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

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

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

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TABLE OF CONTENTS

U.S. ex rel. Dodge v. ACS State & Local Solutions,
2009 WL 928310 (M.D. Fla. Apr. 3, 2009)

U.S.ex rel. Baltazar v. Warden,
2009 WL 935805 (N.D. Ill. Apr. 2, 2009)

U.S. ex rel. Becker v. Tools & Metals, Inc.,
2009 WL 855651 (N.D. Tex. Mar. 31, 2009)

U.S. ex rel. Kirk v. Schindler Elevator Corp.,
2009 WL 857075 (S.D.N.Y. Mar. 30, 2009)

U.S. ex rel. Westfall v. Axiom Worldwide, Inc.,
2009 WL 764528 (M.D. Fla. Mar. 20, 2009)

U.S. ex rel. Poteet v. Lenke,
2009 WL 724940 (D. Mass. Mar. 20, 2009)

In re Natural Gas Royalties,
2009 WL 684653 (10th Cir. Mar. 17, 2009)

U.S. ex rel. Pritsker v. Sodexho, Inc.,
2009 WL 579380 (E.D. Pa. Mar. 6, 2009)

U.S. ex rel. Vuyyuru v. Jadhav,
2009 WL 331967 (4th Cir. Feb. 12, 2009)

U.S. ex rel. Herndon v. Appalachian Reg'l Cmty. Head Start, Inc.,
2009 WL 249645 (W.D. Va. Feb. 3, 2009)

U.S. ex rel. Smart v. Christus Health,
2009 WL 151590 (S.D. Tex. Jan. 22, 2009)

U.S. ex rel. Poteet v. Medtronic, Inc.,
2009 WL 77968 (6th Cir. Jan. 14, 2009)

U.S. ex rel. Davis v. District of Columbia,
2008 WL 5332817 (D.D.C. Dec. 23, 2008)

U.S. ex rel. Radcliffe v. Purdue Pharma, L.P.,
2008 WL 4587783 (W.D. Va. Oct. 14, 2008)

U.S. ex rel. Ondis v. City of Woonsocket, R.I.,
2008 WL 4547495 (D.R.I. Oct. 08, 2008)

U.S. ex rel. First American Engineered Solutions, LLC v. Olin Corp.,
2008 WL 4224350 (E.D. Wis. Sep. 11, 2008)

U.S. ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.,
2008 WL 4149638 (10th Cir. Sep. 10, 2008)

U.S. ex rel. Lam v. Tenet Healthcare Corp.,
2008 WL 2835215 (5th Cir. July 22, 2008)

U.S. ex rel. Sharp v. E. Okla. Orthopedic Ct.,
2009 WL 499375 (N.D. Okla. Feb. 27, 2009)

U.S. ex rel. Radcliffe v. Purdue Pharma, L.P.,
2009 WL 161003 (W.D. Va. Jan. 25, 2009)

U.S. ex rel. Howard v. USA Envtl., Inc.,
2009 WL 113444 (M.D. Fla. Jan. 19, 2009)

U.S. ex rel. Carter v. Halliburton Co.,
2009 WL 90134 (E.D. Va. Jan. 13, 2009)

U.S. ex rel. Rafizadeh v. Continental Common, Inc.,
2008 WL 5265188 (5th Cir. Dec. 19, 2008)

U.S. ex rel. Kennedy v. Aventis Pharmaceuticals,
2008 WL 5211021 (N.D. Ill. Dec. 10, 2008)

U.S. ex rel. Shurick v. Boeing Co.,
2008 WL 5054739 (M.D. Fla. Nov. 21, 2008)

Barys ex rel. U.S. v. Vitas Healthcare Corp.,
2008 WL 4768856 (11th Cir. Nov. 3, 2008)

Unterschuetz v. In Home Personal Care, Inc.,
2008 WL 4572512 (D. Minn. Oct. 14, 2008)

U.S. ex rel. Foster v. Bristol-Myers Squibb Co.,
2008 WL 4360697 (E.D. Tex. Sep. 24, 2008)

U.S. ex rel. Rost v. Pfizer, Inc.,
2008 WL 4293642 (D. Mass. Sep. 18, 2008)

Hopper v. Solvay Pharmaceuticals, Inc.,
2008 WL 4177927 (M.D. Fla. Sep. 08, 2008)

U.S. ex rel. Gonzalez v. Fresenius Medical Care North America,
2008 WL 4277150 (W.D. Tex. Sep. 02, 2008)

Abner v. Jewish Hosp. Healthcare Services, Inc.,
2008 WL 3853361 (S.D. Ind. Aug. 13, 2008)

U.S. ex rel. Staniszewski v. Washington & Jefferson College,
2008 WL 2987213 (W.D. Pa. July 31, 2008)

U.S. ex rel. Serrano v. Oaks Diagnostics, Inc.,
2008 WL 2930348 (C.D.Cal. July 25, 2008)

U.S. ex rel. Lewis v. Walker,
2008 WL 2817091 (M.D. Ga. July 18, 2008)

U.S. v. Pekin Memorial Hospital,
2008 WL 2705443 (C.D. Ill. July 9, 2008)

U.S. ex rel. Shutt v. Community Home and Health Care Services, Inc., 2008 WL 5220273 (9th Cir. Dec. 16, 2008); *U.S. ex rel. Shutt v. Community Home and Health Care Services, Inc.*, 2008 WL 5233478 (9th Cir. Dec. 16, 2008)

U.S. ex rel. Eisenstein v. City of New York, 2008 WL 3840447 (2nd Cir. Aug. 19, 2008)

B. Calculating Damages and Civil Penalties

U.S. ex rel. Resnick v. Weill Medical College of Cornell University, 2009 WL 637137 (S.D.N.Y. Mar. 5, 2009)

Daewoo Engineering and Const. Co., Ltd. v. U.S., 2009 WL 415490 (Fed. Cir. Feb. 20, 2009)

U.S. v. Incorporated Village of Island Park, 2008 WL 4790724 (E.D.N.Y. Nov. 3, 2008)

U.S. v. United Technologies Corp., 2008 WL 3007997 (S.D. Ohio. Aug. 1, 2008)

C. Circumstantial Evidence

U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, 2008 WL 4277153 (D.D.C. Sep. 19, 2008)

D. Costs and Attorney's Fees

U.S. ex rel. Thompson v. Walgreen Co., 2009 WL 1405450 (D. Minn. May 18, 2009)

U.S. ex rel. Woodruff v. Hawaii Pacific Health, 2009 WL 734057 (D. Haw. Mar. 18, 2009)

U.S. ex rel. Woodruff v. Hawaii Pacific Health, 2008 WL 5115051 (D. Haw. Dec. 5, 2008)

U.S. ex rel. Marchese v. Cell Therapeutics, Inc., 2008 WL 4950938 (W.D. Wash. Nov. 18, 2008)

E. Government Intervention

U.S. ex rel. Roberts v. Sunrise Senior Living, Inc., 2009 WL 499764 (D. Ariz. Feb. 26, 2009)

F. Government Employee Relators

U.S. ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp., 2008 WL 4149638 (10th Cir. Sep. 10, 2008)

G. Identifying Federal Government Funds

U.S. ex rel. DRC, Inc. v. Custer Battles, LLC,
2009 WL 971017 (4th Cir. Apr. 10, 2009)

U.S. ex rel. Irwin v. Significant Educ., Inc.,
2009 WL 322875 (D. Ariz. Feb. 10, 2009)

U.S. v. Midwest Transport, Inc.,
2008 WL 4981076 (S.D. Ill. Nov. 24, 2008)

H. *Pro Se* Relators

U.S. ex rel. Meidinger v. Lee Memorial Hosp,
2009 WL 1607801 (M.D. Fla. June 9, 2009)

U.S. ex rel. Morgan v. Sci. Applications Int'l Co.,
2009 WL 881346 (D.D.C. Apr. 3, 2009)

Jones v. The Park at Lakeside Apartments,
2008 WL 4820083 (S.D. Tex. Nov. 5, 2008)

U.S. ex rel. Mergent Services v. Flaherty,
2008 WL 3840769 (2nd Cir. Aug. 19, 2008)

J. Meidinger v. Lee Memorial Hospital,
2008 WL 2704494 (M.D. Fla. July 2, 2008)

I. *Res Judicata*/Collateral Estoppel

U.S. ex rel. Lusby v. Rolls-Royce Corp.,
2009 WL 1855179 (7th Cir. June 30, 2009)

U.S. v. Miller, 2009 WL 943514 (M.D. La. Apr. 7, 2009)

U.S. ex rel. Kennard v. Comstock Resources, Inc.,
2009 WL 765002 (E.D. Tex. Mar. 23, 2009)

U.S. ex rel. Becker v. Tools and Metals, Inc., et al.,
2009 WL 577604 (N.D. Tex., Mar. 5, 2009)

U.S. v. Langley, 2009 WL 306733 (M.D. La. Feb. 9, 2009)

U.S. v. Dolphin Mortg. Corp.,
2009 WL 153190 (N.D. Ill. Jan. 22, 2009)

U.S. ex rel. Lusby v. Rolls-Royce Corp.,
2008 WL 4247689 (S.D. Ind. Sep. 10, 2008)

U.S. v. Khan,
2008 WL 2782669 (E.D. Mich. July 16, 2008)

Barrday Inc.

AT&T Technical Services Corp.

APL Ltd.

Galichia Medical Group

Weill Medical College

Victory Memorial Hospital

Cornerstone Hospital

San Mateo County Medical Center

Diabetes Treatment Center of America

Sikorsky Aircraft Company

The Methodist Hospital

Armor Holdings Products LLC

West Jefferson Medical Center

Cooper University Hospital and St. Joseph Healthcare System Inc.

Washington Savannah River Company

Eagle Global Logistics

NCS Pearson Inc.

RBC Mortgage

Bayer Healthcare LLC

Jackson-Madison County General Hospital and Milan General Hospital

MedQuist Inc.

Condell Health Network and Medical Center

L-3 Communications Corporation

HMS Diagnostics Inc.

Yale University

Spartan Motors

Cooper University Hospital/St. Joseph Healthcare System Inc.

Cephalon, Inc.

General Dynamics Armament and Technical Products Inc.

Walgreen Co.

Staten Island University Hospital

W.W. Grainger, Inc.

LEGAL ANALYSIS

SPOTLIGHT 257

FROM THE EDITOR

"Laws should be constructed so as to leave as little as possible to the decision of those who judge." –Aristotle

As America awaits the outcome of the ongoing Supreme Court confirmation hearings, questions about judicial bias and the proper interpretation of the rule of law abound. False Claims Act jurisprudence is certainly not immune from these dynamics, as FCA litigation regularly occurs nationwide, at all levels of the federal court system. In the aftermath of the 1986 amendments to the False Claims Act, fraud against the Government has been prosecuted at an unprecedented rate, resulting in the return of approximately $25 billion dollars to the public fisc. However, in the 20-plus years since those amendments took effect, defendants have successfully used the courts to exploit various substantive and procedural loopholes in the Act, thereby hamstringing the efforts of *qui tam* relators and government attorneys who fight fraud, and undermining Congress's intent regarding the application of the statute. Congress has responded to these attempts to chip away at the False Claims Act by recently enacting the Fraud Enforcement and Recovery Act of 2009—a statute that clarifies and amends certain liability and procedural provisions of the False Claims Act, in order to ensure that the law works as Congress always intended.

This "year in review" issue focuses on the importance of the language of False Claims Act provisions, as it contains two articles discussing the impact of the recent FCA amendments. In addition, this issue includes an article discussing the deficiencies of the Miami-Dade County False Claims Ordinance, the steps that must be taken to improve that statute, and some insights and advice that states and municipalities may wish to heed when enacting similar statutes in the future. As a community of advocates for, and protectors of, these anti-fraud laws, it is imperative that we fully understand how False Claims Act provisions work, so that we are prepared to educate the public and the courts whenever necessary. Hopefully, this issue can assist in that regard.

As always, I invite your feedback and input, and if you wish to submit an article for publication, please contact me at:

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Sincerely,
Cleveland Lawrence III

Recent False Claims Act & *Qui Tam* Decisions

JULY 1, 2008–JUNE 30, 2009

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

U.S. ex rel. Bly-Magee v. Premo, *slip op.*, 2009 WL 1396825 (9th Cir. May 20, 2009)

A relator filed a *qui tam* action against several California state officials, alleging that those officials falsely certified compliance with various federal regulations when they submitted their plan to the U.S. government for Rehabilitation Act funds. The relator also alleged that, through the defendants, the state of California entered into contracts with various school district and other local entities without using a bidding process, that the "certified time contribution" provisions in these contracts violated federal law—including the Anti-Kickback Act—and that when the defendants certified to the U.S. government that they had not violated the Anti-Kickback Act, they made a false statement in violation of the False Claims Act. The United States District Court for the Central District of California dismissed the relator's third amended complaint for failure to plead fraud with particularity, and denied the relator leave to amend. The relator appealed the district court's decision to the Ninth Circuit.

The Ninth Circuit held that the relator only alleged the "certified time contribution" theory of fraud with particularity, finding that the relator's other allegations failed to specify exactly which federal regulations the defendants allegedly violated. The court noted that these bare allegations were not sufficient to put the defendants on notice of their alleged misconduct, so as to allow them to prepare an answer. Although the circuit court determined that the relator alleged the certified time contribution theory with sufficient particularity, it still affirmed the district court's dismissal of the relator's complaint; the court determined that the relator's certified time contribution theory did not actually allege a violation of the Anti-Kickback Act, since the kickback scheme alleged by the relator alleged was actually allowed by the Act. Obviously, the circuit court then determined that the relator's kickback theory did not state a claim under the False Claims Act either, and thus affirmed the dismissal of the relator's complaint. The court also affirmed the district court's denial of leave to further amend the complaint, holding that granting the relator leave to amend would be futile, since the relator had already amended her complaint several times without curing its defects.

U.S. ex rel. Kennedy v. Aventis Pharmaceuticals, Inc., 2009 WL 1066285 (N.D. Ill. Apr. 20, 2009)

Relators brought a *qui tam* action against a pharmaceutical company, alleging that the defendant illegally marketed its prescription drug Lovenox for off-label uses not approved by FDA. The relators alleged that the defendant paid illegal kickbacks to hospitals for promoting the off-label use of Lovenox and also knowingly caused the submission of false claims to the government for reimbursement regarding the off-label use. The relators alleged that under the Medicare reimbursement program, the hospitals were required to submit a universal billing form containing a diagnosis related group code and that, based on this code, the hospitals received a fixed amount of Medicare reimbursement. Furthermore, the relators asserted that the hospitals were required to submit a cost report showing the costs they incurred during the year and the proportion of those costs attributable to Medicare. All the charges reported in the billing form were then adjusted against the hospitals' total cost, and if the adjusted figure exceeded a cutoff point, the hospitals received additional outlier payments. The relators specifically alleged that inclusion of charges for off-label use of Lovenox inflated the hospitals' total cost, causing the government to pay additional outlier charges. The relators also alleged that the hospitals were ineligible to participate in Medicare programs because they'd falsely certified their compliance with the Anti-Kickback Statute. The defendant moved to dismiss the relators' complaint for failure to state a claim. The United States District Court for the Northern District of Illinois found that the relators had adequately alleged that the hospital submitted claims that included charges for off-label use of Lovenox. However, the court noted that the relators failed to allege that the hospitals falsely certified compliance with the Anti-Kickback Statute. Accordingly, the court held that the relators failed to state a claim regarding their kickback allegation. Thus, the court granted the defendant's motion in part and denied it in part.

Outlier Payments

The court held that the relators adequately alleged the submission of false claims for getting outlier claims paid by the government. It noted that the defendant allegedly marketed Lovenox for off-label uses, which caused the hospitals to include charges for off-label uses in their cost reports, which, in turn, resulted in the inflation of those cost reports. The court noted that the cost reports were material to the government's decision to pay and to determine the amount of outlier claims. Furthermore, the court found that the relators identified several billing forms submitted by two hospitals, which specified the off-label prescription of Lovenox, and that those hospitals received significant outlier payments during the relevant period. Accordingly, the court held that the relators adequately alleged the submission of false claims and the use of falsely inflated cost reports to get outlier claims paid by the government.

Kickback Allegations

The relators alleged that defendant provided kickbacks to hospitals for promoting off-label uses of Lovenox, and that the hospitals sought Medicare reimbursement for off-label use of the drugs, and that the hospitals were ineligible to participate in the Medicare program because they falsely certified their compliance with the Anti-Kickback Statute. The court found that the relators failed to identify any specific claim regarding goods allegedly obtained by payment of a kickback. Furthermore, the relators failed to allege any express false certification of compliance with the Anti-Kickback Statute in connection with Medicare claims. Accordingly, the court held that the relators failed to allege FCA liability with respect to their kickback allegation.

U.S. ex rel. Fry v. Health Alliance of Greater Cincinnati, 2009 WL 485501 (S.D. Ohio Feb. 26, 2009)

The plaintiff filed a *qui tam* action against an integrated health care delivery system and other corporations providing services for heart and vascular diseases, alleging violations of the False Claims Act and Anti-Kickback Statute. Specifically, the plaintiff alleged that the defendants engaged in a cross-referral scheme by assigning heart station panel time to cardiologists in proportion to the volume of referrals made by them to the defendants. The defendants moved to dismiss. The United States District Court for the Southern District of Ohio denied the motion, concluding that the plaintiff adequately alleged that the defendants operated a cross-referral scheme to cause the government to pay. The defendants then jointly moved to certify the court's order for interlocutory appeal, claiming that determining whether heart station panel time constituted remuneration was a novel question that warranted certification. Furthermore, the defendants challenged the court's finding on the objective reasonableness of their alleged conduct and on the applicable standard of intent. The court noted that the remuneration question was not so rare as to warrant interlocutory appeal, and that neither of the remaining two issues raised in the defendants' motion controlled the outcome of the case. Accordingly, the motion was denied.

Heart Station Time as Remuneration

The defendants argued that the court misinterpreted the scope of remuneration under the Anti-Kickback Statute. They contended that remuneration was modified by the phrase "in cash or in kind," where "in kind" was limited to goods or services rather than money. The defendants argued that since heart station panel time did not amount to money, goods or services, it did not constitute remuneration. The government contended that the Anti-Kickback Statute itself provided that remuneration includes anything of value. Likewise, the court stated, trading referrals for referrals and guaranteed work illustrated an "in kind" exchange. The court agreed with the government and held that there was nothing novel about its conclusion on the remuneration question. Hence, it held that this issue did not merit interlocutory appeal.

Standard of Intent

The defendants also challenged the court's earlier ruling on the requisite standard of intent under the Anti-Kickback Statute's willfulness standard. The government argued that all authorities support the court's holding and that the issue of intent was a jury question, regardless of the standard ultimately applied. The court agreed and concluded that an interlocutory appeal on the question of intent would only cause unnecessary delay because the requisite standard applied here did not control the outcome of the case.

Objective Reasonableness

The defendants contended that the court was required to determine the objective reasonableness of their conduct in FCA cases, as announced by the U.S. Supreme Court in *Safeco Insurance Co. of America v. Burr*, 127 S. Ct. 2201 (2007). However, the district court found that even if *Safeco* required such a ruling, the alleged kickback scheme could not be in conformity with an objectively reasonable reading of the statute. Hence, *Safeco* would not alter the litigation and there was no basis for interlocutory appeal under the objective reasonable test.

U.S. ex rel Fry v. The Health Alliance of Greater Cincinnati, 2008 WL 5282139 (S.D. Ohio Dec. 18, 2008)

The relator filed a *qui tam* action against an integrated health care delivery system and other corporations providing services for heart and vascular diseases, alleging violations of the Anti-Kickback Statute, false certification, conspiracy, reverse false claims, and retaliatory discharge from employment. The government elected to intervene and brought claims for payment under mistake of fact, unjust enrichment, and disgorgement. The defendants jointly moved to dismiss the complaint for failure to state a claim and failure to plead fraud with particularity. The United States District Court for the Southern District of Ohio concluded that the plaintiff adequately alleged that the defendants operated a cross-referral scheme to cause the government to pay and also sufficiently identified the false claims in detail. The defendants' motion was accordingly denied.

Relator was a doctor affiliated with the defendants. He alleged that the defendants assigned time to doctors in the hospital's heart station in proportion to the number of referrals made by the doctors. This arrangement was allegedly a "pay to play" scheme that violated the Anti-Kickback Statute, the Stark Law, and the FCA. After the relator complained about the system, he was allegedly terminated in retaliation, and the defendants took steps to conceal the scheme.

Failure to State a Claim

The defendants argued that the time assigned to the cardiologists in the heart station did not amount to remuneration, and therefore, the complaint failed to state a violation of Anti-Kickback Statute. The court, however, found that the term "remuneration" was to be read expansively and that time in the heart stations was essentially money because it provided the doctors with an opportunity to bill for services. Accordingly, the court found that the government adequately pled a referral scheme that violated the Anti-Kickback Statute. Furthermore, the court noted that the complaint properly alleged knowing and willing participation in the scheme, because the defendants knowingly took steps to conceal the referral system.

The defendants also argued that they lacked the *mens rea* to violate the FCA, because it was objectively reasonable for them to believe their conduct was legal. The court found that it was common knowledge that remuneration for referrals was illegal and that their referral scheme had been challenged by doctors. Furthermore, the court held, the question of intent was for a jury to decide.

The defendants also contended that the complaint failed to sufficiently allege that the claims submitted were false or that they were material to the government's decision to pay, that there was no conspiracy, and that FCA claims do not attach to Medicaid, since Medicaid claims are submitted to the state, not the federal, government. The court noted that certification of compliance with the Anti-Kickback Statute was a necessary condition for payment by the government and therefore, was material to the government's decision to pay. It also found that the conspiracy claim was properly pled because it included more than one actor and dismissed the defendants' argument that Medicaid claims were not actionable under the FCA, finding that "Medicaid claims submitted to the state are also claims to the federal government under the FCA." Accordingly, the court held that the FCA claims were properly pled, and denied the motion to dismiss.

Particularity Requirement

The defendants argued that the complaint failed to identify any specific false claims and failed to describe how new patients were obtained as a result of heart station assignment time. The court, however, held that the complaint satisfied Rule 9(b)'s particularity requirement, as it identified not only the parties involved in the alleged fraud, but also the allegedly false claims. In particular, the complaint identified claims that were made under the referral scheme and the relevant diagnostic resource group codes of each false claim. Accordingly, the motions to dismiss were denied.

U.S. ex rel. Thomas v. Bailey, 2008 WL 4853630 (E.D. Ark. Nov. 6, 2008)

The relator filed a *qui tam* action against a neurosurgeon, surgical device manufacturers and other corporate entities, alleging that the defendants engaged in sham consulting agreements that were actually unlawful kickbacks under Anti-Kickback Statute. Specifically, the relator alleged that physicians entered into sham consulting agreements in which they were given kickbacks in return for the usage of the defendant surgical device manufacturer's products. The complaint provided specific facts of this scheme regarding one particular neurosurgeon and more generally alleged that the scheme was in place nationwide. The complaint further alleged that this scheme violated the Anti-Kickback Statute and caused submission of false claims to the government. The government declined to intervene. A settlement agreement was reached with the neurosurgeon and two other defendants. The relator then filed a second amended complaint that included allegations of a nationwide corporate policy of the same conduct. The defendants moved to dismiss for failure to state a claim. The United States District Court for the Eastern District of Arkansas held that the second amended complaint stated a claim to the extent it alleged that the corporate defendants knowingly caused the neurosurgeon to submit false claims to the government, but failed to state a claim regarding the remaining allegations. The defendants' motion was accordingly granted in part and denied in part.

Violation of the Anti-Kickback Statute

The court first addressed whether or not the relator pled the alleged fraud under the Anti-Kickback Statute with sufficient particularity. It held that the allegations of fraud relating to the neurosurgeon in the first complaint were pled with particularity because the relator provided the "who, what, where, when, and how" of the alleged kickback scheme. However, the court held that the allegations of a nationwide corporate policy of kickback arrangements were not pled with sufficient particularity, since the relator failed to identify who adopted the alleged policy, where was it adopted and how was it implemented.

Submission of False Claims

The court then analyzed whether the relator sufficiently pled that false or fraudulent claims were submitted to the government. The relator alleged that, while a sham consulting agreement was in place, the claims for surgical device reimbursement submitted by the hospitals for surgeries involving defendants' products constituted either an express or implied false certification of compliance with the Anti-Kickback statute, and subjected the defendants to liability under the FCA. The court noted that false certification of compliance with the Anti-Kickback statute could trigger liability under the FCA, and then determined that the hospital's act of submitting a claim impliedly certified the hospital's compliance with the Anti-Kickback Statute. However, the court observed, this was different from the hospital certifying a physician's compliance with the Anti-Kickback Statute. Hence, since the alleged sham consulting agreements were with the physicians and not directly with the hospitals, and since hospitals are not required to certify that physicians are in compliance with the Anti-Kickbacks statute, the court found the relator's allegations to be lacking as against the hospital. Furthermore, the court concluded that the relator's complaint did not plead that the hospitals knew that there were allegedly improper kickbacks. The relator, however, also contended that the hospital expressly certified the physicians' selection of devices while submitting their annual cost reports to the government. More broadly, the relator alleged that this certification by the hospital certified every physician's compliance with the relevant regulations. The court found that not only was this certification impossible and beyond the certifier's knowledge but it was also not required by regulation. Accordingly, the court held that the allegations regarding false or fraudulent claims submitted by hospitals were not pled properly and claims based on those allegations were dismissed.

Notably, however, the court held that the amended complaint did state a claim to the extent it alleged that the defendants knowingly caused the neurosurgeon to submit false claims to the government. It found that when a physician submits a claim to Medicare, he or she impliedly certifies the claim is in compliance with the Anti-Kickback Statute.

