observed Fifth Circuit precedent stating that "the Government's ability to seek a range of remedies in the event of noncompliance suggests that payment is not conditioned on a certification of compliance." Since the leases at issue did not mandate cancellation under the aforementioned circumstances, the court held that the relator's false certification claim was deficient.

Similarly, the court held that he relator's "reverse false claim" allegation—whereby the defendant violated the FCA by making false statements in order to avoid paying various obligations to the government. As an initial matter, the court noted that in the Fifth Circuit, reverse false claims liability does not extend to potential environmental fines, penalties, and remediation costs. The court, however, held that the FCA's reverse false claims provision does apply to the defendant's alleged failure to remit royalty payments to the government. The court, though, ultimately concluded that the relator did not plead sufficient facts to support his reverse false claim allegation, noting that he did not allege any false statements material to the defendant's royalty obligations, nor did he specify the people or other particulars of the alleged fraud.

As a result of these findings, the court dismissed the relator's complaint. The court, though, granted the relator leave to amend his complaint.

U.S. ex rel. Thomas v. Black & Veatch Special Projects Corp., 2013 WL 3878168 (D. Kan. July 26, 2013)

A *qui tam* relator filed suit against a construction company. According to the relator, the U.S. Government awarded the defendant a contract to provide goods and services in Afghanistan; the contract required the defendant to comply with Afghan law, and Afghan law required the defendant to obtain visas and work permits for all of its foreign citizen employees. The relator alleged that the defendant experienced delays in obtaining the necessary documents and created false documents for seven employees. The company then submitted claims for payment to the United States for work performed by those employees. The relator contended that

the defendant's claims to the government were false, because they included the defendant's false certification that the claims were "correct and proper for payment." The defendant moved to dismiss the relator's complaint, arguing that the relator failed to state a claim and failed to plead the alleged fraud with particularity.

The U.S. District Court for the District of Kentucky granted the defendant's motion in part. The court dismissed the relator's <u>express</u> false certification claims, but allowed the relator to proceed on an <u>implied</u> false certification theory. The court stated that "[t]o state a viable claim based on an express-false-certification theory, relators must allege that defendant knowingly submitted a legally false request for payment to the government, the request contained a false statement, the false statement was material to the government's decision to pay, and the government paid the request." The court determined that the relators' characterization of the defendant's certification that its invoices were "correct and proper" was too broad—rather than encompass all material terms of the contract, the "correct and proper" language merely referred to "the propriety of the fiscal data and reports submitted to the government." Thus, the court rejected the relator's express false certification theory.

The court further continued, however, and evaluated the implied false certification theory, which requires a showing that the "defendant knowingly submitted legally false requests for payment to the government, that the government paid the requests and that, had the government known of the falsity, it may not have paid." Here, the court held that the *qui tam* complaint could withstand the defendant's motion to dismiss. The court noted that the complaint described the significance of the government's contracting efforts in Afghanistan, as part of its counterinsurgency strategy; stated that the defendant was being paid, in part, to refrain from actions that could undermine the counterinsurgency; alleged that the defendant expressly agreed to comply with Afghan law when performing the contract; and detailed that the government could reduce or suspend the defendant's payments if the defendant failed to comply with materials requirements of the contract. The court held that these allegations were sufficient to state a claim under the implied false certification theory.

The court then turned to the defendant's argument that the alleged fraud was not pled with particularity. The court determined that the relator's allegations were pled with sufficient particularity, noting that the "fraud allegations may be alleged on information and belief when the facts in questions [sic] are peculiarly within the defendant's knowledge and the complaint sets forth he factual basis for the plaintiff's belief." Here, the court held that the relator adequately pled a reasonable basis for believing that the defendant submitted falsified documents to the Afghan government, in light of the fact that information regarding the actual submission of the documents to the Afghan government was peculiarly within the defendant's knowledge.

As a result of these findings, the court dismissed the relator's claims, to the extent that the claims were based on an express false certification theory, but allowed the claims to proceed, to the extent that they were based on an implied false certification theory.

U.S. ex rel. Gillespie v. Kaplan Univ., et al., 2013 WL 3762445 (S.D. Fla. July 16, 2013)

A *qui tam* relator alleged that a group of educational institutions violated the False Claims Act by falsely certifying their compliance with various statutory and regulatory requirements—including provisions of the Rehabilitation Act of 1973—in order to receive federal student financial aid funds. The relator claimed that the defendants entered in "program participation agreements" with the Department of Education that required compliance with these underlying provisions. The relator filed a complaint against the defendants with the Education Department's civil rights office, alleging discrimination and retaliation based on a disability. That complaint led to a government investigation that—while not supporting the relator's allegations—revealed several issues regarding the defendants' policies and procedures. Subsequently, the defendants entered into a "resolution agreement" with the civil rights office, whereby the defendants agreed to implement new policies and procedures to address the issues identified in the investigation—and although the investigation did not determine that the defendants failed to comply with the Rehabilitation Act, the defendants' resolution agreement included language regarding the defendants' compliance with that statute. The relator alleged that the defendants falsely certified to the government that they were in compliance with the Rehabilitation Act and filed suit under the False Claims Act based on a "false certification" theory. The defendants moved for summary judgment on the relator's claim. They filed numerous depositions of employees who were involved in the execution of the program participation agreements and/or the task of ensuring the defendants' compliance with the Rehabilitation Act. Based on these submissions, the defendants argued that the relator's fraud claim could not be maintained, because the relator could not establish: (1) that the defendants actually violated the Rehabilitation Act—and thus, the relator could not provide that the defendant's certifications were actually false; (2) that the defendants acted with the requisite scienter to violate the FCA; and (3) that any alleged false statement was material to the government's decision to release federal funds to the defendants.

Holding: The U.S. District Court for the Southern District of Florida granted the defendants' summary judgment motion, finding that the relator's allegations could not establish the necessary scienter.

The court determined that, based on the undisputed evidence, the responsible officials within the defendants' entities—whom the relator did not allege lacked the skills or experience to do their jobs—were aware of the obligation to ensure compliance with the Rehabilitation Act. In addition, these officials took various steps—including consulting with in-house counsel and outside counsel, and redrafting company policies and procedures based on language that had been approved by the Equal Employment Opportunity Commission—to meet that obligation. Furthermore, the court noted that the government's investigation indicated that the defendant had not actually violated the Rehabilitation Act. Consequently, the court held that the relator could not establish that the defendants knowingly violated the FCA by falsely certifying compliance with the Rehabilitation Act. The defendants' motion for summary judgment was granted.

See *U.S. ex rel. Grenadyor v. Ukranian Vill. Pharm., Inc.*, 2013 WL 5408573 (N.D. Ill. Sept. 26, 2013), at page 66.

See *U.S. v. Wells Fargo Bank, N.A.*, 2013 WL 5312564 (S.D.N.Y. Sept. 24, 2013), at page 71.

See *U.S. ex rel. Winkler v. BAE Sys., Inc.*, 2013 WL 3724784 (E.D. Mich. July 15, 2013), at page 96.

See *U.S. ex rel. Hoffman v. National Coll.*, 2013 WL 3421931 (N.D. Ind. July 8, 2013), at page 100.

F. FCA Seal/Service Issues

U.S. ex rel. Walker v. Community Educ. Ctrs., Inc., 2013 WL 4774778 (D. Ariz. Sept. 5, 2013)

Three *pro se* relators filed a *qui tam* complaint alleging that an educational center violated the False Claims Act. The complaint also alleged various employment law claims, but did not include a claim under the FCA's anti-retaliation provision. The relators originally did not file their *qui tam* complaint under seal, nor did they serve a copy of the complaint and a disclosure statement on the government before serving the defendant with the complaint. The U.S. District Court for the District of Arizona held that "there [was] no evidence the Government was ever given an opportunity to intervene in this case" due to the relators' violations of the FCA's seal provisions. The court further determined that the government was irreparably harmed by the relators' disclosure of the *qui tam* allegations to the defendants before the government had an opportunity to investigate those claims. Moreover, the court stated that the relators' failure to comply with the FCA's directives "irreversibly frustrate[d] the congressional goals underlying the sealing provisions." As a result of these findings, the court dismissed the relators' *qui tam* allegations with prejudice to the relators, but without prejudice to the government. In a footnote, the court also noted that the relators were not entitled to proceed *pro se* and that their *qui tam* claims would be dismissed on that basis as well. The court then dismissed the relators' remaining, non-FCA claims, finding that those claims were improperly included in a *qui tam* suit. The non-FCA claims were dismissed without prejudice to the relators.

United States v. Educ. Mgmt. LLC, 2013 WL 4591317 (W.D. Pa. Aug. 28, 2013)

A relator brought a *qui tam* suit alleging that multiple educational service providers defrauded the federal government and violated the False Claims Act. The United States intervened in the relator's suit and the relator's *qui tam* complaint was unsealed. A second, similar *qui tam* suit was filed a few months after the first suit had been filed, in the same court—the U.S. District Court for the Western District of Pennsylvania. The government declined to intervene in the second suit, and that complaint was unsealed before the government announced its intervention decision in the first suit. Eventually, the second suit was dismissed, upon a stipulation of the parties. Although the court unsealed both *qui tam* complaints, it kept 77 of the previously-filed documents in the first suit, and 22 documents filed in the second suit under seal; the titles of most of those documents were not even publicized on the court's electronic filing system.

One of the defendants moved to lift the sealing order in both cases, arguing that unsealing was required, due to fundamental fairness and due process concerns. The defendant proposed that the court: (1) order the disclosure of all information that the government provided to the relator; (2) limit access of the unsealed information to the defendants and their counsel only; (3) limit the use of any such information to the defense of the pending *qui tam* suit; (4) redact any unsealed documents, as necessary; and (5) require the government to prepare an "under seal" log of the documents at issue. The United States opposed the defendant's request, arguing that the sealed documents should remain under seal, as the False Claims Act only provides for unsealing of the *qui tam* complaint only. The government claimed that the seal protects its investigatory and deliberative process and promotes candor in the government's communications with the court regarding the status of its investigation of relators' fraud allegations. In addition, the government claimed that the sealed documents were irrelevant to any claims or defenses in either of the *qui tam* cases. The government agreed that, should the court order that any of the documents be unsealed, then the court either should review the government's recommended redactions *in camera* or limit the disclosure to "attorneys eyes only."

The court recognized compelling interests on both sides—as well as the "strong public interest in the disclosure of judicial proceedings." Ultimately, the court determined that "[t]he government's justifications are conclusory and the sealed documents merely reflect routine investigative procedures and/or widely known information." As the court concluded that "the government has not explained the adverse consequences of disclosure of [the sealed] information," it lifted the seal in both *qui tam* suits, but only as to the defendant's attorneys of record and with the limitation that the information only be used in defense of the present *qui tam* suit.

U.S. ex rel. Griffith v. Conn, 2013 WL 3935074 (E.D. Ky. July 30, 2013)

Two relators brought a *qui tam* suit against an attorney and an administrative law judge for the U.S. Social Security Administration, alleging that the defendants violated the False Claims Act by engaging in a fraud scheme in which the judge conducted sham Social Security benefits proceedings for the attorney's clients and awarded the clients benefits to which they were not entitled. The relators' suit was properly filed under seal and the United States received several extensions of the seal—over 400 days—before declining to intervene in the suit. The court then lifted the seal and ordered the relators to serve the complaint on the defendants. Subsequently, the relators filed an amended complaint. The United States moved to re-seal the *qui tam* suit, arguing that the relators' amended complaint must also be filed under seal. The government claimed that "complaint," as used in the False Claims Act, refers both to original *qui tam* complaints and to amended *qui tam* complaints, and urged the court to impose the FCA's seal requirement for amended *qui tam* complaints that add new defendants, new claims, or new substantial details.

The U.S. District Court for the Eastern District of Kentucky rejected the government's argument and denied its motion. The court held that the government's interpretation of the FCA's seal provision "is neither consistent with the Act's text nor required to effectuate the Act's purpose." The court determined that the plain language of the FCA—which does refer to "the complaint," but which never references an "amended complaint"—suggests that Congress was not concerned about sealing amended *qui tam* complaints after the government makes its intervention decision. The court reasoned that allowing amendments to *qui tam* complaints while the suit is still under seal "does not affect the United States' ability to 'ascertain the status quo and come to a decision as to whether it will intervene.'" (internal citation omitted) However, once the United States decides not to intervene in a *qui tam* suit and the complaint has been unsealed, "the defendant is aware of the claims against him, . . . [t]he purpose of the sixty-day seal requirement has been accomplished, and there is no need to reseal the case again in light of the amended complaint." The court further noted that, if an amended *qui tam* complaint causes the government to change its mind and seek to intervene in the suit, the FCA allows the government to do so, as it permits intervention after an initial declination, upon a showing of good cause. Moreover, the court held that, even applying the approach suggested by the government—whereby amended complaints that allege new defendants, claims, or details must be filed under seal—the present relators' amended complaint would not be re-sealed, since the amended complaint was "not substantially different than the original complaint."

The government's motion to re-seal the relator's *qui tam* action was denied.

G. Government's Dismissal of *Qui Tam* Complaint

U.S. ex rel. Piacentile v. Amgen, Inc., 2013 WL 5460640 (E.D.N.Y. Sept. 30, 2013)

Two *qui tam* relators filed suit against a pharmaceutical company, alleging violations of the False Claims Act in connection with the company's alleged off-label marketing of drugs. Over a nine-year period, ten such *qui tam* actions were filed against the company—including some filed before the present relators'. Eventually, the defendant reached a settlement in principal with the government and numerous relators, totaling $780,000,000 in civil and criminal penalties. The government offered the present relators a $1.8 million share of the expected recovery. The relators rejected the offer. The government then moved to dismiss the relators' *qui tam* action, arguing: (1) the relators' complaint did not allege fraud with particularity; (2) the relators' suit was barred under the FCA's public disclosure bar, since the relators' allegations were based on publicly-available information; (3) the relators' allegations had been previously raised by other relators in previous *qui tam* suits, and thus, were barred by the FCA's first-to-file provision' and (4) the government was entitled to dismiss the relators' suit pursuant to its prosecutorial discretion, as recognized by the FCA.

The U.S. District Court for the Eastern District of New York held that "the first three of the government's arguments [were] largely academic, because pursuant to Section 3730(c)(2)(A), the government is correct in asserting that, with few exceptions not present here, it has the right to put an end to litigation it deems expensive and needless or futile." The government contended that it preferred not to expend any additional resources on the various *qui tam* actions against the defendant, given the recent budget sequestration and considering the fact that the first of those actions was filed nine years ago, and the government conducted an eight-year investigation of the many relators' claims—after which it concluded that the present relators' claims were unsupportable. The court held that these reasons provided a sufficient basis for dismissing the present relators' suit. In reaching its conclusion, the court noted that when the government reached its settlement with the defendant, that agreement explicitly exempted the conduct alleged in the present relators' suit, and thus, the government did not settle the present relators' claims and instead sought to dismiss those claims for pleading deficiencies. Since the court reasoned that the government could theoretically reinstate the present relators' claims in the future if new information came to light, it held that the claims had not been settled, and thus, could be dismissed. As a result, the court granted the government's motion to dismiss the present relators' claims, finding that "the government was within its right to determine that further litigation was unlikely to lead to fraud prevention or additional recovery."

U.S. ex rel. Schweizer v. Oce' North Am., Inc., 2013 WL 3776260 (D.D.C. July 19, 2013)

A *qui tam* relator filed suit in the U.S. District Court for the District of Columbia, alleging that her former employer, a government contractor, violated the False Claims Act by failing to offer the government the same price discounts it offered to its private customers and by selling the government goods made in countries not designated under the Trade Agreements Act. The relator amended her *qui tam* claims to add a co-relator. The relator also independently alleged that the defendant violated the FCA's anti-retaliation provision by threatening her and later terminating her employment after she notified her supervisors of the alleged FCA violations.

The United States declined to intervene in the relators' *qui tam* suit, but eventually, the government participated in settlement negotiations to resolve the fraud claims. After the government, the second relator, and the defendant—but not the first relator—agreed to settle the *qui tam* claims, the government intervened in the suit, the relators' fraud claims were dismissed, and the relators received a share of the government's recovery. Notably, the district court did not hold a hearing or otherwise evaluate the proposed settlement, finding that government had the unfettered right to dismiss *qui tam* suits. The district court also granted the defendant's motion to dismiss the first relator's retaliation claim, finding that the relator failed to show that she had engaged in protected activity under the FCA. The relator appealed the district court's rulings to the U.S. Court of Appeals for the District of Columbia, challenging the settlement of the *qui tam* claims and the dismissal of the retaliation claim. The government opposed the challenge to the settlement and the defendant opposed therelator's appeal of the dismissal of the retaliation claim.

The D.C. Circuit Court reversed the district court's rulings, finding that the court erred by dismissing the *qui tam* claims without first conducting a hearing to determine that the settlement was "fair, adequate, and reasonable," and by dismissing the relator's retaliation claim even though the relator had stated a prima facie retaliation claim. On remand, the district court then held a hearing on the proposed settlement and conducted a hearing on the retaliation claim.

Holding: The D.C. District Court denied the relator's challenge to the settlement of the *qui tam* claims, finding that the agreement was fair. The court denied the defendant's summary judgment motion on the retaliation claim.

Government's Settlement and Dismissal of *Qui Tam* Claims

The district court noted that the FCA allows the government to settle *qui tam* claims, "notwithstanding the objections of [the relator] if the court determines after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." The relator argued that she was entitled to full-blown discovery on her claims in order to prove that the settlement was inadequate. The court rejected that assertion, finding that the plain language of the FCA does not include such a provision. The court further concluded that permitting full-blown discovery on *qui tam* claims as part determining the reasonableness of an agreement to settle those claims would, in essence, "mak[e] trial a precondition of settlement." The court decided that the fairness hearing is designed to force the government to "provide some reasoning behind its decision to settle the case," and to give relators "an opportunity to direct the court's attention to facts or allegations that would suggest the settlement was not fair. . ." Thus, the court held that relators are not entitled to full-blown discovery on their *qui tam* claims as of right.

The court further observed that the FCA does not specific a test for determining the fairness of FCA settlements, and that other courts have looked to the criteria for judicial review of class action settlements for guidance. Applying those factors—which consist of "(a) whether the settlement is the result of arm's length negotiations; (b) the terms of the settlement in relation to the strength of plaintiff's case; (c) the status of the litigation proceedings at the time of settlement; (d) the reaction of the class [here, of the relator]; and (e) the opinion of experienced counsel—the court held that the settlement was fair; none of the factors weighed in favor of the relator. The court first found that, although the record was sparse, there was no evidence of collusion between the government and the defendant concerning the terms of the settlement—the relator even conceded that the settlement was reached after an extensive government investigation. Next, the court considered the settlement in relation to the strength of the relator's claims. Although the court found that there was insufficient information to make a complete assessment of the merits of the relator's claims, it observed that the government was able to make an adequate showing that it engaged in "significant investigative effort" and calculated its litigation risks based on the strengths and weaknesses of the claims, before agreeing to settle for a little more than single damages on the claims the government felt it could prevail on. As a result, the court held that the second factor weighed in favor of the settlement. Third, the court assessed the status of the proceedings at the time of the settlement and again focused on the fact that the government had conducted an extensive investigation into the relator's claims, and therefore had sufficient information to make an informed judgment regarding the settlement. Next, the court held that the "reaction of the relator" factor weighed equally in favor of both sides, noting that one of the two relators consented to the settlement, while the other did not. Finally, the court decided that the opinion of experienced counsel factor did not weigh in favor of either side. The settlement agreement was approved.

Retaliation

The district court stated that FCA retaliation claims consist of "two basic elements: (1) acts by the employee in furtherance of a suit under [the FCA]—acts also known as 'protected activity'; and (2) retaliation by the employer against the employee 'because of' those acts." The court further declared that the retaliation element involves two questions: (1) whether the employer knew the employee was engaged in protected activity; and (2) whether the adverse action against the employee was motivated by the employee's protected activity—notably, the district court held, contrary to the circuit court's opinion, that relators' protected activity must be a "but-for" cause of the alleged retaliation, and not merely one of multiple motivating factors. The court determined that the relator properly pled the elements of her FCA retaliation claim, and stated that "the ultimate question [is] whether a reasonable jury could infer retaliation from all the evidence." The defendant argued that the relator could not establish that retaliation for protected whistleblowing activity was a "but-for" cause of the decision to terminate the relator's employment. The court held that since both sides offered evidence in support of their arguments regarding the reason(s) for the relator's termination, there was a genuine issue of material fact as to whether retaliation was a but-for cause of the termination—an issue that a jury should decide. Thus, the court held that summary judgment was not proper and denied the defendant's motion.

H. Leave to Amend *Qui Tam* Complaint

U.S. ex rel. Saldivar v. Fresenius Med. Car Holdings, Inc., 2013 WL 5340480 (N.D. Ga. Sept. 17, 2013)

A *qui tam* relator moved for leave to amend his second amended complaint to expand his FCA claims from a limited geographic area to a nationwide scheme involving fraudulent Medicare and Medicaid billing for end-stage renal disease medications. More specifically, the relator alleged that the defendant improperly billed the government for dispensing "overfill" amounts of drugs it received—surplus amounts of drugs remaining in vials after the drugs were administered. The U.S. District Court for the Northern District of Georgia denied the relator's request, but directed the parties to exchange focused discovery on the allegation of a nationwide scheme—the court indicated that the relator would have an opportunity to amend the complaint should the focused discovery produce sufficient evidence. During discovery, the defendant produced documents disclosing that the allegedly fraudulent billing practices had occurred on a nationwide scale. The relator then renewed his motion to file an amended complaint, and, with that motion, submitted a more detailed complaint alleging a nationwide fraud scheme. In addition, this proposed third amended complaint added four new *qui tam* allegations under the FCA. These four new claims included two claims regarding fraudulent billing for "ghost drugs"—overfill amounts that were not actually in the vial and therefore never administered to patient, and two claims involving illegal kickbacks between the defendant and drug manufacturers. The defendant opposed the relator's motion.

First, the defendant argued that the relator failed to comply with the FCA's seal requirement when submitting the amended complaint, thereby depriving the government an opportunity to intervene in the new claims. The court rejected that argument and held that the FCA's seal provisions do not apply to amended *qui tam* complaints. The court further noted that, upon a showing of good cause, the government has the ability to intervene in *qui tam* actions involving amended complaints, and reasoned that requiring relators to file amended complaints under seal would only delay the progress of *qui tam* litigation.

Next, the court addressed the relator's amended complaint. While the court determined that the complaint properly alleged a nationwide fraud scheme, consistent with the court's prior order, it rejected the relator's attempt to add completely new claims to the amended complaint. While the court determined that the "ghost drug" allegations were related to the relator's original allegations, it ultimately denied the relator's request to add those claims, finding that the relator failed to plead those fraud allegations with particularity. The court based its ruling on the fact that the ghost drug allegation was based on the relator's comparisons of the defendant's billing for overfill amounts with the average amount of overfill. The court

held that these allegations were not pled with sufficient particularity, given the potential for significant differences between actual and average overfill amounts. In addition, the court held that the relator did not allege sufficient facts regarding the particulars of the defendant's alleged fraudulent billing for ghost drugs, as the proposed amended complaint did not indicate the amount of non-existent overfill for which the defendant billed the government, who reported overfill that did not existence and by what method, or when the alleged violations occurred. Finding that the relator had no personal knowledge of his fraud allegations, the court held that he could not provide the necessary indicia of reliability to create a reasonable inference that the defendant actually submitted false claims. The relator's request to add the ghost drug claims was denied. In addition, the court denied the relator leave to add kickbacks claims to the third amended complaint, finding that the kickback claims were not related to any of the relator's original claims, and noting that the relator was not granted "*carte blanche* leave to file a new complaint adding additional claims," but rather was authorized to conduct focused discovery regarding the defendant's nation-wide policies and then file an amended complaint if warranted. The court reasoned that none of the relator's original allegations gave the defendant notice of the possibility of a kickback claim, and thus concluded that allowing the relator to add these two completely new claims—as the parties prepared for summary judgment—would unduly delay the case. Consequently, the court denied the relator's motion to add kickback claims.

Sears v. Livingston Mgmt. Inc., 2013 WL 3730094 (M.D. La. July 11, 2013)

Three relators filed a *qui tam* suit against a residential management company, alleging that the defendant fraudulently submitted tenant income certifications and verifications to the federal government in order to secure federal funds. After the defendant answered the relators' complaint, the parties agreed to a discovery plan and jointly proposed dates for amending the complaint or adding new parties, claims, counterclaims, or cross-claims. Subsequently, the relators moved to amend their complaint to add thirteen additional defendants and a new conspiracy claim. The defendant opposed the relators' motion for leave to amend their complaint, arguing that the relators waited three years and should have amended the complaint sooner. In addition, the defendant claimed that the relators were acting in bad faith and had a dilatory motive, and that allowing the amended complaint would be unduly prejudicial to the defendant. The defendant also argued that the relators failed to follow proper procedures, since the proposed amended complaint was not filed under seal.

The relators responded that they could not amend the complaint any sooner because the United States kept their original *qui tam* complaint under seal for nearly two years before declining to intervene. Additionally, they contended that

it was only after the government shared information from its investigation with the relators that they were had sufficient information to amend their complaint. They further asserted that the defendant would not be prejudiced by the amended complaint, because discovery in the case was still in its infancy. Moreover, they argued that they followed the required procedures, since only original *qui tam* complaints—not amended complaints—must be filed under seal, under the FCA.

The U.S. District Court for the Middle District of Louisiana granted the relators' motion to amend their complaint.

The court agreed with the relators that they did not engage in undue delay, since the United States took twenty-two months to investigate the relator's allegations, before choosing not to intervene in their suit. The court noted that "[t]here is nothing to indicate that Plaintiffs were somehow responsible for the length of time the Government needed to make its decision. The court also agreed that the relators did not cause undue delay, since their proposed amendments were based on investigatory information the government did not immediately turn over to the relators. The court also rejected the defendant's "undue prejudice" argument, finding that the defendant's assertions that it expended significant time and resources since the filing of the original *qui tam* complaint were "generic." Furthermore, the court concluded that any work the defendant previously accomplished would not be rendered ineffective simply because additional defendants were being added to the complaint, nor would the additional proposed cause of action prejudice the defendant, since the defendant's "investigation, discovery and preparation conducted thus far should likewise cover large portions of the new allegations." The court also noted that, at the time the relators moved to amend, there were seven months remaining in discovery and the trial date was twenty months away; the defendants would not be prejudiced by the proposed amended complaint—and the court stated that the current deadlines could be adjusted, if necessary to accommodate the additional parties.

Finally, the court rejected the defendant's argument that allowing the proposed amendment would be futile, since relators failed to make any allegations that would support a finding of liability against the additional proposed defendants. The court disagreed, noting that the relators had already survived the defendant's prior motions to dismiss for failure to state a claim and failure to plead fraud with particularity. The relators' original complaint described a scheme in which defendant allegedly fraudulently managed several multi-family housing complexes. The proposed amended complaint named the owning entities and general partners of the owning entities for several of the complexes managed by the defendant—each of whom was alleged to have engaged in the fraud scheme and/or were alleged to be liable under a *respondeat superior* theory. Thus, the court held that the proposed amendment was not futile. The court also rejected the defendant's argument that the relators' proposed amended complaint was not properly submitted, since it was not filed under seal. The relators argued that the seal requirement only applies

to original *qui tam* complaints and not subsequent amendments. Without deciding the issue, the court held that since the seal provision is not jurisdictional, even if the relators had violated the provision, their violation would not require dismissal of the proposed amended or a finding of futility.

I. Relators' Share Issues

Bagley v. United States, 2013 WL 4007774 (C.D. Cal. Aug. 5, 2013)

A successful *qui tam* relator sued the United States for a refund of federal income taxes he paid on his relator's award. The relator had sued his former employer, and that litigation resulted in the FCA defendant agreeing to pay the United States $111.2 million, of which the relator received $27.2 million as his relator's award plus $9.4 million in statutory attorneys' fees, for a total of more than $36.6 million. More than half of that $36 million was paid to the relator's attorneys pursuant to the FCA's statutory attorneys' fee provision and the relator's contingency fee agreement with his attorneys. Specifically, the relator alleged that his award was attributable to his "trade or business" (as defined by the Internal Revenue Code) as a "private attorney general" under the False Claims Act, and should not have been characterized as "other income," under applicable regulations, as the IRS required. Had the relator's award been considered trade or business income, then the payment to his attorneys would be deemed tax-deductible ordinary and necessary business expenses, which would have saved the relator millions of dollars in federal income taxes paid. The relator argued that the U.S. District Court for the Central District of California should apply the standard set forth in case law for determining whether his FCA activities were a trade or business and correspondingly, whether the payment to his attorneys was an ordinary and necessary expense. The United States, though, argued that the court should apply the judicially-created "origin of the claim" test to determine whether or not the relator's litigation expenses were incurred as business expenses or personal expenses.

The court agreed with the relator. Although the court recognized that the term "trade or business" is not defined in the IRS regulations, the U.S. Supreme Court has declared that the term is "broad and comprehensive," is based on the facts of each case, and involves activity with continuity and regularity for the primary purpose of acquiring income for profit. The court concluded that the relator satisfied this criteria, noting that the FCA framework incentivizes relators to expose fraud against the government in exchange for an award or "bounty," and "therefore, fostering a profit motive in a potential relator seems to have been Congress's intent." Although some relators may not be motivated primarily by the FCA's award structure, the court held that "unquestionably," the present relator was motivated by the prospect of an award. The court further held that none of the factors outlined by the applicable Treasury Regulation for determining profit motive weighed against the relator. These factors include: "(1) the manner in which he carried on his FCA prosecution activity; (2) the expertise of [the relator] and his advisors; (3) the time and effort expended by [the relator]; (4) the success of [the relator] in carrying on similar activities; (5) [the relator]'s history of income or losses with respect to the FCA prosecution activity; (6) the amount of occasional profits earned; (7)

the financial status of [the relator] while he carried on his FCA prosecution activity; and (8) any element of personal pleasure or recreation."

Applying those factors, the court observed that the relator—who, within seven months, filed two *qui tam* suits alleging numerous claims against the same defendant—spent over 200 hours preparing the lawsuits with his counsel and later "exerted diligent efforts to convince the Government to intervene in the FCA suits in order to reach a successful conclusion." Ultimately, the government intervened in some of the claims alleged in one of the two suits. In addition the court noted that the FCA defendant terminated the relator's employment more than a year before he filed the two *qui tam* complaints, and that during the nearly ten-year period between the time the suits were filed and eventually resolved, the plaintiff was unemployed and "exclusively worked on his FCA prosecution activity," while relying on a retirement pension and some savings as his sole sources of income. The court further noted that, from the time he first consulted with his *qui tam* counsel, the relator maintained a contemporaneous log of the hours he worked on his *qui tam* litigation; the log revealed that the relator spent nearly 6000 hours on his FCA activity, which included attending hundreds of meetings with his counsel and federal government attorneys and agencies, reviewing drafts of documents prepared by his attorneys, and assisting both his attorneys and the government attorneys in reviewing the FCA defendant's documents. The relator also had his deposition taken, offered his expertise to his counsel on the relevant statutes, regulations and government contracting provisions at the heart of the *qui tam* allegations. The relator was also able to decipher the FCA defendant's "code" words used throughout internal memoranda, so as to decipher whether a document that appeared innocuous in fact reflected FCA violations. Additionally, the court determined that the relator assisted his counsel in preparing for depositions of the FCA's defendant's employees, as the relator was familiar with those individuals. He also drafted or edited more than 70 documents in furtherance of the FCA suits. The court recognized that the relator completed all of these tasks in order to successfully prosecute his FCA claims and to receive an award; his FCA activities were not a hobby and did not bring any personal pleasure to the relator.

Based on these factual findings, the court held that the relator met his burden of proof to show that his activities as a relator over a nearly ten-year period were a trade or business for income tax purposes. The court then held that the relator was "engaged in the business of prosecuting FCA lawsuit and providing services to the government in that prosecution." Before holding that the more than $18 million the relator paid to his attorneys in statutory and contingency fees constituted ordinary and necessary business expenses, the court turned to the government's "origin and nature of the claim" argument in which the government argued that the nature of the relator's claim—where "claim" refers not to the relator's tax claim, but instead to the underlying FCA claim—was personal. The court held that, by filing

two *qui tam* suits, the relator stood in the shoes of the United States, and was not acting in his personal capacity. Contrary to the government's assertion, the court declared: "The relator is not simply an informant, as the FCA encourages relators to be more than that, by taking an active role in investigating the fraud and filing a lawsuit." Consequently, the court rejected the government's contention that he relator's litigation expenses were personal and should not be deductible as ordinary and business expenses. The court held that the relator was entitled to a refund of nearly $4 million, plus interest, in federal income taxes he had paid.

See *U.S. ex rel. Newell v. City of St. Paul, Minn.*, 2013 WL 4529353 (8th Cir. Aug. 28, 2013), at page 17.

See *U.S. ex rel. Gale v. Omnicare, Inc.*, 2013 WL 3822152 (N.D. Ohio July 23, 2013), at page 5.

J. Sanctions

See *Leveski v. ITT Educ. Svcs., Inc.*, 2013 WL 3379343 (7th Cir. July 8, 2013), at page 32.

K. Settlement Issues

U.S. ex rel. Osheroff v. MCCI Group Holdings, LLC, 2013 WL 3991964 (S.D. Fla. Aug. 2, 2013)

A *qui tam* relator filed suit against several healthcare entities, alleging violations of the False Claims Act. The United States declined to intervene in the suit. Each of the defendants participated in mediations with the relator, and the present defendant reached an agreement with the relator to settle the relator's fraud claims. That agreement was memorialized in a handwritten "memo of understanding." None of the other defendants agreed to a settlement with the relator. After both the relator and the present defendant filed notices of settlement with the district court, they submitted their memo of understanding to the U.S. Department of Justice, in order to obtain the government's approval of the settlement and its required consent to the dismissal of the *qui tam* claim. The government refused to consent to the settlement, unless certain additional terms were included in the agreement. While the relator and the defendant were exchanging drafts of the agreement, the U.S. District Court for the Southern District of Florida dismissed the relator's claims against the remaining defendants, finding that those claims were barred under the False Claims Act. Three days later, the present defendant sought to withdraw its settlement offer. The relator then moved to enforce the settlement. The matter was referred to a magistrate judge for a report and recommendation, and after a hearing, the magistrate judge recommended that the relator's motion be denied, finding that no binding agreement had been reached between the relator and the present defendant, since the government had not yet approved the settlement.

The U.S. District Court for the Southern District of Florida disagreed with the magistrate judge. The court determined that "the parties reached agreement on all essential terms at the mediation and memorialized them in the 'Memo of Understanding' . . . The parties' meeting of the minds on these essential terms—payment of money in exchange for mutual releases, no admission of liability, and dismissal—was sufficient to form a binding and enforceable agreement. Moreover, the parties represented to the mediator, to each other, and to the Court that they had reached a full settlement." The court further held that the defendant's attempt to withdraw its settlement offer arrived too late, since the parties had already agreed on all material terms of the settlement during the mediation. The court noted that while the government had not yet approved the settlement, the issues raised by the government were not essential to the agreement between the relator and the defendant. The court reasoned that since the government did not intervene in the *qui tam* suit, the government was not a party to the suit—and since the government was not a party to the suit, it was not a party to the settlement either. Thus, the fact that the government insisted that various additional terms be included in the settlement agreement—terms which the court stated were "little more than

boilerplate" and which were "not germane to the dispute being resolved"—did not affect the agreement between the relator and the defendant. The court further observed that although the FCA specifies that the government must consent to the dismissal of *qui tam* suits in the aftermath of a settlement agreement between a relator and a defendant, the statute does not require the government's consent before the parties' settlement can be considered a binding agreement.