Particular FCA Claims

Lastly, the court discussed whether or not the relator adequately pled the remaining claims under sections 3729(a)(1), (2) and (3). The court found that the claim under subsection (a)(1) was properly pled because it alleged that the defendants engaged in a scheme that they knew would violate the Anti-Kickback Statute and result in the submission of false or fraudulent claims to the government. However, the claim under subsection (a)(2) was dismissed because the relator identified no false record that was presented to the government for payment. The subsection (a)(3) claim was also dismissed because the relator did not allege a specific intent to defraud the government.

Accordingly, the court only allowed the relator to maintain his claim under section 3729 (a)(1) of the FCA, which alleged that the defendants caused the neurosurgeon to submit false or fraudulent claims to the government for payment.

U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, 2008 WL 2791687 (D.D.C. July 21, 2008)

A relator filed a suit against a medical treatment center alleging that the center presented false Medicare and Medicaid claims to the government, in violation of the FCA, the Anti-Kickback Statute and the Stark Law. The center moved for summary judgment related to various aspects of the AKS and Stark Law claims under the FCA. The United States District Court for the District of Columbia denied the motion in part and granted it in part, holding that AKS and the Stark

Law violations could lead to liability under the FCA, and also finding that the relator produced sufficient evidence of a FCA violation, as it related to the AKS claim. However, the court found that the relator failed to meet the requisite elements of a Stark Law violation.

The relator claimed that defendant medical treatment center knowingly and willfully caused false Medicare claims to be submitted to the government, in violation of the FCA, the AKS and the Stark Law. The center moved for summary judgment, claiming that violations of the AKS and Stark Law could not proceed under the FCA as a matter of law and arguing, in the alternative, that the relator failed to prove the necessary elements of AKS and Stark Law violations. The court held as an initial matter that AKS and Stark Law violations can be brought under the FCA, since compliance with the AKS and Stark is a condition for Medicare reimbursement, and when defendants submit claims to Medicare, they impliedly certify compliance with these laws.

Additionally, the court denied the summary judgment motion related to the AKS. The court concluded that it was not necessary for the relator to produce evidence of each allegedly false claim submitted to the government, as long as the relator could highlight sufficient evidence of claim submission generally. Although the relator failed to produce evidence showing that Medicare claims had been presented to the government by hospitals with which the defendants had contracts, the relator did produce a declaration from an official working for Medicaid, which showed that the center caused Medicaid claims to be presented to the government. The court also found that the relator produced sufficient circumstantial evidence to support its argument that the center remunerated physicians with a purpose to induce referrals. Pointing to evidence that the defendant paid its medical directors fees far in excess of the fair market value commensurate with their duties, that the foundation of the defendant's business model was built primarily on concerns about the number of patients treated on a particular day, that the defendant was focused on referral numbers when negotiating with medical directors and hospitals, as well as some other "smoking guns," the court concluded that a reasonable jury could decide the issue in relator's favor. Furthermore, the court found that the relator produced sufficient evidence regarding the defendant's reckless disregard or knowledge of available information related to its potential AKS violation. The court found that the evidence was sufficient for a reasonable jury to find that the defendant acted with the required level of culpability to impose AKS and FCA liability. As a result, the court denied the center's motion with respect to the relator's AKS claim.

However, the court found that the relator failed to prove the necessary elements of a Stark Law violation and granted defendant's motion with respect to that claim. The court determined that the relator failed "to produce sufficient evidence showing that contracting hospitals had the requisite knowledge of defendant's payment scheme," and only made conclusory allegations regarding the alleged Stark violation.

***See U.S. ex rel. Conner v. Salina Regional Health Center, Inc.,* 2008 WL 4430668 (10th Cir. Oct. 02, 2008), at page 100.**

B. What Constitutes a "False" Claim?

Laymon, Jr. v. Bombardier Transp. (Holdings) USA, Inc., 2009 WL 793627 (W.D. Pa. Mar. 23, 2009)

The relator brought a *qui tam* action against a transport company, alleging that it overstated the amount of work done by a subcontractor in its disadvantaged business enterprise ("DBE") report to the Department of Transportation ("DoT"), in violation of the federal FCA and California's state FCA. Specifically, the relator alleged that the defendant entered into a contract with California's Bay Area transit system to renovate public transit vehicles, that the contract was partially funded by the DoT and that the contract required the defendant to: (1) allocate 16% of the base contract to disadvantaged business enterprises; and (2) to submit monthly reports to the DoT certifying compliance with that provision. The relator, owner of a DBE, further alleged that the defendant hired his company to work on the DoT contract, but inflated the number of hours the relator's company worked on the contract, in order to comply with the terms of the DoT contract. The relator claimed that the defendant's alleged misrepresentations in its DBE reports violated the FCA. The government declined to intervene and the defendant moved for summary judgment. The United States District Court for the Western District of Pennsylvania held that genuine issues of material fact remained as to the falsity of the reports, materiality, scienter, and damages, and consequently, denied the defendant's motion.

Falsity of Claims

While the defendant conceded that it incorrectly reported the work performed by the relator's company, it contended that the claims were not false because it did not actually use the inflated amounts to meet its contractual DBE goal—the defendant claimed that it had already reached the DBE goal of 16% without including the work performed by the relator's company. The court, however, found that the submission of accurate monthly reports was a prerequisite for receiving government funding. More importantly, the court found that there was evidence that the defendant did in fact use the inflated numbers to determine the cumulative total for the DBE program. Therefore, the court held that there was a material issue of whether or not the monthly DBE report was false, which prevented the court from granting summary judgment.

Materiality

The defendant also contended that the allegedly false reports were not material to government's decision to pay. The court again disagreed, noting that the amounts awarded to the relator's company had the natural tendency to influence the government's decision to pay the defendant. The court emphasized that the defendant's accurate reporting was a prerequisite for receiving government funding and that the contract could have been terminated on the basis of inaccurate reporting. Furthermore, although the defendant had been partially paid under the contract, the court found that the work performed by the relator's company was essential to completing the contract and meeting the DBE requirements. Hence, the court held that a material issue of fact existed with respect to materiality, and summary judgment was not proper.

Requisite Scienter

The defendant also argued that the inflated amounts in the reports were an honest mistake. However, the court found evidence that the defendant's certifying officer failed to verify the accuracy of the reports, while knowing that the amounts were inflated. Furthermore, the defendant also failed to notify the government and rectify the mistakes after learning of the inflated amounts. Thus, the court held that the defendant could have had the requisite scienter to violate the FCA, but that scienter was also an issue of material fact that could only be decided by a jury.

Damages

Finally, the defendant contended that the government did not suffer any actual damages by the false reports because it received everything it paid for and did not receive any payments from the government that it was not entitled to. The court held, however, that the government's DBE program could have been harmed by the defendant's allegedly false certifications. In addition, the court held that statutory damages could be appropriate as well. Accordingly, the court held that there was a material issue of fact regarding damages.

Relator's California FCA Claim

The defendant also moved to dismiss the relator's claim under the California False Claims Act, arguing that since the relator's cause of action under the federal FCA failed, the federal district court had no subject matter jurisdiction over the relator's state law claim. The court rejected this argument, in reliance on the plain language of the federal FCA, which provides that federal district courts "shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as the action brought under section 3730." The court also noted that federal district courts are authorized to decide state law claims deriving from "a common nucleus of operative fact" with substantive federal claims. This was more than sufficient to give the court subject matter jurisdiction over the relator's state law claim, and the court retain jurisdiction over that claim.

U.S. ex rel. Wilson v. Maxxam, Inc., 2009 WL 691224 (N.D. Cal. Mar. 10, 2009)

The plaintiffs brought a *qui tam* action against a company and its CEO, alleging that the defendants defrauded the government by submitting a fraudulently modeled sustained yield plan (SYP) in order to defraud the government into contributing $250 million dollars toward a government purchase of two of the defendants' forests. The government declined to intervene. After discovery closed, the defendants moved for summary judgment and moved to exclude new allegations of fraud. The United States District Court for the Northern District of California found that the defendants failed to disclose material information regarding the modeling protocols in the SYP, which was material to the government's decision to pay. Furthermore, the court found that the action was not barred by the statute of limitations. Hence, the defendants' motion for summary judgment was denied. The motion to exclude was granted in part.

Falsity

The defendants contended that the SYP was not false, arguing that they fully answered the government's questions regarding the SYP and that they came to an agreement with the government about issues raised in litigation. The court disagreed and found that the defendants failed to answer the government's questions. In fact, the court found that the government even stated that the defendants' answers were not sufficient. With respect to the defendants' assertion that they reach and agreement with the government, the court held that a single deposition statement by one government employee was not enough evidence to support a grant of summary judgment. Hence, the court held that the defendants were not entitled to summary judgment.

Materiality

The defendants argued that the SYP was not material to the government's decision to pay, because Congress appropriated the purchase funds before the SYP was complete. The court rejected this argument, though, and found that the approval of the purchase was contingent upon the SYP approval, even if the agreement did not depend on the specific content of the SYP. Moreover, the court found that the SYP was a key part of the agreement, since it aimed to sustain lawful production of timber and to quell public controversy regarding the defendants' management of their forests. Accordingly, the court denied the defendants' motion for summary judgment.

Damages

The defendants then contended that even if the SYP was material to the government's decision to pay, the government did not suffer any damages, as evidenced by an appraisal of the land which showed that the government paid a fair price. The court stated, however, that a jury could still find that the government suffered damages because of the fraudulent SYP, even though the court acknowledged that the damages calculation could be difficult. Furthermore, the court held that a trial was still necessary because the defendants could still be subject to civil penalties even if the jury found the government did not suffer any actual damages. Hence, the court denied the defendants' motion for summary judgment.

Statute of Limitations

The court also concluded that the statute of limitations did not bar the complaint. The defendants argued that the plaintiffs had constructive knowledge of the terms of the purchase agreement because it was a publicly available act of Congress. The court rejected the defendants' argument that constructive knowledge could be found based on a provision's inclusion in a large appropriations bill. Accordingly, the court held that the defendants failed to establish that the action was barred by the statute of limitations.

U.S. ex rel. Antidiscrimination Ctr. of Metro New York, Inc. v. Westchester County, N.Y., 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009)

The plaintiff filed a *qui tam* action against a county, alleging that it submitted falsely certified claims to the Department of Housing and Urban Development ("HUD"). The defendant received federal funding from HUD. As part of its application, the defendant was required to certify that it would meet a variety of fair housing obligations. In addition, the applicable regulatory scheme required the defendant to conduct an analysis of impediments to fair housing choice within the area, both in general and specifically with respect to race. The plaintiff alleged that the defendant, despite being a racially segregated county, failed to comply with the obligation to analyze race-based impediments, and hence made false certifications to HUD. The plaintiff moved for partial summary judgment on the issues of falsity and knowledge. The defendant filed a cross-motion for summary judgment on the grounds that the claims were not falsely certified, that it lacked knowledge of any alleged falsity, and that the certification was not material to the government's decision to pay. The United States District Court for the Southern District of New York granted the plaintiff's motion in part, granting summary judgment on the issue of falsity because the defendant made no demonstration that it properly analyzed race in analyzing the impediments to fair housing choice. Consequently, the court denied the defendant's motion, with respect to falsity. As to the remaining issues, the court found that material issues of fact were still present, and denied the remainder of the summary judgment motions.

Falsity of Claims

The court held that the defendant made express false certifications while applying for federal funds, since the defendant did not analyze any race-based impediments to fair housing, despite a federal regulation that required it to do so. The court also found that the defendant made impliedly false certifications, because the applicable statutory and regulatory scheme made it clear that compliance was a requirement for payment. Accordingly, the court granted the plaintiff's motion for summary judgment and denied the defendant's motion for summary judgment, on the issue of falsity.

Knowledge of the Falsity of Claims

The court noted that the plaintiff's evidence supported an inference that the defendant acted knowingly or in reckless disregard of the falsity of its certifications. However, the defendant voluntarily submitted its analysis of impediments to HUD. This disclosure was not required by the HUD regulations and the court held that such an unwarranted disclosure permitted an inference that the defendant did not act knowingly or in reckless disregard as to the falsity of its certifications. Hence, the respective motions for summary judgment on the issue of knowledge were denied.

Materiality Requirement

The court found that the federal grants were expressly conditioned on the certification requirement. However, the defendant asserted that HUD approved its funding even after knowing the defendant's interpretation of the certification requirements based on its submissions to the HUD. Since HUD continued to grant funds, the defendant argued, false certification could not be material to the government's decision to pay. The court, however, found that submission of the defendant's analysis report did not establish that HUD knew how the defendant was conducting the analysis. Furthermore, the court held that the defendant's assertion that HUD reviewed the submissions and continued to grant funding did not make the alleged certification immaterial. The defendant's motion for summary judgment was accordingly denied.

U.S. ex rel. Bane v. Breathe Easy Pulmonary Services, Inc., 2009 WL 188564 (M.D. Fla. Jan. 23, 2009)

The relator brought a *qui tam* action against Lincare, a medical equipment company, and two related independent diagnostic testing facilities ("Breathe Easy"). He alleged that Lincare and Breathe Easy conspired to submit fraudulent Medicare claims for medically unnecessary services incident to pulse oximetry testing. Both defendants moved for summary judgment. The United States District Court for the Middle District of Florida granted the motions in part. It denied Breathe Easy's motion for summary judgment because the relator produced numerous paid

claims for unnecessary pulmonary diagnostic exams. However, it granted Lincare's motion for summary judgment, finding that there was no evidence that Lincare caused a false claim to be paid. Finally, the court held that the relator failed to provide any evidence of an agreement between the defendants and thus dismissed the relator's conspiracy claim against both defendants.

The relator was a medical equipment industry veteran who worked with the defendants during his career. During that time, the relator suspected that the defendants were committing fraud. He then began independently investigating the defendants and later filed his *qui tam* complaint. In his complaint, the relator alleged that the defendants conspired to defraud Medicare by having Lincare refer physicians directly to Breathe Easy for oximetry tests, and providing the physicians with order forms created by Breathe Easy. These order forms. The relator alleged, authorize the oximetry testing, but also authorized a diagnostic exam, even if they physician did not know that he or she was ordering it. In fact, Breathe Easy admitted their services automatically included a diagnostic exam unless they were instructed not to perform the exam. The relator further alleged that Breathe Easy then only sent the oximtery results to the physician or Lincare, but billed Medicare for the more expensive diagnostic exam. The relator alleged that the defendants' Medicare claims were fraudulent because the diagnostic exams were neither medically necessary nor authorized by the physicians, and the physicians did not receive the results of those exams.

The Court Denied Breathe Easy's Motion for Summary Judgment

Breathe Easy argued that it was entitled to summary judgment on the relator's FCA claims for four reasons. First, they argued that they were not liable under Section 3729(a)(1), because there was no physician testimony of an unauthorized test to corroborate the relator's false claims allegations. Second, they argued that since the Breathe Easy order forms were not sent to the government, Section 3729(a)(1)'s presentment requirement was not satisfied. Third, they argued that they did not knowingly submit a false claim because reasonable minds could differ as to whether the diagnostic exams were properly billed to the government. Finally, they argued that they were not liable under Section 3729(a)(2) because there was no direct link between the order forms and Medicare's decision to pay.

The court rejected the first three arguments and denied Breathe Easy's motion for summary judgment with respect to the relator's claims under Section 3729(a)(1). The court found that there was ample evidence of false Medicare claims, as the relator produced unsigned Breathe Easy order forms and prescriptions for oximtery testing for over 100 individuals, as well as the corresponding Medicare payments for the unauthorized diagnostic exams. In response, Breathe Easy argued that it received verbal orders from physicians to conduct the diagnostic exams for some of the tests. The court disagreed and found that even if it had received verbal orders, Breathe Easy failed to properly document them under the applicable regulations. Accordingly, the court found that Breathe Easy failed to comply with Medicare's requirement that a test be specifically ordered in writing. In effect, the court found that there was evidence of specific false claims. In addition, the court determined that there was evidence that Breathe Easy presented false claims to the government, finding that the relator's data from Florida's Medicare carrier was evidence of Medicare payments for unauthorized services. The court also concluded that Breathe Easy knowingly presented false claims, finding that Breathe Easy had reviewed the claims documents before submitting them to Medicare. Finally, the court found that Breathe Easy was liable under Section 3729(a)(2) as well. The court held that since Breathe Easy knew that its claims were contingent upon a written physician's authorization, there was evidence of a false statement linked to Medicare's decision to pay. The court accordingly denied Breathe Easy's motion for summary judgment as to the relator's Sections 3729(a)(1) and (2) claims.

The Court Held That There Was No Conspiracy

The court granted Lincare's and Breathe Easy's motion for summary judgment on the relator's FCA conspiracy claim. It held that the relator failed to present sufficient evidence of a conspiratorial agreement between the defendants, finding that: (1) the relator did not identify the terms of the alleged agreement or any direct communication between the defendants; (2) Lincare management consistently stated that they were a separate entity from Breathe Easy; (3) there was no evidence of a shared conspiratorial objective—Lincare did not share in the proceeds from the unauthorized billing and its primary objective in using Breathe Easy was to get a quick turnaround on the oximetry tests, which were difficult to obtain; and (4) Lincare had no authority to investigate Breathe Easy's billing practices. Finally, while there were some vague references in the record to the defendants' relationship, the court found no evidence of an agreement or any specific individuals who participated in the alleged conspiracy. Accordingly, the court granted the defendants' motion for summary judgment with respect to the relator's conspiracy claim.

The Court Found That Lincare Was Not Liable under the FCA

The court granted Lincare's motion for summary judgment on the relators claims under FCA sections 3729(a)(1) and (2). With respect to the Section 3729(a)(1) claim, the court found that Lincare did not knowingly assist in the alleged fraud because it did nothing other than forward completed order forms and prescriptions to Breathe Easy. Lincare had no control over Breathe Easy's claim procedures, never made changes to any order form after it had been signed, and believed that Breathe Easy was simply billing for the prescribed tests. Furthermore, there was no allegation that Lincare violated any rule or regulation. Hence, the court found that Lincare's actions were too attenuated to support liability under Section 3729(a)(1).

Likewise, the court granted summary judgment in Lincare's favor on the Section 3729(a)(2) claim. The court found no evidence that Lincare was trying to defraud the government or that Lincare made any false statement. Furthermore, even assuming that the order forms were the false statements, the court found the Lincare would not be liable, since Lincare did not create the forms or fraudulently enter any information into the forms. Accordingly, the court granted Lincare's motion for summary judgment.

U.S. v. Eghbal, 2008 WL 5101943 (9th Cir. Dec. 5, 2008)

The government filed an FCA action against two individuals, alleging that they made false statements to procure home mortgage insurance from the Department of Housing and Urban Development (HUD). The defendants were accused of violating the FCA by falsely certifying that they had complied with various HUD regulations, which state that HUD will not insure mortgage loans for buyers who cannot cover their own down payments, and which include the condition that HUD will not agree to insure a buyer's mortgage loan unless the seller signs a document certifying that he/she did not provide any portion of the buyer's down payment. The government alleged that the defendants violated those regulations by buying 200 HUD-foreclosed homes, reselling them for profit to buyers with mortgage loans insured by HUD, providing their own funds to help buyers cover their respective down payments, and falsely certifying to HUD that they did not assist buyers with their down payments. As a result of the defendants' actions, many of the buyers defaulted on their mortgage loans, triggering the HUD mortgage insurance.

The defendants had previously pled guilty to criminal charges of making false statements to the government, and the government's FCA case sought to recover about $2.8 million that HUD paid out to cover balances owed on 27 properties on which buyers had defaulted. The district court granted summary judgment in favor of the government, and awarded nearly $6 million in damages and penalties (The court reached that figure by trebling the government's actual damages of $2.8 million and then subtracting from that amount the $2.7 million the government recouped by selling the 27 properties. In addition, the court imposed the minimum civil penalties for each of the 27 false certifications, which totaled about $148,000.) The United States District Court for the Central District of California granted the motion. The defendants appealed to the Ninth Circuit, contesting both their FCA liability and the district court's damages award. The Ninth Circuit affirmed the decision of the district court, holding that the allegedly false statements made by the defendants caused the government to approve the false claims and that the district court's damages calculation was proper.

Liability for Making False Claims

The defendants contended that they were not liable under the FCA because their false statements to HUD were not "claims," but were merely fraudulent inducements to get HUD to insure mortgage loans that it otherwise would not have insured. They argued that the actual claims on HUD funds were made by the mortgage holders who defaulted on their loans, and that they—the defendants—played no role in causing those mortgage loan defaults. The Ninth Circuit, applying the Supreme Court's recent decision in the *Allison Engine* case, noted that "FCA liability attaches to a false statement that has a 'material effect' on the Government's eventual decision to pay a claim." Hence, the defendants were liable under the FCA because government's commitment to pay for the mortgage insurance claim was based on the defendants' false statements to HUD. Furthermore, the appeals court found a causal link between the defendants' admittedly false statements and HUD's payment and approval of the mortgage loan insurance claims, stating that "the false statements at issue here bore directly upon the likelihood that the buyers would be unable to make their mortgage payments, and thus, the misrepresentations had a causal connection to the subsequent defaults sufficient to support FCA liability." Hence the court held the defendants violated the FCA.

Calculating Damages

With respect to the district court's calculation of damages, the defendants conceded that the district court calculated damages properly. However, they argued that the damages award violated the Eighth Amendment's excessive fines provision. The circuit court disagreed, finding that the district court's award was justified, as the district court made specific factual findings in determining that the award was not grossly disproportionate to the offenses, including finding that the defendant's false claims were related to other illegal activities, that even greater penalties could have been imposed but were not, and that the harm caused by the defendants' scheme was far-reaching. The circuit court agreed with this assessment, and added to those factors the fact that the defendants' "systematic and ongoing scheme . . . undermines the integrity of the programs and erodes the public confidence in the Government's ability to manage and fund such programs." Thus, the Ninth Circuit affirmed the district court's judgment on and damages.

U.S. ex rel. Loughren v. Unumprovident Corp., 2008 WL 4280133 (D. Mass. Sep. 15, 2008)

The relator brought a *qui tam* action against a company providing employee benefits and its subsidiary, in the United States District Court for the District of Massachusetts. The relator alleged that the defendants conspired to require many of their insureds to file false claims for disability benefits from the Social Security Administration (SSA). The defendants moved for summary judgment, arguing that since the SSA welcomed all claimants, even if they were unsure whether they qualified for benefits, the submission of a claim could not be a false claim under the FCA. The court disagreed, however, and held that the defendants had a duty to be truthful with the SSA and that the relator's evidence regarding the submission of false claims was disputed and improper for a summary judgment decision. The court also allowed the conspiracy claim, in part, for the period when the defendants were not corporate affiliates.

U.S. v. Stevens, 2008 WL 4146666 (W.D. Ky. Aug. 29, 2008)

The government filed a suit in the United States District Court in the Western District of Kentucky against a doctor, his wife, his clinic, his father-in-law, his mother-in-law, and a company formed by his in-laws, alleging that the defendants defrauded the government by submitting Medicare claims under a wrong billing code ("CPT Code 95937") for reimbursement in violation of FCA sections 3729 (a)(1)-(3). The action arose out of the doctor's billings regarding a device called a Matrix machine. After his initial claims for reimbursement were denied, his father-in-law took control of the doctor's clinic's billing. After a meeting with a governmental employee regarding billing matters, the claims for treatment from the Matrix machine began to be paid. Eventually, the doctor's in-laws formed a corporation to handle all of the clinic's billing. The doctor never reviewed his in-laws' billing practices. The Kentucky Board of Medical Licensure investigated the clinic's billing and found improper billing practices. The government's FCA action followed. The government moved for partial summary judgment regarding the CPT Code 95937 FCA claim. The court granted the motion, finding that the doctor acted with reckless disregard as to the truth or falsity of the claims submitted for reimbursement, since he never took any reasonable steps to ensure that his billings were correct. The court also awarded $863,769 to the government as the doctor's wife and his father-in-law did not dispute liability. The court finally declined to address the unjust enrichment claims.

Falsity Element

The court concluded that there were no issues of fact related to whether the claims submitted using the alleged wrong billing code were false because there was no evidence to show that the use of the alleged wrong billing code was appropriate. The defendant doctor argued that the billings were not false claims as Medicare allegedly told his father-in-law that it was proper to bill the Matrix machine in the manner in which he did. However, the court observed that the doctor did not have first hand knowledge of what Medicare told his father-in-law. Furthermore, the court held that the argument was not sustainable in light of the father-in-law's admission that he knowingly and intentionally submitted false claims.

Knowledge Requirement

The court then discussed whether the doctor had knowledge of the fraud and held that knowledge could be shown by reckless disregard of the truth or falsity of the information instead of proof of specific intent. The court's finding that the doctor completely gave control of his billing to a person with no prior medical billing experience was enough to satisfy the court that he acted with reckless disregard of the truth or falsity of the billings. Indeed, the court observed that there was no evidence to suggest that the doctor did anything to make sure his billings were correct. Hence, the court granted summary judgment in favor of the government.