As a result of these findings, the court held that the settlement between the relator and the defendant was subject to enforcement, and that the *qui tam* suit would be dismissed upon the government's consent; if the government did not consent to dismissal of the relator's suit, then the court stated that it would address that issue at that time.

L. Vicarious Liability

See *U.S. ex rel. Dale v. Abeshaus*, 2013 WL 5379384 (E.D. Pa. Sept. 26, 2013), at page 63.

Judgments & Settlements

JULY 1, 2013–SEPTEMBER 30, 2013

Kan-Di-Ki LLC/Diagnostic Laboratories and Radiology (C.D. Cal. Sept. 25, 2013)

Kan-Di-Ki LLC, a California-based mobile lab doing business as Diagnostic Laboratories and Radiology, agreed to pay $17.5 million to resolve allegations that the lab violated the False Claims Act by engaging in an illegal kickback scheme in which the company charged various Skilled Nursing Facilities (SNFs) lower rates for inpatient services in exchange for referrals of outpatient services that were billed to Medicare and Medi-Cal. Two former Diagnostic Lab employees, Jon Pasqua and Jeff Hauser, brought a *qui tam* suit against the lab; they will receive $3,755,500 as their share of the government's recovery. Pasqua and Hauser were represented by TAFEF members Niall McCarthy and Justin Berger of Cotchett, Pitre & McCarthy, LLP.

The Macalan Group Inc. (Sept. 16, 2013)

A Colorado Springs-based security contractor, The Macalan Group Inc. (formerly known as NEK Advanced Securities Inc.), has agreed to pay the government $2.08 million and relinquish an outstanding invoice for $744,969 in order to resolve allegations that it submitted false claims in connection with a government contract. The Macalan Group was under contract with the U.S. military's Joint Improvised Explosive Device Defeat Organizations to develop and deploy specialized teams to combat IEDs in Iraq and Afghanistan. The security contractor allegedly claimed excessive or unallowable costs, including overinflated equipment leasing fees. In addition to the settlement payment, The Macalan Group will return weapons and accessories that were acquired under the contract.

Florida Radiation Oncology Providers (N.D. Fla. Sept. 13, 2013)

Several radiation oncology providers located in Pensacola, Fla. have agreed to pay $3.5 million to the federal government and the state of Florida. The defendants—Gulf Region Radiation Oncology Centers Inc. (GRROC), Gulf Region Radiation Oncology MSO LLC, Sacred Heart Health System Inc., West Florida Medical Center Clinic P.A., Emerald Coast Radiation Oncology Center LLC, Dr. Gerald Lowrey, and Dr. Rod Krentel—allegedly billed Medicare, Medicaid and TRICARE for ineligible radiation oncology services between 2007 and 2011. The allegedly false claims included bills for services that lacked required physician supervision, as well as bills for services that were not reflected in patients' medical records. The government also contended that the defendants double-billed for certain procedures and overstated the level of services provided to increase reimbursement rates. The settlement resolves claims in a *qui tam* lawsuit brought by a former GRROC employee, Richard Koch. Koch will receive an approximate $609,796 award from the government's recovery.

Forest Park Medical Center, LLC (Sept. 12, 2013)

Forest Park Medical Center, LLC (FPMC) paid $285,000 to resolve claims that it violated the False Claims Act between 2008 and 2012. The government alleged that an FPMC representative provided illegal kickbacks to physicians in exchange for referrals for Tricare patients. Though FPMC did not seek reimbursement from federal sources, the United States contended that the excessive remuneration to area physicians constituted unlawful kickbacks made to obtain referrals of federal healthcare program patients, in violation of the Anti-Kickback Statute. In exchange for a Non-Prosecution Agreement between the United States and FPMC, the hospital agreed to retain an independent monitor for at least 24 months and to cooperate with certain ongoing investigations.

Major Pharmaceuticals (Sept. 4, 2013)

The United States and the State of Texas will receive $5 million from a settlement agreement with Major Pharmaceuticals to resolve allegations that the drug company violated the False Claims Act. Major Pharmaceuticals allegedly reported inflated prices for their drugs to the Medicaid program, causing Medicaid to reimburse for these drugs at an inflated rate. The government contended that Major used the inflated reimbursement rates to convince pharmacies and other medical providers to purchase its drugs. The allegations were initially brought by Ven-A-Care of the Florida Keys. Ven-A-Care was represented by TAFEF member Jim Breen of The Breen Law Firm, P.A.

Wahiawa General Hospital (Aug. 30, 2013)

Honolulu-based Wahiawa General Hospital ("WGH") agreed to pay $451,428 to resolve allegations that WGH submitted improper bills to Medicare, Hawaii's Medicaid program, and TRICARE. The government alleged that WGH billed the programs for services provided without the required level of supervision. The settlement arose from a *qui tam* lawsuit brought by a doctor who had worked at an outpatient clinic operated by WGH. The relator will receive $84,642.75 as his share of the government's recovery. WGH also agreed to pay $75,000 in fees and costs for the relator's attorney.

Conax Florida Corporation (S.D. Ohio Aug. 29, 2013)

Conax Florida Corp. has paid $2 million to the government to resolve allegations that the company violated the False Claims Act. The government alleged that Conax failed to properly test inertia reels provided to the government; inertia reels are part of a system to secure crew members in an airplane crash. Conax also allegedly used non-conforming voltage references, which are an important component of water-activated parachute releases. As part of the settlement agreement, Conax will also provide the government with 4,969 new parachute release parts, valued at approximately $2.4 million. The settlement also resolves a *qui tam* lawsuit filed by two former Conax employees. The relators, Mark Hansson and Steven Schummer, were represented by Frederick Morgan and Jennifer Verkamp of Morgan Verkamp LLC; they will receive up to $810,478.

Emory University (N.D. Ga. Aug. 28, 2013)

Emory University has agreed to pay $1.5 million to settle allegations that it violated the False Claims Act in connection with clinical trial services. The allegations arose in a *qui tam* lawsuit filed by Elizabeth Elliott, a former Clinical Research Finance Manager at Emory. Elliott contended that Emory improperly billed Medicare and Medicaid for clinical trial services which should have been—and in some cases were—billed to clinical sponsors. Of the $1.5 million settlement, $70,027.05 will go to the state of Georgia. Emory will also pay $332,500 to cover the relator's attorneys' fees, and an additional $11,250 in relation to the relator's wrongful termination claim.

Farideh Heidarpour, Ali Heidarpour, A.B.C. Billing Inc. (N.D. Cal. Aug. 28, 2013)

Farideh Heidarpour, her billing company A.B.C. Billing Inc., and her son and employee Ali Heidarpour, have agreed to pay $1.7 million to settle allegations that they violated the False Claims Act by submitting illegitimate claims to the Department of Labor, Office of Workers' Compensation Programs (DOL-OWCP). The government alleged that Heidarpour caused certain clinics to submit false claims for supplies and services that were not provided, not supported by documentation, or not medically necessary. Most of these alleged false claims involved employees from the United States Postal Service who were claiming work-related injuries. The allegations arose in a *qui tam* lawsuit brought by a physician who will receive $323,000 as her share of the government's recovery.

RPM International and Tremco Inc. (D.D.C. Aug. 28, 2013)

Tremco Inc., a subsidiary of RPM International Inc., has agreed to pay $60.9 million to settle allegations that the company violated the False Claims Act in connection with a contract with the General Services Administration (GSA) for roofing supplies and services. The government alleged that from January 2002 to March 2011, Tremco violated multiple award schedule (MAS) contracts with the GSA by failing to provide current, accurate, and complete information about its commercial sales practices; Tremco also allegedly failed to provide the government with discounts that it offered to comparable commercial customers in violation of the MAS contracts' requirements.

The government further contended that Tremco used defective adhesive in its roofing systems. The settlement agreement resolves a *qui tam* lawsuit filed by the former vice president of Tremco, Gregory Rudolph. Rudolph will receive more than $10.9 million from the government's recovery. The relator was represented by TAFEF members Mark Hanna and Ann Lugbill of Murphy Anderson, PLLC; as well as Ann-Marie Ahern of McCarthy, Lebit, Crystal and Liffman. The settlement agreement does not resolve related state false claims act allegations included in Rudolph's lawsuit.

Imagimed LLC (N.D.N.Y. Aug. 27, 2013)

Imagimed LLC, which owns and operates MRI facilities in New York State; the company's former owners, William B. Wolf III and Dr. Timothy Greenan; and its former chief radiologist, Steven Winter, have agreed to pay $3.57 million to resolve claims that they violated the False Claims Act from July 2001 through April 2008. Imagimed allegedly submitted claims for MRI scans performed with a contrast dye, without direct supervision by a qualified physician, as required by applicable federal regulations. Moreover, Imagimed, Greenan, Wolf, and Winter allegedly submitted claims for services resulting from improper financial relationships between Imagimed and referring physicians—in violation of the Stark law and the Anti-Kickback Statute. The settlement resolves a *qui tam* lawsuit brought by a local radiologist, Dr. Patrick Lynch. Lynch will receive $565,500 of the government's recovery.

UMass Memorial Health Care, Inc. and UMass Memorial Medical Center, Inc. (Aug. 23, 2013)

UMass Memorial Health Care, Inc. and UMass Memorial Medical Center, Inc. ("UMass") will pay over $50,000 to Massachusetts' Health Safety Net program to resolve allegations of submitting fraudulent bills. The allegations arose from a *qui tam* lawsuit filed by an accounts receivable collections analyst, Nelson Casto, who claimed to have noticed that an emergency room bill was submitted to the program as "bad debt" for a homeless Massachusetts resident, when in fact the services had been provided to a Canadian citizen who was willing to pay his bill.

ATI Enterprises Inc. (N.D. Tex. Aug. 22, 2013)

ATI Enterprises Inc., a Texas-based school chain, will pay $3.7 to resolve allegations that it violated the False Claims Act by falsely certifying compliance with federal student aid programs' eligibility requirements and then submitting false claims for ineligible students. The government alleged that, in order to maintain its licensure and accreditation, ATI Enterprises knowingly misrepresented its job placement statistics to the Texas Workforce Commission and the Accrediting Commission of Career Schools and Colleges. By providing inaccurate job placement rates, ATI Enterprises allegedly violated its Program Participation Agreement with the Secretary of Education—a contract that is a requirement for participation in federal student aid programs. In addition, the government contended that ATI employees improperly increased the schools' enrollment numbers by engaging in fraudulent practices. The settlement also resolves claims in two separate *qui tam* complaints against ATI Enterprises.

Richard S. Obedian, M.D. (Aug. 21, 2013)

Long Island orthopedic surgeon Richard S. Obedian agreed to pay the government $388,000 to resolve allegations that he submitted false claims to Medicare for kyphoplasty procedures. In 2005, Obedian allegedly improperly billed Medicare for the minimally invasive spine procedure, by using billing codes for more complicated and expensive surgical procedures.

Employment Specialists of Maine Inc. (Aug. 20, 2013)

Employment Specialists of Maine Inc., which provides services to adults with developmental disabilities, has agreed to pay $125,254 to resolve claims that it improperly billed MaineCare for services by a registered nurse who was excluded from participating in federal health care programs. The organization submitted an agreement to the Maine Department of Health and Human Services in 2006 certifying that it had not employed any excluded providers; however, this certification was submitted while the organization was employing the excluded nurse. Employment Specialists terminated the nurse's employment in 2007, after becoming that he was an excluded provider.

Shands Healthcare (M.D. Fla. Aug. 19, 2013)

Shands Healthcare agreed to pay $26 million as a partial settlement of claims made in a False Claims Act whistleblower case. Of the $26 million, $25,170,400 will go to the United States, and the remaining $829,600 will go to the State of Florida. The allegations against Shands are the subject of a *qui tam* lawsuit filed by Terry Myers, who was hired to perform an audit related to Medicare and Medicaid billing rules in six hospitals. According to Myers' complaint, the audit showed that, many of the Medicare and Medicaid patients admitted to the hospital did not require inpatient care. Shands allegedly ignored Myers' advice to disclose billing inconsistencies to the government. Myers was represented by Marlan Wilbanks of Wilbanks & Bridges, LLP; and Chris Casper of James, Hoyer, Newcomer & Smiljanich, P.A. The $26 million agreement settles Myers' claims regarding patients who were improperly admitted to Shands' hospitals. It does not resolve other allegations regarding improper outpatient claims, and the government's investigation of these claims is ongoing.

Planned Parenthood Gulf Coast, Inc. (E.D. Tex. Aug. 16, 2013)

Planned Parenthood Gulf Coast, a Planned Parenthood affiliate that operates 12 clinics in Texas and Louisiana, agreed to pay $4.3 million to resolve allegations that it overbilled Medicaid for services that either were not needed or not provided. The settlement resolves a *qui tam* lawsuit filed by a former Planned Parenthood employee, Karen Reynolds, who will receive approximately $1.25 million as her share of the government's recovery.

Maryland General Hospital (D. Md. Aug. 12, 2013)

Maryland General Hospital (MGH), an acute care facility located in Baltimore, agreed to pay the United States $750,000 to settle allegations that MGH overbilled Medicare for cardiac perfusion studies. The United States also contended that MGH officials failed to return Medicare's overpayments after becoming aware of them. The settlement resolves a *qui tam* lawsuit brought by Kenneth Creeger, a former financial analyst at MGH, who will receive $119,728 as his share of the recovery.

Phillip Esformes and Morris Esformes (N.D. Ill. Aug. 6, 2013)

Two nursing home operators, Philip and Morris Esformes, agreed to pay $5 million to the government to settle allegations that they took illegal kickbacks relating to the sale of Total Pharmacy—which was partially owned by Philip Esformes—to Omnicare Inc. The relator, a former Total Pharmacy employee named Maureen Nehls, alleged that Omnicare purchased the pharmacy company at an inflated price in exchange for long-term contracts with nursing homes operated by Philip and Morris Esformes. Nehls was represented by TAFEF members Matthew Organ and David Chizewer of Goldberg Kohn Ltd, as well as TAFEF members Timothy McCormack and Mary Louise Cohen of Phillips & Cohen LLP.

Larry Lehmann (S.D. Tex. Aug. 6, 2013)

Larry Lehmann, the CEO and managing partner of Acclaim Professional Services (Acclaim) agreed to pay $400,000 to settle allegations that he violated the False Claims Act while providing equipment and services to the Houston Independent School District (HISD) under the Federal Communication Commission's E-rate Program. The FCC program attempts to create more affordable Internet access for public schools and libraries by subsidizing certain equipment and services. The United States alleged that Lehmann provided gifts and loans to an HISD employee who worked on the administration of the school district's E-rate programs. The government also contended that Lehmann developed a system in which HISD employees were paid by the E-rate Program while continuing to work at the school district. The allegations were included in a *qui tam* lawsuit brought by David Richardson and Dave Gillis and the settlement resolves one of many investigations into fraud related to the E-rate Program; the government has also signed settlement agreements with Hewlett-Packard, HISD, and the Dallas Independent School District.

The University of Pittsburgh Medical Center (July 31, 2013)

The University of Pittsburgh Medical Center (UPMC) and UPMC VNA Home Health have agreed to a settlement that resolves UPMC's self-disclosure of potentially improper referrals to UPMC VNA Home Health. After the self-disclosure, the government investigated and concluded that it had sufficient evidence to file civil claims; the government claimed that certain Medicare billings were not supported by documented face-to-face encounters with doctors, as required. UPMC and UPMC VNA Home Health agreed to pay $956,590 to the government to resolve the issue.

Northwestern University (N.D. Ill. July 30, 2013)

Northwestern University signed a settlement agreement to resolve claims that it violated the False Claims Act by submitting claims for expenditures that fell outside grant guidelines from the National Institutes of Health (NIH) and the Office of Management and Budget (OMB). The allegations arose in a *qui tam* complaint filed by Melissa Theis, who worked as a purchasing coordinator at Northwestern's Feinberg School of Medicine. While reviewing invoices and reimbursement requests, Theis—who was represented by TAFEF member Linda Wyetzner of Behn & Wyetnzer, CHTD—came across irregularities in requests paid from NIH grants. The federal complaint against Northwestern asserted that the allegedly improper claims included expenditures "…that were for the personal benefit of a Principal Investigator, his friends, and his family," along with other expenses that did not meet NIH and OMB grant guidelines.

Wyeth Pharmaceuticals Inc. (E.D. Pa. and W.D. Okla. July 30, 2013)

Wyeth Pharmaceuticals Inc. has agreed to pay $257.4 million in a civil settlement relating to illegal, off-label marketing of Rapamune, an organ transplant drug. The drug maker, which was purchased by Pfizer Inc. in 2009, will also pay a $157.6 million criminal fine and forfeit $76 million in assets, for a total payment of $490.9 million. Wyeth sales representatives were trained to promote the drug—which the FDA approved for kidney transplant patients—for liver, lung, and heart transplant patients. Wyeth also provided financial incentives to encourage its representatives to promote Rapamune for these off-label uses. The civil settlement resolves two *qui tam* lawsuits. The relators in the first action—a former Rapamune sales representative, Marlene

Sandler, and a pharmacist, Scott Paris—were represented by attorneys from Grant & Eisenhofer P.A., including TAFEF member Traci Buschner. The former Wyeth sales representative who brought the second *qui tam* action, Mark Campbell, was represented by TAFEF member Shelley Slade of Vogel, Slade & Goldstein.

Beth Israel Deaconess Medical Center (July 29, 2013)

Beth Israel Deaconess Medical Center (BIDMC) agreed to pay $5.3 million to resolve allegations that it improperly billed Medicare from June 2004 through March 2008. The United States claimed that the Boston hospital billed Medicare for one-day inpatient stays for patients who merely received observational services. BIDMC also allegedly billed Medicare for "zero day" stays instead of outpatient services in order to boost its reimbursements improperly.

Dubuis Health System and Southern Crescent Hospital for Specialty Care, Inc. (S.D. Tex. July 26, 2013)

Dubuis Health System, a company that manages long-term acute care hospitals; and Southern Crescent, a long-term acute care hospital in Georgia, have agreed to an $8 million settlement to resolve allegations that they violated the False Claims Act. Medicare reimburses long-term acute care hospitals—whose patients typically remain in the hospital more than 25 days—at a higher rate than other acute care hospitals. The government alleged that from 2003 to 2009, Dubuis Health System and Southern Crescent attempted to increase their Medicare reimbursement by deliberately keeping patients hospitalized longer than was medically necessary. These allegations were initially brought in a *qui tam* lawsuit by Darlene Tucker, a former administrator at Southern Crescent. Tucker, who was represented by TAFEF member Joel Hesch, will receive $2.16 million as her share of the government's recovery.

Sherman-Dixie Concrete Industries, Inc. (July 25, 2013)

The United States will receive $664,581 from Sherman-Dixie Concrete Industries, Inc., as part of a settlement agreement to resolve allegations that the company submitted false claims while working on projects for the Tennessee Department of Transportation that were partially funded by the U.S. Department of Transportation. The United States contended that Sherman-Dixie requested payment for concrete end walls and catch basins that failed to comply with strength and rebar placement requirements. As part of the settlement, Sherman-Dixie has signed a monitoring agreement with the U.S. Department of Transportation's Federal Highway Administration, designed to prevent future False Claims Act violations.

HPH Hospice, Inc. (M.D. Fla. July 22, 2013)

HPH Hospice, a not-for-profit corporation that provides hospice services in Florida, agreed to pay $1 million to resolve allegations that it submitted false claims to Medicare and Medicaid, thus violating the False Claims Act. The United States contended that HPH Hospice submitted claims for ineligible patients; moreover, HPH Hospice allegedly adopted policies that delayed staff from discharging ineligible patients and encouraged staff to alter the files of ineligible patients. The United States further claimed that HPH Hospice provided illegal kickbacks in the form of free services to skilled nursing facilities in exchange for patient referrals. The settlement resolves a lawsuit brought by two former HPH Hospice employees, Heather Numbers and Greg Davis. The relators, who were represented by TAFEF members from Froshin & Barger, LLC, will receive $250,000 of the government's recovery.

Park Avenue Medical Associates, P.C.; Park Avenue Health Care Management, LLC; and Park Avenue Health Care Management, Inc. (S.D.N.Y. July 18, 2013)

Park Avenue Medical Associates, P.C.; Park Avenue Health Care Management, LLC; and Park Avenue Health Care Management, Inc., a group of affiliated companies known collectively as "PAMA," agreed to a $1 million settlement to resolve allegations that they violated the False Claims Act. A *qui tam* lawsuit filed on March 5, 2013, alleged that PAMA billed Medicare for unnecessary, improperly documented, or otherwise impermissible services provided to elderly, mentally ill patients. Specifically, PAMA allegedly incorrectly billed for duplicative services and violated Medicare regulations by providing psychotherapy to patients with severe dementia who were unable to benefit from the services. In addition to the monetary settlement, PAMA agreed to a Corporate Integrity Agreement with the Department of Health and Human Services Office of Inspector General. The relator in the *qui tam* lawsuit against PAMA is a former employee of PAMA, and the son of one of PAMA's founding partners.

Mallinckrodt LLC (N.D. Cal. July 18, 2013)

Mallinckrodt LLC, a pharmaceutical manufacturer, agreed to pay $3.5 million to resolve allegations that it provided kickbacks to physician consultants to promote the use of its drugs Restoril, an insomnia treatment; Mangacet, a pain reliever; Tofranil-PM, an antidepressant; and the drugs' respective generic versions. According to the United States, as a result of the alleged kickbacks, various Medicare and Medicare claims submitted for the drugs violated the False Claims Act. A former Mallinckrodt employee, John Prieve, filed a *qui tam* lawsuit against the company in 2008; Prieve will receive $603,000 of the government's recovery. Prieve was represented by TAFEF members from Nolan & Auerbach PA; Engstrom Lipscomb & Lack PC; Oliver Close LLP; and Meckler Bulger Tilson Marick & Pearson LLP. The United States will receive approximately $3.173 million from the settlement, and the remainder will be split between the States of California, Maryland, Missouri, New York, Ohio, Rhode Island, Utah, and West Virginia.

The Gallup Organization (D.D.C. July 15, 2013)

The Gallup Organization agreed to a settlement with the United States to resolve allegations that the polling firm violated the False Claims Act by exaggerating estimated labor hours in proposals to the U.S. Mint and State Department; these exaggerations allegedly led to overpayments for various contracts and task orders. The settlement also resolves allegations regarding improper employment negotiations between Gallup and Federal Emergency Management Agency (FEMA) official Timothy Cannon. Gallup will pay $10.5 million to settle both allegations. Michael Lindley, Gallup's former Director of Client Services, brought the *qui tam* lawsuit that lead to the settlement. Lindley was represented by TAFEF member attorneys from Katz, Marshall and Banks, LLP, and from Vogel, Slade & Goldstein, LLP. He will receive a $1,929,363 share of the government's recovery.

Contrack International Inc. (N.D. Idaho July 12, 2013)

Virginia-based design and construction company, Contrack International Inc., agreed to pay $3.5 million to resolve allegations that it violated the False Claims Act during negotiations for contracts with the U.S. Agency for International Development (USAID). The government alleged that bidders for the contracts were required to receive prequalification, which included establishing that they were U.S. companies. Contrack was allegedly ineligible to receive the USAID contracts because of a partnership with an Egyptian company that was concealed from USAID.

Amgen Inc. (N.D. Cal. July 11, 2013)

Amgen Inc. has agreed to pay more than $15 million to resolve allegations that the company violated the Anti-Kickback Statute and the False Claims Act while promoting the cancer drug Xgeva. The United States contended that Amgen used data purchase agreements—known internally as "Deep Dive" contracts—to induce oncologists and urologists to prescribe Xgeva. Amgen allegedly altered an online survey to offer higher payments only to doctors who prescribed Xgeva to their patients. The United States also claimed that Amgen made cash payments to physicians who participated in market research surveys and advisory programs focused on the benefits of Xgeva. The settlement resolves a *qui tam* lawsuit filed by William Davis and Spencer Miller, who will receive $2.75 million.

Jackson Cardiology Associates and Allegiance Health (E.D. Mich. July 10, 2013)

Three entities located in Jackson, Michigan—a cardiology practice, Jackson Cardiology Associates; its owner, Dr. Jashu Patel; and a hospital, Allegiance Health—have agreed to pay the United States a total of $4 million to resolve allegations that they violated the False Claims Act. Dr. Julie A. Kovach, a cardiologist, filed a *qui tam* lawsuit against the three entities, alleging that cardiologists at Jackson Cardiology Associates, including Dr. Patel, performed medically unnecessary cardiac tests and procedures at Allegiance Health based on improperly-read stress tests; an investigation found that, of the patients who were allegedly subject to unnecessary catheterizations, three-quarters had no significant heart blockages. Dr. Patel and Jackson Cardiology Associates agreed to pay $2.2 million in the settlement, while Allegiance Health's settlement was for $1.8 million. In addition, the practice and the hospital have agreed to enter into Integrity Agreements with HHS-OIG. Kovach, who was represented by TAFEF member Monica P. Navarro of Vezina Law, PLC, will receive 19% of the government's recovery.

Shred-It Incorporated and Iron Mountain (July 9, 2013)

Two major commercial shredding services companies, Iron Mountain and Shred-It Incorporated, agreed to pay $800,000 and $300,000 respectively, to settle allegations that the companies violated the False Claims Act. Both companies contracted to provide shredding services to the government, but they allegedly failed to adhere to the General Services Administration's requirements regarding document shred size. Douglas Knisely, who operates a Pennsylvania paper shredding business, filed a *qui tam* lawsuit against the companies. Knisely was represented by TAFEF members Marc Raspanti and Michael Morse of Pietragallo Gordon Alfano Bosick & Raspanti, LLP; and James Beasley, Jr. and Maxwell Kennerly of The Beasley Firm, LLC.

Doctor's Hospital of Augusta LLC and Oncology Associates (S.D. Ga. July 9, 2013)

Doctor's Hospital of Augusta, LLC, has agreed to pay $645,000 to settle allegations that it violated the False Claims Act. Oncology Associates, which helps operate the hospital's oncology center, has also agreed to pay $375,000. The United States alleged that the two entities—which are owned by HCA Inc.—knowingly overcharged Medicare and TRICARE for outpatient therapeutic radiation oncology procedures that lacked appropriate physician supervision. The violations allegedly occurred from June 2007 through September 2012. Kimberly Woods, a former HCA employee, brought a *qui tam* action against the hospital and Oncology Associates in 2011.

Science Applications International Corporation (M.D. Fla. July 3, 2013)

McLean, Virginia-based Science Applications International Corporation (SAIC) agreed to a settlement to resolve claims that it knowingly submitted false claims while under contract with the General Services Administration (GSA). The United States alleged that SAIC provided false information to GSA officials while attempting to secure a blanket purchase agreement (BPA) for engineering and consulting services in 2006. Specifically, the government contended that SAIC personnel provided false information to GSA contracting officials—including misrepresenting an employee as a member of the Senior Executive Staff of the Department of Defense—to induce them to award the BPA to the company. SAIC will pay $5.75 million to settle the allegations, which arose in a *qui tam* complaint filed by Timothy Ferner, a retired Lt. Colonel in the U.S. Air Force. Ferner was represented by TAFEF members Elaine Stromgren and Jillian Estes at the James Hoyer Law Firm. He will receive $977,500 as his share of the government's recovery.

Sound Inpatient Physicians Inc. (W.D. Wash. July 3, 2013)

Tacoma-based Sound Inpatient Physicians Inc. agreed to pay $14.5 million to settle allegations that, between 2004 and 2012, it knowingly submitted inflated claims to federal health care programs, including Medicare. Specifically, the government alleged that Sound Physicians billed for more expensive levels of service by hospitalists than were actually performed. A former Sound Physicians employee, Craig Thomas, brought a *qui tam* lawsuit against the company. Thomas was represented by TAFEF members Jeffrey Sprung of Hagens Berman Sobol Shapiro, LLP, and James Ratner. He will receive $2.7 million as his share of the government's recovery.

TranS1 Inc. (D. Md. July 3, 2013)

TranS1 Inc., a medical device manufacturer, agreed to pay $6 million to resolve allegations that the company violated the False Claims Act by causing false claims related to its AxiaLIF System to be submitted to Medicare and other government healthcare programs. The United States contended that TranS1 knowingly encouraged physicians to bill for minimally-invasive spine fusion procedures using TranS1's AxiaLIF System with codes intended for more invasive spine fusion surgeries, thereby causing physicians to submit fraudulent healthcare claims. The government also claimed that TranS1 violated the Federal Anti-Kickback Statute by illegally paying doctors to participate in programs intended to encourage their use of TranS1 products. Moreover, the United States contended that TranS1 promoted non-FDA approved uses for their AxiaLIF System. The settlement resolves a *qui tam* lawsuit brought by Kevin Ryan, a former clinical sales manager at TranS1. Ryan will receive $1,020,000 as his share of the government's recovery.

Fifty-Five Hospitals (July 2, 2013)

A group of fifty-five U.S. hospitals have agreed to pay over $34 million to resolve allegations that the facilities deliberately overbilled Medicare for kyphoplasty, a procedure to treat certain spinal fractures. Kyphoplasty can often be performed safely and effectively on an outpatient basis, and the government alleged that the hospitals deliberately billed for inpatient procedures in order to increase their billings. The initial allegations against fifty-one of the hospitals were brought in a *qui tam* lawsuit. The relators in that suit, Craig Patrick and Charles Bates, were both former employees of Kyphon, Inc.—a company that had previously reached settlement with the United States regarding allegations that it counseled hospitals to perform inpatient kyphoplasty procedures. Patrick and Bates—who were represented by TAFEF members Mary Louise Cohen, Tim McCormack, Matt Smith, and Julie Figueira at Phillips & Cohen, LLP—will receive $5.5 million as their share of the government's recovery.

CyTerra Corporation (D. Mass. July 2, 2013)

Massachusetts-based CyTerra Corporation agreed to pay $1.9 million to resolve allegations that the company failed to provide accurate cost and pricing information to the United States Department of the Army during negotiations over a 2003 contract for the production and delivery of mine detection units. The government alleged that CyTerra failed to meet its obligation to provide up-to-date pricing information during contract negotiations. Two former CyTerra executives, Kevin Bartczak and Keith Aldrich, served as relators in a *qui tam* lawsuit against the company. Bartczak and Aldrich, who were represented by TAFEF member Mark Kleiman, will receive $361,000 from the government's recovery.

Dr. William R. Kincaid, Dr. Millard R. Lamb, and Dr. Charles O. Famoyin (July 2, 2013)

Three Johnson City physicians—William R. Kincaid, Millard R. Lamb, and Charles O. Famoyin—all former partners in East Tennessee Hematology-Oncology Associates, P.C. (McLeod Cancer)—have agreed to pay $4.25 million to settle allegations that they knowingly submitted false claims to Medicare and Medicaid for unapproved chemotherapy drugs. Beginning in 2007, McLeod Cancer purchased lower-cost chemotherapy drugs from a distributor in Canada—some of the drugs came with non-English labeling and without dosage information. The government alleged that the doctors then submitted claims for the unapproved drugs to Medicare, TennCare, and other government health programs, thus violating the False Claims Act. Dr. Kincaid, the managing partner of McLeod Cancer, will pay $2.55 million of the civil settlement; he also pled guilty to receiving misbranded drugs with intent to defraud or mislead and will serve 24 months in federal prison. Drs. Lamb and Famoyin will each pay $850,000.

Legal Analysis

New Tools to Combat Whistleblower Retaliation

by R. Scott Oswald

New Tools to Combat Whistleblower Retaliation

R. Scott Oswald[1]

Recognizing the critical role that whistleblowers play in exposing financial fraud, threats to public health and safety, and fraud on the government, Congress has enacted numerous robust whistleblower protection laws and strengthened existing whistleblower protection statutes. A most recent example is the National Defense Authorization Act for Fiscal Year 2013 ("NDAA"), which amends 10 U.S.C. § 2409 and protects contractors and subcontractors of the DoD and NASA who report gross mismanagement, gross waste, or abuse of authority relating to a DoD or NASA contract or grant. *See* NDAA, Pub. L. No. 112-329 § 827 (Jan. 2, 2013). The NDAA also contains a pilot program which expands protections to contractors and subcontractors of other executive agencies. *See id.* at § 828; 41 U.S.C. § 4712

This article aims to assist counsel in identifying and evaluating whistleblower retaliation claims and formulating a strategy to maximize the whistleblower's recovery.

The article discusses the following federal whistleblower protections:

Section I Retaliation provision of the False Claims Act ("FCA")

Section II Retaliation provision of the American Recovery and Reinvestment Act ("ARRA")

Section III Other protections for contractors and subcontractors under the National Defense Authorization Act of FY 2013 ("NDAA")

A. 10 U.S.C. § 2409 protecting DoD and NASA contractors

B. 41 U.S.C. § 4712 protecting executive agency contractors

C. Retaliation provision of the Federal Acquisitions Streamlining Act

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

Section V Retaliation provision of the Consumer Product Safety Improvement Act

Section VI Retaliation provisions of the Consumer Financial Protection Act of 2010 ("CFPA")

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

Section VIII Retaliation provision of the Patient Protection and Affordable Care Act ("PPACA")

1. The original version of this article, appearing in the October 2010 Quarterly Review, was authored by R. Scott Oswald and Jason M. Zuckerman, principals at The Employment Law Group, PC (www.employmentlawgroup.com). In July 2011, Jason was appointed as the Senior Legal Advisor to the Special Counsel at the U.S. Office of Special Counsel.

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

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

The retaliation provision of the FCA provides robust protection to any employee, contractor, or agent who is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h). Section 3730(h) plaintiffs must allege three things: (1) that they engaged in protected conduct, *i.e.*, acted in a lawful manner to stop a false claim; (2) that the defendants knew that the relators were engaged in this protected conduct; and (3) that the defendants were motivated, at least in part, to retaliate against the relators because of the protected conduct. *See Mann v. Heckler & Koch Defense, Inc.*, 630 F.3d 338, 343 (4th Cir. 2010). Section 3730(h) protects not only individuals who bring *qui tam* actions, but also individuals who take steps to expose fraud, including investigating a potential *qui tam* action or supplying information that could prompt an investigation. *See Neal v. Honeywell Inc.*, 33 F.3d 860, 864-65 (7th Cir. 1994); *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

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

A. Scope of Coverage

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

B. Protected Conduct

Protected conduct under § 3730(h) includes "lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h). Protected conduct includes internal complaints about what an employee, contractor, or agent reasonably believes to be a violation of the FCA. *See, e.g., Fanslow v. Chicago Mfg. Ctr., Inc.*, 384 F.3d 469, 481 (7th Cir. 2004) (holding that employee's internal complaints about alleged misappropriations of federal funds to government official can constitute protected conduct under FCA); *Neal v. Honeywell Inc.*, 33 F.3d 860, 865 (7th Cir. 1994) (court specifically rejected argument that plaintiff must raise her concerns directly to government to qualify for protection, noting that it was appropriate for plaintiff to complain through corporate channels).