U.S. ex rel. Rose v. East Texas Med. Ctr. Reg. Healthcare Sys., 2008 WL 4056601 (E.D. Tex. Aug. 25, 2008)

The relator brought a *qui tam* action against a hospital conglomerate and a private hospital facility, alleging that the defendants violated the False Claims Act by masquerading as a rural public hospital in order to fraudulently receive additional Medicaid matching funds from the government through the intergovernmental transfers ("IGT") procedure for the Medicaid Upper Payment Limits ("UPL") Program. The relator alleged that the defendants obtained over 15 million dollars of federal Medicaid matching funds in violation of the FCA. The case was filed in the United States District Court for the Eastern District of Texas and the government declined to intervene. The defendant moved for summary judgment. The court determined that although both parties thoroughly briefed the issue of whether the defendant was a rural public hospital under the applicable federal law, it was not necessary to decide the issue substantively. Instead, the court relied on the Fifth Circuit's recent decision in *U.S. v. Medica Rents*, No. 03-11297 (5th Cir. August 19, 2008)—summarized herein—and held that the only issue it needed to decide was whether the evidence was sufficient to raise a genuine issue that the defendant hospital knowingly made a false claim to the government. Because of the defendant's reliance upon a government entity's advice and the lack of clarity in the applicable law, the court found that the defendant could not have knowingly submitted a false or fraudulent claim. Tellingly, the relator's own expert was unable to say definitively that the defendants acted improperly. At most, the court found that the defendant's actions amounted to negligent behavior, which, it held, cannot support an FCA claim. Accordingly, the court found that there was no genuine issue of material fact as to whether the defendants acted knowingly with respect to their UPL claims. Thus, the court granted the defendants' motion for summary judgment and dismissed the case with prejudice.

U.S. v. Medica Rents Co. Ltd., 2008 WL 3876307 (5th Cir. Aug. 19, 2008)

The relators filed a *qui tam* action against a medical equipment rental company that rented special kinds of mattress overlays called ROHOs and then submitted reimbursement claims to Medicare in each state where it did business. Beginning in 1992, the defendant began to receive conflicting information regarding how to correctly code the mattresses for billing—the defendant received instructions from various state Medicare programs and the Health Care Financing Administration to bill under one code, while other states and various federal agencies gave instructions to bill under a different code, which was more lucrative for the defendant. The relators alleged that the defendant had knowingly overbilled for ROHOs in violation of the FCA. In addition, the government had filed another action against the defendant for common law claims of mistaken payment and unjust enrichment. The two actions were consolidated and brought before the United States District Court for the Northern District of Texas. The district court granted summary judgment for the defendants on the FCA claim and the common law claims and awarded $4.8 million in attorneys' fees pursuant to the Equal Access to Justice Act ("EAJA"). On appeal, the United States Court of Appeal for the Fifth Circuit affirmed the decision of district court on the FCA claim, holding that since there was substantial confusion about which code to use due to contradictory instructions and guidance, it could not be inferred that the defendant knowingly submitted false or fraudulent claims. In addition, the appeals court affirmed the district court's decision on the government's common law claims regarding mistaken payment and unjust enrichment because the government itself had authorized use of the more lucrative billing code. The court also reversed the award of attorneys' fees because of the legitimate confusion about the correct billing code apparent in the facts which precluded a finding of bad faith on the part of the government's claims.

U.S. ex rel. Gudur v. Deloitte & Touche, 2008 WL 3244000 (5th Circuit Aug. 7, 2008)

Relator filed a *qui tam* action in the United States District Court for the Southern District of Texas against an accounting management firm and an insurance company, in which he alleged FCA violations arising from the defendants' alleged inflation of the reimbursement rates for services rendered to Medicare-eligible students. The district court dismissed the defendant insurance company from the suit and granted the other defendant's motion for summary judgment. The district court also excluded one of the relator's expert witnesses. In addition, the district court denied the relator's motion for partial summary judgment. The relator appealed to the United States Court of Appeals for the Fifth Circuit. However, the Fifth Circuit affirmed the district court's decision, holding that the relator failed to establish falsity, knowledge or intent under the FCA. The court also affirmed the district court's dismissal of the defendant insurance company from the case and held that the relator failed to state a claim against that defendant since he did not plead with specificity and instead relied on the occasional use of the generic term "defendants."

U.S. ex rel. Roberts v. Aging Care Home Health, Inc., 2008 WL 2945946 (W.D. La. July 25, 2008)

Defendants—a home health service provider and its hospital's CEO—are alleged to have violated the FCA by submitting false claims to Medicare. Initially, the government sought partial summary judgment against the defendants, and the United States District Court for the Western District of Louisiana granted that motion. The government then filed an Amended Complaint which alleged that the home health service provider's CFO also violated the FCA. Subsequently, the govern-

ment moved for partial summary judgment against the CFO as well. The government contended that the CFO was estopped from contesting the court's previous rulings against the CEO and the home health service provider, and argued that the CFO was liable under the FCA when he submitted, or caused to be submitted, false cost report certifications and claims after he knew that the home health service provider was in violation of the Stark Statute. The CFO opposed the government's motion in part. While he did not oppose the collateral estoppel argument, he argued that the government did not present sufficient evidence against him, since it allegedly did not show that the cost certifications he signed were material to the payments made by Medicare. The court granted the government's motion in part and denied it in part. The court granted the government's motion with respect to its claims under FCA sections 3729(a)(1) and (a)(2), after determining that the CFO had sufficient knowledge or reckless disregard of the truth to warrant FCA liability, and that the government provided sufficient evidence that the CFO signed the cost certifications in order to get Medicare to pay the home health service provider. However, the court denied the government's motion with respect to its claims under FCA section 3729(a)(7), holding that the government failed to show that the CFO concealed an obligation to pay the government.

The government alleged that the CFO of Aging Care Home Health, Inc. (a home health service provider) violated FCA sections 3729(a)(1), (a)(2), and (a)(7), by acting with knowledge, or reckless disregard of the truth, when he submitted, or caused to be submitted, false cost report certifications and claims after he knew that Aging Care was in violation of the Stark Statute. Since the government had already been granted summary judgment after filing an initial complaint alleging the same claims against Aging Care and its CEO, the government argued that collateral estoppel (a/k/a issue preclusion) Aging Care's CFO from contesting liability on those claims. As a result, the government moved for partial summary judgment on its claims against the CFO. The court granted the government's motion with respect to the government's claims under FCA sections 3729(a)(1) and (a)(2), but denied the motion with respect to the claims under FCA section 3729(a)(7).

Collateral Estoppel

Even though the CFO was not a successor in interest of Aging Care, the court still found that issue preclusion was properly applied against him. The CFO was a 50% shareholder in Aging Care, and retained the attorneys that represented the defendants in the earlier action. The court found that, although the government did not seek summary judgment against the CFO in its earlier actions, the judgment was sought against the CFO's corporation, and the CFO had control of the litigation. The court also determined that the CFO's interests were adequately represented since Aging Care had the opportunity to defend against the earlier motions. Therefore, the court held that collateral estoppel was applicable.

Government's Motion For Partial Summary Judgment On FCA Section 3729 (a)(1) Was Granted

Only home health service providers (HHAs) and physicians can violate the Stark Statute. However, the court had previously found that Aging Care violated the Stark Statute when it fraudulently billed Medicare. Aging Care's CFO signed four of the five cost certifications, therefore the court found that he presented or caused to be presented a fraudulent or false claim for payment. The court determined that the CFO had reckless disregard or sufficient knowledge of the truth under the FCA, since he personally attended training related to Medicare billing requirements. Therefore, the court granted the government's motion for partial summary judgment on its claims under FCA section 3729(a)(1).

Government's Motion For Partial Summary Judgment On FCA Section 3729 (a)(2) Was Granted

The court first recognized that under section 3729(a)(2), there can be liability when a defendant intends to get a request approved or paid by the government, and originally makes a demand or request to a grantee, contractor, or other recipient of federal funds, which is subsequently forwarded to the government. Thus, the government was required to produce evidence that the CFO knew that the information in the Medicare claims at issue was fraudulent or false, and that his purpose in using or making the alleged false statements contained in those claims was to get the government to pay or approve a them. The court found that the government provided sufficient evidence that the CFO recklessly disregarded, or had actual knowledge of, the fact that Aging Care violated Stark, and that he signed cost certifications for the purpose of getting Medicare to pay Aging Care. Therefore, the court granted the government's motion for partial summary judgment with respect to the claims under FCA section 3729(a)(2).

Government's Motion For Partial Summary Judgment On FCA Section 3729 (a)(7) Was Denied

The court determined that the government failed to produce evidence against the CFO that showed that he concealed an obligation to pay or transmit money to the government. Accordingly, the government's Motion for Partial Summary Judgment under FCA section 3729(a)(2) was denied.

Damages

The court ordered the defendants to pay three times the amount of the single damages (for a total of $1,282,511.64) and imposed a fine of $5,500 for each of the 615 false claim alleged (for a total of $3,382,500.00).

U.S. ex rel K&R Limited Partnership v. Massachusetts Housing Financing Agency, 2008 WL 2651088 (D.C. Cir. July 8, 2008)

The D.C. Circuit affirmed the D.C. District Court's grant of summary judgment in favor of the defendant, MassHousing, a HUD mortgage lender. MassHousing sold tax-exempt bonds to investors, and used the proceeds of those bonds to finance affordable housing projects. MassHousing received low-interest housing payments from low-income housing owners, and sought reimbursement from HUD for the difference. In this *qui tam* action, the relator, K&R, alleged that MassHousing violated the FCA by using the proceeds from the sale of bonds to refund the higher interest bonds it used to finance its loans, including loans from which it received payments from HUD. K&R alleged that MassHousing knowingly miscalculated subsidy payments it was receiving from HUD, since MassHousing failed to pass along savings to HUD, by not reducing its claims for payment. The D.C. District Court granted summary judgment in favor of MassHousing and K & R appealed. After finding that both parties had offered up plausible interpretations of the applicable agreements and regulations, the D.C. Circuit Court determined that K&R could not show that MassHousing had the requisite intent to "knowingly" submit false claims to HUD. The court noted that the defendant's interpretation was not unreasonable, that it had voluntarily disclosed the questionable transactions to HUD, and that HUD did not express any concerns about the transactions but continued to pay the defendant, even after the relator filed its lawsuit. The court concluded that the lender "merely urges a different reading of the [claims], which here falls far short of showing a genuine issue as to whether [it] knew its claims were false." As a result, the court affirmed the district court's grant of summary judgment in favor of MassHousing.

See U.S. v. Menominee Tribal Enters., 2009 WL 122802 (E.D. Wis. Jan. 16, 2009) at page 103.

See U.S., ex rel. Ramadoss v. Caremark Inc., 2008 WL 3978086 (W.D. Tex. Aug. 27, 2008), at page 69.

U.S. ex rel. Ubl v. IIF Data Solutions, 2009 WL 1254704 (E.D. Va. May 5, 2009)

A relator filed a *qui tam* action against a professional services provider and an individual, alleging that the defendants defrauded the government pursuant to schedule contracts. The government declined to intervene. The United States District Court for the Eastern District of Virginia granted the defendants' motion to dismiss the relator's original complaint, but granted the relator leave to amend the complaint. The relator filed an amended complaint but did not file it not *in camera* or under seal. The defendants filed a motion for leave to file a motion to dismiss for lack of subject matter jurisdiction due the failure to file *in camera* and under seal. The court concluded that Congress did not intend for the failure to file *in camera* and under seal to eliminate subject matter jurisdiction. The court also concluded that the FCA's under seal and *in camera* requirements did not apply to the relator's amended complaint under the circumstances of this case. Hence, the court denied the defendants' motion as futile.

The FCA's Filing Requirements Do Not Affect Subject Matter Jurisdiction

Section 3730(b)(2) of the False Claims Act states that "The [relator's] complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." The court first discussed the presence of the word "shall" throughout this provision in order to ascertain whether a relator's failure to comply with the *in camera* and under seal requirements would divest a court of subject matter jurisdiction over the relator's FCA claims. The court concluded that the use of the word "shall" did not divest courts of such jurisdiction, since unlike other provisions of the FCA, section 3730(b)(2) does not include any limit on jurisdiction. The court also examined the legislative history of section 3730(b)(2), which described the section's purposes. That history does not explain the consequences of non-compliance with the *in camera* and under seal requirements, nor does it indicate that non-compliance with these provisions divests courts of subject matter jurisdiction. The court reasoned the FCA's purposes of fraud prevention would be frustrated if relator non-compliance automatically resulted in a lack of subject matter jurisdiction. Thus, the court denied the defendants' motion to dismiss.

The *In Camera* and Under Seal Requirements Did Not Apply under These Circumstances

The court noted the purpose of the *in camera* and under seal requirements is to allow the government to review the relator's complaint without the defendant learning of its existence. In this case, at the time the relator's amended complaint was filed, the government had reviewed the original complaint and the defendants had notice of that original complaint. Although the relator's amended complaint clarified the original complaint, it did not add claims for the government to investigate. Therefore, the court reasoned that applying the *in camera* and under seal requirements to the relator's amended complaint would not have served the purposes served by those requirements. Consequently, the court concluded that the under seal and *in camera* requirements did not apply to the relator's amended complaint, and that the defendants' motion to dismiss for lack of subject matter jurisdiction based on the relator's failure to file his amended complaint *in camera* and under seal was futile. Accordingly, the court denied that motion.

U.S. ex rel. Bane v. Lincare Holdings, Inc., 2008 WL 2856893 (M.D. Fla. July 22, 2008)

Relator filed an FCA action against a laboratory, alleging that the lab schemed to defraud the government by getting false Medicare claims paid. The lab filed a motion for judgment on the pleadings, asserting that the relator failed to establish subject matter jurisdiction, failed to plead compliance with FCA section 3730(b)(2), and failed to plead a cause of action under FCA section 3729(a)(2). The motion was referred to a magistrate judge, who recommended that the laboratory's motion be denied. The district court adopted the magistrate's recommendation and denied the defendants' motion.

Relator Ben Bane filed an action in the U.S. District Court for the Middle District of Florida, alleging that Life Care Diagnostics (a laboratory) fraudulently bundled laboratory tests by mixing reasonably necessary tests with unnecessary tests, and then sought payment from Medicare for the tests, which resulted in Medicare paying for redundant and medically unnecessary services. The laboratory filed a motion for judgment on the pleadings, arguing that FCA sections 3730(b) and 3732(a) do not confer subject matter jurisdiction, only personal jurisdiction. In addition, the lab argued that Bane failed to file the required disclosure statement with the government, and failed to plead a cause of action. The motion was referred to a magistrate judge, who determined that the FCA does confer subject matter jurisdiction, since federal courts have federal question jurisdiction over FCA claims. The magistrate also determined that even though Bane filed his *qui tam* action before providing a disclosure statement to the government, the FCA "allows a relator to file suit *before* informing the government of the basis of the suit to avoid the risk of the government filing suit first and depriving the relator of his right to sue." Finally, the magistrate concluded that Bane provided the court with sufficient documentary evidence to support his claims. Therefore, the magistrate recommended that the district court deny the lab's motion. The district court adopted the magistrate's recommendation, and the defendant's motion was denied.

A. First-to-File Bar

In re Natural Gas Royalties Qui Tam Litig., 2009 WL 1336644 (10th Cir. May 14, 2009)

The Tenth Circuit reversed the U.S. District Court for the District of Wyoming's dismissal of *qui tam* claims—claims that were dismissed under the FCA's first-to-file bar. The claims were brought against seven different natural pipeline companies, and alleged that those companies violated the FCA by underpaying natural gas royalties owed to the federal government. The district court dismissed those claims, finding that the allegations were based on the same essential facts as were alleged in a previous, pending suit. Although the prior suit only named two of the defendants who'd been named in the present suit, and mentioned three others without joining them, the district court held that, under the first-to-file rule, the prior suit did not need to name all of the same parties in order to bar the subsequent action. The relator settled his case against one of the defendants, leaving only six defendants—the two that had been named in the prior suit, and four others. The relator took no issue with the dismissal of the claims against the two defendants who had been named in the prior suit, but appealed to the Tenth Circuit the district court's decision with respect to the four defendants who were not named in the previous suit.

The Tenth Circuit first explained that the FCA's first-to-file provision prohibits "related actions based on the facts underlying the pending action." The defendants argued that since the statute refers to "facts" and not "parties," it allows for the dismissal of *qui tam* actions that share the same facts as alleged in a prior action, even if the prior suit did not name the same defendants. The circuit court disagreed, noting that the identity of the defendants is also a "fact," and raised the question of "whether the 'fact' of a party's identity is a 'material element' necessary to consider the two actions as stating the same 'essential claim.'" The appeals court concluded that the defendant's identity is a material fact, finding that multiple complaints can allege the same scheme to defraud the same victim, but are not the same claim unless they name the same defendants. The court allowed for a caveat to this general rule in cases where multiple defendants are part of the same corporate family, noting that in such cases, it makes sense to allow for a prior complaint against one defendant to bar a subsequent complaint against a different defendant, since the defendants "will often be jointly liable for the same underlying conduct."

The Tenth Circuit then went to great lengths to distinguish the FCA's public disclosure bar from its first-to-file bar, noting that the public disclosure bar includes an original source exception, while the first-to-file bar does not. The circuit court held that this distinction is important, because, in the public disclosure context, "allowing an original source to bring an action even when the government should be on notice of the fraud serves the purpose of the FCA by increasing valid [as opposed to parasitic] enforcement actions." The court determined that every public disclosure case that involves a pending, prior action implicates the first-to-file bar as well, and the court reasoned that since the first-to-file rule does not include an original source exception, that rule should be limited in scope, so as to not "obliterate the original source exception whenever the public disclosure is a pending *qui tam* suit." Therefore, the circuit court concluded that the first-to-file bar should only be applied when multiple suits share common defendants, observing that "requiring a common identity between defendants when applying the first-to-file bar makes more sense within the overall structure of the FCA." The court recognized that its announcement might allow some relators who relied on facts underlying a pending action, but who named different defendants in their subsequent action, to overcome the first-to-file rule. However, the court believed that the FCA provides a fix for that potential problem, since "most of those relators would be eliminated by the public disclosure bar anyway." Consequently, the court held that the relator's claims against the four defendants who were not named in the pending suit should not have been dismissed on first-to-file grounds, but expressed concerns that the complaint might still not overcome the public disclosure bar. Accordingly, the Tenth Circuit reversed the district court's dismissal of the claims against those four defendants, and remanded the matter.

U.S. ex rel. Wickliffe v. EMC Corp., 2009 WL 911037 (D. Utah Mar. 30, 2009)

Two relators brought a *qui tam* action against a corporation, alleging that it defrauded the government by selling defective computers to government agencies and concealed material information regarding the defects. Before the government made its decision intervene or not, it sought dismissal of the complaint under the FCA's first-to-file bar. The government contended that an earlier action alleged the same claims as those in the relators' present action. The relators argued that the first-to-file rule was inapplicable because the earlier complaint did not satisfy Rule 9(b)'s heightened pleading requirements and was jurisdictionally barred under the public disclosure rule. The United States District Court for the District of Utah, essentially adopting the rule announced in *Ridenour v. Kaiser-Hill Co., L.L.C.*, 397 F.3d 925 (10th Cir. 2005) granted the dismissal, holding that the government's authority to dismiss a case is virtually unfettered if it identifies a valid purpose that is rationally related to the dismissal motion and the relator is given an opportunity for hearing. In this case, the court held that the government did have a valid reason for dismissal: the prior case gave the government knowledge of the alleged fraud and an opportunity to investigate those allegations. In addition, the court held that the relators' complaint did not provide the government with any additional information or any new basis for recovery. The court held that the relators could only challenge that the dismissal was fraudulent, arbitrary or illegal. Since the relators did not make such a challenge, the court granted the government's request and dismissed the relators' complaint with prejudice.

U.S. ex rel. Roop v. Hypoguard USA, Inc., 2009 WL 674142 (8th Cir. Mar. 17, 2009)

The relator brought a *qui tam* action against a medical device manufacturer, alleging that the defendant submitted false Medicare reimbursement claims. He also alleged that the defendant knowingly failed to file medical device defect reports, which were required by applicable regulations. The government declined to intervene. The defendant filed a motion to dismiss for failure to plead fraud with specificity. The United States District Court for the District of Minnesota granted the defendant's motion and dismissed the case with prejudice. The court then denied the relator's motions to alter the judgment and to amend his complaint. On appeal, the Eighth Circuit held that the relator's motions and memorandum failed to explain how his proposed amended complaint would plead fraud with particularity, since the proposed amended complaint did not detail the submission of any false claim or any payment received from the government or its agent, and failed to plead any false certification of compliance with applicable regulations or how the defendant's alleged failure to report device defects was material to a government decision to pay a claim. Finally, the appeals court found that the district court did not abuse its discretion in denying the relator's motion to amend under the Federal Rules of Civil Procedure. Hence, the circuit court affirmed the district court's decision.

U.S. ex rel. Branch Consultants v. Allstate Ins. Co., 2009 WL 388947 (5th Cir. Feb. 18, 2009)

The relator brought a *qui tam* action against multiple insurance companies and adjusting firms, alleging that the defendants defrauded the National Flood Insurance Program (NFIP). The defendants moved to dismiss under the first-to-file jurisdictional bar. The United States District Court for the Eastern District of Louisiana held that the relator's complaint alleged similar facts of Hurricane Katrina–related insurance fraud as another pending FCA action and dismissed the action. On appeal, the Fifth Circuit affirmed the district court's dismissal as to two defendants that were also parties in the prior action. However, the court reversed the district court's decision regarding the remaining defendants. It held that the prior action did not preclude subsequent claims against defendants who were not named in the prior suit, because the first case did not allege industry-wide fraud. The court accordingly affirmed the dismissals in part. It declined to rule on the defendants' original source and Rule 9(b) motions. The relator appealed.

As the court was confronted with the first-to-file bar, it was forced to consider two *qui tam* actions. The first case, *Rigsby*, was filed by two sisters—both employees of a disaster claims management service—who claimed that four insurance companies defrauded the federal government by mischaracterizing wind damage (which would be covered by those companies' respective homeowners insurance policies) as flood damage (which would not be covered by those insurance policies, but covered by a federally subsidized flood insurance program). Although the *Rigsby* complaint named four insurance companies as defendants, it alleged specific instances of fraud against only one company—State Farm. A few months later, Branch Consultants, the relator in the case at issue, filed its *qui tam* complaint, alleging numerous instances of fraud in support of its claim that a group of at least thirteen insurance company defendants defrauded the federal government by misattributing wind damage as flood damage covered by flood policies subsidized by the federal government. State Farm and Allstate insurance companies were named as defendants in both *Rigsby* and in Branch Consultants' respective complaints. The defendants to Branch Consultants' suit moved the district court to dismiss that action, arguing, among other things, that Branch Consultants' complaint failed to satisfy Federal Rule of Civil Procedure 9(b)'s heightened pleading requirement, that it was barred by the public disclosure rule, and that it was barred by the first-to-file rule since it alleged the same conduct and theory of fraud as *Rigsby*. The district court granted the defendants' motion to dismiss, but only ruled on the issue of the first-to-file bar. Branch Consultants appealed the district court's decision to the Fifth Circuit.

FCA's First-to-File Bar

The Fifth Circuit held that "the applicability of [the first-to-file rule] should be determined under an 'essential facts' or 'material elements' standard," and determined that the question to be decided is "whether Branch's complaint avoids the potential preclusive effect of *Rigsby* because it alleges different details, different geographic locations, and different wrongdoers." The Fifth Circuit recognized that simply pleading additional factual details and geographic locations is not sufficient to overcome the first-to-file bar. As a result, the court determined that Branch Consultants' claims against State Farm were properly dismissed, since the prior, *Rigsby* complaint pled identical facts against that defendant. The Fifth Circuit also affirmed the district court's dismissal of Branch Consultants' claims against Allstate. The circuit court noted that the *Rigsby* complaint raised "only skeletal allegations" against Allstate, and that those allegations may not meet rule 9(b)'s pleading standard, but the court stated that it would not opine on "the as-yet-unpresented question of whether a dismissal for lack of any factual basis or on Rule 9(b) grounds in the *Rigsby* case would then permit a suit by Branch or any other person with knowledge of facts" against Allstate. However, the appeals court held that the district court erred when it dismissed Branch Consultants' claims against the defendants that were not common to both complaints. The Fifth Circuit acknowledged that there might be instances in which allegations in a first-filed complaint allege an industry-wide fraud and precludes subsequent allegations against previously unnamed defendants. The circuit court, though, determined that the *Rigsby* complaint was too narrow to allege industry-wide fraud, as it "tells us nothing about any parties not named therein." Since the *Rigsby* complaint could only implicate the four defendants it named, and since the Fifth Circuit determined that Branch Consultants' complaint "likely revealed instances of fraud that would have otherwise eluded the government," the court held that Branch Consultants' complaint was not barred by the first-to-file rule, with respect to the claims against the defendants that were not common to the *Rigsby* complaint.

The Fifth Circuit then remanded the matter to the district court, so that the trial court could address the defendants' public disclosure and Rule 9(b) arguments.

Her v. Regions Financial Corp., 2008 WL 5381321 (W.D. Ark. Dec. 22, 2008)

The relators filed separate *qui tam* actions against two banks, alleging false certification and submission of false claims to the government, based on the defendants' alleged misrepresentation of compliance with federal regulations in order to obtain guarantees on non-viable farm loans, and their alleged submission of false claims to the government in order to obtain payments related to those guarantees. The defendants moved for dismissal contending that the court lacked jurisdiction under the first-to-file bar because they were defendants to a prior action filed by a different relator, which was based on the same alleged fraudulent scheme. The plaintiffs argued that the prior action involved false certifications regarding the feasibility of the loans and the adequacy of the collateral, whereas their claims involved false certifications that the defendants would not charge excessive interest rates or loan fees. The United States District Court for the Western District of Arkansas found that all three cases were materially based on the same underlying facts and that the two later-filed actions only alleged different aspects of the same fraudulent scheme. The court further observed that in all three actions, the defendants allegedly made false statements to induce the government to make payments on the fraudulently obtained guaranteed loans. Hence, the court found that the first-to-file bar applied and the defendants' motion to dismiss was granted.

U.S. ex rel. Bane v. Life Care Diagnostics, 2008 WL 4853599 (M.D. Fla. Nov. 10, 2008)

The relator brought a *qui tam* action against a laboratory service provider alleging that the defendant conspired with other health service providers to file fraudulent Medicare claims. The defendant moved to dismiss the second amended complaint for lack of subject matter jurisdiction under the first-to-file bar. The defendant contended that it had not been included in a previous *qui tam* action filed by the relator, which essentially described the same alleged scheme of defrauding the government. The magistrate who considered the motion recommended that the motion be granted and the United States District Court for the Middle District of Florida adopted the magistrate's recommendation. The court held that the first-

to-file doctrine barred the relator's claim because that claim was based upon the same fraudulent scheme alleged in an earlier FCA action. The court found that the core facts, general allegations and the fraudulent scheme described in the present action and in the previous action were almost identical, and that only a couple of nuances and fine distinctions to the alleged scheme to defraud were added in the latter action. Furthermore, the court noted that although the defendant was not included as a party in the previous action, it was mentioned twelve times in the previous complaint. The court then found that the relator's claim under the Anti-Kickback Statute was also based on the same underlying facts as the previous claim. Accordingly, the court granted the motion to dismiss.

In re Pharmaceutical Industry Average Wholesale Price Litigation, 2008 WL 2778808 (D. Mass July 15, 2008)

Defendant, a laboratory, filed a motion to dismiss the plaintiff's complaint, *inter alia*, for lack of subject matter jurisdiction under the first-to-file bar of FCA section 3730(b)(5). The United States District Court for Massachusetts denied the motion, and held that the complaint did not contain allegations relating to the specific drug Erthromycin. Defendant moved for certification of an immediate appeal under 28 U.S.C. section 1292(b). Defendant claimed that Plaintiff had already brought a related action, and that the current action was barred by the FCA's first-to-file bar. Defendant alleged the court mistakenly applied an "identical facts" test to the first-to-file bar provision. The court denied the defendant's motion. The court found that the failure to specify Erythromycin in the earlier action constituted a failure to state all the essential facts under the "same material elements" standard in established case law. Therefore, plaintiff's complaint was allowed to stand.

Plaintiff, Ven-A-Care, filed a suit against a number of drug manufacturers (including the defendant in the present case, Abbott Laboratories, Inc.) in the Southern District of Florida, alleging Medicare and Medicaid fraud. In the Florida Case, plaintiff alleged that the defendants reported inflated, false, and fraudulent cost and price information of certain pharmaceutical products. Ven-A-Care subsequently amended its complaint by adding allegations regarding numerous drugs and National Drug Codes ("NDCs") for product using Erythromycin, a drug manufactured by Abbott. Plaintiff filed a similar complaint in the present case, in the District of Massachusetts, against several pharmaceutical companies, and amended that complaint to add Abbott as a defendant. That Massachusetts complaint also added several NDCs for Erythromycin products. Plaintiff then twice amended its Massachusetts complaint, adding additional allegations regarding NDCs for Erythromycin products. The Government intervened in the portion of the Florida Case that alleged Medicaid and Medicare fraud on the part of defendant, but the Government's intervention did not include claims involving Erthromycin products. Plaintiff then amended its complaint in the Florida Case, by adopting the Government's complaint-in-intervention and dropping the Erythromycin products claims. The Judicial Panel on Multidistrict Litigation consolidated the Florida Case with the Massachusetts Case into the present multi-district litigation.

Plaintiff severed its Erythromycin products claims as to Abbott, filed the present complaint against Abbott, and moved to transfer that complaint to the multi-district litigation. Plaintiff's motion to transfer its amended severed complaint was granted. Abbott then moved to dismiss the severed complaint regarding Erythromycin products claims, alleging that the False Claims Act's first-to-file bar prevented that action. The court denied that motion and Abbott moved for certification of an immediate appeal under 28 U.S.C. section 292(b). The court denied that motion as well, holding that the "same material elements" standard, not the "identical facts" standard applies when determining whether the first-to-file bar applies. Applying that standard, the court found that since the plaintiff's complaint in the Florida case did not specify Erythromycin, then that complaint "did not provide the government with notice of the essential fact that the alleged fraudulent scheme involved Erythromycin." Therefore, the plaintiff's Florida complaint did not state all the essential facts under the "same material elements" standard, the first-to-file bar did not bar the plaintiff's severed complaint in the Massachusetts case, and thus, the defendant's motion for a certification of an immediate appeal was denied.

See U.S. ex rel. Becker v. Tools & Metals, Inc., 2009 WL 855651 (N.D. Tex. Mar. 31, 2009) at page 41.

See U.S. ex rel. Poteet v. Lenke, 2009 WL 724940 (D. Mass. Mar. 20, 2009) at page 46.

See U.S. ex rel. Poteet v. Medtronic, Inc., 2009 WL 77968 (6th Cir. Jan. 14, 2009) at page 55.

B. Public Disclosure Bar and Original Source Exception

U.S. ex rel. Meyer v. Horizon Health Corp., 2009 WL 1331874 (9th Cir. May 14, 2009)

Relators filed a *qui tam* action in the U.S. District Court for the Northern District of California, against a healthcare corporation, a medical center, and a doctor. The case was originally filed by three relators, two of whom were psychiatric nurses employed by the medical center. Eventually, the third relator withdrew from the suit, and the remaining two relators proceeded without her, alleging that the defendants violated the False Claims Act by fraudulently billing Medicare by admitting patients to a geropsychiatric unit, even though they knew that the patients suffered from dementia and could not benefit from the program. The government declined to intervene in the case, and the defendants ultimately moved to dismiss the relators' complaint, arguing that the district court lacked subject-matter jurisdiction, since the relators' allegations were based on publicly disclosed information included in the third relators' wrongful termination suit against the geropsychiatric unit—a suit that was filed about six months prior to the *qui tam* action. The district court granted the defendants' motion to dismiss and the relators appealed to the Ninth Circuit.

On appeal, the relators contended that they were the first to publicly disclose the allegations, when, before the prior lawsuit was filed, their attorney met with a Medicare fraud investigator and disclosed the alleged fraud. The Ninth Circuit, relying on the plain language of the FCA's public disclosure language, held that a "public disclosure may occur in only three categories of fora: (1) in a 'criminal, civil, or administrative hearing'; (2) in a 'congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation'; or (3) in the 'news media'". Since the relators' purported report of the alleged fraud to the government did not fall within one of those three categories, the Ninth Circuit concluded that the relators' report did not qualify as a public disclosure under the False Claims Act, and thus, the first public disclosure occurred when the wrongful termination suit was filed. Moreover, the court, citing Ninth Circuit precedent, held that a "private" disclosure of information to the government can not qualify as a "public" disclosure under the False Claims Act. The court stated that "even when the government has the information, it is not publicly disclosed under the Act until it actually disclosed to the public."

The circuit court then turned to the question of whether the relators satisfied the public disclosure rule's "original source exception," which would preserve their complaint if the court found that the relators had direct and independent knowledge of the information on which their allegations were based, had voluntarily provided that information to the government before filing their *qui tam* suit and played a role in the public disclosure of those allegations. Again, the circuit

court agreed with the district court, and held that the relators did not qualify for the original source exception. The circuit court made a distinction between knowing about fraud and having direct and independent knowledge of fraud, and determined that the "relators lacked the requisite direct and independent knowledge of the alleged fraud to qualify as original sources," in part, because their complaint failed to allege any such knowledge. In addition, the court noted that the relators played no part in the public disclosure of their allegations, since they were neither parties to the third relators' wrongful termination suit nor made any assertions to the contrary. Accordingly, the Ninth Circuit affirmed the dismissal of the relators' complaint with prejudice.

Dissenting Opinion

In a dissenting opinion, Circuit Judge Stephen Reinhardt acknowledged that the majority correctly held that the wrongful termination suit constituted a public disclosure, which presumptively barred the relators' *qui tam* action. However, he did not agree with the majority that neither relator qualified for the original source exception. The dissent does not evaluate the original source status of both relators, noting that if even one of them qualified as an original source, then their complaint should not be dismissed on public disclosure grounds. The dissent states that at least one of the relators established her original source status, since she voluntarily disclosed her allegations to the government before the wrongful termination suit was filed, since the relators' complaint and its exhibits showed that this relator was a nurse for one of the patients about whom fraud allegations were made and that she actually witnessed the fraud, and since she purportedly observed patients being admitted to the geropsychiatric program even though they could not benefit from it, observed false entries regarding the defendant-doctor's visits to the patients, observed patients' stays being extended beyond what was appropriate, and notified management of the alleged fraud before resigning from her employment position. Finally, Judge Reinhardt noted that "where the relator discloses her allegations to the government before similar allegations are publicly disclosed," she is considered to have "indirectly [had] a hand in the public disclosure." Since Judge Reinhardt determined that at least one of the two relators qualified for the original source exception to the public disclosure rule, he believed that the majority should have reversed the district court's decision and remanded the case to allow the proceedings to continue.

U.S. ex rel. Fry v. Health Alliance of Greater Cincinnati, 2009 WL 1324164 (S.D. Ohio May 12, 2009)

The relator filed a *qui tam* action against an integrated health care delivery system and other corporations, alleging that the defendants violated the Anti-Kickback Statute by assigning heart station time to cardiologists in proportion to the referrals made by them. The government elected to intervene. The defendants moved

to dismiss the relator for lack of subject matter jurisdiction, contending that a prior lawsuit publicly disclosed the allegations in his complaint. The defendants asserted public disclosure occurred when the parties to the prior suit exchanged discovery documents without a protective order. The relator argued that those discovery documents did not constitute a public disclosure because the parties in the case never filed the documents with the court, but merely exchanged them with each other. Thus, the relator argued, there was no disclosure to the public. The government agreed with the relator's position, and asserted that the government had no knowledge of the relator's allegations until the relator came forward.

The United States District Court for the Southern District of Ohio determined that the prior lawsuit was not a public disclosure of the fraud allegations in the presence suit—the court stated that the prior complaint "did not alert any one as to the allegations of fraud at issue in the case at bar." The court then turned to the discovery documents exchanged in that prior lawsuit. The court first noted that filing documents on a court docket provides judicial notice of the filing, and constitutes a public disclosure. However, the court agreed with the relator and held that information contained in discovery documents that have not been filed on a court's docket do not provide such notice and, therefore, do not constitute public disclosures. Consequently, the court rejected the defendants' proposed requirement that unfiled discovery documents be treated as public disclosures unless they are subject to a protective order. Ultimately, the court reasoned that it would be bad public policy to force the government to pore over discovery documents in every existing civil case in order to find evidence for an FCA claim. Accordingly, the court denied the defendants' motion to dismiss the relator for lack of subject matter jurisdiction.

U.S. ex rel. Feldstein v. Organon, Inc., 2009 WL 961267 (D.N.J. Apr. 7, 2009)

A relator brought a *qui tam* action against a pharmaceutical company and its parent entity, alleging that the defendants knowingly withheld information from the FDA that was relevant to the FDA's approval of the defendants' drug, Raplon. The relator also alleged that the defendants caused the submission of false claims for reimbursement to Medicare and Medicaid with respect to the drug. The government declined to intervene and the defendants moved for dismissal for lack of subject matter jurisdiction and for failure to plead fraud with particularity. The United States District Court for the District of New Jersey held that the relator's allegations were based on information that was publicly disclosed in prior personal injury actions against the defendants. The court further held that the relator did not qualify as an original source of that information. The court also held that the relator failed to factually support his allegations and therefore failed to plead fraud with requisite particularity. For these reasons, the court granted the defendants' motion to dismiss.

Public Disclosure Bar & its Original Source Exception

The defendants contended that the relator's action was based upon publicly disclosed allegations in prior personal injury actions and media reports. The court noted that the earlier actions alleged that the defendants knowingly concealed material information regarding the efficacy of Raplon, which was also the basis for the relator's claims. Thus, the court found that even though the prior actions were alleged personal injury and not a claim for damages suffered by the government, the allegations regarding the fraud allegedly committed by the defendants were substantially similar. Moreover, the court noted, all the material elements of the alleged fraud underlying the relator's claims had been disclosed. Therefore, the court held that the relator's allegations were "based upon" publicly disclosed information.

The court then rejected the relator's assertion that he was an original source of the information on which his allegations were based. The relator asserted that he had direct and independent knowledge of the defendants' alleged fraud, claiming that he was an insider who conducted his own investigation, acquired an e-mail regarding the alleged fraud, and voluntarily provided that information to the government. The court found that the relator did not have first-hand knowledge of the FDA's approval process for Raplon and that the e-mail upon which the relator's allegations were based had been obtained through the relator's colleague. Thus, the court held that the relator did not possess direct and independent knowledge of the alleged fraud and that he did not qualify as an original source of the information upon which his allegations were based.

Particularity Requirement

The defendants argued that the relator failed to adequately plead concealment or misrepresentation of material information to the FDA regarding the efficacy of Raplon for its approval. The defendants also argued that the relator failed to identify any actual submissions to the FDA. The court found that the relator failed to support his allegations with evidence, noting that he based his allegations on assumptions about the defendants' knowledge and alleged concealment of adverse effects of Raplon. Accordingly, the court held that the relator failed to plead fraud with sufficient particularity.

U.S. ex rel. Rille v. Accenture LLP, 2009 WL 941036 (E.D. Ark. Apr. 3, 2009)

A *qui tam* action was filed against a consulting company, alleging FCA violations. The defendants moved to dismiss the *qui tam* complaint, arguing lack of subject matter jurisdiction and failure to plead fraud with particularity. The defendants contended that the FCA allegations against them had been previously publicly disclosed in news media, and further asserted that the relators obtained their supporting documents from the government, making those documents a public disclosure. The United States District Court for the Eastern District of Arkansas

held that there had been no public disclosure, since one of the relators had actually retained the relators' supporting documents when he was terminated from employment by the defendant. The court also found that the complaint provided sufficient details regarding the alleged fraud and therefore pled fraud with adequate particularity. The court accordingly denied the motion to dismiss.

U.S. ex rel. Dodge v. ACS State & Local Solutions, 2009 WL 928310 (M.D. Fla. Apr. 3, 2009)

A relator brought a *qui tam* action against a technology service provider, alleging submission of false claims with respect to government-funded employment programs. Specifically, the relator alleged that the defendant falsified information and misrepresented services provided under the contract. The government declined to intervene. The defendant moved to dismiss for lack of subject matter jurisdiction. The United States District Court for the Middle District of Florida noted that the relator's allegations were based on information that had been publicly disclosed in various newspaper articles published prior to the filing of the relator's lawsuit. The court then determined that the relator did not obtain his knowledge of the alleged false claims through his own investigation, and thus was not an original source of that information. While the relator claimed that he ordered the investigation, the court found that he actually based his allegations solely on the work of others. The court also noted that the relator failed to provide a factual basis for the defendant's allegedly false claims. Therefore, the court held, the relator did not have direct and independent knowledge of the facts he alleged. Consequently, the court granted the defendant's motion to dismiss.

U.S. ex rel. Baltazar v. Warden, 2009 WL 935805 (N.D. Ill. Apr. 2, 2009)

A relator brought a *qui tam* action against her former employer, a healthcare provider, and her supervisor, alleging that the defendants improperly billed Medicare for chiropractic services that were not provided. Specifically, the relator alleged that her supervisor altered the relator's billing sheets to reflect services about which the relator was unaware and then submitted those billing sheets to Medicare for payment. The government declined to intervene in the relator's case. The defendants then moved for summary judgment, contending that the public disclosure bar precluded the relator's *qui tam* action—the defendants attached copies of articles and reports that they purported were prior public disclosures of industry-wide fraud upon which the relator's allegations were based. Conversely, the relator asserted that the defendants' documentation did not expose industry-wide fraud and that she had personal knowledge of the allegations in her complaint. The United States District Court for the Northern District of Illinois found that the articles and reports exposed "critical elements" of industry-wide chiropractic billing fraud, and that the defendants, who were participants in the industry, did not need to be specifically named in those articles or reports in order for the public disclosure bar to apply to the relator's suit against them. While the court found that the relator was the original source of her specific allegations regarding the specific defendants' alleged fraudulent billing practices, she failed to qualify as an original source of the fraudulent scheme described in the public disclosures. In addition, the court held that the relator's allegations could only establish that she stopped the defendants from committing a fraud against the government, but could not establish that the defendants actually submitted altered billing statements to Medicare. The court then assessed whether the relator qualified as an original source, and noted that while some of her allegations may have been independent of the public disclosures, the scheme described in her complaint was rooted in publicly disclosed information, and her suit could not survive without that information. Thus, even though the relator was the original source of her specific story regarding the specific defendants' alleged fraudulent billing practices, she failed to qualify as an original source of the widespread scheme described in the public disclosures. Hence, the court held that the relator's claims were based upon publicly disclosed information, that she was not an original source of that information, and that the defendants' summary judgment motion should be granted.

U.S. ex rel. Becker v. Tools & Metals, Inc., 2009 WL 855651 (N.D. Tex. Mar. 31, 2009)

This case arose when two relators filed separate *qui tam* actions against government contractor TMI and other defendants, alleging various FCA violations. The actions were consolidated and the relators filed a joint amended complaint adding additional claims and additional corporate and individual defendants. The government intervened and filed a complaint alleging FCA violations and other common law claims, but declined to intervene on some of the relators' other claims against certain defendants. The intervened case was decided on March 5, 2009 and can be found at *U.S. ex rel. Becker v. Tools and Metals, Inc., et al.* 2009 WL 577604 (N.D. Tex., Mar. 5, 2009).

The relators chose to pursue the non-intervened claims on their own, and filed a joint *qui tam* complaint against the following defendants: corporate defendants TMI, TMI Integrated, and Lockheed, as well as individual defendants Loftis, Johnson, Loehr, Young, and Stroh. Defendants Lockheed, Young, and Stroh were all associated with Lockheed, and were referenced by the court as the "Lockheed Defendants." All of the defendants moved to dismiss the relators' claims—some defendants argued that the relators' complaint failed to state a claim, and others argued that the relators' claims were barred by the FCA's public disclosure and first-to-file provisions. The United States District Court for the Northern Dis-

trict of Texas held that: (1) the relators' claims had not been publicly disclosed in a prior lawsuit; (2) that the relators pled their fraud claims with the requisite specificity; (3) that any of the relators' claims against Lockheed that were duplicative of the claims in which the government intervened would be dismissed; (4) that the conspiracy claims against Loehr and Johnson would be dismissed, since those claims don't claims don't allege that those defendants participated in any agreement to defraud the government; (5) that, pursuant to an agreement between the relators and defendants Lockheed, Young, and Stroh, all claims based on conduct beyond the limitations period would be barred; and (6) that the first relator's claims against Lockheed that were duplicative of the second relator's claims would be dismissed under first-to-file rule, since the first relator did not make those claims until after they had been raised by the second relator.

The FCA's Public Disclosure Bar

The Lockheed defendants argued the court should dismiss the claims against them because those claims were based on publicly disclosed information in yet another prior lawsuit filed against TMI by a different plaintiff. This third plaintiff, who, incidentally, was a former president of TMI, filed an employment action against TMI, alleging that he was fired from his job when he reported TMI's alleged fraud to his father, TMI's founder. The court, however, held that the present claims were not publicly disclosed in that prior lawsuit because the earlier suit did not allege any fraud by the Lockheed defendants and because some of the allegations occurred after the initiation of the prior lawsuit. Accordingly, the court held that those claims were not publicly disclosed.

Defendants' Motion to Dismiss for Failure to State a Claim

The relators alleged that defendants Young and Lockheed engaged in bid collusion to defraud the government. In response, those defendants contended that the relators failed to allege any connection between a fraudulent scheme and false claims to the government. The court held that the complaint sufficiently alleged an FCA claim based upon the alleged collusion under a fraud-in-the-inducement theory. The defendants had also argued that the relators' claim was not pled with requisite specificity. The court held that the relators met Rule 9(b)'s specificity requirements, noting that the relators detailed the alleged scheme, bid requirements, and specific actions supporting the alleged scheme.

Loehr's and Johnson's Motions to Dismiss the Conspiracy Claims

Defendants Loehr and Johnson moved for dismissal of the relators' conspiracy claims against them. Loehr contended that the relators' conspiracy claim against her was void as the government elected to pursue only common law claims against her. The court disagreed and held that the relators were entitled to proceed on the conspiracy claim since the government only partially intervened in the action.

Both individual defendants argued that the relators' complaint failed to plead fraud with particularity. The court held that the relators failed to allege the defendants' participation in any unlawful agreement to defraud the government. Specifically, it held that an allegation of a defendant failing to take action in order to prevent fraud was insufficient to plead conspiracy. Accordingly, the motions were granted and the court dismissed the relators' conspiracy claims against the two individual defendants with prejudice.

The Lockheed Defendants' Motion to Dismiss Under First-to-File Rule

The Lockheed defendants moved to dismiss the relators' claims against them pursuant to the FCA's first-to-file bar. The court noted that the first relator's action alleged falsification of costs by TMI to Lockheed, whereas, the second relator's action alleged collusion between TMI and Lockheed regarding the bidding process. It found that there was a material difference between the allegations in the two complaints, since one cast Lockheed as a victim of TMI's alleged fraud and the other case Lockheed as a participant in that alleged fraud—and that the relator whose complaint was filed first did not assert any claims against Lockheed until after the second relator did so. Therefore the first relator's claims against Lockheed were barred by the second relator's claims against Lockheed. The court accordingly granted the motion and dismissed the claims of the first relator against Lockheed defendants.

U.S. ex rel. Kirk v. Schindler Elevator Corp., 2009 WL 857075 (S.D.N.Y. Mar. 30, 2009)

The relator brought a *qui tam* action against his former employer, an elevator manufacturer and supplier, alleging that the defendant falsely certified claims for payment under numerous government contracts. Specifically, the relator alleged that the defendant entered into numerous contracts to manufacture, install, and maintain elevators and escalators in government buildings. As a government contractor, the defendant was subject to the Vietnam Era Veterans Readjustment Assistance Act ("VEVRAA"). Under VEVRAA, the defendant was required to establish affirmative action programs for covered veterans, invite employees to identify themselves as covered veterans, and file annual reports known as "VETS-100" report with the Department of Labor ("DoL") detailing the number of covered veterans they employ. The relator, a Vietnam War veteran, alleged that the defendant failed to comply with these requirements for several years. The relator resigned from his position with the defendant and made FOIA requests to the DoL for information regarding the defendant's filing of VETS-100 reports. The DoL provided all requested information and the relator commenced his FCA action against the defendant.

The defendant moved to dismiss for failure to state a claim and lack of subject matter jurisdiction. The United States District Court for the Southern District of New York held that most of the relator's allegations failed to state a claim, and held

that the public disclosure bar applied to the relator's remaining allegations, since the relator based those allegations on information obtained through Freedom of Information Act (FOIA) requests, and the relator was not an original source of that information. Accordingly, the defendant's motion to dismiss was granted.

Failure to State a Claim

The relator alleged that the defendant falsely certified that it properly submitted its VETS-100 reports, that its VETS-100 reports were accurate, and that it complied with the VEVRAA affirmative action program. The defendant moved to dismiss the latter two claims only, and the court agreed to dismiss those claims. The court held that the relator's allegation that the defendant's reports were inaccurate reports could not state a claim because VEVRAA does not require a party to certify that its reports are accurate as a condition for payment. Further, the court found no allegation that the defendant impliedly certified the accuracy of those reports. Likewise, the court found that VEVRAA does not expressly state that a provider must actually institute an affirmative action program as a condition for payment. Moreover, the court noted that the FCA is not the appropriate avenue for challenging every alleged falsity submitted to the government or every instance of regulatory noncompliance. In this instance, the court noted, the VEVRAA itself provided a remedy to aggrieved veterans who challenged a contractor's noncompliance with the statute's requirements. In fact, the relator pursued such a remedy. Hence, the court concluded that the relator's claims that were based upon the defendant's allegedly inaccurate reporting and the defendant's lack of an affirmative action program failed to allege a violation of the FCA. Thus, those claims were dismissed.

Lack of Subject Matter Jurisdiction

The court then dismissed the relator's remaining false certification claim on jurisdictional grounds. The defendant contended that the relator based his claims upon publicly disclosed information obtained from the DoL's responses to the relator's FOIA requests. Specifically, the defendant contended that those responses constituted administrative investigations or reports which publicly disclosed the information upon which the relator's underlying claims were based. The court first held that a response to a FOIA request qualified as an administrative investigation or report under the FCA's public disclosure bar because a FOIA request prompts administrative investigation and a corresponding administrative report. Second, the court concluded that the information provided in response to the relator's FOIA requests was "publicly disclosed," since the information was in the public domain, even though it was not widely disseminated. The court held that the information was equally accessible to anyone who would have chosen to look for it. Finally, the court held that all of the critical elements of the alleged fraud were in the public domain, either from information from publicly available websites or from his FOIA request, and that, consequently, the public disclosure bar applied to all of the relator's claims. Hence, the court held that the relator's remaining claim was based upon publicly disclosed information. The court then determined that the relator's remaining claim should be dismissed, because he was not the original source of the publicly disclosed information. The court held that the relator failed to qualify as an original source because he could not establish direct and independent knowledge of the information on which his allegations were based prior to the DoL's response to his FOIA request. Moreover, the fact that the relator did some "independent research" to compile information relevant to his allegations by submitting a FOIA request or obtaining information from a government website did not render him the original source of those claims. Hence, the relator failed to qualify as an original source, and his remaining claim was dismissed.