A "protected activity" is defined as that activity that reasonably could lead to a viable FCA action. *See McKenzie v. Bellsouth Telecomms., Inc.*, 219 F.3d 508, 516 (6th Cir. 2000) (citation omitted). An employee's conduct is protected when it raises the distinct possibility of litigation, when it could lead to an action under the FCA, or when there is a reasonable possibility of litigation. *Mann*, 630 F.3d at 344 (citing *Eberhardt v. Integrated Design & Const., Inc.*, 167 F.3d 861, 869 (4th Cir. 1999)). A plaintiff "need not use formal words of 'illegality' or 'fraud,' but must sufficiently allege activity with a nexus to a *qui tam* action, or fraud against the United States government." *McKenzie*, 219 F.3d at 516. An employee need not have actual knowledge of the FCA for her actions to be considered "protected activity" under § 3730(h). If so, only those with sophisticated legal knowledge would be protected by the statute. *United States ex rel. Yesudian v. Howard Univ.*, 332 U.S. App. D.C. 56, 153 F.3d 731, 741 (D.C. Cir. 1998) ("…only [lawyers] would know from the outset that what they were investigating could lead to a False Claims Act prosecution.").

There is both a subjective and an objective component for assessing whether an activity is protected conduct under the FCA, *i.e.*, the relevant inquiry is whether "(1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government." *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845 (9th Cir. 2002). Employers have tried to apply an onerous standard of objective reasonableness under which the plaintiff must demonstrate that her disclosures would have resulted in a successful *qui tam* action. *See, e.g., Dookeran v. Mercy Hosp. of Pittsburgh*, 281 F.3d 105, 109 (3d Cir. 2002) (plaintiff's disclosure about false information in application to be designated clinical study research center is not protected because application was not claim for payment). Requiring a § 3730(h) plaintiff to prove that she disclosed actual violations of the FCA, however, is contrary to the plain meaning of § 3730(h) and well-established precedent. The Supreme Court has specifically noted that "proving a violation of § 3729 is not an element of a § 3730(h) cause of action." *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 416 n.1 (2005) (citing *Yesudian*, 153 F.3d at 740). FCA litigation is a "distinct possibility" if plaintiff had a "good faith" belief, based on information he had "at the time of the retaliation," he could reasonably conclude that "there was a 'distinct possibility' [the plaintiff] would find evidence" showing the defendant had submitted false claims. *See Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 869 (4th Cir. 1999).

Courts tend to use a broad standard when evaluating whether a plaintiff has sufficiently pleaded the existence of a "distinct possibility." *See Layman v. MET Labs., Inc.*, No. RDB–12–2860, 2013 WL 2237689, at *7 (D. Md. May 20, 2013) (citing *Brazill v. Cal. Northstate Coll. of Pharmacy, LLC*, 904 F. Supp. 2d 1047, 1055 (E.D. Cal. 2012) (employee engaged in protected conduct when reporting to management that the potential fraud in question "could result in civil and criminal sanctions."); *United States ex rel. George v. Boston Scientific Corp.*, 864 F. Supp. 2d 597, 607 (S.D. Tex. 2012) (employee engaged in protected conduct when asking if a medical device "'could be promoted legally' for the off label use presented by the sales trainer.").

As the D.C. Circuit held in a leading case construing the scope of § 3730(h) protected conduct, Congress's "inclusion of an 'investigation for…an action filed or to be filed' within its protective cover…manifests Congress' intent to protect employees while they are collecting information about a possible fraud, *before they have put all the pieces of the puzzle together*." *Yesudian*, 153 F.3d at 740 (emphasis added). According to the U.S. District Court for the District of Maine, "[s]ince a plaintiff now engages in protected conduct whenever he engages in an effort to stop an FCA violation, the act of internal reporting itself suffices as both the effort to stop the FCA violation and the notice to the employer." *Manfield v. Alutiiq Int'l Solutions, Inc.*, 851 F. Supp. 2d 196, 204 (D. Me. 2012).

The D.C. Circuit's metaphor of "putting all the pieces of the puzzle together" should guide discovery, *i.e.*, plaintiff should take discovery not only about the pieces of the puzzle that he gathered at the time he engage in protected conduct, but also the pieces of the puzzle that plaintiff was not aware of or had not put together at the time he blew the whistle. Taking broad discovery about the plaintiff's protected conduct is important to demonstrate the objective reasonableness of plaintiff's disclosures, and also show the employer's motive to retaliate against plaintiff.

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

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

United States ex rel. Sanchez v. Lymphatx, Inc., 596 F.3d 1300, 1304 (11th Cir. 2010) (citation omitted) (emphasis added). In *Lymphatx*, the court concluded that the plaintiff has sufficiently alleged an FCA retaliation action by averring that "she complained about the defendants' 'unlawful actions' and warn[ing] them that they were incurring 'significant criminal and civil liability,'" which if proven suffices to show that the defendants were aware of the possibility of *qui tam* litigation. *Id. Lymphatx* underscores the importance of taking broad discovery about the employer's knowledge of and reaction to plaintiff's disclosures, including an investigation of those disclosures.

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

C. Scope of Actionable Adverse Actions

Section 3730(h) of the FCA prohibits an employer from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against a whistleblower. The purpose of § 3730(h) is to prevent retaliation which would dissuade whistleblowers from coming forward. *See, e.g., McKenzie*, 123 F.3d at 943-44. Section 3730(h) plaintiffs are not limited to seeking redress for "ultimate employment decisions" affecting the terms and conditions of their employment, and need only show "that a reasonable employee would have found the challenged action materially adverse." *Vander Boegh v. EnergySolutions, Inc.*, No. 12–5643, 2013 WL 4105648), 6, __ F. App'x __ at *6 (6th Cir. Aug. 14, 2013) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006)).

Acts which constitute actionable retaliation under Title VII are generally actionable under the FCA, though on its face, the FCA covers a broader range of adverse actions. *See Moore*, 275 F.3d at 847. This includes oral or written reprimands, reassignment of duties, as well as other actions that "might well have dissuaded a reasonable person from making or supporting a claim" or otherwise engaging in protected conduct. *See Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 63. For example, courts have construed § 3730(h) to protect individuals who are constructively discharged. *See Neal v. Honeywell, Inc.*, 191 F.3d 827, 831 (7th Cir. 1999), *aff'g*, 995 F. Supp. 889 (N.D. Ill. 1998) (concluding that "a drastic diminution of duties might suffice as a 'constructive discharge.'").

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

According to statutory history, a plaintiff must show that "the retaliation was motivated at least in part by the employee's engaging in protected activity." S. Rep. No. 99-345, at 35, reprinted in 1986 U.S.C.C.A.N. at 5300. However, in light of the Supreme Court's decision in *Nassar*[2], 3730(h) plaintiffs should be prepared to prove that their protected conduct was the "but-for" cause of their employer's decision to take an adverse employment action. *See United States ex rel. Schweizer v. Oce N. Am.*, No. 06–648, 2013 WL 3776260, 11, __ F. Supp. 2d __ (D.D.C. July 19, 2013 ("[W]here Congress has given plaintiffs the right to sue employers for adverse actions taken against them by their employers 'because of' X, plaintiffs may succeed only by showing that X was a 'but-for' cause of the adverse action, not merely one of several 'motivating factors.'").

E. Individual Liability

There is a split among district courts regarding individual liability for violations of 3730(h). The split stems from the 2009 FERA amendments, which changed 3730(h) from:

> [a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment *by his or her employer* because of lawful acts done in furtherance of…

to:

> [a]ny employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts…

31 U.S.C. § 3730(h) (emphasis added).

In *Laborde v. Rivera-Dueño*, 719 F. Supp. 2d 198, 205 (D. Puerto Rico 2010), Senior District Judge Pieras, Jr., denied an individual defendant's motion to dismiss due to "the absence of specific First Circuit guidance holding that individual liability does not exist in FCA retaliation claims, and in light of the fact that the persuasive authority on the issue relies upon an outdated version of the statute." *Laborde*, 719 F. Supp. 2d at 205.

The U.S. District Court for the Western District of Virginia issued a similar holding in *Huang v. Rector & Visitors of Univ. of Va.*, 896 F. Supp. 2d 524 (W.D. Va. 2012).[3] Huang, an assistant professor, brought an action against the University of Virginia, a department chairman, and his former supervisor, alleging *inter alia*, unlawful

2. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013). ("[T]he Court now concludes as follows: Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e–2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.").

3. Author R. Scott Oswald and Adam Augustine Carter of The Employment Law Group, PC, represented Mr. Huang.

retaliation under section 3730(h). The court denied summary judgment and allowed Mr. Huang to pursue his relation claims against his supervisors in their individual capacities, explaining:

> Prior to the 2009 amendment, plaintiffs could only file FCA retaliation claims against their employers. In the instant matter, that would have meant Dr. Huang's individual-capacity claim against Defendants, and probably his official-capacity claim as well, would fail as a matter of law. However, by eliminating the reference to "employers" as defendants in § 3730(h)(1), the 2009 amendment effectively left the universe of defendants undefined and wide-open. Notably, the 2009 amendment applies to conduct on or after the date of enactment, which was May 20, 2009.
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> ****
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> In the absence of specific guidance from the United States Court of Appeals for the Fourth Circuit dictating that there can be no individual liability in FCA retaliation claims after the 2009 amendment, and because Defendants do not assert in their motion that Dr. Huang's FCA claims against them are legally impermissible, I will not dismiss those claims out of hand.

Id. at n.16.

In contrast, the courts in *Russo v. Broncor, Inc. et al.*, No. 13-cv-348-JPG-DGW (S.D. Ill. July 24, 2013) and *Aryai v. Forfeiture Support Assocs., LLC*, 10 Civ. 8952 (LAP), 2012 U.S. Dist. LEXIS 125227 (S.D.N.Y. Aug. 27, 2012) found that Congress did not intend 3730(h) to create liability for individual supervisors.

F. Statute of Limitations and Forum

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

G. Remedies

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

H. State False Claims Acts

Twenty-nine (29) states and the District of Columbia have enacted false claims act statutes containing a *qui tam* provision, twenty-seven (27) of which contain an anti-retaliation provision. There is little case law interpreting state FCA retaliation provisions; therefore, judicial interpretations of § 3730(h) will likely shape construction of the retaliation provision of state false claims act statutes.

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

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

A. Scope of Coverage

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

B. Protected Conduct

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

- Gross mismanagement of an agency contract or grant relating to stimulus funds;
- A gross waste of stimulus funds;
- A substantial and specific danger to public health or safety related to the implementation or use of stimulus funds;
- An abuse of authority related to the implementation or use of stimulus funds; or
- A violation of a law, rule, or regulation that governs an agency contract or grant related to stimulus funds.

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

C. Burden of Proof

To prevail on a § 1553 whistleblower claim, an employee need only demonstrate that the protected conduct was a contributing factor in the employer's decision to take an adverse action. *Gerhard v. D Const., Inc.*, No. 11 C 0631, 2012 WL 893673, at *3 (N.D. Ill. Mar. 14, 2012). Under this standard, employees need not prove that their whistleblower complaint was the sole factor or the determinative factor leading to the adverse action. Additionally, § 1553 specifically clarifies that an employee can satisfy the "contributing factor" standard through the use of "circumstantial evidence," *i.e.*, by showing temporal proximity or by demonstrating that the decision-maker knew of the protected disclosure. Once the employee demonstrates by a preponderance of the evidence that her protected conduct was a contributing factor in the retaliatory action, the employer can avoid liability only by proving by clear and convincing evidence that it would have taken the same adverse action in the absence of the employee's protected conduct.

D. Administrative Exhaustion Requirement and Right to Jury Trial

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

E. Remedies

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

III. ADDITIONAL CONTRACTOR EMPLOYEE PROTECTIONS

There are three lesser known anti-retaliation provisions that prohibit retaliation against employees of government contactors yet provide robust remedies, including reinstatement. *See* 10 U.S.C. § 2409; 41 U.S.C. § 4705; 41 U.S.C. § 265. These statutes require agency inspectors general to investigate claims of retaliation. Provisions protecting employees of contractors and subcontractors authorize a private right of action in federal court and expressly provide for trial by jury.

A. Protections for DoD and NASA Contractors and Subcontractors, 10 U.S.C. § 2409

1. Scope of Coverage

Revised in 2013 by section 827 of the National Defense Authorization Act for Fiscal Year 2013 ("NDAA"), Pub. L. No. 112-329 (Jan. 2, 2013), section 2409 is expanded to include subcontractors of the Department of Defense ("DoD"), the Army, the Navy, the Air Force, the Coast Guard and the National Aeronautics and Space Administration ("NASA"). *See* 10 U.S.C. § 2409; NDAA § 827; *see also* 10 U.S.C. § 2303(a).

Implementing regulations can be found at 78 Fed. Reg. 189, from pages 59851 to 54, *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-09-30/html/2013-23768.htm. Cost aspects are addressed at 78 Fed. Reg. 189, from pages 60173 to 74, *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-09-30/html/2013-23702.htm.

2. Protected Conduct

Section 2409 protects contractors and subcontractors who disclose information that they reasonably believe evidences:

- a gross mismanagement of a DoD or NASA contract or grant;
- a gross waste of DoD or NASA funds;
- an abuse of authority relating to a DoD or NASA contract or grant;
- a violation of law, rule or regulation related to a DoD or NASA contract or grant; or
- a substantial and specific danger to public health or safety;[4]

10 U.S.C. § 2409(a)(1)

There is no materiality requirement for reporting violations of a violation of law rule or regulation. *See Drake v. Agency for Int'l Dev.*, 543 F.3d 1377 (Fed. Cir. 2008).[5]

In order to be protected, the disclosure must be made to:

a. a Member of Congress;
b. an Inspector General;
c. the Government Accountability Office;
d. a DoD or NASA employee, as applicable, responsible for contract oversight or management.
e. an authorized official of the Department of Justice or other law enforcement agency;
f. a court or grand jury; or
g. a management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct

10 U.S.C. § 2409(a)(2). Filing a complaint with any judicial or administrative body is per se protected activity. *See* 10 U.S.C. § 2409(a)(3)(A).

3. Procedure and Remedies

A § 2409 Action must be filed with the DoD or NASA Inspector General ("IG") within three years after the date on which the alleged reprisal took place.

A complaint filed with the IG must contain:

- the name of the contractor;
- contract number if known, or a description reasonably sufficient to identify the contract(s) involved;

4. The "substantial and specific danger to public health or safety" does not need to be related to a DoD or NASA contract or grant. *See* 10 U.S.C. § 2409(a)(1)(C).

5. Author R. Scott Oswald and Nicholas Woodfield of The Employment Law Group, PC, represented Mr. Drake.

- the violation of law, rule, or regulation giving rise to the disclosure;
- the nature of the disclosure giving rise to the retaliatory act, including to whom the information was disclosed; and
- the specific nature and date of the reprisal.

DFARS § 203.904(c).

Unless the IG determines that the complaint is frivolous, fails to allege a violation, or has been previously addressed in another federal or state judicial or administrative proceeding initiated by the complainant, the IG must conduct an investigation and make a determination on the merits no later than 180 days after receipt of the complaint. The IG may request, and the complainant may grant, an extension of up to 180 additional days. Within thirty (30) days of receiving an inspector general's investigative findings, the head of the agency must determine whether there has been a violation, in which event the agency head can award a complainant reinstatement, back pay, employment benefits, exemplary damages, and attorney fees and expenses.

If the agency denies relief or fails to issue a decision within 210 days of the filing of the complaint or thirty (30) days after the expiration of any extension, the complainant can bring a de novo action in federal court and seek a jury trial. A complainant must file in federal court within two years of exhausting his administrative remedies.

Plaintiffs under 10 U.S.C. § 2409 need only show that their protected activity was a "contributing factor" in the employer's decision to take an adverse action. *See* 10 U.S.C. § 2409(c)(6); 5 U.S.C. § 1221(e). The more onerous "but-for" standard applicable to FCA retaliation claims does not apply.[6]

Under the revised NDAA protections, employer "forced arbitration" clauses are invalid, and it is no longer an affirmative defense to claim that the DoD ordered the employee's termination. *See* 10 U.S.C. § 2409(c)(7), (a)(3)(B) (Retaliation "is prohibited even if it is undertaken at the request of a Department or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the Department or Administration official making the request.").

B. Pilot Program Expanding Contractor and Subcontractor Protections, 41 U.S.C. § 4712

Section 828 of the NDAA creates a four year pilot program that dramatically expands whistleblower protections for federal contractors and subcontractors. Section 828 provides protections virtually identical to section 827 for all contractors and subcontractors other than those working for the DoD, NASA, Coast Guard, or elements of the intelligence community. *See* 41 U.S.C. § 4712.

Sections 828 and 827 now provide protections for nearly all *qui tam* relators whose disclosures relate to federal contracts, and plaintiff's counsel should consider 10 U.S.C. § 2409 and 41 U.S.C.§ 4712 as possible alternatives to FCA retaliation claims under 31 U.S.C. § 3730(h).

6. *See generally supra* section I(D) discussing the impact of the Supreme Court's decision in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) on FCA retaliation claims.

Section 828 protections only apply to contracts awarded or significantly modified to include coverage after July 1, 2013. *See* 41 U.S.C. § 4712. Interim rules can be found at 78 Fed. Reg. 189, from pages 60169 to 74, *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-09-30/html/2013-23703.htm and http://www.gpo.gov/fdsys/pkg/FR-2013-09-30/html/2013-23702.htm.

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

Section 828 of the NDAA suspends whistleblower provisions of the Federal Acquisitions Streamlining Act while the pilot program contained at 41 U.S.C. § 4712 is in effect.

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

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

In the wake of several corporate fraud scandals in the early 2000s, including the collapse of Enron, Congress enacted the Sarbanes-Oxley Act of 2002 ("SOX"), also known as the Corporate and Criminal Fraud Accountability Act.[7] Section 806 provides a robust private right of action for retaliation, including preliminary reinstatement for employees who prevail at the investigative stage of the action. Recently, OSHA has issued some very favorable orders for SOX complainants, including a Sept. 30, 2013, order awarding the former CFO of Clean Diesel Technologies, Inc., over $1.9 million, and a $346,000 award for a former T-Mobile employee.

In order to establish a prima facie case, a claimant must prove: (1) he or she engaged in SOX protected activity, (2) the respondent took unfavorable employment actions against complainant, and (3) the protected activity was a contributing factor to the adverse action. A complainant engages in protected activity if he discloses information to a supervisor that the complainant reasonably believes evidences a violation of the laws enumerated in SOX 806. *Zinn v. American Commercial Lines, Inc.*, ARB Case No. 10-029, ALJ Case No. 2009-SOX-025 (March 28, 2012) (citations omitted). A reasonable belief includes subjective and objective elements. *Id*.

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

A. Scope of Coverage

Section 806 of SOX applies to any "officer, employee, contractor, subcontractor or agency" of a company that has securities registered under § 12 of the Securities Exchange Act or is required to file reports under section 15(d) of the same Act. *See* 18 U.S.C. § 1514(A). SOX also applies to employees of "any subsidiary whose financial information is included in the consolidated financial statements of such company" and employees of nationally recognized statistical rating organizations. *See* Dodd-Frank §§ 922, 929A.[8]

B. Protected Conduct

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

Protected conduct is not limited to disclosures about shareholder fraud, and, instead, includes disclosures of a violation of *any* SEC rule or regulation. *See* 18 U.S.C. § 1514(A). For example, a disclosure about deficient internal accounting controls9 or non-compliance with Generally Accepted Accounting Principles is protected. *See Smith v. Corning Inc.*, 496 F. Supp. 2d 244 (W.D.N.Y. 2007); *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008).

The Department of Labor's Administrative Review Board ("ARB") in *Sylvester v. Parexel Int'l LLC*, noted that various types of fraud or a violation of an SEC rule or regulation may lead to fraud on shareholders, even if they do not immediately harm a company's investors. The ARB also held that a SOX complainant need not allege all of the elements of a claim of securities fraud, or conduct approximating such a claim, in order to demonstrate that he or she engaged in protected whistleblowing activity. *Sylvester*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 042, 2011 WL 2165854 (ARB May 25, 2011); *see also Wiest v. Lynch*, 710 F.3d 121, 134 (3d Cir. 2013) (discussing *Sylvester* and acknowledging that it is owed *Chevron* deference).

In *Vannoy v. Celanese Corp*, an employee made a disclosure to the IRS Whistleblower Rewards Program and complained to company officials that the company "misstated their financial records and underestimated their required tax burden potentially in millions of dollars." The court held that "while Vannoy may not have asserted a

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

9. *See Klopfenstein v. PPC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ 2004-SOX-11 (ARB May 31, 2006).

claim of shareholder fraud specifically, under SOX he need not do so to sustain his claim of a SOX violation." *Vannoy*, ARB Case No. 09-118 at *11 (Sept. 28, 2011).

C. Reasonable Belief Requirement

A SOX retaliation plaintiff need not demonstrate that she disclosed an actual violation of securities law, only that she reasonably believed that her employer was defrauding shareholders or violating an SEC rule. *See Van Asdale*, 577 F.3d at 992. Indeed, a reasonable but mistaken belief is protected under SOX. *See Kalkunte v. DVI Fin. Servs.*, ARB Nos. 05-139, 05-140 at 11, ALJ No. 2004-SOX-56 at 11 (ARB Feb. 27, 2009); *see also Halloum v. Intel Corp.*, 2003-SOX-7 at 10 (ALJ Mar. 4, 2004), *aff'd* (ARB Jan. 31, 2006) ("belief that an activity was illegal may be reasonable even when subsequent investigation proves a complainant was entirely wrong…"); *Wiest v. Lynch*, 710 F.3d 121, 132 (3d Cir. 2013) ("an employee must establish not only a subjective, good faith belief that his or her employer violated a provision listed in SOX, but also that his or her belief was objectively reasonable") (citation omitted); *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1132 (10th Cir. 2013).

An employee's reasonable belief must be scrutinized under both a subjective and objective standard. *See Welch*, 536 F.3d at 275. The objective reasonableness of a complainant's belief is evaluated based on "the knowledge available to a reasonable person in the same factual circumstances, with the same training and experience as the aggrieved employee." In *Allen*, the court held that a certified public accountant ("CPA") did not engage in protected conduct when she complained about her employer overstating gross profits in violation of SEC Staff Accounting Bulletin 101 ("SAB-101"). *See Allen v. Admin. Review Bd.*, 514 F.3d 468 (5th Cir. 2008). The *Allen* Court held that this disclosure was not protected because the whistleblower identified improper accounting practices in accounting reports that had not yet been filed with the SEC and a CPA should know that SAB-101 applies to only financial reports that have been filed with the SEC. *Allen*, 514 F.3d, 478. The implication of this flawed decision is that a whistleblower should allow the violation to occur before reporting it, thereby ensuring that the whistleblower is disclosing an actual violation. Adopting this rule would defeat the intent of SOX, which is to prevent the underlying crime from occurring. *See Getman v. Southwest Secs., Inc.*, 2003-SOX-8 at 13 n.8 (ALJ Feb. 2, 2004), *reversed on other grounds*, ARB No. 04-059 (ARB July 29, 2005). Judge Levin pointed out in *Morefield v. Exelon Servs., Inc.*, 2004-SOX-2 at 5 (ALJ Jan. 28, 2004):

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

A more recent ARB decision acknowledges that an employee's good faith reasonable, but mistaken disclosures can still be protected. *See Menendez v. Halliburton*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005 (Sept. 13, 2011).

Requiring a SOX complainant to demonstrate that she disclosed an actual violation is contrary to Congressional intent in that the legislative history of § 806 specifically states that the reasonableness test "is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence." Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, Cong. Rec. S7418, S7420 (daily ed. July 26, 2002), available at 2002 WL 32054527 (citing *Passaic Valley Sewerage Commissioners v. DOL*, 992 F.2d 474, 478 (3d Cir. 1993) (setting forth broad definition of "good faith" protected disclosures under analogous whistleblower protection statutes)). Since a SOX plaintiff need not prove that they disclosed an actual violation or fraud, SOX retaliation claims are not subject to the heightened pleading requirements of Fed. R. Civ. P 9(b).

In sum, limiting protected conduct to disclosures of actual violations of SEC rules is contrary to the plain meaning and intent of SOX. A SOX plaintiff, however, must prepare at the outset of the case to meet a high standard of objective reasonableness. For example, the complaint should plead how the plaintiff's disclosures implicate violations of specific SEC rules or fraud statutes. Since a plaintiff does not need to prove the underlying violation, they do not need to meet the heightened pleading requirements necessary for a shareholder fraud case.

D. Scope of Actionable Adverse Actions

Under § 806, the scope of actionable adverse actions is broad and includes discharging, demoting, suspending, threatening, harassing or discriminating against an employee who engages in protected conduct. *See* 18 U.S.C. § 1514A(a). The Supreme Court's *Burlington Northern*[10] standard is "a particularly helpful interpretive tool, but the plain language of Section 806's adverse action provision controls." *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005, at *15 (ARB Sept. 13, 2011). According to the ARB, "By explicitly proscribing non-tangible activity, this language bespeaks a clear congressional intent to prohibit a very broad spectrum of adverse actions against SOX whistleblowers." *Id*. In *Menendez*, the ARB found that releasing a whistleblower's identity to coworkers constituted an actionable adverse action. The ARB explained that "Section 806's express statutory language is more expansive than either of the Title VII provisions addressed in *Burlington*, and consequently demands a correspondingly broader interpretation." *Id*

E. Burden of Proof

A SOX complainant need not prove that her protected conduct was the motivating or determining factor in the employer's adverse action but instead need only prove

10. *See supra* section I(C) (discussing *Burlington Northern* standard).

that the protected conduct was a "contributing factor." The ARB defines a contributing factor as "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, *slip op.* at 17 (July 27, 2006). This standard is "intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action." *Id.* Once an employee satisfies this minimal causation standard by a preponderance of the evidence, an employer can avoid liability only where it proves by "clear and convincing evidence" that it would have taken the same action absent the employee's protected conduct. *See Kalkunte*, ARB Nos. 05-139, 05-140 at 13; *Menendez*, ARB Case Nos. 09-002, 09-003, ALJ Case No. 2007-SOX-05, at *11 (ARB Sept. 13, 2011).

F. Statute of Limitations and Forum

A SOX whistleblower must file a complaint with the Department of Labor ("DOL") within 180 days of the date that she becomes aware of the violation. *See* § 1514A(b)(2)(D) (as amended by the Dodd-Frank Act § 922(c)(1)(A)(i)-(ii)). A SOX plaintiff must exhaust administrative remedies prior to litigating, *i.e.*, a SOX plaintiff must file her complaint with DOL's Occupational Safety and Health Administration ("OSHA"). Plaintiffs must ensure that they include all possible respondents in their administrative filing. *See Genberg v. Porter*, No. 11-cv-2434 (D.Colo. Mar. 25, 2013) (dismissing counts against defendants not named as respondents in the plaintiff's OSHA complaint). If, while the claim is before OSHA, new adverse actions take place, an employee must amend her complaint to include the subsequent adverse employment actions. *See, e.g., Willis v. Vie Fin. Grp., Inc.*, No. 04-435, 2004 WL 1774575 (E.D. Pa. 2004) (dismissing complaint for termination in violation of SOX because it was never presented to DOL). After OSHA performs an investigation, either party can request a hearing before a DOL ALJ and can appeal an ALJ decision to the DOL's Administrative Review Board. If DOL has not issued a final decision within 180 days of the filing of the complaint, the employee may remove the complaint to federal court for de novo review and seek a jury trial. *See* § 1514A(b)(1)(B)-(E) (as amended by the Dodd-Frank Act § 922(c)(1); *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 245 (4th Cir. 2009).

G. Remedies

A prevailing employee under the SOX retaliation provision is entitled to "all relief necessary to make the employee whole," including reinstatement, back pay, attorney's fees, and costs. 18 U.S.C. § 1514A(c). An employee can also obtain special damages under SOX, which includes damages for impairment of reputation, personal humiliation, mental anguish and suffering, and other non-economic harm resulting from retaliation. *See Kalkunte*, ARB Nos. 05-139, 05-140 (clarifying that "special damages" under

SOX includes compensatory damages; upholding ALJ's award of damages for pain, suffering, mental anguish, humiliation, and effect on complainant's credit). If OSHA finds for the employee and the employer appeals, OSHA's preliminary award of relief is stayed, except for any order for reinstatement.

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

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

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

1. Reporting violations of the standard for the flammability of children's sleepwear;
2. Disclosing information about the use of consumer patching compounds containing free-form asbestos;
3. Reporting an employer's violation of a safety standard for creating architectural glazing materials;
4. Reporting choking incidents involving marbles, small balls, latex balloons and other small parts;
5. Reporting the export of banned or misbranded products;
6. Disclosing information about an employer's import or distribution of new all-terrain vehicles in violation of the CPSIA; and

7. Providing information about an employer who manufactures a toy that contains an unsafe amount of lead.

The ARB has been liberal when identifying products covered by the CPSIA, and counsel should not limit its analysis to the plain language of the CPSIA. For example, in *Saporito v. Publix Super Markets, Inc.*, the ARB held that an employee's complaints about the suspected contamination of milk bottles was protected even though the CPSIA expressly excludes "food" from the definition of "consumer product." *Saporito*, ARB No. 10-073, ALJ No. 2010-CPS-1, at *4-5 (ARB Mar. 28, 2012) ("the Commission also enforces the Federal Hazardous Substances Act (FHSA), and the Poison Prevention Packaging Act (PPPA). Under the PPPA, the Commission regulates packaging of 'household substance[s]' which can include 'food' as defined under the [Federal Food, Drug, and Cosmetics Act].") (citations omitted).

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

VI. WHISTLEBLOWER PROTECTION FOR EMPLOYEES IN THE FINANCIAL SERVICES INDUSTRY

The Dodd-Frank Act creates a robust retaliation action for employees in the financial services industry.[11] *See* Dodd-Frank Act § 1057, codified at 12 U.S.C. § 5567. The scope of coverage is quite broad in that Section 1057 applies to organizations that extend credit or service or broker loans; provide real estate settlement services or perform property appraisals; provide financial advisory services to consumers relating to proprietary financial products, including credit counseling; or collect, analyze, maintain, or provide consumer report information or other account information in connection with any decision regarding the offering or provision of a consumer financial product or service.

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

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

12 U.S.C. § 5481(12) identifies the laws enforced by the CFPB:

(A) the Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. 3801 et seq.);

(B) the Consumer Leasing Act of 1976 (15 U.S.C. 1667 et seq.);

(C) the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), except with respect to section 920 of that Act;

(D) the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.);

(E) the Fair Credit Billing Act (15 U.S.C. 1666 et seq.);

(F) the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), except with respect to sections 615(e) and 628 of that Act (15 U.S.C. 1681m(e), 1681w);

(G) the Home Owners Protection Act of 1998 (12 U.S.C. 4901 et seq.);

(H) the Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.);

(I) subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act (12 U.S.C. 1831t(c)-(f))3;

(J) sections 502 through 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6802-6809) except for section 505 as it applies to section 501(b);

(K) the Home Mortgage Disclosure Act of 1975 (12 U.S.C. 2801 et seq.);

(L) the Home Ownership and Equity Protection Act of 1994 (15 U.S.C. 1601 note);

(M) the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.);

(N) the S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. 5101 et seq.);

(O) the Truth in Lending Act (15 U.S.C. 1601 et seq.);

(P) the Truth in Savings Act (12 U.S.C. 4301 et seq.);

(Q) section 626 of the Omnibus Appropriations Act, 2009 (Public Law 111-8); and

(R) the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701).

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

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

Under the Dodd-Frank Act, an individual who provides original information to the SEC or the Commodity Futures Trading Commission ("CFTC") that results in monetary sanctions exceeding $1 million shall be paid an award of ten (10) to thirty (30) percent of the amount recouped. *See* 78 U.S.C. § 78u-6 (applying to CFTC whistleblowers) and 7 U.S.C. § 26 (applying to SEC whistleblowers). The amount of the reward is at the discretion of the respective commission. Factors to be considered in calculating the amount of the award include the significance of the information provided by the whistleblower, the degree of assistance provided by the whistleblower, the interest of the respective commission in deterring violations by making awards to whistleblowers, and other factors that each commission may establish by rule or regulation. *Id*.

Each provision contains various restrictions. For example, under the SEC program, an award shall not be paid to a whistleblower who has been convicted of a criminal violation related to the judicial or administrative action for which the whistleblower provided information; who gains the information by auditing financial statements as required under the securities laws; who fails to submit information to the SEC as required by an SEC rule; or who is an employee of the Department of Justice ("DOJ") or an appropriate regulatory agency, a self-regulatory organization, the Public Company Accounting Oversight Board or a law enforcement organization. 78 U.S.C. § 78u-6(c)(2). Similar restrictions for the CFTC program are provided under 26 U.S.C. § 26(c)(2).

The SEC and CFTC whistleblower rewards programs do not contain *qui tam* provisions, *i.e.*, the whistleblower cannot pursue an action if the SEC or CFTC decline to act on the whistleblower's disclosure. SEC and CFTC whistleblower tips are submitted via form TCR (Tip, Complaint, or Referral), and may be completed online. The SEC form is available at https://denebleo.sec.gov/TCRExternal/index.xhtml, and the CFTC form is available at http://www.cftc.gov/ConsumerProtection/FileaTiporComplaint/index.htm.

A. SEC Whistleblower Protection Provision

Dodd-Frank section 922(a), codified at 15 U.S.C. § 78u-6(h), protects employees who have suffered retaliation "because of any lawful act done by the whistleblower — '(i) in providing information to the Commission in accordance with [the whistleblower reward subsection]; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act,'" the Securities Exchange Act of 1934, and "'any other law, rule, or regulation subject to the jurisdiction of the [SEC].'"

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

A § 78u-6(h) plaintiff must show:

> (1) he or she was retaliated against for reporting a violation of the securities laws;
>
> (2) the plaintiff reported that information to the SEC or to another entity (perhaps even internally) as appropriate;
>
> (3) the disclosure was made pursuant to a law, rule, or regulation subject to the SEC's jurisdiction; and
>
> (4) the disclosure was "required or protected" by that law, rule, or regulation within the SEC's jurisdiction.

Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012); *Genberg v. Porter*, 935 F. Spp. 2d 1094, 1105 (D. Colo. 2013).

There is a circuit split regarding what constitutes protected activity under 15 U.S.C. § 78u-6(h), and just who is a "whistleblower." The split stems from two seemingly conflicting provisions. Under § 78u-6(a)(6), "The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." The anti-retaliation provision contained in at § 78u-6(h)(1)(A) defines protected conduct as lawful actions taken by a whistleblower:

> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or re-

> lated to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

As described by the U.S. District Court for the Middle District of Tennessee, part (iii) appears to create a "catch-all" provision, not dependent on § 78u-6(a)(6)'s definition, which requires a disclosure to the SEC. *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994 (M.D. Tenn. 2012).

In *Kramer v. Trans-Lux Corp*, the U.S. District Court for the District of Connecticut ruled that the definition of "whistleblower" under § 78u-6(h) encompasses individuals who make disclosures required or protected under the Sarbanes-Oxley Act or the Securities Exchange Act of 1934, even if the individual did not actually disclose information to the SEC. *Kramer*, No. 3:11cv1424, 2012 WL 4444820, at *3–5 (D. Conn. Sept. 25, 2012).[12] Trans-Lux argued in its motion to dismiss that Kramer did not report Trans-Lux's violations in the manner that the SEC requires, and therefore did not meet the definition of a "whistleblower." Kramer argued that individuals who make disclosures that are required or protected under the Sarbanes-Oxley Act or the Securities Exchange Act of 1934 meet this definition regardless of the manner in which they make their disclosure.