U.S. ex rel. Westfall v. Axiom Worldwide, Inc., 2009 WL 764528 (M.D. Fla. Mar. 20, 2009)

The relators filed a *qui tam* action against a medical equipment manufacturer, its network partner and other individual defendants. Specifically, the relators alleged that defendants submitted false claims or facilitated the filing of fraudulent claims by providing false Medicare billing advice regarding their spinal decompression device. The government declined to intervene and the defendants moved to strike certain allegations that were unrelated to the FCA claims. The defendants also moved to dismiss the first amended complaint for lack of subject matter jurisdiction and for failure to state a claim. The United States District Court for the Middle District of Florida found that although the claims were based on publicly disclosed information, the relators qualified as original sources. The court also found that the complaint successfully alleged one false claim for payment, even though most of the allegations were vague and unrelated to the FCA. Accordingly, the court denied the motion to dismiss but ordered the relators to re-plead their complaint. The defendants' motion to strike was denied without prejudice.

Public Disclosure Bar and the Original Source Exception

The defendants contended that the court lacked subject matter jurisdiction because the allegations were based on an investigative report published five months prior to the filing of the relator's complaint. The court found that the report was a public disclosure because it provided details of the alleged misrepresentations and named some of the defendants. However, the court found that the relators qualified as original sources, since they were employees of the defendants for several years prior to the publication of the report. In that capacity, the court determined that the relators had access to confidential information and could have gained direct and independent knowledge of the defendants' conduct. Accordingly, the court held that it had subject matter jurisdiction over the relators' claims.

Failure to State a Claim

The defendants also contended that the complaint failed to allege the submission of false claims regarding the use of their spinal decompression device. The court held, however, that there were at least two allegations stating that specific physicians submitted fraudulent claims. Even though these allegations and the rest of the complaint were not clearly pled, the court held it would be inappropriate to dismiss the case with prejudice. Instead, it ordered that the complaint be re-pled.

U.S. ex rel. Poteet v. Lenke, 2009 WL 724940 (D. Mass. Mar. 20, 2009)

A relator filed a *qui tam* action against numerous physicians and medical device distributors, alleging that they violated the Anti-Kickback Statute and submitted false Medicare claims for payment. In particular, the relator alleged that the defendants defrauded the government by accepting kickbacks from a medical device manufacturer. The doctor defendants moved to dismiss, based on the public disclosure and first-to-file rules. The distributor defendants also moved to dismiss, but argued that the plaintiff failed to plead fraud with particularity. The United States District Court for the District of Massachusetts held that the relators' complaint was jurisdictionally barred because the allegations derived from publicly disclosed information in prior actions. The court also held that the relator failed to plead her allegations with adequate particularity. It accordingly granted the defendants' motions to dismiss.

Public Disclosure and First-To-File Bar

The court first addressed the doctor defendants' public disclosure bar argument, and held that it did not have jurisdiction over the relator's action because a prior public disclosure barred her claims. The court noted that while the motions to dismiss were pending, the Sixth Circuit affirmed the dismissal of another *qui tam* case filed by the same relator, on public disclosure grounds. In that case, the relator had alleged a similar scheme of kickbacks and had named as a defendant the medical device manufacturer who was alleged to have provided the kickbacks in the current case. The Sixth Circuit held that the allegations in the prior case had been publicly disclosed in a state court case and that there was a substantial identity between the two actions. Using the Sixth Circuit's analysis, the Massachusetts district court found that there was a prior public disclosure of the allegations in both the earlier *Poteet* case as well as the prior state court case. It held that the allegations in all of the complaints were similar enough to put the government on notice of the alleged improper kickbacks.

The court then turned to the issue of whether or not the instant case was "based upon" the earlier public disclosures and held that the allegations in the current case were based upon the earlier cases because they were sufficiently identical to the allegations in the prior cases. The relator argued, however, that the allegations in the present action concerned off-label drug promotion, and that such allegations were not made in the earlier cases. The court held, however, that a complete similarity between allegations was not required.

After finding that the public disclosure bar applied in this case, the court then determined the original source exception did not apply. The relator did not even argue that she was an original source. Instead, her complaint named another relator, "John Doe," who was described as having independent knowledge of the allegations. The court held that this anonymous broadside pleading could not form the basis for an original source exception. Hence the court granted the motion to dismiss.

The defendants also contended the first-to-file bar applied in this case. The court declined to address this argument because the public disclosure rule already barred the action.

Particularity Requirement

The distributor defendants contended that the complaint failed to allege with particularity the details of the false claims submitted for payment. The court found that the complaint failed to link any kickbacks to the filing of a false claim because the relator did not allege which distributors were involved in the alleged scheme or how they were involved. Furthermore, the relator failed to identify a kickback recipient or any specific claim for Medicare benefits. Hence, the relator's claims against the distributor defendants were dismissed for failure to plead fraud with particularity.

In re Natural Gas Royalties, 2009 WL 684653 (10th Cir. Mar. 17, 2009)

The relator brought 73 *qui tam* suits against numerous natural gas pipeline companies and their affiliates, alleging that the defendants underpaid royalties on gas purchased from federally owned and/or Indian lands. The cases were consolidated in an MDL in the District of Wyoming and a special master was appointed to preside over the defendants' motions to dismiss for lack of subject matter jurisdiction. After limited discovery was taken, the special master recommended that 40 of the cases be dismissed under the public disclosure bar and that the remaining 33 move forward. However, the district court determined that all 73 of the cases were barred, since the publicly disclosed allegations were sufficient to put the government on the trail of fraud as to all the defendants, and the relator did not qualify as an original source of the publicly disclosed information. The district court relied on documents related to a Senate Committee investigation into oil and gas royalties, as well as court documents from, and newspaper articles referencing, a *qui tam* action the relator had previously filed against 44 natural gas pipeline companies, which had been dismissed. Although the Senate Committee investigation did not identify any specific companies, and while the previous *qui*

***tam* action only named about half of the 73 companies named in the suit at issue, the district court concluded that these documents put the government on the trail of industry-wide fraud, and thus triggered the public disclosure bar with respect to all the defendants in the suit at issue.**

The relator appealed to the Tenth Circuit and argued that the public disclosure bar was not triggered, since his present *qui tam* complaint was not "based upon" the publicly disclosed information. He also challenged the district court's holding that he was not an original source of the information that was publicly disclosed. However, the Tenth Circuit affirmed the district court's ruling, finding that the prior public disclosures put the government on notice of industry-wide fraud, and finding that the relator was not an original source of that information.

Public Disclosure Bar

The Tenth Circuit first stated that, under the FCA's public disclosure provision, the term "based upon" means "supported by," and that "[t]he test is whether 'substantial identity' exists between the publicly disclosed allegations and the *qui tam* complaint." The appeals court then noted that the relator was correct in observing that the court must use a claim-by-claim analysis when determining whether the allegations in a complaint were publicly disclosed. However, the circuit court found that the allegations of mis-measurement of and underpayment of royalties were not actually separate claims of fraud, but rather, were "interrelated parts" of the allegedly fraudulent scheme, and that "the district court correctly considered whether there was substantial identity between the complaints and the publicly disclosed documents based on the overall fraudulent mismeasurement scheme rather than each mis-measurement technique allegedly employed in the scheme," and that the allegations in the prior *qui tam* suit and in the Senate Committee documents shared substantial identity with the allegations in the present *qui tam* action. The court then determined that those prior disclosures triggered the public disclosure bar as to the entire industry. This ruling was based on the circuit court's finding that the public disclosures involved a significant percentage of the industry participants and indicated that further investigation would likely reveal that others within the industry engaged in similar practices. In addition, because of the type of fraudulent scheme alleged, the publicly disclosed information allowed the government to focus any investigation on specific actors and on a specific type of fraudulent activity—since the government knows who all the royalty payors are and the government controls all of the gas measuring facilities—thereby putting the government on the trail of industry-wide fraud. Thus, the Tenth Circuit affirmed the district court's ruling that an industry-wide public disclosure bar applied.

Original Source Exception

The circuit court then addressed whether or not the relator was an original source of the allegations in his complaint. The court first addressed the original source requirement that the relator voluntarily disclose to the government the essential elements or information on which the *qui tam* action is based. The court, referencing its previous holding in *U.S. ex rel King v. Hillcrest Health Ctr., Inc.*, stated that "a relator could not qualify as an original source if he had withheld essential elements of the fraud transaction from his pre-filing disclosure and thus deprived the government of key facts necessary in its efforts to confirm, substantiate or evaluate the fraud allegations." Consequently, the court held that the relator's knowledge as an original source would be limited to the information that he voluntarily provided to the government before filing the *qui tam* suit at issue. The court then determined that, prior to filing his *qui tam* suit, the the relator only had limited direct and independent knowledge of the fraud scheme he alleged, and that he did not provide the government with any first-hand information regarding any of the named defendants, but merely relied on his experience in the industry, his hypotheses regarding the alleged fraud, and his interviews with third parties. The circuit court held that where the relator did not even provide the government with the names of any defendants prior to filing suit, he could not qualify as an original source as to the allegations made against those defendants in his *qui tam* complaint. Finally the Tenth Circuit announced that, when dealing with situations in which a relator's claim of original source status is based on the relator providing a limited amount of direct and independent knowledge of some (but not most) of the essential elements of a fraud scheme, a "substantiality" approach should be used, whereby "the district court would evaluate the relator's independently discovered information against the entirety of the allegations on which he based his claim and sustain the relator's invocation of subject matter jurisdiction only if his contribution in terms of direct and independent knowledge was substantial." The circuit court concluded that this approach was best, because it "allows the relator to supplement his direct knowledge with some information derived from innocuous public sources." However, the appeals court agreed with the district court that the relator's limited direct and independent knowledge of the various defendants' alleged fraud was "minimal" when compared to the broad scope of his allegations against them. Thus, the court concluded, the relator did not qualify as an original source, and his claims were barred by the public disclosure rule.

U.S. ex rel. Pritsker v. Sodexho, Inc., 2009 WL 579380 (E.D. Pa. Mar. 6, 2009)

The relator brought a *qui tam* against a number of food service management companies, alleging that the defendants defrauded the government by failing to pass rebates, discounts and credits to various school food authorities under the National School Lunch Program and the School Breakfast Program. The relator also alleged that the defendants did not comply with federal procurement regulations under the same statutes, which resulted in the defendants causing the school food authorities to file claims falsely stating that they were in regulatory compliance. The government declined to intervene in the case. The defendants then moved to

dismiss, arguing that the public disclosure bar applied, and that the relator failed to state a claim. The court granted the motion to dismiss, finding that the public disclosure bar applied, since the government had issued reports regarding the alleged fraud prior to the relator's action and finding that the procurement regulations relied on by the relator did not apply to the defendants.

Public Disclosure Bar

The court held that there were previous public disclosures of the relator's fraud allegations and that he was not an original source. The court found that the government investigated the issue of whether food service management companies wrongly retained rebates from the school food authorities administering the school lunch and breakfast programs. In particular, the government found, through various audits, that food service management companies were retaining rebates.

In response, the relator argued that while the audits revealed that the food service management companies retained rebates, those audits did not disclose that this practice caused the submission of fraudulent claims. The court rejected the relator's argument, finding that the audits publicized all of the essential elements of fraud. In particular, the court found that the relator's theory of fraud was described exactly by the government audits. Hence, the court held a prior public disclosure occurred.

The relator then argued that even if the audits disclosed the elements of fraud, the public disclosure bar didn't apply because the audits didn't identify the defendants as participants in the fraud. The court rejected this contention also, and held that public disclosures of industry wide fraud can bar *qui tam* claims when it would take only minimal effort to determine specific perpetrators from the general allegations. In this case, the court found that it would have been easy to discern who the audits described, since some of the defendants had already been identified in the audits, and all were major players in the food service industry.

The court then found that the relator was not an original source of the allegations of fraud contained in his complaint. While the relator argued he became aware of the fraud through an extensive, independent review of the contracts, the court found that he only compiled easily accessible public information. Furthermore, because the government knew of the alleged fraud, the relator was not assisting the government in discovering the fraud. Accordingly, the court held that it did not have subject matter jurisdiction over the rebate-based claim.

Failure to State a Claim

The court then held that even if it had jurisdiction over all of the claims, it would have dismissed them for failure to state a claim. The court found that the defendants could not be held liable because the federal agency administering the school lunch and breakfast programs took the position that the regulations did not require the food service management companies to pass through rebates. There was also disagreement about the applicability of those regulations by other federal agencies. The court then held that the procurement regulations only applied to the school authorities and not to food service management companies. Accordingly, it held that the relator failed to state a claim and dismissed the complaint.

U.S. ex rel. Vuyyuru v. Jadhav, 2009 WL 331967 (4th Cir. Feb. 12, 2009)

The plaintiff filed a *qui tam* action against a gastroenterologist, two medical centers, and their operating corporations. He alleged that the defendants fraudulently billed the government for unnecessary and improper medical procedures, used false records to get the claims paid or approved, and conspired to defraud the government. The government declined to intervene in the case. The defendants moved to dismiss for lack of subject matter jurisdiction, arguing that the allegations were derived from publicly disclosed information. The defendants stated that the relator's claims were based on information that appeared in various prior articles that appeared in a newspaper that was published by the relator. The defendants contended that the relator was not an original source for this information, because he admitted during a deposition that he only published the newspaper, and did not investigate the stories concerning the defendants' alleged fraud. In response, the relator said that he had spoken to the FBI and multiple U.S. Attorneys about the defendants' alleged fraud, long before stories about those issues appeared in his newspaper. The court held a hearing on the defendants' motion to dismiss, during which, for the first time, the relator revealed that he had been on one of the defendant's medical staffs, had been employed by a healthcare company owned by one of the other defendants, and had personally observed some of the conduct described in his complaint. The relator then sought leave to conduct discovery on the question of the district court's subject matter jurisdiction over his FCA claims. The district court denied the relator's request as untimely, and granted the defendants' motion to dismiss. In granting the defendants' motion to dismiss, the district court specifically found that the relator's FCA claims "were actually derived from" the newspaper articles, and that the relator did not qualify as an original source for that information. Following the district court's dismissal of the relator's claims, one of the defendants moved for an award of its fees, arguing that the relator's claim that the district court had subject matter jurisdiction over his case was clearly frivolous and vexatious, and was brought to harass the defendants. The district court award that defendant about 2/3 of the amount it sought in fees and costs. The relator then appealed both the dismissal of his case and the award of fees to that defendant. The Fourth Circuit affirmed the dismissal because the relator did not produce any evidence establishing subject matter jurisdiction. Moreover, the court found that the relator's claims were clearly frivolous and that the defendants were entitled to attorney fees and costs. The district court's decision was accordingly affirmed.

Public Disclosure Bar and Its Original Source Exception

The Fourth Circuit determined that the district court did not err when it dismissed the relator's claims, finding that, in the face of the defendants' motion to dismiss, the relator bore the burden of proving that the district court had subject matter jurisdiction over his FCA claims. The circuit court further found that the subject matter jurisdiction issues were not intertwined with the factual issues central to the merits of the relator's case, since "[t]he proof required to establish the substantive elements of [the relator]'s claims under [the FCA] is wholly distinct from that necessary to survive Defendants' jurisdictional challenge under [the FCA's public disclosure provisions]." The court then determined that the district court was correct in observing that many of the relator's claims were "substantially similar" to the allegations that appeared in newspaper articles that were written before the relator filed his original complaint. The circuit court then determined that the relator did not qualify for original source status, noting that the relator had testified under oath that he was not the original source for the information contained in those newspaper articles.

The court also noted that the relator had left his employment with the defendants' organizations prior to the occurrence of the fraud he alleged, and that there was no evidence that the relator had direct and independent knowledge that the defendants actually presented any false claims to the government or that he ever presented such information to the FBI or any other federal agency prior to filing his complaint. The circuit court then determined that the district court did not prohibit the relator from conducting discovery on the defendants' subject matter jurisdiction argument, as that issue of fact was completely separate from issues of fact regarding the merits of his case.

The court further held that although the relator was not precluded from conducting discovery on the subject matter jurisdiction issue, even if the district court had disallowed discovery on that issue, the relator was still not prejudiced, since evidence of his direct and independent knowledge of the defendants' alleged fraud should have been in his custody and control and since he could not identify any evidence that he would have obtained through discovery that would have established subject matter jurisdiction. Consequently, the Fourth Circuit affirmed the district court's dismissal of the relator's claims.

Prevailing Party's Fees

The Fourth Circuit also affirmed the district court's award of fees and costs to the defendant who sought them. The circuit court agreed with the district court that the defendants had prevailed in the action and that the relator's claim of subject matter jurisdiction was clearly vexatious. The court found that the relator's "claim that he qualified as a proper relator clearly had no reasonable chance of success," and that the amount of fees awarded by the district court was not excessive, based on its lodestar analysis and the amount of fees customarily charged for services in similar cases.

Dissenting Opinion

The Fourth Circuit's ruling was not unanimous, however, as one of the circuit court judges dissented, stating that it appeared that the district court conducted a facial, as opposed to factual, review of the defendants' subject matter jurisdiction challenge, and that the district court did not properly apply the definition of "based upon" for public disclosure purposes, which would have required the district court to find more than similarities between the newspaper articles and the relator's allegations. The dissent takes the position that the relator's statements concerning how he came to know of the defendants' alleged fraud were sufficient to make a prima facie showing of subject matter jurisdiction, which was disregarded by both the district court and the majority. Further, the dissent states that the relator's evidence of original source status were not afforded any of the inferences that are part of Rule 12(b)(6) review, which constituted error. Consequently, the dissent also states that the award of attorneys' fees was in error.

U.S. ex rel. Herndon v. Appalachian Reg'l Cmty. Head Start, Inc., 2009 WL 249645 (W.D. Va. Feb. 3, 2009)

The relator brought a *qui tam* action against his former employer, an operator of a Head Start program, alleging FCA and retaliatory discharge claims. The relator alleged that the defendants contracted with the Department of Health and Human Services to administer a Head Start program. After a budget shortfall caused the Head Start program to close for two weeks, the government investigated. Subsequently, the defendant agreed to pay back approximately $36,000 in unauthorized expenditures. The relator alleged that he was then fired for cooperating with the government investigation, and the *qui tam* suit followed. The defendant moved to dismiss the substantive FCA claims on the basis of the public disclosure bar and also moved for summary judgment on the retaliatory discharge claim. The court held that the government's investigative reports were public disclosures, but found that the relator's claims were not based upon those prior disclosures. Using a host/parasite analysis, the court found that the relator's claims went beyond the government's earlier investigation because the investigation did not mention fraud. Thus, the defendant's motion to dismiss was denied. The court also denied the defendant's motion for summary judgment, finding that there were issues of fact that required resolution by a jury. The court accordingly denied the motion to dismiss and the motion for summary judgment.

U.S. ex rel. Smart v. Christus Health, 2009 WL 151590 (S.D. Tex. Jan. 22, 2009)

The relator filed a *qui tam* action against two hospital operating companies alleging violations of the FCA, the Stark law, and the Anti-Kickback Statute, as well as retaliatory discharge and state law claims. Specifically, he alleged that the de-

fendants entered into below-market leases with doctors in exchange for referrals to the defendants' hospitals. The government did not intervene. Both defendants moved to dismiss. The United States District Court for the Southern District of Texas granted their motions. Although the court found that the relator's claims were not barred by a previous public disclosure that did not mention fraud or disclose the material elements of this FCA claim, it ultimately held that the relator failed to allege either a false claim for payment or a false certification with particularity. Finally, the court found that the relator's retaliatory discharge claim was barred by the statute of limitations. The relator voluntarily dismissed the remainder of his claims. The court then granted him leave to amend.

The Public Disclosure Bar Did Not Apply

The court first addressed the defendants' argument that the relator's allegations had been previously made against the defendants in state litigation which contained an allegation of a Stark law violation, and therefore, the public disclosure bar blocked the relator's claims. The court disagreed and held that the public disclosure bar did not apply. The court agreed with the majority rule that the "based upon," requirement, as used in FCA section 3730(e)(4)(A), is satisfied by suits that are supported by the previously disclosed information. The court, however, held that the relator's claims were not supported by the previous litigation, since the previous complaint did not include an actual allegation of fraud or any mention of Medicare. Instead, the complaint only sketchily mentioned one Stark law violation. The court held that this Stark law allegation did not disclose the material elements of the relator's fraud claim or even discuss the instant allegations. Accordingly, it found that the relator's complaint was not based on the previous litigation.

The Relator Failed to Plead His Claims with Particularity

The court then found that the relator failed to plead fraud. In particular, the court found that the relator's allegations of false claims of payment were nothing more than general allegations that illegal claims were submitted. With no other specific allegations, the court held that the complaint should be dismissed. Likewise, the court found the false certifications claims were also deficient. Those allegations failed to identify when the false certifications occurred, what the certifications stated, or even if the certifications were a prerequisite for payment. The court granted the defendants' motion to dismiss on the FCA claims.

The Retaliatory Discharge Claim Was Barred by the Statute of Limitations

The court held that the relator failed to bring his retaliatory discharge claim within the statute of limitations period. The court found that the statute of limitations for this claim was the same as the most closely analogous state statute of limitations. In this case, the most analogous statute was the 180-day time period given to hospital employees discharged for reporting violations of law. Since the defendant failed to file within that time period, the court found that his claim was time-barred.

U.S. ex rel. Poteet v. Medtronic, Inc., 2009 WL 77968 (6th Cir. Jan. 14, 2009)

The relator alleged in her suit that medical equipment manufacturer Medtronic, Inc., one of its subsidiary companies ("MSD"), sixteen physicians, and nine healthcare providers, were involved in a scheme to defraud the government, in which Medtronic and MSD entered into sham consulting and royalty agreements with the defendant healthcare providers and provided lavish travel and other accommodations to the defendant physicians, in exchange for using and recommending their products. She alleged that this scheme resulted in the defendants filing false claims for Medicare and Medicaid reimbursement, in violation of the FCA. During the government's investigation of the relator's allegations, the local U.S. Attorneys Office and the DoJ noticed that, more than a year earlier, another relator—a former attorney for Medtronic—had filed a *qui tam* suit that included similar allegations. The relator was notified of the existence of this prior *qui tam* lawsuit, but chose to continue to pursue her case. The government eventually moved to dismiss her case, arguing that it was barred by the first-to-file and public disclosure provisions of the FCA. The government also informed the district court that dismissal of the relator's case was necessary as a condition of a settlement that was being finalized with Medtronic and MSD. The relator opposed the government's motion, and sought discovery of all documents that necessary to determining the extent of her role in the case and the settlement. The district court determined that the relator violated a local rule by not consulting with the government prior to filing her discovery motion. The court then denied the motion. Subsequently, the district court granted the government's motion to dismiss Poteet's complaint. Poteet appealed to the Sixth Circuit, challenging the district court's analysis on public disclosure and first-to-file, appealing the district court's denial of her discovery motion, and arguing that she was entitled to an evidentiary before her complaint was dismissed. The Sixth Circuit Court of Appeals held that the relator's claims were barred by the public disclosures made in the wrongful termination case. It also held that the first-to-file bar did not technically apply to her claims because the other *qui tam* action was also barred by the same public disclosures. Finally, it held that relator was not entitled to discovery or an evidentiary hearing because the government never had primary responsibility for prosecuting the action.

The Public Disclosure Provision Barred Relator's FCA Claims

The Sixth Circuit noted that prior to both relators' suits, another former employee of Medtronic filed a wrongful termination (not a *qui tam*) suit against the company, alleging that he was fired from his job for refusing to participate in the kickback scheme alleged in the two *qui tam* suits—the circuit court found that the relator's suit alleged the same basic scheme of fraud as was alleged in the wrongful termination suit. Consequently, the Sixth Circuit determined that this wrongful termination suit was a public disclosure of the alleged fraud and that the complaint was "based upon" the information contained in the wrongful termination complaint. In addition, the circuit court concluded that the relator did not qualify as an "original source" for the allegations contained in her complaint, since she did not share those allegations with the government before filing her FCA case. Thus, the circuit court agreed that the complaint was barred by the public disclosure rule and was properly dismissed.

The First-to-File Provision Did Not Bar Relator's FCA Claims

Contrary to the district court's ruling, the Sixth Circuit found that the first-to-file rule did not bar the relator's complaint. Although the circuit court recognized that an analysis of the first-to-file bar was not required, since sufficient grounds already existed for dismissing the complaint, it decided to "provide clarity to district courts regarding the proper application of the first-to-file rule." First, the Sixth Circuit stated that a prior *qui tam* action will only preclude a subsequent *qui tam* action if the prior action itself has not been barred (jurisdictionally, or otherwise). Following that reasoning, the court determined that, due to the public disclosure rule, the first *qui tam* complaint—filed by the former Medtronic attorney—was also precluded by the earlier wrongful termination suit. Thus, even though the allegations in the two *qui tam* suits were similar enough for the first-to-file rule to apply, the rule technically could not bar Poteet's complaint.

The Court Denied the Relator's Discovery and Evidentiary Hearing Requests

Finally, the Sixth Circuit affirmed the district court's denial of Poteet's discovery motion, since she did not follow the district court's local rules when filing that motion. In addition, the court also concluded that no discovery was necessary to decide the jurisdictional issue of whether or not the public disclosure and/or first-to-file provisions barred her lawsuit. Since no discovery was needed to rule on the government's motion to dismiss, and since the FCA only requires an evidentiary hearing when "the government has taken over the case" and seeks to dismiss it (which did not happen), the appeals court affirmed the district court's determination that no evidentiary hearing was warranted.