The court agreed with Kramer's argument, citing to a final rule promulgated by the SEC on Aug. 12, 2011. The court explained:

> Trans-Lux's interpretation would dramatically narrow the available protections available to potential whistleblowers. In order to have provided information in the manner provided by the SEC, an individual would have either had to submit the information online, through the Commission's website, or by mailing or faxing a Form TCR (Tip, Complaint or Referral). Mailing a regular letter is insufficient.... Such a reading seems inconsistent with the goal of the Dodd-Frank Act, which was to "improve the accountability and transparency of the financial system," and create "new incentives and protections for whistleblowers."

Id. at *4.

In contrast to *Kramer* and other lower court decisions (and SEC regulations), the U.S. Court of Appeals for the Fifth Circuit in *Asadi v. G.E. Energy(USA), LLC*, takes the opposite stance. After examining the language of § 78u-6(h) and the SEC's implementing regulations, Circuit Judge Jennifer Walker Elrod opined, "we conclude that

12. Author R. Scott Oswald, along with Nicholas Woodfield of The Employment Law Group, PC, represented Mr. Kramer.

the whistleblower-protection provision unambiguously requires individuals to provide information relating to a violation of the securities laws to the SEC to qualify for protection from retaliation under § 78u–6(h)." *Asadi*, 720 F.3d 620, 629 (5th Cir. 2013).

In October 2013, the U.S. District Court for the Southern District of New York rejected the reasoning in *Asadi*, finding instead that statutory ambiguity made "appropriate to consider the SEC's interpretation of the statute," which states that protections exist for "individuals who report to persons or other governmental authorities other than the [SEC]." *Thomson Reuters LLC*, No. 13 Civ. 2219, 2013 WL 5780775, slip copy at *5 (S.D.N.Y. Oct. 25, 2013).

B. CFTC Whistleblower Protection Provision

Section 748 of the Dodd-Frank Act contains a whistleblower protection provision that is substantially similar to § 922(a). *Compare* 7 U.S.C. § 26(h) *with* 15 U.S.C. § 78u-6(h). Protected conduct includes providing information to the CFTC in accordance with the whistleblower incentive program or assisting "in any investigation or judicial or administrative action of the [CFTC] based upon or related to such information." *Id*. The statute of limitations is two years from the date of the violation. *Id*.

VIII. PROTECTION FOR HEALTH CARE WHISTLEBLOWERS

The Patient Protection and Affordable Care Act of 2009 ("PPACA") which became law on March 23, 2010, amended the definition of an "original source" under the FCA and created new protections for employees who blow the whistle about violations of Title I of the PPACA.[13] *See* PPACA §§ 1558, 10104(j)(2). Section 1558, codified at 29 U.S.C. § 218c, amends the Fair Labor Standards Act ("FLSA") and provides that an employee engages in protected conduct when he provides or is about to provide to an employer, the Federal Government, or a state attorney general, information that the employee reasonably believes to be a violation of Title I of the PPACA. Section 1558 also protects employees who participate in an investigation, or object to or refuse to participate in any activity that the employee reasonably believes to constitute a violation of Title I.[14] Title I covers a broad range of rules governing health insurance including policy and financial reporting requirements and prohibitions against discrimination. Title I also mandates that hospitals establish and publish a list of standard charges, and prescribes rules for insurers to submit reinsurance claims to the Secretary under a program for early retirees. *See* PPACA §§ 1001, 1102(c).

Section 1558 incorporates the procedures, burden-shifting framework, remedies, and statute of limitation set forth in the CPSIA, 15 U.S.C. 2087(b).[15] *See* PPACA § 1558; 29 U.S.C. § 218c.

13. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

14. Section 1558, 29 U.S.C. 218c, makes repeated reference to "this title." The phrase "this title," means Title I of the PPACA, not Title 29 of the United States Code. *See Rosenfield v. GlobalTranz Enters., Inc.*, No. CV 11–02327, 2012 WL 2572984 (D. Ariz. July 2, 2012).

15. *See supra* Section V - Consumer Product Safety Improvement Act, 15 U.S.C. § 2087.

IX. COMMON LAW WRONGFUL DISCHARGE

In addition to the relief available under Federal whistleblower laws, employees may have a common law claim for wrongful discharge in violation of public policy. This can be the best remedy for whistleblowers because employees can seek punitive damages in wrongful discharge cases.[16]

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

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

A. Refusing to Engage in Illegal Activity

The tort for wrongful discharge protects employees from being terminated because they refuse to engage in illegal activity. For example, courts will likely recognize a

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

wrongful discharge claim where an employee is terminated for refusing to participate in an employer's irregular accounting practices, including the recording of an asset purchased by one entity and placing it on the books of another entity. *See Rocky Mountain Hosp. & Medi. Serv. v. Mariani*, 916 P.2d 519, 527 (Colo. 1996) (recognizing wrongful discharge claim where company recorded assets purchased by one entity under books of another entity). Cases construing this form of protected conduct include:

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

B. Fulfilling a Statutory Obligation

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

C. Exercising a Statutory Right or Privilege

Terminating an employee for exercising her statutory rights can give rise to a wrongful discharge claim. *Uylaki v. Town of Griffith*, 878 N.E. 2d 412, 414 (Ind. Ct. App. 2007) (holding that employee who has been fired for exercising statutory right or refusing to violate law has claim for wrongful discharge). In *Jackson v. Morris Commc'ns Corp.*, for example, a Nebraska court recognized a cause of action for wrongful discharge where a co-circulation manager for the York News-Times alleged that "she was discharged in retaliation for filing a [workers' compensation] claim." *Jackson*, 657 N.W.2d 634, 641 (Neb. 2003). In reaching its decision, the court reasoned that the "failure to recognize the cause of action for retaliatory discharge for filing a workmen's compensation claim would only undermine [the] Act and the strong public policy behind its enactment." *Id.* at 641 (citing *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984)). A California court reiterated this principle in *Grant-Burton v. Covenant Care, Inc.*, when it recognized a wrongful discharge claim for an employee who was terminated for participating in a group discussion with other employees about the fairness of the employer's bonus system, a statutory right available to employees under section 232 the California Labor Code. *See Grant-Burton*, 99 Cal. App. 4th 1361, 1371 (2002). Covenant Care argued that section 232 was not triggered because the marketing directors did not disclose the amount of their bonuses. The court, however, rejected Covenant's argument, stating that the amount of wages can be disclosed without mentioning dollars and cents and concluded that the company wrongfully discharged the marketing director for exercising her statutory right to discuss compensation with her co-workers. Other examples of rights that have been recognized as the basis of a violation include:

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

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

D. Potential Sources of Public Policy

Sources of public policy for a common law wrongful discharge claim may include clear and particularized pronouncements of public policy in the United States Constitution, the State Constitution, and federal and state statutes and regulations. *See, e.g., Island v. Buena Vista Resort*, 103 S.W.3d 671,679 (Ark. 2003) (sexual harassment statute established public policy against sexual harassment); *Ballinger v. Delaware River Port Auth.*, 800 A.2d 97, 108 (N.J. 2002) (sources of public policy include legislation, administrative rules, regulations or decisions, and judicial decisions, as well as professional codes of ethics under certain circumstances); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 575 S.E.2d 618, 622 (W. Va. 2002) (Code of State Regulations sets forth specific statement of substantial public policy, ensuring that hospital unit is properly staffed to accommodate regulation's directive, that patients are protected from inadequate staffing practices, and that medical care is provided to hospital patients); *Wholey v. Sears Roebuck*, 803 A.2d 482, 490 (Md. 2002) (constitutional provisions and principles provide clear public policy mandates under which a termination may be grounds for wrongful discharge claim); *Mitchem v. Counts*, 523 S.E.2d 246, 250 (Va. 2000) (common law cause of action for wrongful termination could be based on public policies expressed in statutes prohibiting fornication and lewd and lascivious behavior); *Faulkner v. United Tech. Corp.*, 693 A.2d 293, 295 (Conn. 1997) (wrongful discharge claim may be predicated solely on violation of federal as opposed to state statute); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1033 (Ariz. 1985) (public policy can be found in expressions of state's founders and state's constitution and statutes that embody the public conscience of people within that state). Specific examples of federal statutes that may serve as sources of public policy include:

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

The FCA itself can be a source of public policy in a wrongful discharge action. For example, in *McNerney v. Lockheed Martin Operations Support, Inc.*, a district judge denied a motion to dismiss a Missouri common law wrongful discharge action in which the plaintiff alleged she was terminated for disclosing to her supervisor a billing scheme in which her employer was spreading the cost of certain projects to other unrelated projects, thereby causing certain projects to be falsely over billed. *McNerney*, No. 10–0704–CV–W–DGK, 2010 WL 4312976, at *2 (W.D. Mo. Oct. 22, 2010);

McNerney v. Lockheed Martin Operations Support, Inc., No. 10–0704–CV–W–DGK, 2012 WL 2131826 (W.D. Mo. June 12, 2012) (granting summary judgment for the employer, but further acknowledging the FCA as a source of public policy).

E. Pleading Requirements and Burden of Proof

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

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

1. That plaintiff was an at-will employee terminated by the defendant;

2. That the termination of the plaintiff's employment violates a specific public policy; and

3. That there is a causal nexus between the public policy violation and the employer's decision to terminate the plaintiff.

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

Additionally, in some states an employee must identify a public policy that is expressed in a source acceptable and actionable within the state governing the action. For example, as discussed above, some states require that the public policy be expressed in a state statute, rather than a federal source. *See, e.g., Clinton v. State ex rel. Logan County Election Bd.*, 29 P.3d 543 (Okla. 2001) (plaintiff must identify Oklahoma public policy goal that is clear and compelling and is articulated in existing Oklahoma constitutional, statutory, or jurisprudential law); *Torrez v. City of Scottsdale*, No. CV 96-07667, 13 IER 316 (Ariz. Super. Ct. 1997) (holding that neither federal statutes nor municipal ordinances are cognizable sources of public policy). Once the public policy has been established, the employee must demonstrate that her conduct furthered that particular public policy. This may require a showing that the employee took affirmative steps that required the employer to conform to the stated public policy.

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

F. Remedies

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

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

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

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

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

I. State Statutory Whistleblower Protections

Nearly all states and the District of Columbia have adopted statutory whistleblower protections, some of which protect only public sector employees.[17] The scope of protected conduct varies widely. Some state whistleblower statutes protect only disclosures concerning violation of law, while some also protect disclosures concerning violations of rules and regulations. Unlike nearly all of the federal whistleblower protection statutes, many state whistleblower protection laws do not protect internal disclosures. And some afford protection to a whistleblower only where the whistleblower disclosed the matter internally prior to reporting it to the Government.

The strongest state whistleblower protection statute for employees in the private sector is New Jersey's Conscientious Employee Protection Act ("CEPA"), N.J.S.A. § 34:19-5, which protects both private and public sector employees who disclose or threaten to disclose internally or to a public body an activity, policy, or practice that the employee reasonably believes is in violation of a law, rule, or regulation. Remedies for a prevailing CEPA plaintiff include economic damages, emotional distress damages, attorney's fees and punitive damages.

The District of Columbia also provides robust protections under its Contractors and Instrumentality Whistleblower Protection Act of 1998, D.C. Code §§ 2-223.01 to .07, which protects internal and external disclosures regarding:

> (A) Gross mismanagement in connection with the administration of a public program or the execution of a public contract;
>
> (B) Gross misuse or waste of public resources or funds;
>
> (C) Abuse of authority in connection with the administration of a public program or the execution of a public contract;
>
> (D) A violation of a federal, state, or local law, rule, or regulation, or of a term of a contract between the District government and a District government contractor which is not of a merely technical or minimal nature; or
>
> (E) A substantial and specific danger to the public health and safety.

D.C. Code § 2-223.01(7).

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

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17. Public Employees for Environmental Responsibility has compiled a detailed survey of state whistleblower protection statutes, which is posted at http://www.peer.org/assets/docs/wbp2/overview.pdf.

X. GENERAL TIPS FOR LITIGATING WHISTLEBLOWER RETALIATION CLAIMS

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

A. Claim Selection

1. Maximizing Damages

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

Another advantage of adding a statutory whistleblower retaliation claim is the opportunity to obtain reinstatement. Most of the DOL whistleblower retaliation statutes authorize preliminary reinstatement, *i.e.*, if OSHA finds for the complainant at the investigative stage (before the parties have litigated the case), the employer must reinstate the employee immediately. Preliminary reinstatement gives a complainant significant leverage in litigation (the whistleblower is back at the worksite while prosecuting his claim) and can lead to a favorable settlement.

Under the leadership of former US Labor Secretary Elaine Chao, OSHA was criticized for failing to enforce whistleblower protection statutes and for finding in favor of employers in most whistleblower retaliation investigations. Plaintiff's counsel typically viewed the OSHA investigative stage as a waste of time for the whistleblower because OSHA merely adopted the employer's justification for the adverse action. The current leadership of OSHA has undertaken concrete steps to invigorate OSHA's Whistleblower Protection Program, and OSHA has issued numerous favorable orders in whistleblower retaliation cases. The improvements are due in part to OSHA's updated Whistleblower Investigations Manual, which took effect on Sept. 20, 2011.[18]

18. The OSHA Whistleblower Investigations Manual is available online at https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf.

Accordingly, plaintiff's counsel should not assume that it is best to forego pursuing a whistleblower retaliation claim with an administrative exhaustion requirement. To the contrary, pursuing a strong whistleblower retaliation claim before OSHA can provide an opportunity to obtain preliminary reinstatement. The OSHA investigative process also enables plaintiff to discover the employer's defenses and possibly obtain critical admissions prior to prosecuting related claims. Furthermore, since many of the whistleblower retaliation claims that must be initially filed with DOL contain a removal provision, the whistleblower can initially pursue the claim before DOL and later remove it to federal court.

2. Choosing a Remedy with a Favorable Causation Standard

As discussed *supra*, the whistleblower retaliation statutes enacted in the past decade all employ a very favorable causation standard for plaintiffs. To prevail, the plaintiff must demonstrate merely that protected conduct was a "contributing factor" in the employer's decision to take an adverse action. The ARB defines a contributing factor as "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, *slip op.* at 17 (July 27, 2006). Close temporal proximity alone can support an inference of causation under the "contributing factor" standard. *See, e.g., Kalkunte*, 2004-SOX-56, *supra*. Some state common law wrongful discharge actions, however, require a plaintiff to meet a "sole cause" standard, a far more onerous causation standard. Accordingly, in selecting claims, it is important to consider adding a claim that employs the favorable "contributing factor" standard.

3. Naming Individual Defendants

An important consideration in choosing among retaliation claims is whether the claim authorizes individual liability. The retaliation provision of SOX expressly authorizes claims against individuals, and at least some jurisdictions have held the FERA amendments to § 3730(h) authorize claims against individuals. *See Laborde v. Rivera-Dueño*, 719 F. Supp. 2d 198, 205 (D. Puerto Rico 2010); *Huang v. Rector & Visitors of Univ. of Va.*, 896 F. Supp. 2d 524 (W.D. Va. 2012) (post-FERA, liability is not limited to employers). Additionally, several jurisdictions allow for individual supervisor liability in common law wrongful discharged claims. *See, e.g., VanBuren v. Grubb*, 733 S.E.2d 919, 923 (Va. 2012); *Myers v. Alutiiq Int'l Solutions, LLC,* 811 F.Supp.2d 261, 269 (D.D.C. 2011); *Harless v. First Nat'l Bank in Fairmont,* 169 W.Va. 673, 289 S.E.2d 692, 698, 699 (1982).

Asserting a claim against an individual can be especially important where the corporation might not have sufficient assets to pay a judgment and the individual responsible for the retaliation is covered under a Director & Officers insurance policy. Before naming an individual as a defendant, consider the potential impact on diversity jurisdiction and consider whether naming an individual defendant will make them personally invested in the case and pose an obstacle to settlement. An individual defendant might be strongly disinclined to settle and instead prefer to litigate the claim.

B. Forum Selection

As a general rule, state courts are the preferred forum to try whistleblower retaliation claims because jury verdicts tends to be higher and summary judgment is less of an obstacle when litigating in state court. While jurors can readily relate to being the subject of an abusive working environment, it is important to carefully evaluate whether the plaintiff will be likeable to a jury in the forum in which the claim would be brought.

Where the plaintiff is not likely to be viewed favorably by a jury but the facts are strong, litigating before a DOL ALJ might be a better option than a jury trial because DOL ALJs are less inclined to make emotional decisions in reaction to the employer's efforts to undermine the plaintiff's motive for engaging in protected activities or the employer's efforts to portray the plaintiff as a disgruntled former employee and instead focus on the evidence.

Counsel should also consider the varying standards for actionable adverse actions and causation. For example, SOX section 806's scope of actionable adverse actions is considered broader than the *Burlington Northern* standard applied by courts when interpreting 31 U.S.C. § 3730(h). Additionally, SOX and the new provisions of the NDAA use a "contributing factor" standard instead of 3730(h)'s more rigorous "but-for" requirement.

Litigating a retaliation claim before a DOL ALJ can also be advantageous because ALJs typically permit the plaintiff to take broad discovery,[19] which could produce evidence useful in a *qui tam* action.[20] In addition, DOL ALJs usually address discovery disputes promptly, and will permit nearly all relevant evidence to come in at the hearing. Formal rules of evidence generally do not apply in whistleblower retaliation cases tried before DOL ALJs. Lastly, plaintiff can reach a hearing on the merits before an ALJ far more expeditiously than in federal court while avoiding baseless counterclaims.