U.S. ex rel. Davis v. District of Columbia, 2008 WL 5332817 (D.D.C. Dec. 23, 2008)

The plaintiff filed a *qui tam* action against the District of Columbia and its school system, alleging that the defendants failed to comply with the statutory requirements of maintaining financial documents regarding their claims to the federal government for Medicaid reimbursement. The government declined to intervene. The defendants moved to dismiss for lack of subject matter jurisdiction, failure to plead with particularity and failure to state a claim. The United States District Court for the District of Columbia observed that though the suit was based on publicly disclosed information, the plaintiff qualified as an original source. The court also found that the plaintiff had adequately alleged false representation and stated a valid claim. However, the court held that the plaintiff had not alleged any damages to the government and therefore, the motion to dismiss the claim for treble damages was granted. The motion to dismiss the conspiracy claim was also granted.

The plaintiff was an executive of a company (D&A) that developed and implemented Medicaid reimbursement plans. The defendants contracted with D&A to create a reimbursement plan for its special education program. When D&A's contract with the defendants expired at the end of 1998, the defendants did not renew it, and chose to contract with a different company. Nevertheless, D&A prepared a 1998 Medicaid reimbursement claim for the defendants of $60 million, and created the necessary supporting documentation. This claim was more than $50 million higher than the claim the defendants initially submitted to the federal government—a claim that was prepared by the defendants' new company. D&A informed the defendants that they were due more money, and alerted the defendants to the $60 million claim it had prepared. However, D&A refused to provide the defendants with the supporting documentation. The applicable regulations required that an entity seeking reimbursement maintain supporting documentation. Subsequently, the defendants submitted a revised cost claim for $60 million, without the supporting documentation from D&A, and the claim was paid by the government. After notifying the Department of Health and Human Services and the Department of Justice, the plaintiff brought this *qui tam* action, contending that the defendants' claim for $60 million was a false claim because they failed to maintain the necessary supporting documentation.

Public Disclosure Bar

In its motion to dismiss, the defendants contended that the court lacked subject matter jurisdiction because of the public disclosure bar. First, they argued that a discrimination suit arising out of the same relationship between the parties was a public disclosure. The court, though, found that the discrimination suit was filed after the *qui tam* action and therefore was not a public disclosure. The defendants also argued that a prior state audit of Medicare reimbursement revealed that, in 1998, the defendants had submitted claims for Medicare reimbursement without supporting documentation. The defendants argued that this report constituted a public disclosure. Although the court was aware of the possibility that the U.S. Supreme Court might rule that state audit reports (as opposed to federal audit reports) may not qualify as public disclosures, the court determined that the state audit was a public disclosure but that the plaintiff was as an original source of the information, since he had direct and independent knowledge that in 1998 the defendants submitted claims for Medicare reimbursement without supporting documentation. The court noted that the plaintiff alleged that D&A was the only entity that could have created the necessary documentation. The plaintiff further alleged that he only disclosed his allegations to the relevant government agencies and did not divulge the documentation to anyone else, including the defendants. Therefore, the public disclosure bar did not apply and the court had subject matter jurisdiction over the plaintiff's *qui tam* action.

Particularity Requirement

The defendants argued that the plaintiff failed to allege with particularity when the fraud occurred. The court found that the allegation that the fraud occurred "in or about the Spring of 2002" was pled with particularity because it was not an open-ended allegation without definite starting or ending points. Furthermore, the court found that the plaintiff's personal disclosure statement contained factual allegations sufficient to support his claims and that he adequately alleged the time of the allegedly false representation in his personal disclosure statement. Accordingly, the court held that the plaintiff pled fraud with sufficient particularity.

Failure to State A Claim

The defendants also argued that there was no submission of a false claim. They contended that they were in possession of the supporting documentation because, by contract, D&A was an agent of the defendants. However, the court found that in a separate suit, the defendants had persuaded another member of the court that the contract with D&A was void. Hence, the court found, the plaintiff had properly alleged fraud. However, the court found that plaintiff failed to allege that the government had overpaid the Medicaid reimbursement because the complaint alleged that the defendants were, in fact, entitled to the $60 million claim amount. Accordingly, the court found that the plaintiff had only alleged the submission of a false claim and was only entitled to statutory penalties. The plaintiff's claim for treble damages was dismissed, as was his conspiracy claim.

U.S. ex rel. Radcliffe v. Purdue Pharma, L.P., 2008 WL 4587783 (W.D. Va. Oct. 14, 2008)

The relator filed a *qui tam* action against his former employer, a pharmaceutical company, as well as related entities. He alleged that the defendants had misrep-

resented the potency of OxyContin and that, as a result, the government reimbursed OxyContin prescriptions at a fraudulently higher rate, which, he alleged, constituted a false claim. The government declined to intervene. The defendants moved to dismiss, arguing a prior public disclosure of the alleged false claims, the relator's execution of a pre-filing general release, and the relator's failure to plead fraud with particularity. The United States District Court for the Western District of Virginia held that there had not been a public disclosure of the alleged fraud and that the relator's pre-filing release did not bar the *qui tam* suit. However, the court granted the motion to dismiss, finding that the complaint failed to plead fraud with particularity, and granted the relator leave to amend.

The relator was a former employee of the defendant pharmaceutical company. During his employment, he allegedly found that the defendants misrepresented the potency of OxyContin through oral representations or assurances made by the defendants' salespeople and in the OxyContin package insert. Consequently, physicians allegedly prescribed the defendants' medicine more frequently because it was purportedly both stronger and cheaper. The relator also alleged that government reimbursements for OxyContin were incorrect because they were based on the misrepresented potency. Hence, he alleged that OxyContin prescriptions submitted for government reimbursement constituted false claims. Prior to the *qui tam* action, the relator brought his concerns to the defendants. Eventually, he signed a severance agreement that included a general release of all claims. At that point, however, he had neither notified the government of the defendants' alleged fraud nor filed his *qui tam* suit. Meanwhile, the government was also investigating the defendants' marketing of OxyContin, among other things. The government then requested and was granted a stay in the *qui tam* action to continue that investigation. When the stay was lifted, the government brought criminal charges against the defendants for actions unrelated to the *qui tam* action, and also declined to intervene in the relator's suit.

There Was No Prior Public Disclosure of Information

The defendants argued that the relator's claims should be dismissed because of the public disclosure bar. Specifically, they claimed that published scientific articles and reference materials and the OxyContin package insert constituted public disclosures of the alleged fraud. The court held that scientific articles and reference materials were publicly disclosed in the news media. The court also found the packet insert, which was included in OxyContin packages and published on the defendants' website, was publicly disclosed because the internet posting was either a corporate report or a press release. However, the court found that these materials were not public disclosures under the FCA because the disclosures only revealed scientific debate over the appropriate way to measure the potency of OxyContin and did not reveal any fraudulent intent by the defendant. Thus, the defendants' motion was denied on this issue.

Claim Was Not Barred by a Pre-Filing General Release

The defendants argued that the general release contained in the severance agreement between the pharmaceutical company and the relator barred the relator's claims. The court adopted the reasoning of the Ninth Circuit in determining whether a general release is enforceable to bar a subsequent *qui tam* action. The court held that, in general, pre-filing releases are unenforceable unless the government has full knowledge of the allegations and an opportunity to investigate prior to the release. It then found that since the government had not completed its investigation of the defendants in this case, the pre-filing release was not enforceable for public policy reasons. In particular, the court found that enforcing this agreement would hamper the ability of relators to supplement governmental enforcement of the FCA and would discourage relators from disclosing information to the government.

Particularity Requirement Regarding Fraud Not Met

The court granted the defendants' motion to dismiss, finding that the relator failed to plead fraud with particularity under Fed.R.Civ.P. Rule 9(b). It found that the relator's complaint did not describe even one instance in which a physician was influenced to prescribe OxyContin based on the defendants' misrepresentations, resulting in a false claim for payment being made by the physician to the government. However, the court granted the relator leave to file an amended complaint.

U.S. ex rel. Ondis v. City of Woonsocket, R.I., 2008 WL 4547495 (D.R.I. Oct. 08, 2008)

The relator brought a *qui tam* action against a city and its mayor alleging that the defendants made false statements to the Department of Housing and Urban Development (HUD) while applying for federal funds. The relator alleged that although the defendant received grants from HUD to create affordable housing for low-income households, through FOIA requests, the relator discovered nine incidents of the defendants' bias against affordable housing. The government declined to intervene. The defendants moved to dismiss, arguing that the FCA's public disclosure bar applied, since all but one of the alleged incidents had been reported in local newspapers or disclosed in a suit involving the city and two housing partnerships. The United States District Court for the District of Rhode Island agreed with the defendants and held that it lacked subject matter jurisdiction because the action was based upon publicly disclosed information and the relator was not an original source of that information. Consequently, the court granted the motion to dismiss.

The Claims Were Based on Publicly Disclosed Information

The defendants argued that the court did not have jurisdiction because the relator's claims were based on publicly disclosed information. The court found that information appearing in newspapers, even if they are legal notices and classified advertisements—and even if the relator was unaware of their existence—was publicly disclosed. Furthermore, the fact that the plaintiff received information through an FOIA request was also evidence of a public disclosure. Accordingly, the court found a public disclosure within the meaning of FCA. The court then grouped the single incident not previously disclosed with the rest, finding that it was dependent on the publicly disclosed information. In addition, the court noted that the relator had conceded that he did not have any first-hand knowledge of the facts alleged, and therefore, he could not have been the original source of the information. Consequently, the court granted the defendants' motion to dismiss, on public disclosure grounds.

U.S. ex rel. First American Engineered Solutions, LLC v. Olin Corp., 2008 WL 4224350 (E.D. Wis. Sep. 11, 2008)

Plaintiff filed an action in the United States District Court for the Eastern District of Wisconsin, alleging FCA violations and contractual claims against an ammunition manufacturing corporation. The complaint involved a contract where the plaintiff was an authorized distributor for ammunition manufactured by the defendant to the Department of Homeland Security ("DHS"). The plaintiff claimed that the defendant violated the FCA by fraudulently delivering defective and nonconforming goods to the DHS. The plaintiff was informed about the government's rejection of the goods by a Federal Contracting Officer, after which the plaintiff's complaint was filed. The defendant moved to dismiss the claims under the FCA because the plaintiff was not the original source of the information in the complaint. The court granted the motion to dismiss.

Public Disclosure Bar Applied To The Plaintiff's Claim

The court held that the plaintiff's FCA claims were based on a public disclosure, finding that the information underlying the FCA claim was not only discovered by the government but it was disclosed to the plaintiff by the government itself. Indeed, the complaint explicitly stated as much. Finally, nothing indicated that the plaintiff was in any way an original source of the information. Hence, the court dismissed the FCA claim.

Government's Approval For Dismissal Not Required

The plaintiff argued that *qui tam* actions can not be dismissed without the government's approval under § 3730(b)(1). The court rejected that argument and held that this section under 3730(b)(1) only applies in voluntary dismissals.

U.S. ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp., 2008 WL 4149638 (10th Cir. Sep. 10, 2008)

The Tenth Circuit Court of Appeals overturned a Colorado district court's determination that it did not have subject matter jurisdiction over an FCA claim. In the underlying case, the plaintiff alleged that the defendant, an oil and gas producer, defrauded the government by underpaying royalties for federal offshore oil leases. After trial, the jury awarded damages of $7.5 million but, before entering judgment, the district court reversed its prior ruling on the issue of subject matter jurisdiction and determined that the information underlying the suit had previously been disclosed to the public by an e-mail exchanged between a state employee and an agent of Minerals Management Service ("MMS"), thereby removing jurisdiction under the "public disclosure bar" provision of FCA section 3730 (e)(4). The Tenth Circuit reversed. First, it held that a government employee may properly act as a relator. Second, it held that the transfer of information between a federal employee and a state government auditor who was under a duty of confidentiality was not a public disclosure and therefore did not deprive the district court of subject matter jurisdiction. Finally, the appellate court held that the plaintiff's allegations were not based upon information publicly disclosed by any prior litigation. The court overturned the district court's dismissal of the case for lack of subject matter jurisdiction and remanded the matter for further proceedings.

Government Employee As Relator

The court concluded that the plaintiff was not prevented from serving as a relator simply because he was a federal auditor who discovered the information underlying his FCA claim in his official governmental role. It observed that the 1986 FCA amendments intended to encourage more private enforcement suits by providing more permissive jurisdiction limitations. The defendant, in an attempt to distinguish recent Tenth Circuit precedent, contended that government employees could only be relators if they discovered fraud while not acting within their official capacity. The court rejected this argument and held that government employees can be relators as long as there is not a public disclosure of the information underlying their claims.

Public Disclosure

The court then held that the transfer of information to a state government employee who was under a duty of confidentiality with respect to that information was not a "public disclosure" under the FCA. The court interpreted "public disclosure" as the release of information such that the information was generally available and not subject to confidentiality. Since the email exchange between the state government employee and the MMS agent was subject to confidentiality, it was not a "public disclosure" that would deprive the courts of jurisdiction over the plaintiff's suit. The court further stated that this interpretation was consistent with the intent of the 1986 amendments to encourage private citizen suits and limitation of civil actions by opportunists acting only upon public information.

Prior Litigation Was Not A Public Disclosure

Finally, the court held that the plaintiff's suit was not based on information which was publicly disclosed in the course and settlement of prior litigation in which the defendant was a party. The court observed that the publicly filed documents in the prior litigation did not mention the facts in the case at bar and that the alleged fraud took place after the prior litigation ended. Further the court held that general allegations that the defendant was involved in fraud were not sufficiently specific to constitute a public disclosure because it was not in itself enough information to discover related frauds.

U.S. ex rel. Lam v. Tenet Healthcare Corp., 2008 WL 2835215 (5th Cir. July 22, 2008)

Relators appealed the district court's order granting summary judgment in favor of the defendant. The district court held that the public disclosure bar prohibited the relators's suit, since they did not qualify as original sources under FCA section 3730(e)(4). The Fifth Circuit found that the relators' allegations were based on publicly disclosed information and affirmed the district court's order for summary judgment in favor of the defendant.

Relators, Man Tai Lam and William Meshel, filed a *qui tam* action in the United States District Court for the Western District of Texas against the defendant, Tenet Healthcare Corporation, alleging that the defendant artificially inflated charges for services at two of its hospitals and consequently was able to qualify more patients as outlier patients and receive Medicare reimbursements that it was not entitled to. The Government declined to intervene. However, after the district court determined that the information contained in the relators' complaint had been publicly disclosed in a publication called the "Weakley Report," prior to the time the relators filed suit, both the Government and the defendant moved for summary judgment. The district court granted summary judgment in favor of the defendant and the Government, finding that the relators did not have direct and independent knowledge of the information on which their allegations were based. The relators appealed to the Fifth Circuit and the appellate court affirmed the district court's summary judgment decision.

Relators Were Not The "Original Sources" As Defined Under FCA Section 3730(e)(4)

After upholding the district court's finding that the allegations contained in the relators' complaint had been previously publicly disclosed, the Fifth Circuit turned to the question of whether or not the relators qualified as the original source of that information. The court held that an original source is one who has independent, direct knowledge of information on which the allegations are based, and noted that "direct" and "independent" have different meanings. The court stated that "direct" knowledge is obtained by the relator's first-hand efforts, and is not obtained through the labor of others, nor is it derived from the information of others. "Independent" knowledge, however, must not rely on public disclosures. The defendant argued that the relators' information came from patient complaints. The circuit court observed that while the relators did examine a report of comparative charges, the report did not indicate the charges that would be required to establish the defendant's outlier fraud. The court found that the rest of the relators' supporting information was just as indirect. Therefore, the appellate court affirmed the summary judgment order.

See Hopper v. Solvay Pharmaceuticals, Inc., 2008 WL 4177927 (M.D. Fla. Sep. 08, 2008), at page 133.

C. Dismissal Issues

U.S. ex rel. Hindin v. New York Lutheran Med. Ctr., 2009 WL 366490 (E.D.N.Y. Feb. 13, 2009)

The plaintiff filed a *qui tam* action against several institutions, alleging that their dental residency programs fraudulently obtained Medicare funds. In his second amended complaint, he dropped twenty five defendants from the case. The government consented to the dismissals without prejudice. One of the dismissed institutions then moved for summary judgment, contending that the claims against it should have been dismissed with prejudice. The United States District Court for the Eastern District of New York court denied the motion. The court noted that a party already dismissed without prejudice cannot seek dismissal with prejudice. Furthermore, the court held that the defendant university did not have standing to move for summary judgment because relief was no longer sought against it. The court then denied both parties' requests for attorney's fees because neither the plaintiff's claim nor the defendant's motion for summary judgment was frivolous.

Ector ex rel U.S. v. Axia College Online, Western Int'l Univ., et al., 2008 WL 2704622 (D.D.C. July 7, 2008)

Plaintiff, Morsellor Ector, brought a *qui tam* action against defendants Axia College Online (an online university) and Apollo Group, its parent corporation, seeking to recover damages that arose from alleged false claims made by the defendants in violation of FCA section 3729. The United States declined to intervene in the case, and plaintiff filed a notice for voluntary dismissal. Pursuant to FCA section 3730(b)(1), the plaintiff's action could only be dismissed if the Attorney General and the court provided written consent to the dismissal, including reasons for consenting. The government consented to the voluntary dismissal but failed to state the reasons for its consent. Therefore, the United States District Court for the District of Columbia ordered the government to show cause as to why the plaintiff's case should be dismissed. The government confirmed that it had investigated the plaintiff's case and that it was not in the government's interest to pursue the litigation. The court reviewed the plaintiff's voluntary dismissal, along with the government's reasons for consenting to the dismissal and concluded that the requirements of FCA section 3730(b)(1) were satisfied. Thus the case was dismissed without prejudice to the United States.

Sherwood Brown v. Joseph Michael Sherrod, 2008 WL 2640441 (10th Cir. July 7, 2008)

Brown alleged that defendant Sherrod filed a false bankruptcy claim in violation of the FCA. The district court dismissed the complaint, finding that Brown failed

to demonstrate that Sherrod requested or received payment from the government and there was no evidence that the government was a creditor in Sherrod's bankruptcy claim. Brown appealed the district court ruling, and alleged that the case was improperly dismissed, since the Attorney General did not consent. However, the Tenth Circuit affirmed the dismissal of Brown's complaint for failure to state a claim. Although section 3730(b) of the FCA provides that an action can only be dismissed if "the court and the Attorney General give written consent to the dismissal and their reasons for consenting," the appellate court found that the Attorney General's consent was not necessary when the district court granted a defendant's motion to dismiss; instead, consent of the Attorney General is only required when a voluntary dismissal is sought by a plaintiff.

***See U.S. ex rel. First American Engineered Solutions, LLC v. Olin Corp.*, 2008 WL 4224350 (E.D. Wis. Sep. 11, 2008), at page 61.**

STATUTORY INTERPRETATIONS

A. Presentment Requirements

U.S. Dep't. of Transp. ex rel. Arnold v. CMC Eng'g, 2009 WL 1203297 (3d Cir. May 5, 2009)

A relator brought a *qui tam* action in the U.S. District Court for the Western District of Pennsylvania, against a group of six engineering consultants who provided services to the Pennsylvania Department of Transportation ("PennDOT"). The suit alleged that the defendants falsified their credentials in order to receive increased pay for their work. The relator—a former PennDOT employee—alleged that the defendants colluded with PennDOT officials to allow PennDOT to be overcharged, since at least 80% of the funding for PennDOT's contracts with the defendants came from the U.S. Department of Transportation. Consequently, the relator alleged that the defendants not only defrauded PennDOT, but defrauded the federal government, in violation of the False Claims Act. The district court dismissed the relator's case, finding that the relator did not show that the defendants' allegedly false claims and false statements were presented to the United States, since he only alleged that those false claims/statements were presented to PennDOT, a state agency. The district court held that since the False Claims Act requires that false claims/statements be presented to the United States, as opposed to grantees who receive federal funds, it was irrelevant that the PennDOT contracts at issue were largely funded by the federal government. Moreover, the district court was not swayed by the relator's arguments that PennDOT was an agent of the federal government and that the defendants' allegedly false claims/statements were necessarily presented to the federal government when U.S. Department of Transportation officials reviewed PennDOT's project sites and logs. The relator appealed the district court's decision to the Third Circuit.

Application of *Allison Engine* Decision

The Third Circuit refused to affirm the district court's holding, noting that while the relator's appeal was pending, the Supreme Court decided *Allison Engine Co. v. U.S. ex rel. Sanders,* which makes clear that only section 3729(a)(1) of the False Claims Act requires plaintiffs to show that a defendant actually presented a false claim/statement to the United States. Since the False Claims Act also imposes liability for making or using a false statement or record to get a false claim paid by the government and for conspiring to defraud the government (section 3729(a)(2) and (a)(3), respectively), and neither of those two provisions requires a showing that a false claim was actually presented to the United States, the Third Circuit concluded that the relator's complaint may still have stated a claim under the False Claims Act. The Third Circuit acknowledged that the Supreme Court clarified that there can be liability under the False Claims Act, even without a showing that a false claim/statement was presented to the United States, as long as the federal government was at least indirectly involved with the payment of the false claim and the defendant intended that the federal government (not some other party) would ultimately pay the false claim. However, the circuit court noted, there can be no False Claims Act liability when a false claim or statement induces a private entity to disburse federal funds over which the private entity has complete control.

Although the Third Circuit emphasized the apparent distinction the Supreme Court drew between *private* entities who receive federal funds, and public entities who receive federal funds—a distinction that would certainly be relevant to this case, since the federal grantee was a public agency—the circuit court did not fully discuss the significance of the distinction, stating that "[i]t is unclear how much, if at all, the difference between public grantee versus private grantee should drive a court's analysis. Regardless, we believe that this distinction further supports our holding that *Allison Engine* casts doubt on the District Court's decision to categorically exclude false claims made to state transportation agencies, which are funded in large part by the federal government, from the purview of the FCA. . . . If the Federal Highway Administration [of the U.S. Department of Transportation] was involved in the disbursement of funds from PennDOT to the consultants upon submission of the fraudulent claims in any way, [the relator's] claims may be actionable under the FCA and it is possible the consultants' motion to dismiss should have been denied." As a result, the Third Circuit vacated the district court's dismissal of the relator's case, and remanded the case to the district court, for further proceedings consistent with the Supreme Court's decision in *Allison Engine*.

See U.S. ex rel. DRC, Inc. v. Custer Battles, LLC, 2009 WL 971017 (4th Cir. Apr. 10, 2009) at page 175.

See U.S. ex rel. Ramadoss v. Caremark Inc., 2008 WL 3978086 (W.D. Tex. Aug. 27, 2008), at page 69.

B. Reverse False Claims

U.S. ex rel. Ramadoss v. Caremark Inc., 2008 WL 3978086 (W.D.Tex. Aug. 27, 2008)

The relator filed a *qui tam* action in the United States District Court for the Western District of Texas, alleging that a pharmacy benefit management company violated the reverse false claims provision of the FCA by applying restrictions contained in the health plans it administered to state Medicaid claims. The government intervened six years after the original complaint was filed, alleging violations of the FCA, negligent misrepresentation, common law recoupment and violations of state FCA and/or Medicaid statutes for the plaintiff states in the lawsuit. The *qui tam* action resulted in a multi-state litigation involving the federal government, the relator, and several states. The collective plaintiffs alleged that the defendant exploited situations in which dual eligibles—persons who qualified for Medicaid coverage but who also had third party health insurance plans—received prescription drugs. The plaintiffs alleged that the defendant's role, as a pharmacy benefit management company, was to process prescriptions and corresponding claims for its third party health plan clients, based on agreements the defendant had with its clients regarding which expenses the clients' respective health plans covered. The plaintiffs alleged that since Medicaid payments are a last resort, the defendant was only allowed to bill Medicaid for charges above and beyond what its clients were first obligated to pay, and that if Medicaid paid more than it should have paid, then the defendant's clients were to reimburse Medicaid for the overpayment. However, the plaintiffs alleged, the defendant unlawfully applied restrictions contained in its clients' health care plans in order to reduce or avoid their obligation to pay the government, and that these actions constituted FCA violations. Both sides moved for partial summary judgment.

With respect to the government's FCA claims, the defendant moved for summary judgment, arguing: (1) that the government's FCA claims on behalf of state Medicaid agencies failed because the defendant's statements rejecting or denying Medicaid claims for reimbursement were submitted to state Medicaid agencies, not the government; and (2) all of the government's FCA claims arising six years prior to its unsealed complaint-in-intervention were barred by the statute of limitations in the FCA. The government also moved for summary judgment on the FCA claims, arguing that: (1) the defendant owed the government an "obligation" under the FCA; (2) the defendant was collaterally estopped from arguing that the various health plan restrictions defeated its obligation; and (3) allegedly false statements were made by the defendant to avoid reimbursing the government. The primary issues were whether the defendant could apply existing restrictions to reject a reimbursement request from a state Medicaid agency, VA or IHS and whether the defendant's application of its clients' health plan restrictions constituted a reverse false claim under the FCA. The court denied the defendant's motion for summary

judgment on the issue of whether the alleged false claims must be presented to the government. However, the court granted the defendant's motion for summary judgment and denied summary judgment for the government with respect to the falsity and obligation elements and the statute of limitations issue.

Presentment Requirement

The court noted that in light of the Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*, there is no presentment requirement under section 3729 (a)(2) of the FCA. The defendant contended that the government was barred from asserting FCA claims on behalf of state Medicaid agencies because none of the alleged false statements involving state Medicaid were submitted to the government. The government argued that presentment was not a prerequisite for liability under the reverse false claims provision of the FCA. The government asserted that even if the court found that presentment was a requirement to FCA liability, the government's claims were still valid because presentment could occur directly or indirectly. However, the court did not find it necessary to resolve the presentment issue as the court later found pursuant to FCA section 3729(a)(7) that the defendant company did not owe an "obligation" to the government in regard to denials of reimbursement requests submitted to state Medicaid agencies. Thus the government could not establish FCA liability to the government on behalf of the state Medicaid agencies.

Falsity Element

In analyzing the FCA claims, the court only discussed two issues under section 3729(a)(7): falsity and obligation. The court's discussion of falsity centered upon the correct application of *Caremark, Inc. v. Goetz*, 395 F.Supp.2d 683 (M.D. Tenn. 2005). That case discussed to what extent plan restrictions can be applied to state Medicaid claims. It held that procedural restrictions were inapplicable to Medicaid claims but substantive restrictions were applicable. Using this distinction as a springboard and recognizing the unsettled status of the law regarding this issue, the court found that the government could not establish that the defendant company made a "false record or statement" before the *Goetz* decision. First, because the restrictions actually existed as part of the plans the defendants administered, they were not objectively false. Of course, the court observed, this defense fails if the restriction has been deemed impermissible by statute or case law. Thus, the court then determined that there were legitimate grounds for disagreement over the complex issue of restrictions as exemplified by the *Goetz* decision. Hence, the court found that the defendant did not make a false statement prior to *Goetz*. The court also noted that because of the unsettled nature of the law, it would be unfair to subject the defendant to punitive damages under the FCA. Furthermore, the court held that the FCA is not a "catch-all" enforcement vehicle for all regulations, and that statutory remedies may be the appropriate vehicle for policing compliance. Accordingly, the court granted the defendant's summary judgment motion regarding restrictions claimed prior to *Goetz*.

Obligation Element

The court's decision on obligation was limited to the question of what obligation the defendant owed to the federal government under FCA section 3729(a)(7). After consideration of different analyses of "obligation" by various courts, the court found that the defendant company did not owe an obligation to pay the government under FCA section 3729(a)(7) for the alleged false claims to state Medicaid. The court found that the defendant did not have an existing obligation to pay the government at the time the allegedly false statements were made and that the defendant company did not have a specific economic relationship with the government, independent of any relationship with the state Medicaid agency. This holding was supported by the fact the defendant was not a health insurer. The court granted summary judgment in favor of the defendant company with regard to the element of obligation.

Collateral Estoppel

The court found that the defendant company was not collaterally estopped from arguing that applying any plan restrictions, whether procedural or substantive, did not subject the defendant company to FCA liability. The government argued that the Sixth Circuit in *Caremark v. Goetz,* 480 F.3d 779 (6th Cir. 2008), "conclusively determined" that the defendant's obligation to pay Medicaid requests for reimbursement could not be avoided through applying procedural plan restrictions and that the defendant was estopped from re-litigating the same point. The court found that collateral estoppel did not apply with FCA claims because the FCA was not at issue before the court in *Goetz*. Accordingly, the court denied summary judgment for the government as to the collateral estoppel claim.

Statute of Limitations

The court found that the government's FCA claims prior to August 19, 1999 (the date on which the complaint-in-intervention was filed) were time barred. The defendant had argued that the filing of a *qui tam* action by a relator did not give notice to the party being sued because it was filed under seal. In contrast, the government argued that the FCA claims that arose before August 19, 1999 were not time barred because: (1) the complaint-in-intervention related back to the relator's *qui tam* complaint under Fed.R.Civ.P. 15(c)(1); (2) relation back was also possible under Fed.R.Civ.P. 15(c)(2) because the defendant company had adequate notice of the government's claims; and (3) the statute of limitations was tolled when the relator filed her original complaint. The government also asserted that the statutory scheme of the FCA allowed the government to apply for extensions beyond the initial sixty days to conduct its investigation per FCA section 3730(b)(3). While the court acknowledged there was case law supporting both of the parties' positions, the court found that adopting the government's argument would belie the intent of the FCA statute of limitations provision and would also contradict the well-settled notice requirements within the

Fed.R.Civ.P. The court found that the government's FCA claims prior to August 19, 1999 were time barred, and that the critical date for statute of limitations purposes was the date that the government filed its complaint-in-intervention. The court found that the statute of limitations period prevented the government from pursuing claims that occurred prior to six years before it filed the complaint-in-intervention. The court also found that the government's complaint-in-intervention did not relate back under Fed.R.Civ.P. 15 (c)(1) or 15 (c)(2) because the defendant company did not receive notice until the complaint-in-intervention was filed on August 19, 2005. The court granted summary judgment in favor of the defendant company on the statute of limitations issue.

U.S. v. Bourseau, 2008 WL 2718878 (9th Cir. July 14, 2008)

The Ninth Circuit affirmed the U.S. District Court for the Southern District of California's ruling that a group of defendants violated the False Claims Act by improperly billing Medicare. The defendants owned and controlled a parent company that owned and operated a psychiatric hospital that participated in the Medicare program. Following a bench trial, the district court found that, after the parent company filed a bankruptcy petition, it improperly included on its Medicare costs reports expenses for bankruptcy legal fees that exceeded the amount of fees related to the psychiatric hospital; nonallowable interest that was never paid, was owed to a related party, and/or did not relate to patients at the psychiatric hospital; expenses related to the procuring additional space that was not used for patient services; expenses for management services that were never provided; and rental expenses that never existed. The district court held the defendants jointly and severally liable for reverse false claims, and assessed treble damages and civil penalties totaling more than $15 million. Each of the defendants appealed, and the Ninth Circuit affirmed.

Reverse False Claims

The Ninth Circuit held that, for a variety of reasons, the Medicare cost reports that the defendants submitted to their Medicare intermediary contained nonallowed costs. As a result, the court held that the cost reports were false and constituted the basis of a reverse false claims violation. The circuit court further determined that the defendants had knowledge—at the very least, they acted with reckless disregard or deliberate ignorance of the truth—that the cost reports were false, since the false claims largely arose from alleged payments that were never made, from alleged services that were never performed, or from alleged expenses that were unrelated to any patient services rendered by the psychiatric hospital. One of the defendants sought to escape liability by arguing that there was no reverse false claims violation because he did not 'make, use, or cause to be made or used a false statement.' The court rejected that argument—which it said was tantamount to an argument that the defendant did not present a false claim to the intermediary nor cause a false statement to be presented to the intermediary. The court determined that such presentment arguments were limited to section 3729(a)(1) of the False Claims Act, and had no applicability to section (a)(7). The court also rejected the defendants' argument that there was no reverse false claims violation because they had no pre-existing obligation to pay Medicare a fixed amount, because the cost reports were never audited. The court, having adopted the rationale followed by the Sixth and Eighth Circuits in determining whether an obligation exists under section 3729(a)(7) of the False Claims Act, found that the Medicare regulations imposed on the defendants "a continuing, specific obligation to repay" any overpayments at the end of each reporting period. Thus, the court held, the defendants had a legal obligation to repay the government at the time it submitted its cost reports, even though the specific amount of the repayment may not have been known at that time, and even if the defendants planned to challenge whether some of the expenses should have been allowed. The court agreed that the False Claims Act contains an implicit materiality requirement, but held that, under the "natural tendency test," the defendants' cost reports were material, since the reports had the potential effect to decrease the amount that the defendants were to repay to Medicare.

Damages

The defendants argued that, notwithstanding the district court's finding of liability, the government did not sustain any damages because, as a result of the bankruptcy proceeding, Medicare never relied on the false cost reports for adjusting payment rates. The court rejected this theory, noting that by including nonallowable costs in their cost reports, the defendants impeded the intermediary's ability to determine whether the a rate adjustment was necessary, which, in turn, prevented Medicare from making payments are proper, lower rates. The court further noted that the district court properly calculated the amount of damages to be paid by the defendants, stating that "[d]amages for a reverse false claim consist of the difference between what the defendant should have paid the government and what the defendant actually paid the government." Since the defendants did not cooperate with the government, they were not eligible for the a reduction to double damages. Therefore, once the district court determined the amount of damages, it properly trebled that amount—and that decision was not unconstitutional, since the evidence showed that the damages were not grossly disproportional to the gravity of the defendants' offense.

***See U.S. ex rel. Mason v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 2857372 (D. Idaho July 23, 2008), at page 154.**

FALSE CLAIMS ACT RETALIATION CLAIMS

Perius v. Abbott Labs., 2009 WL 1851151 (N.D. Ill. June 26, 2009)

The plaintiff brought an action against a pharmaceutical company, alleging a claim for retaliation under the False Claims Act and other state law claims. The plaintiff alleged that during the course of a government investigation of the company's sales and marketing practices, the DOJ issued subpoenas to the company and four of its employees, including the plaintiff. The company then hired a law firm for assistance in responding to the investigation and in conducting its own internal investigation. The plaintiff further alleged that, in response to the subpoena, he produced materials relating to the company's sales and marketing practices and that he also participated in the internal investigation. He also alleged that he raised concerns about fraud with his superiors and sought clarification of the company's sales and marketing policy and the permissibility of certain activities under the policy. He complained that after receiving training on compliance with sales and marketing laws, he began to believe some of the company's practices were illegal, that he informed his superiors of possible violations of the company's policies in other regions, and that, in response, the defendant terminated him. The parties filed cross-motions for summary judgment. The defendant also moved to strike the plaintiff's responses to its statement of facts. The United States District Court for the Northern District of Illinois held that the plaintiff failed to present sufficient evidence upon which a jury could conclude that the plaintiff engaged in protected activity under the FCA. Hence, the court granted the defendant's motion for summary judgment and relinquished its supplemental jurisdiction over the state-law claims.

Compliance with the Government's Subpoena *Duces Tecum*

The plaintiff contended that he engaged in protected activity by sending documents to the government in response to, and in compliance with, the subpoena. In response, the defendant contended that no court has held that simple compliance with a legal obligation to produce documents constituted protected whistleblower activity. The court held the plaintiff failed to produce sufficient evidence that demonstrated his belief that the defendant defrauded the government at the time when he complied with the subpoena. The court also noted that the plaintiff began to believe that the company committed illegal acts only after his final response to the government's subpoena. The court left open the possibility that simple compliance with a subpoena could constitute engagement in protected activity if the employer discouraged the employee from complying. However, the plaintiff failed to show that anyone at the company discouraged him from complying with the subpoena. Thus, the court held that the plaintiff's compliance with the subpoena did not constitute engagement in protected activity under the FCA.

Participation in the Internal Investigation

The plaintiff also contended that he engaged in protected activity by participating in the company's internal investigation, alleging that he informed the law firm of the company's sales and marketing practices. In response, the defendant contended that the plaintiff did not engage in protected activity, since he spoke to the defendant's law firm in order to comply with the company's internal investigation, and that he knew that the law firm was not affiliated with the government. The court held the plaintiff failed to provide evidence to demonstrate that he sought to uncover fraudulent activity by participating in the company's internal investigation. Moreover, the court found that the plaintiff did not believe that the company had done anything wrong when he participated in the investigation. Hence, the court held that the plaintiff did not engage in protected activity under the FCA by participating in the company's internal investigation.

Internal Complaints

The plaintiff contended that his internal complaints to upper management, along with his refusal to engage in illegal sales and marketing practices constituted engagement in protected activity. In response, the defendant contended that internal complaints could not constitute engagement in protected activity, and that the plaintiff never complained that the company defrauded the government or falsely collected government funds. The court noted that the plaintiff failed to provide evidence showing that he ever suggested to his superiors that the company committed fraud on the government. Hence, the court held that the plaintiff failed to show that his complaints constituted more than a mere suggestion for improvement and that the plaintiff's internal complaints to upper management did not constitute engagement in protected activity. The court accordingly granted the defendant's motion for summary judgment and denied the plaintiff's motion for summary judgment.

U.S. ex rel. Suh v. HCA-The Healthcare Co., 2009 WL 1834586 (E.D.N.C. June 23, 2009)

Relators brought a *qui tam* action against a healthcare corporation and an individual, alleging substantive violations of the False Claims Act, as well as a claim for retaliation under the Act. The government intervened, and the parties settled the *qui tam* action, leaving the FCA retaliation claim unresolved. The relator's moved for an extension of time *nunc pro tunc* to serve a summons and amended complaint, and the defendant corporation objected. The United States District Court for the Eastern District of North Carolina granted the relators' motion and the defendant corporation then moved to dismiss for lack of subject matter jurisdiction, arguing that there was not subject matter jurisdiction because the relators were not employees of the hospital corporation and lacked standing to pursue an FCA retaliation claim against that defendant. The court noted that this jurisdictional attack

on the relators' employment status warranted examination on the merits of the case, but denied the motion to dismiss the retaliation claims, since it concluded that an examination of the merits was improper at this stage of the litigation. The defendant next argued for dismissal of the complaint because the plaintiffs failed to serve a summons and amended complaint within the court-imposed deadline. Alternatively, the defendant moved to dismiss for insufficiency of service of process. The court denied the defendant's motion to dismiss on these grounds as well, citing an earlier court order.

Hill v. Booz Allen Hamilton, Inc., 2009 WL 1620403 (D. Guam June 9, 2009)

The plaintiff brought an action against her former employer, a consulting firm, and others, alleging retaliatory termination under state law and wrongful termination in violation of public policy. The United States District Court for the Central District of California granted the former employer's motion to dismiss for failure to state a claim as to the state law claim, but denied it as to the public policy claim. Subsequently, the court granted that defendant's motion to transfer the case to the United States District Court for the District of Guam. The plaintiff later filed a second amended complaint, and added a claim for retaliation in violation of the FCA. The court denied the defendant's motion to dismiss the second amended complaint for failure to state a claim and held that the plaintiff sufficiently alleged her engagement in a protected activity, her former employer's knowledge of such engagement, and her retaliatory termination. The court also held that the plaintiff adequately stated her claim under applicable public policy.

FCA's Anti-Retaliation Provision Does Not Require Employers to be Targets of an FCA Investigation

The plaintiff's former employer sought dismissal of her FCA retaliation claim by contending that the FCA's anti-retaliation provision is limited to situations in which the employer-defendant is the target of a government FCA investigation. The court rejected this argument, finding that it was not supported by case law. The court reviewed the FCA's legislative history and concluded that Congress intended that the statute be interpreted broadly. As a result, the court concluded that alleging a reasonable belief that an employer or any third party committed fraud against the government and alleging an investigation into the fraud was sufficient to qualify as protected activity.

The Plaintiff Successfully Stated an FCA Retaliation Claim.

The court held the plaintiff successfully pled her retaliation claim by alleging that her former employer terminated her for investigating, reporting, and refusing to cover up its billing practices, which allegedly defrauded the government. Specifically, the court found that the relator alleged a reasonable belief of the defendants' allegedly fraudulent billing activities, that she alleged her investigation into that alleged fraud, that she pled that her former employer had knowledge of her engagement in protected activity by alleging that she presented the findings of her investigation to her former employer, and that she adequately pled retaliatory termination by giving notice to the defendant that she believed her investigations were the cause of her termination. Hence, the court concluded the plaintiff successfully stated a claim for FCA retaliation.

Georgandellis v. Holzer Clinic, Inc., 2009 WL 1585772 (S.D. Ohio June 5, 2009)

The plaintiff brought an action against his former employer—a medical care provider—an affiliated hospital, and the officials of each, alleging FCA retaliation and other federal, state, and common law claims. He alleged that a patient at the medical center died because of the gross negligence of a surgeon, but that the defendants allowed the surgeon to continue to operate on patients in a grossly negligent manner and without supervision. He further alleged that he repeatedly complained to the defendants about the surgeon's gross negligence and that he informed them that billing Medicare for surgeries performed by an unqualified surgeon constituted Medicare fraud. He alleged that he contacted the United States Center for Medicare and Medicaid ("CMS") and the Ohio Medical Board concerning fraudulent payments for surgeries by the unqualified surgeon, and that, as a result of his actions, the defendants retaliated against him—he alleged that the defendant medical provider terminated his employment and the defendant hospital terminated his privileges. The defendants filed collective and separate motions to dismiss the plaintiff's complaint for failure to state a claim, and also sought summary judgment. The U.S. District Court for the Southern District of Ohio held that the individual defendants were not the relator's plaintiff's employer and, therefore dismissed his FCA retaliation claims against them. The court then held that the plaintiff had sufficiently alleged his engagement in a protected activity, as well as the care provider's and hospital's knowledge of that activity. The court further held the plaintiff had alleged sufficient facts to show that those two defendants had retaliated against the plaintiff for engaging in the protected activity. The court accordingly denied those defendants' motions to dismiss the plaintiff's FCA retaliation claim. Consequently, the court dismissed the majority of the plaintiff's claims against the individual defendants, but allowed most of his claims against the hospital and medical care provider to proceed.

The Hospital Was the Plaintiff's Employer

The court dismissed the plaintiff's FCA retaliation claims against the individual defendants, finding that those defendants were not the plaintiff's employer, and therefore could not be liable for retaliation against the plaintiff under the False Claims Act. The defendant hospital argued the court should dismiss the FCA retaliation claim against it as well, arguing that the plaintiff had failed to sufficiently allege that it was the plaintiff's employer. The court determined that the plaintiff's complaint alleged that the defendant hospital exercised substantial supervisory control over the plaintiff, controlled the manner and means that the plaintiff used to provide care, and told the plaintiff when he should work at the hospital. Thus, the court held the plaintiff's allegations were sufficient to reasonably infer that the defendant hospital was his employer.

Plaintiff's Protected Activity and the Defendants' Knowledge of that Activity

The defendant hospital and defendant medical care provider asserted that the plaintiff failed to allege his engagement in a protected activity. The court rejected this assertion, as it noted that the plaintiff had alleged that he continuously warned officials of the defendant hospital and defendant care provider of the alleged fraud and later contacted the CMS and Ohio Medical Board in furtherance of his FCA claim. The defendant hospital and defendant care provider also argued that the plaintiff faced a heightened standard to show protected activity, since he served on their PEER Review and Quality Assurance Committee, which required him to perform investigative duties—essentially, these defendants argued that because of the plaintiff's role on the committee, there was no way for them to know that the plaintiff's warnings regarding their alleged Medicare fraud were given in contemplation of an FCA action. The court rejected this argument, finding that the plaintiff's complaint alleged that his service on the committee only involved determining the circumstances of the patient's death and whether the surgeon met the standard of care. Thus, the court found, the plaintiff's service on the committee was unconnected to his warnings about possible Medicare fraud. Moreover, the court noted that the complaint alleged that the plaintiff raised the issue of Medicare fraud at one of the defendant hospital's departmental meetings and at its quarterly medical staff meeting. The court concluded that the plaintiff's repeated warnings were sufficient to put the defendants on notice that the plaintiff was at least contemplating of a potential FCA action.

Retaliatory Termination

The defendant hospital and defendant care provider argued the plaintiff did not show a connection between his protected activity and his termination. The court held the FCA's anti-retaliation provision protected employees from discrimination against terms and conditions of employment—not just termination—due to engagement in protected activity. The court found the plaintiff's complaint alleged such retaliation, as it asserted that the defendants removed him from committees and accused him of anger management problems and poor bedside manner. In addition, his complaint alleged that the defendant care provider retaliated against him by placing him on leave, making him undergo psychiatric and psychological counseling, and cancelling his medical malpractice insurance. Finally, the complaint alleged the defendant hospital retaliated against him by suspending his hospital privileges. The court also noted that the complaint alleged that these defendants terminated the plaintiff in retaliation for his complaints against the defendants. Thus, the court held that the plaintiff alleged sufficient facts to support his claim that these defendants care provider and defendant hospital terminated him because of his protected activity. Since the plaintiff alleged sufficient facts to establish all the elements of an FCA retaliation claim, the court denied the defendants' motions to dismiss the FCA retaliation claim.

U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 2009 WL 1457036 (D. Ariz. May 21, 2009)

The relator brought a *qui tam* action against her former employer, a communication and information systems and technology provider, alleging retaliation under the FCA and various common law claims. The relator alleged that a voice mail message from one of the defendant's senior engineers led her to believe that the defendant planned to delay and abandon patent prosecution on inventions for which the government had intellectual property rights. Such a delay would increase the government's risk of missing its opportunity to pursue the patent process and would enable the defendant to retain the inventions as trade secrets. The relator further alleged that she reported her concerns about potential fraud to her. In the meantime, the president of the defendant corporation restructured the organization and eliminated a number of central departments, including the relator's department—eventually, the relator was terminated from her position. She subsequently filed an FCA *qui tam* action against the defendant, and also alleged retaliation and common law claims. As the relator's FCA allegations were based on information she downloaded during her employment with the defendant, the defendant counterclaimed for breach of a confidentiality agreement. The government declined to intervene.

The United States District Court for the District of Arizona granted the defendant's motion for judgment on the pleadings with respect to the relator's FCA claims, finding that the relator failed to plead those claims with particularity. The parties then filed various summary judgment motions with respect to the defendant's counterclaim and the relator's retaliation claim. The court granted the defendant partial summary judgment on the relator's retaliation claim, finding that the relator's investigation and reporting did not constitute acts in furtherance of an FCA action, that the defendant had no knowledge that the relator engaged in any protected activity under the FCA, and that there was evidence showing that the defendant terminated the relator's employment as a result of a strategic business decision and not in retaliation for engaging in protected activity. The court also granted the defendant partial summary judgment on its counterclaim for breach of contract (and denied the relator's summary judgment motion with respect to the counterclaim), concluding that the FCA did not immunize the relator's breach.

Retaliation

The relator alleged the defendant terminated her employment in retaliation for investigating and reporting that the defendant was failing to comply with company policy and with federal regulations. The court, though, noted that the relator failed to allege that she investigated and reported—or even suspected—the defendant's alleged submission of false claims, or creation of false records to conceal or avoid obligations to pay the government. In addition, since the court found that the defendant's allegedly fraudulent business strategy applied only to inventions for which the government already held unlimited intellectual property rights, the court concluded that a reasonable employee in the same or similar circumstances could not have believed that the defendant had violated the FCA. Thus, the court held that the relator's alleged investigatory activities did not constitute acts in furtherance of an action under the FCA. The court also noted that the relator only raised her concerns about compliance to the defendant's legal department and complained to her supervisor, but did not give notice to anyone else. Since the relator's job included ensuring compliance with government contracts, and she repeatedly expressed concerns over compliance, the court determined that none of her actions could have notified the defendant that she was acting in furtherance of an FCA action. The court further noted that when the president of the defendant corporation eliminated the relator's department, he did not know of the relator's concerns about possible fraud, and thus, there was no evidence to demonstrate that the president's decision to eliminate the relator's department was influenced by the relator's alleged investigation. The court even determined that the undisputed evidence indicated that the relator's department was eliminated for strategic decisions. Thus, the court held that the defendant did not terminate the relator's employment in retaliation, and granted the defendant's motion for partial summary judgment on the relator's retaliation claim.

FCA as a Defense to Breach of a Confidentiality Agreement

In response to the defendant's counterclaim for breach of the relator's confidentiality agreement, the relator argued that public policy allows relators to gather documents as part of an FCA investigation, despite the existence of a confidentiality agreement. However, the court determined that the relator did not need to remove copies of the defendant's documents in order to prevent their destruction. The court noted that when the relator spoke to a procurement fraud officer of the U.S. Army, she was neither asked nor authorized to engage in any conduct that would violate her confidentiality agreement, and she did not provide the documents to the officer. The court also held that, under the circumstances, the FCA would not immunize the relator for breaching her employment contract—the court observed that the relator and her attorneys did not even review the defendant's documents until <u>after</u> she had already filed her FCA. In addition, the court stated that the "[s]tatutory incentives encouraging investigation of possible fraud under the FCA do not establish a public policy in favor of violating an employer's contractual confidentiality and nondisclosure rights by wholesale copying of files admittedly containing confidential, proprietary, and trade secret information. Although the [relator's confidentiality agreement] might be unenforceable if the interest in its enforcement is outweighed in the circumstances by a substantial public interest, *e.g.*, the public interest in filing an FCA *qui tam* action, that would be harmed by enforcement of the Agreement, such an interest is not harmed by enforcement of the Agreement in these circumstances." As a result, the court granted the defendant summary judgment on its breach of contract counterclaim.

Morgan v. Sci. Applications Int'l Corp., 2009 WL 1262387 (D.D.C. May 8, 2009)

The plaintiff sued his former employer, a scientific services provider, alleging FCA violations and retaliatory discharge. After the government declined to intervene, the plaintiff's counsel withdrew, and the plaintiff was unable to find new counsel. The United States District Court for the District of Columbia dismissed the plaintiff's FCA claims, holding that he could not pursue those claims as a *pro se* litigant. The defendant then moved to compel the plaintiff to arbitrate his retaliation claim, pursuant to an arbitration agreement the plaintiff signed. The court explained that the substantive FCA claims were not subject to arbitration, since those claims belong to the government, and the government did not agree to arbitrate the FCA claims. However, the Court reasoned, the plaintiff's retaliatory discharge claim was subject to arbitration, since that claim was between the plaintiff and his former employer. Finally, the court determined that the plaintiff had timely filed the retaliatory discharge claim. The court noted that the arbitration agreement deemed a claim timely filed if the filing occurred before the expiration of the applicable statute of limitations. The court determined that the FCA includes a six-year statute of limitations and that the plaintiff filed his claim within that six-year period. Thus, the court the court granted the defendant's motion to compel arbitration on the retaliation claim.

Liburd v. Bronx Lebanon Hosp. Ctr., 2009 WL 900739 (S.D.N.Y. Apr. 3, 2009)

A relator brought an action against her former employer—a federally funded medical center—and its officials, alleging retaliation and other discrimination claims. With respect to the FCA, she alleged that the defendants defrauded the government by charging for computers that were never purchased. She alleged that after she complained to management about the computers, she was terminated from her employment. The defendants moved for summary judgment and the United States District Court for the Southern District of New York granted the motion, holding that: (1) the plaintiff failed to produce evidence demonstrat-

ing that she was actually investigating fraud under the FCA; (2) the plaintiff's alleged complaint to management was insufficient to constitute protected activity under the FCA because she did not mention fraud when she complained; (3) for the same reason, she failed to offer any evidence to show that the defendants were aware of her allged engagement in protected activity; and (4) that there was sufficient evidence to show that the defendant terminated the plaintiff for violating the defendant's telephone usage policy. Hence, the court held that the plaintiff failed to raise a genuine issue of material fact regarding her retaliation claim and accordingly granted the defendants' summary judgment motion.