Several of the recently enacted federal whistleblower protection statutes contain a removal provision under which the plaintiff may elect to bring the retaliation claim *de novo* in federal court once the claim has been pending before DOL for a certain period of time—180 days for a SOX claim, for example. That option provides the complainant an opportunity to initially litigate the claim at DOL and then remove it to federal court and add other deferral claims and pendent state claims. Employers have tried to argue that although these statutes provide for *de novo* review in federal court, the decisions of the presiding ALJ, such as an order granting a motion to dismiss or a motion for summary decision, should be accorded preclusive effect when the claim is removed to federal court. The Fourth Circuit, however, has flatly rejected this argument, hold-

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

20. While FERA amendments to the public disclosure bar contained at 31 U.S.C. § 3730(e) restrict its application to actions in which the government is a party, the government may still call for a reduction in the relator's reward under § 3730(d)(1).

ing that a SOX whistleblower may seek *de novo* review in federal court so long as the complaint has been pending for 180 days and DOL has not issued a final decision. *See Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 245 (4th Cir. 2009) (deferring to administrative agency, "even if more efficient, is in direct conflict with the unambiguous language of [SOX]").

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

C. Claim Preemption

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

D. Claim Preclusion

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

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

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

In general, the findings of an agency investigation do not have preclusive effect on related claims. *See, e.g., Hanna v. WCI Cmtys., Inc.*, 2004 U.S. Dist. LEXIS 25651 (S.D. Fla. Nov. 18, 2004) (holding that OSHA's preliminary findings in a SOX do not have preclusive effect). But the California Supreme Court did issue a surprising holding in *Murray v. Alaska Airlines, Inc.*, when it ruled that OSHA's findings in an AIR21 retaliation action barred a plaintiff from pursuing related claims under state law because he had the option of a formal adjudicatory hearing at DOL to determine the contested issues and failed to request a hearing before DOL, thereby rendering OSHA's notice of determination a final order. *Murray*, 237 P.3d 565 (CA 2010). It does not appear that any other courts have followed the *Murray* decision with regard to DOL-administered whistleblower claims, but it underscores the importance of timely appealing agency decisions before they become final orders.

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

E. Preserving Ability to Recover Relator Share

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

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

F. Pleading Whistleblower Retaliation Claims

While Rule 9(b) does not apply to 3730(h) or any other retaliation cause of action, counsel for whistleblowers are well-advised in the wake of *Iqbal*[21] and *Twombly*[22] to plead whistleblower retaliation complaints in detail. In a 3730(h) action, plaintiff should plead how plaintiff's disclosures or plaintiff's investigation reasonably could lead to a viable FCA action. *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261,

21. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
22. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

1269 (9th Cir. 1996). In a SOX retaliation action, plaintiff should plead how plaintiff's disclosure "definitively and specifically" relates to the SOX subject matter (such as shareholder fraud or a violation of an SEC rule).[23] Pleading protected conduct in detail will also be useful in discovery disputes in that plaintiff will be able to point to specific allegations in the complaint as a basis to take broad discovery on plaintiff's disclosures.

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

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

G. Prosecuting Whistleblower Retaliation Claims

Although whistleblower retaliation statutes generally do not require that plaintiff disclose an actual violation of law,[24] some courts are erroneously applying a heightened standard of objective reasonableness that comes close to requiring plaintiff to prove that she disclosed an actual violation of law, *e.g.*, requiring a § 3730(h) plaintiff to demonstrate that her disclosures would have resulted in a successful *qui tam* action. Therefore, to survive summary judgment, it is critical to develop evidence proving the objective reasonableness of plaintiff's disclosures.

Whistleblower retaliation plaintiffs are entitled to take broad discovery about their protected disclosures, but of course should expect defendants vigorously to resist disclosing documents and information about the plaintiff's disclosures. Counsel should promptly move to compel such evidence, and there are several strong legal arguments to support a motion to compel. As discussed *supra*, plaintiff will have to prove the objective reasonableness of her disclosures, and therefore should take broad

23. While *Sylvester v. Parexel Inc., LLC*, ARB Case No. 07-123, ALJ Nos. 2007-SOX-39, 42, 2011 WL 2165854 (ARB May 25, 2011), replaced the "definitively and specifically" with "reasonable belief," some circuits have been slow to adopt the more liberal standard. *See Riddle v. First Tenn. Bank, Nat'l Ass'n*, 497 F. App'x 588, 595 (6th Cir. 2012) ("In order to receive the whistle-blower protections of SOX, 'an employee's complaint must definitively and specifically relate to one of the six enumerated categories found in 18 U.S.C. § 1514A.'") (quotation and citation omitted).

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

discovery about her disclosures. In addition, courts have held that information about the plaintiff's disclosures is relevant to the employer's motive for retaliating against plaintiff. *See, e.g., Dilback v. Gen. Elec. Co.*, No. 4:00-CV-222, 2008 WL 4372901, at *4 (W.D. Ky. Sept. 22, 2008) ("If Plaintiff can show that the documents he was attempting to retrieve reveal the existence of false claims on the part of the Defendant, then such evidence may be probative of the Defendant's motivation.").

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

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

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

- Direct evidence of retaliatory motive, *i.e.*, "statements or acts that point toward a discriminatory motive for the adverse employment action." William Dorsey, *An Overview of Whistleblower Protection Claims at the United States Department of Labor*, 26 J. Nat'l Ass'n Admin. L. Judiciary 43, 66 (Spring 2006) (citing *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004)). As the Eighth Circuit has pointed out, direct evidence is not the converse of circumstantial evidence, but instead "is evidence 'showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated' the adverse employment action." *Griffith*, 387 F.3d at 736. "'[D]irect' refers to the causal strength of the proof, not whether it is 'circumstantial' evidence." *Id*.

- Deviation from company policy or practice, such as failing to apply a progressive discipline policy to the whistleblower. During the employer's Rule 30(b)(6) deposition or the deposition of a Human Resources official, plaintiff should explore relevant company policies in detail to lay a foundation for proving that the employer deviated from its policies. For example, a whistleblower who is terminated for committing a minor violation of policy, such as sending a personal email using a work computer, should establish that the company has a progressive disciplinary policy and that the employer typically metes out an oral warning or no disciplinary action to an employee who sends a personal email from work. Similarly, explore whether the company investigated plaintiff's disclosures in accordance with its policies or protocols concerning investigation of employee concerns. A sham or biased investigation is strong evidence of retaliation. Failure to investigate can also be circumstantial evidence of retaliation. In *Howard v. Urban Inv. Trust, Inc.*, No. 03cv7668, 2010 WL 832294 at *4 (N.D. Ill. Mar. 8, 2010), the court held that the employer's failure to investigate or stop the harassment of the whistleblower constitutes discrimination in the terms and conditions of employment.

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

- Singling out the whistleblower for extraordinary or unusually harsh disciplinary action. *See Overall* v. *TVA,* ARB Nos. 98-111 and 128*,* ALJ No. 1997-ERA-000S3, slip op. at 16-17 (Apr. 30, 2001)*, aff'd TVA* v. *DOL*, 59 F. App'x 732 (6th Cir. 2003). Obtain all relevant policies and procedures, including the employer's progressive discipline policy, and determine whether the employer failed to follow its procedures. Where your client was subject to an adverse action for violating a particular policy or work rule, ascertain whether the employer meted out similar discipline against other employees who violated the same policy or work rule.

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

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

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

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

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

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

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

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

H. Playing Defense

While whistleblower retaliation plaintiffs often have significant leverage in litigation, including the prospect of far-reaching discovery about the unlawful conduct that the whistleblower disclosed, a straightforward retaliation case can turn into years of expensive and hard-fought litigation. Upper management's animosity toward the whistleblower, an inclination to avoid the appearance of conceding that the whistleblower's disclosures were legitimate, and other factors sometimes cause employers to commit an irrational level of resources towards defending a whistleblower retaliation claim, including legal costs that are several times the value of the claim. During the intake stage and throughout the litigation, it is critical to anticipate scorched earth tactics and to develop a strategy to avoid permitting such tactics to derail the litigation. The following are some tips for playing defense:

- Advise clients early on to avoid posting anything about their claims on social media and from commenting about their claims in emails or text messages. Indeed, a retaliation plaintiff should strongly consider curtailing the use of social media while the litigation is pending.

- With some exceptions, such as cooperation with the DOJ or other law enforcement, it is best for a retaliation plaintiff to obtain documents to support a retaliation claim through the discovery process or from public records.[25] To avoid defending a strong retaliation case on the merits, defense counsel might use a plaintiff's retention of company documents as a basis to derail the litigation. For example, the employer may file and aggressively prosecute retaliatory counterclaims with no value except to force a settlement or intimidate the plaintiff. The employer may also move for sanctions.

- Where the defendant files retaliatory counterclaims, amend the complaint to bring a separate cause of action. *See, e.g., Darveau v. Detecon, Inc.*, 515 F.3d 334, 343 (4th Cir. 2008) ("filing a lawsuit alleging fraud with a retaliatory motive and without a reasonable basis in fact or law" constitutes an adverse employment action).

- Do not let the case focus on plaintiff's motive. Indeed, the ARB has repeatedly held that plaintiff's motive for blowing the whistle is irrelevant.[26]

- React promptly and pro-actively to defense tactics designed to harass plaintiff. For example, where defendant insists on subjecting the plaintiff to a gratuitous defense medical examination (defense counsel will refer to it as an "independent medical examination") in a case where plaintiff is alleging only garden variety emotional distress damages, consider moving for a protective order before the defendant moves to compel the examination.[27] Similarly, consider moving for a protective order where the defense counsel takes extensive discovery from plaintiff's current or prior employers as a means to harm plaintiff's reputation.

- Plaintiff should be cautious in discussing the litigation with current employees, as the employer might use current employees to conduct informal discovery.

- During the intake process, counsel should investigate potential pitfalls, such as untrue statements on a job application or resume (harmful to plaintiff's credibility and a possible ground for an after-acquired evidence defense), or plaintiff's nega-

25. The Sixth Circuit has articulated a six-factor test to determine whether employee's delivery of confidential documents to his counsel in support of a discrimination claim was protected conduct. *See Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 725-26 (6th Cir. 2008); *see also Kempcke v. Monsanto Co.*, 132 F.3d 442, 446–47 (8th Cir. 1998) (reversing district court's grant of summary judgment for employer because reasonable jury could find that employee who obtained and disseminated confidential information engaged in protected activity under Title VII); *but see* ARB No. 09-118, ALJ No. 2008-SOX-64 (ARB Sept. 28, 2011) (holding that an employee engaged in SOX protected conduct when he sent an email with co-workers' social security numbers to a personal email address and provided proprietary information to the IRS.).

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

27. *See, e.g., Flanagan v. Keller Prods., Inc.*, No. CIV. 00–542–M, 2001 WL 1669379 (D.N.H. Dec. 18, 2001) (plaintiff did not place her mental condition in controversy where plaintiff renounced any claim for damages for unusually severe emotional distress).

tive postings about the employer on blogs, social media, or listservs.

- Ensure that plaintiff preserves all evidence relevant to the claim. The idea of a "litigation hold" and the consequences of failing to preserve electronic evidence are foreign to most plaintiffs pursuing retaliation claims. Therefore, counsel should explain in detail the steps necessary to preserve evidence. Aggressive defense counsel will question plaintiff at a deposition in detail to establish that plaintiff did not take adequate measures to preserve evidence and then bring a spoliation motion in an effort to obtain dismissal or an adverse inference.

- Plaintiff should maintain a detailed log of job search efforts in order to prove mitigation of damages.

- Limit aggressive employer discovery concerning the after-acquired evidence defense, which is often used as a means to harass the plaintiff and put the plaintiff on trial. The after-acquired evidence defense gives employers a strong incentive to undertake extensive discovery into a discrimination plaintiff's character, conduct, background, and job performance to find some misconduct that would potentially warrant cutting off certain damages at the time the employer learned of new information. Indeed, as suggested by Professor Hart, a frivolous assertion of the after-acquired evidence defense to dissuade a plaintiff from pursuing her case may give rise to an independent retaliation claim.[28]

XI. CONCLUSION

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

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

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

Statute	Protected Conduct	SOL	Administrative Exhaustion	Remedies	Jury Trial
Department of Defense Authorization Act, 10 U.S.C. § 2409.	Disclosure about: • gross mismanagement of DoD or NASA contract or grant; • gross waste of DoD or NASA funds; violation of law related to a DoD or NASA contract or grant; or • a substantial and specific danger to public health or safety.	3 years	Yes, employee must file with Inspector General. If no decision within 210 days of filing the complaint, employee may file a complaint in federal district court.	• Reinstatement • Back pay • Restoration of employment benefits • Exemplary damages • Attorney's fees and costs	Yes
Pilot program for enhancement of contractor protection from reprisal for disclosure of certain information, 41 U.S.C. § 4712.	Disclosure about: • gross mismanagement of a federal grant; • a gross waste of federal funds; • a violation of law, rule, or regulation related to a federal contract (including the competition for or negotiation of a contract) or grant; or • a substantial and specific danger to public health or safety. Excludes the intelligence community.	3 years	Yes, employee must file with Inspector General. If no decision within 210 days of filing the complaint, employee may file a complaint in federal district court.	• Reinstatement • Back pay • Restoration of employment benefits • Exemplary damages • Attorney's fees and costs	Yes
Federal Acquisitions Streamlining Act, 41 U.S.C. § 265. Temporarily suspended for the duration of the pilot program found at 42 U.S.C. § 4712.	Disclosures about a substantial violation of law related to a contract.	None	No private right of action. Employee receives only an investigation by the Inspector General.	• Reinstatement • Back pay • Attorney's fees and costs	No
False Claims Act, 31 U.S.C. § 3730(h).	• Lawful acts done in furtherance of a qui tam action or to stop a violation of the FCA. • Being associated with someone who engaged in protected conduct.	3 years	No, employee can bring claim in any federal district court.	• Reinstatement • Double back pay • Interest on back pay • Special damages • Attorney's fees and costs	Yes

Statute	Protected Conduct	SOL	Administrative Exhaustion	Remedies	Jury Trial
Sarbanes-Oxley Act, 18 U.S.C. § 1514(A).	Disclosures about alleged violations of the federal mail, wire, radio, TV, bank, securities fraud statutes or any rule or regulation of the SEC.	180 days	Yes, employee must file with DOL's OSHA. If no decision within 180 days of filing complaint, may file a complaint in federal district court.	• Reinstatement • Back pay with interest • Special damages • Attorney's fees and costs	Yes
Wrongful Discharge	Varies by state. Examples include: (1) exercising a statutory right, (2) refusing to engage in illegal activity, or (3) performing a duty required by law.	State statute of limitations for tort actions.	No, employee can file in federal or state court.	• Back pay • Front pay • Special damages • Punitive damages • Lacks statutory fee-shifting	Yes
Patient Protection and Affordable Care Act § 1558; 29 U.S.C. § 218c.	• Disclosures about suspected violations of Title I of the Act to the employer, federal government, or state attorney general. • Participating in investigations. • Testifying about violations. • Objecting or refusing to participate in an activity reasonably believed to violate Title I.	180 days	Yes, employee must file with DOL's OSHA. If no decision within 210 days of filing complaint, may file a complaint in federal district court.	• Reinstatement • Back pay • Special damages • Attorney's fees and costs	Yes
Dodd-Frank Wall Street Reform and Consumer Protection Act § 748; 7 U.S.C. § 26(h).	• Disclosing information to the CFTC in accordance with the whistleblower incentive program. • Assisting in any investigation or action of the CFTC based upon or related to disclosed information.	2 years	No, employee can bring claim in any federal district court.	• Reinstatement • Back pay with interest • Special damages • Attorney's fees and costs	Likely yes[29]

29. While § 748 of the Dodd-Frank Act does not explicitly grant the right to a jury trial, the ARB's decision in *Kalkunte*—affirming the ALJ's award of damages for "pain, suffering, mental anguish, the effect on her credit [due to losing her job], and the humiliation she suffered"—shows that special damages can include compensatory damages. *Kalkunte v. DVI Fin. Servs.*, ARB Nos. 05-139, 05-140 at 11, ALJ No. 2004-SOX-56 at 11 (ARB Feb. 27, 2009). If compensatory damages are sought, it is likely the plaintiff would be entitled to a jury trial.

Statute	Protected Conduct	SOL	Administrative Exhaustion	Remedies	Jury Trial
Dodd-Frank Wall Street Reform and Consumer Protection Act § 922; 15 U.S.C. § 78u-6(h).	• Disclosing information to the SEC in accordance with the whistleblower incentive program • Initiating, testifying in, or assisting in any investigation or action based on or related to previously disclosed information • Making disclosures that are required or protected under SOX. • Making disclosures that are protected or required under any law, rule, or regulation subject to the jurisdiction of the SEC.[30]	3 years from the date when the facts material to the right of action are known or reasonably should have been known by the employee; no more than 6 years from the date of the violation.	No, employee can bring claim in any federal district court.	• Reinstatement • Double back pay with interest • Attorney's fees and costs	No
Dodd-Frank Wall Street Reform and Consumer Protection Act § 1057; 12 U.S.C. § 5567.	(1) providing information relating to a violation of the Consumer Finance Protection Act or any law enforced by the Consumer Financial Protection Bureau ("CFPB") to the employer, CFPB, or any state, federal, or local government or law enforcement agency; (2) testifying or assisting in a proceeding concerning a violation of the CFPA or any rule, order, standard, or prohibition prescribed by the CFPB; (3) filing, instituting, or causing to be filed any proceeding under any Federal consumer finance law; or (4) refusing to participate in an activity, policy, practice, or assigned task that the employee reasonably (or other such person) reasonably believes violates any law, rule, order, standard, or prohibition subject to the jurisdiction of, or enforceable by, the CFPB.[31]	180 days	Yes, employee must file with DOL's OSHA. If no decision within 210 days of filing complaint, may file a complaint in federal district court.	• Reinstatement • Back pay with interest • Special damages • Attorney's fees and costs	Yes

30. *See supra* Section VII(A) discussing the circuit split regarding the definition of "whistleblower" and what constitute protected activity.

31. *See supra* section VI listing the laws enforced by the CFPB; 12 U.S.C. § 5481(12).