U.S. ex rel. Howard v. USA Environmental, Inc., 2009 WL 652433 (M.D. Fla. Mar. 12, 2009)

The plaintiff brought a *qui tam* action against her former employer, an environmental remediation service provider, alleging substantive FCA violations, as well as retaliatory discharge. The relator's complaint alleged that the defendant entered into an Army contract for disposing unexploded ammunition in Iraq and that the defendant failed to comply with the contract's health and safety requirements. The complaint further alleged that upon complaining to the defendant's manager about non-compliance with the contract's health and safety provisions, the relator was asked to remain quiet, was denied access to the defendant's warehouse, and that out of fear for her safety, she resigned from her position. The government declined to intervene but filed a statement of interest. The United States District Court for the Middle District of Florida then granted the defendant's motion to dismiss. The plaintiff then filed an amended complaint that only included her retaliation claim. The defendant again moved to dismiss. The court found that the relator's alleged comments to the defendant were not sufficient to support her retaliation claim. Furthermore, the court found that the plaintiff was in no position to allege that she engaged in protected activity because she could not have had any first hand knowledge of the alleged fraud. In fact, the court stated that the relator failed to even allege that the defendants knew that she was engaged in any protected activity. Accordingly, the court held that the plaintiff's conduct was not "protected." Accordingly, the court granted the motion to dismiss and the relator's complaint was dismissed with prejudice.

Sanches v. City of Crescent City, 2009 WL 650247 (N.D. Cal. Mar. 10, 2009)

The plaintiff brought an action against her former employer—a city—and its officers, alleging retaliation under the FCA and other state law claims. In particular, she alleged that the defendants fired her for reporting, among other things, unpaid federal taxes. The defendants moved to dismiss the retaliation claim for lack of subject matter jurisdiction and failure to state a claim, asserting that the court lacked subject matter jurisdiction over the plaintiff's claims because the plaintiff failed to follow the required *qui tam* procedure, as she had not filed a *qui tam* action. However, the United States District Court for the Northern District of California found that filing of a *qui tam* action is not a pre-requisite for asserting a retaliation claim. The defendants then contended that the plaintiff failed to sufficiently plead the defendants' knowledge of her engagement in protected activity. The court found that the knowledge element was effectively alleged in the complaint. However, the court found that, although the plaintiff's complaint included an allegation that the defendants knew that she was engaged in protected activity, she failed to reference that allegation in her response to the defendants' motion. The court stated that it was "unsure whether to infer from this omission that Plaintiff overlooked this allegation in her pleading, or that she does not believe that it pertains to her [retaliation] claim." Consequently, the court was forced to hold that the plaintiff failed to sufficiently allege the defendants' knowledge of her engagement in protected activity. Thus, the court dismissed her complaint, but without prejudice.

U.S. ex rel. Deering v. Physiotherapy Assocs., Inc., et al., 2009 WL 605276 (D. Mass. Mar. 10, 2009)

The relator brought an FCA claim against his former employer, a physical, occupational, and speech therapy company. The complaint alleged Medicare and Medicaid fraud, and was subsequently amended to include a retaliation claim. The defendant and the government settled the fraud claims and the defendant moved to dismiss the retaliation claim. The United States District Court for the District of Massachusetts found that the relator's retaliation claim was time-barred. The court held that any reading of the most closely analogous state law would provide for a maximum limitations period of three years. The relator's retaliation claim, however, was filed almost five years after the relator was terminated from his job. The relator argued that the statute of limitations tolled while his *qui tam* action was under seal. The court, though, disagreed, noting that the relator failed to provide any case law in support of the proposition that the statute of limitations is tolled in FCA cases, while the case is under seal. In addition, the court stated that the relator was not prejudiced by the seal, and could have filed amended complaints (and brought his retaliation claim) while his initial complaint was still under seal—in fact, the court observed, the relator filed his amended complaint one month before the case was brought from under seal. The court determined that the relator "likely had enough information when he filed his original complaint—six months after his termination" to add his retaliation claim.

Since the court found that the relator failed to amend his complaint before the limitations period had run, the only way his retaliation claim could survive is if it

related back to the date his original complaint was filed. However, the court held that the relator's retaliation claim did not meet the relation back standard, since the retaliation claim did not arise from the same conduct, transaction or occurrence as his fraud allegations. The court stated that "[h]is retaliation claim concerns not whether [the defendant] had been committing fraud, but rather whether he complained to [the defendant's] supervisors 'in furtherance of' an FCA action, whether [the defendant] was aware that an FCA action was a reasonable possibility, and whether [the defendant]discharged him because of his complaints." Consequently, the court held that the limitations period on the relator's retaliation claim had passed, relation back did not apply, and his retaliation claim should be dismissed as time-barred.

Campion v. Northeast Utilities, 2009 WL 439892 (M.D. Pa. Feb. 24, 2009)

The relator brought an action against an energy and electrical services corporation, its affiliate and their subsidiaries, asserting *qui tam* claims under the False Claims Act violations, as well as a claim for retaliation. With respect to his retaliation claim, the relator alleged that he was assaulted, demoted, and eventually terminated from his position with one of the defendant companies, after he complained about numerous false claims made by that defendant. After the government declined to intervene, the relator withdrew his *qui tam* claims. The defendants moved to dismiss the retaliation claim on the grounds that the action was time-barred and failed to state a claim. The United States District Court for the Middle District of Pennsylvania held that Pennsylvania's residual statute of limitations for personal injury actions was the most closely analogous statute of limitations for anti-retaliation claims and held the plaintiff's retaliation action was not time-barred. The court, however, still dismissed the retaliation claim as to three of the defendants, finding that those defendants were not employers of the plaintiff. Finally, the court found that the plaintiff did not allege that he engaged in protected conduct or that he provided notice of a potential FCA action to the defendant he did work for. Accordingly, the court dismissed the complaint with prejudice for failure to state a claim.

Statute of Limitations

The court first addressed the statute of limitations issue and held that since there is no express limitations period for retaliatory discharge in the FCA itself, it was necessary to find the most closely analogous state limitations period. The defendants argued that the limitations period under the Pennsylvania Whistleblower Law should apply, while the plaintiff argued that the longer limitations period under Pennsylvania's wrongful discharge law applied. The court, however, found that neither statute was applicable, as both were too narrow in scope. The court reasoned that, unlike the FCA, which applies to any employee, the Pennsylvania Whistleblower Law only applies to government employees. Thus, it was not the most analogous state statute. Likewise, the court found that the state's wrongful discharge statute only applies to discharges and does not provide a remedy when an employee is demoted, suspended or discriminated against in retaliation for protected activity. Therefore, the court determined that it was not the most analogous state statute either.

Instead, given the wide scope of the FCA's anti-retaliation provision, the court declared that a uniform statute of limitations should apply to all FCA retaliation claims, since a uniform limitations period would result in certainty and would minimize litigation. The court concluded that Pennsylvania's residual statute of limitations for personal injury actions is the most closely analogous statute of limitations because it is broad enough to apply to a wide spectrum of FCA retaliatory discharge claims. After adopting this statute of limitations, the court found that the plaintiff's complaint was within the limitations period.

Failure to State a Claim

Three of the defendants argued that the plaintiff failed to state a claim because they were not "employers" of the plaintiff in the context of the anti-retaliation provision. In response, the plaintiff asserted an "integrated enterprise" theory in which the subsidiary he worked for, another subsidiary, the parent corporation, and the affiliate company were all liable. The court noted that affiliated corporations could be treated as a single employer, but only if facts such as interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control existed. The court found that the plaintiff failed allege any facts supporting his integrated enterprise theory, and thus dismissed his claims against those defendants that did not employ him.

The court also held that the plaintiff's allegations were insufficient to constitute protected activity or notice to his former employer of the distinct possibility of FCA litigation. The court found that the plaintiff did not engage in "protected conduct," since his "purported protected activity and notice consist entirely of telling a supervisor about 'some' allegations, including falsification of time sheets, on one occasion and hiring an attorney who demanded an investigation into his treatment on the job. [The plaintiff's] merely reporting his concern about mischarging the government to his supervisor does not suffice to establish that he was acting 'in furtherance of' a *qui tam* action." The court specifically noted that the plaintiff never gave his former employer any indication that he might ultimately initiate an FCA action or report the defendants' alleged fraud to the government. Since the court determined that the focus of the plaintiff's conduct was to report his alleged mistreatment at work, rather than to expose fraud or false claims against the government, the court held that the plaintiff's allegations were insufficient to state a claim. Consequently, the defendants' motion to dismiss for failure to state a claim was granted.

U.S. ex rel. Cassaday v. KBR, Inc., 2008 WL 5273496 (S.D. Tex. Dec. 16, 2008)

The relator brought a *qui tam* action against his former employer and other affiliate corporations, alleging the submission of false claims to the government and retaliatory discharge. The government declined to intervene. The defendants moved to compel arbitration of the relator's retaliation claims pursuant to his employment contract with the defendant. The United States District Court for the Southern District of Texas held that the retaliation claims fell within the scope of the arbitration clause because the relator's claims related to his employment and termination from the defendant. The court granted the defendants' motion to compel arbitration. The retaliation claim was thus severed and stayed pending adjudication.

Arbitrability of FCA Retaliation Claims

The relator asserted that FCA retaliation claims are not subject to arbitration because arbitration conflicts with the text of the FCA, the FCA's public disclosure provision, and the legislative history of the FCA, and creates inherent conflicts with the FCA. First, the court held the text of the FCA does not mandate that retaliation claims are not subject to arbitration. The court observed that other courts have not found any congressional intent in the statutory text that precludes arbitration. Second, the court found that the relator's public disclosure argument was unfounded. The relator argued that if arbitration proceedings could constitute a public disclosure under the FCA, employers could effectively immunize themselves from liability in similar situations. The court, however, found that since the FCA does not require that retaliation claims be filed prior to other claims, relators can avoid the public disclosure bar by simply filing the retaliation claims with or after the *qui tam* claims. Third, the court found that the relator's arguments that arbitration could cause a relator to improperly notify a defendant of a pending *qui tam* suit was unfounded because arbitration could be stayed pending the resolution of the other claims. Fourth, the court held that there was no specific language in the legislative history of the FCA that indicates that it precludes arbitration of retaliation claims. Finally, the court found that arbitration of FCA retaliation claims does not create an inherent conflict with the FCA's underlying purposes, finding that other federal claims have been held to be arbitrable and no federal statute or policy rendered the claims non-arbitrable. In sum, the court held that the relator's FCA retaliation claims fell within the scope of the arbitration provision because the relator's claims related to his employment agreement with the defendant. The defendants' motion to compel was granted and the retaliation claim was severed and stayed pending arbitration.

McKinney v. Apollo Group, Inc., 2008 WL 5179110 (S.D. Cal. Dec. 10, 2008)

A *pro se* plaintiff filed an action against his former employer, a university, and other individual defendants, alleging retaliatory termination from employment in violation of the FCA and other claims. The complaint alleged that the defendants violated the Higher Education Act by using sales quotas to determine the pay of enrollment counselors. The plaintiff asserted that by notifying his employer of the alleged illegal activities, he performed a lawful act under the FCA's anti-retaliation provision. The defendants contended that apart from mentioning his concerns to his superiors, the plaintiff did not allege any facts indicating that he performed any investigation or other action in furtherance of an existing *qui tam* action. The defendants also asserted that the claim was barred as they were already involved in an ongoing *qui tam* action with the government regarding identical facts. The United States District Court for the Southern District of California found that the plaintiff failed to bring his FCA claim in the name of the government which was grounds for dismissal. The court also found that neither expressing mere dissatisfaction with one's treatment on the job nor simply investigating non-compliance with regulations was sufficient to state a FCA claim. The court then found that the complaint was devoid of any other facts supporting the alleged retaliatory termination. The court accordingly held that the plaintiff failed to state a claim under the FCA and dismissed the claim.

Mann v. Heckler & Koch Defense, Inc., 2008 WL 4551104 (E.D. Va. Oct. 07, 2008)

The plaintiff brought an original *qui tam* action against his former employer, a rifle manufacturer, alleging a violation of the FCA as well as a defamation claim under state law. The plaintiff alleged that the defendant improperly attempted to induce the U.S. Secret Service to enter into a contract to supply rifles, which in fact, did not meet the government's specifications. The complaint further alleged that after the plaintiff investigated the alleged FCA violation and alerted the defendant about what he had discovered, he was sent home from work for a few weeks and then harassed when he returned. Within weeks after the original complaint had been filed, the defendant suspended the plaintiff without pay, and eventually terminated his employment. The plaintiff then filed an amended complaint, and added and additional retaliation count, alleging that the defendant wrongfully terminated his employment in response to the filing of his original complaint. The defendant moved to dismiss arguing that the plaintiff did not engage in protected activities under the FCA.

The United States District Court for the Eastern District of Virginia held that the plaintiff's investigation and internal complaints were protected activity, particu-

larly since the plaintiff's investigation and internal complaints reasonably notified the defendants about a possible FCA action. The court also found it relevant that the plaintiff complained outside of the chain of command, informed a number of officers and directors about the alleged wrongdoing and took his concerns outside of the company. The fact that an internal investigation resulted from the plaintiff's complaints also supported the plaintiff's contention. Thus, the court denied the defendant's motion to dismiss with respect to the plaintiff's first count of retaliation. However, relying on the U.S. Supreme Court's decision in *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005), the district court found that the filing a complaint for retaliatory discharge under the FCA is not, in and of itself, a protected activity, since section 3730(h) only refers to retaliation for engaging in protected activities under the FCA's substantive provisions—sections 3730(a) and (b)—and does not refer to retaliation for engaging in activities under section 3730(h) itself. Accordingly, the court dismissed the retaliation claim based upon the filing of the plaintiff's original complaint.

U.S. ex. rel. Ellis v. Sheikh, 2008 WL 4761875 (W.D.N.Y. Oct. 31, 2008)

The relator filed a *qui tam* action against her former employer, a medical practitioner, and others. She alleged that the defendants had defrauded the government by using inappropriate billing codes for payment under Medicare and Medicaid. The relator also alleged that her termination by the defendants was in retaliation for her investigation of the defendants' activities. The defendants filed a motion to dismiss for failure to plead fraud with particularity and for failure to state a claim. The United States District Court for the Western District of New York held that the relator had sufficiently pled fraud with particularity. It found that the complaint described the fraud in detail and provided specific illustrative instances. In particular, the court found that the relator's allegations of short and frivolous medical appointments and her allegations of billing statements that included inaccurate billing codes but did not detail the services provided, were sufficient to plead fraud. The court also held that the relator had sufficiently pled that her termination was in retaliation for protected activity. The court observed that the relator, after investigating the defendants' activities, notified her supervisor regarding the alleged fraud. She then allegedly spoke to government investigators and was subsequently terminated. The court found these facts were sufficient to allege that the defendants were aware of the relator's engagement in protected activity and she was terminated in retaliation.

Dilback v. General Elec. Co., 2008 WL 4372901 (W.D. Ky. Sep. 22, 2008)

The plaintiff brought a *qui tam* action against his former employer, an aircraft manufacturing company. The parties settled all of the claims except for plaintiff's retaliation claim. Plaintiff then requested discovery regarding, in part, information about whether or not the underlying fraud actually occurred. The defendant refused to produce this discovery. The plaintiff then brought a motion to compel which the Magistrate Judge denied. After reviewing the order, the United States District Court for the Western District of Kentucky found that the information was relevant to the plaintiff's FCA retaliation claim. Specifically, it held that a retaliation claimant does not need to prove actual fraud to prevail. Instead, it found that a plaintiff need only show engagement in activity related to viable FCA claim. Accordingly, since the defendant acknowledged that the plaintiff investigated and filed a viable *qui tam* claim, evidence relating to the alleged underlying fraud was not relevant and not discoverable. However, the court found that proof of the alleged fraud was relevant because it could be used to prove the defendant's motivation to retaliate. The court accepted the plaintiff's argument that because the defendant asserted a non-retaliatory reason as to why the plaintiff was terminated, he should be permitted to use evidence of fraud to prove that the stated reason was merely pretext. The court then allowed limited discovery into the underlying fraud.

Kuhn v. LaPorte County Comprehensive Mental Health Council, 2008 WL 4099883 (N.D. Ind. Sep. 04, 2008)

The plaintiffs filed a complaint in the United States District Court for the Northern District of Indiana alleging that the defendant, a non-profit mental health center, illegally terminated the plaintiffs from their employment. The plaintiffs alleged that they were "whistleblowers" impermissibly terminated for engaging in statutorily protected activity. The defendant contended that the plaintiffs were terminated for other permissible reasons and moved for summary judgment. The court observed that to prove retaliation under FCA section 3730(h), a plaintiff must show: (1) that the plaintiff's actions were taken "in furtherance of" an FCA enforcement action and were therefore protected by statute; (2) that the defendant knew that the plaintiff was engaged in such protected activity; and (3) that the plaintiff's discharge was motivated by the protected activity. The court denied the motion for summary judgment.

The defendant argued that the plaintiffs' actions were not protected under the FCA because the plaintiffs violated federal and state privacy laws by disclosing confidential patient records to an outside attorney as part of their investigation. The defendant further argued that the plaintiffs' conduct was unprotected under the FCA because the altered documents were never presented to the government for payment. The court rejected both of these arguments and held that the plaintiffs' actions were statutorily protected activity. First, the court found that disclosure of investigative records to outside counsel was lawful under 45 C.F.R. § 164.502(j). Second, the court observed that the plaintiffs were not required to show that the defendant was subsequently liable for its actions in order to have been engaged in protected activity. Instead, the plaintiffs needed only to submit substantial evidence establishing that their "investigatory conduct" was motivated by good faith. They did so by showing that there was a history of problems with Medicaid billing, that an internal audit occurred, that documents were altered by the defendant's employees, and that the plaintiffs took steps to protect the defendant from legal liability.

The court also held that the plaintiffs sufficiently notified the defendant of their *qui tam* action. The court recognized that different employees have differing notice obligations under the FCA and that employees who are normally engaged in reporting fraudulent activity are under a heightened obligated to indicate an explicit intention to bring a *qui tam* action or to otherwise report the fraud, while other employees need only show that the employer was aware of the fraud investigation. The court held that even the heightened obligation was satisfied, since the plaintiffs communicated their intent to report the suspected fraud to the defendant's HR director. Furthermore, the plaintiffs submitted depositions of the defendant's employees to the defendant's board president.

Finally, the court rejected the defendant's argument that the plaintiffs were terminated for reasons other than their FCA concerns. The court found that the timing of the plaintiffs' firings created a material issue of fact. One plaintiff was fired only three days after she notified the defendant of her investigation and only a week after she received a substantial pay raise. The other plaintiff was dismissed the day after he stated his intent to report the alleged fraud.

***See U.S. ex rel. Sharp v. E. Okla. Orthopedic Ct.,* 2009 WL 499375 (N.D. Okla. Feb. 27, 2009) at page 123.**

***See U.S. ex rel. Smart v. Christus Health*, 2009 WL 151590 (S.D. Tex. Jan. 22, 2009) at page 53.**

***See U.S. ex rel. Howard v. USA Envtl., Inc.,* 2009 WL 113444 (M.D. Fla. Jan. 19, 2009) at page 125.**

COMMON DEFENSES TO FCA ALLEGATIONS

A. Government Knowledge Inference

U.S. ex rel. Burlbaw v. Orenduff, 2008 WL 5046814 (10th Cir. Nov. 28, 2008)

Two relators, former employees of a state university, initially brought a *qui tam* action against the university, alleging that it falsely certified itself as a minority institution eligible for government set aside contract grants. The relators' allegations pertained to grants and contracts that funded a program at the school, through a Department of Defense set-aside program for minority institutions. The relators alleged that the school was not a minority institution, but falsely certified that it satisfied the criteria to be eligible for the set-aside program. In light of Supreme Court precedent clarifying that state agencies—such as state universities—are not considered "persons" under the FCA, the relators amended their complaint and, in lieu of filing suit against the university, sued (in their individual capacity) the high-ranking university employees who applied for benefits under the Department of Defense set-aside program. The court allowed this amendment over the defendants' objection that the Eleventh Amendment barred suits against state officers for performing conduct in the scope of their employment. The government declined to intervene in the case and the defendants moved for summary judgment, contending that qualified immunity protected them from the suit, and also arguing that, based on the facts, no reasonable jury could find that they had violated the FCA. The district court agreed on both fronts, and granted summary judgment in the defendants' favor. The relators appealed, arguing that qualified immunity did not apply to state officials in their individual capacities under the FCA and that there was sufficient evidence in the record to defeat the summary judgment motion. In a 60-page opinion, the Tenth Circuit affirmed the judgment of the district court, holding that the relators failed to produce sufficient evidence of the requisite scienter.

The facts show that the Department of Education maintained a list of minority institutions, which was based on enrollment data furnished by the institutions. Pursuant to a regulatory scheme, the Department of Defense relied on the DoE's list when determining eligibility for its set-aside program. Although it appears that the university did not in fact satisfy all of the criteria for minority institution status, New Mexico State University regularly appeared on the DoE's list of minority institutions. The relators argued that the defendants either had knowledge that the university did not qualify as a minority institution or were without sufficient knowledge to make that determination. Thus, the relators concluded, the defendants submitted false claims when they applied for the set-aside program. While the district court acknowledged that the defendants signed various documents certifying that the university qualified for minority institution status, its found that just as the DoD relied on the DoE's list of minority institutions, so did the defendants—so when the defendants certified to the Department of Defense that the university was a minority institution, they were merely repeating what the Department of Education had already said. Therefore, the district court opined, even if the defendants submitted false claims based on false certifications, the relators could not demonstrate that they did so knowingly. The district court reasoned that the defendants' failure to independently verify the university's status was likely negligence, but did not constitute a knowing violation of the FCA.

The relators appealed to the Tenth Circuit, which agreed that the relators' FCA claims failed as a matter of law, and affirmed the trial court's grant of summary judgment in favor of the defendants.

Lack of Evidence of Scienter

The appeals court found that the relators could not contradict the district court's conclusions that both the Department of Defense, as well as the defendants, relied on the Department of Education's list of minority institutions, and that the defendants' negligence in not investigating the university's status themselves did not rise to the level of a knowing FCA violation. The court found it significant that the relators did not identify any deposition testimony from any defendant relevant to the issue of scienter. Furthermore, the documents offered as proof by the relators did not support an inference of scienter because they did not show knowledge of possible ineligibility. Accordingly, the court found that the record failed to create an issue of material fact.

Government Knowledge Inference

The court also found that, even if there were issues of fact regarding scienter, the government knowledge inference would preclude the *qui tam* action. The court found that there was both government knowledge of the facts surrounding the alleged fraud and government cooperation in the submission of the alleged false claim. The circuit court determined that the Department of Education had full access to the university's pertinent information, and still repeatedly and consistently determined that the university qualified as a minority institution. Furthermore, the court observed that, pursuant to the statutory/regulatory scheme in place, the Department of Defense blindly relied on the Education Department's determinations and consequently invited the university to apply for its set-aside program. Moreover, the court noted that the relators produced no evidence showing that the defendants provided inaccurate or incomplete information to the Department of Education. Thus, the court concluded, both the Education Department and Defense Department "were aware of the same universe of facts to which defendants were aware when defendants certified [the university's] minority institution eligibility." Accordingly, the appeals court concluded that there was a government knowledge inference that created a strong presumption that the defendants did not knowingly submit false claims, and held that the district court's grant of summary judgment in the defendants' favor was proper.

Qualified Immunity

Since the Tenth Circuit was able to determine that the relators' allegations failed as a matter of law, the court found it unnecessary to decide the defendants' cross-appeal, in which they argued that, as state officials being sued in the individual capacity, they, like the university, are not "persons" under the FCA, and that the Eleventh Amendment bars the relators' claims against them, since the university was the real party in interest in the case. As a result, the court left the qualified immunity issues for another day.

In re Pharmaceutical Industry Average Wholesale Price Litig., 2008 WL 4823968 (D. Mass. Nov. 5, 2008)

The government brought an FCA case alleging that the defendant pharmaceutical company fraudulently caused the government to overpay for drugs under the Medicare and Medicaid Programs. In particular, the government alleged that the defendant inflated prices for certain drugs in a pricing compendium used to set Medicare and Medicaid reimbursement rates. During discovery, the government asserted deliberative privilege on a number of documents relating to the government's knowledge of the alleged inflated pricing. The defendant moved to compel the production of these documents. The United States District Court for the District of Massachusetts issued a margin order regarding the discovery dispute and then referred the matter to a magistrate judge after both parties objected. The magistrate conducted an *in camera* review of the documents. After review, the court ordered production of the documents relevant to the defendant's government knowledge defense.

Government Knowledge

The defendant asserted that documents regarding the government's knowledge were relevant to whether the government justifiably relied on the defendant's prices and whether the government was misled. The government contended that the documents were privileged and that the defense of government knowledge was applicable only if the government had communicated its knowledge to the defendant. The court first held that there are exceptions to the government's deliberative privilege and that courts should employ a balancing test to determine when to compel disclosure. It then held that the government's prior knowledge of the alleged misrepresentation could be a defense to the FCA claims. Specifically, knowledge could be relevant to determine the falsity element of the claim as well as the defendant's state of mind. The court also found that the knowledge would be relevant to the government's common law fraud claim. Accordingly, the court held that the defendant was entitled to the discovery of the documents to ascertain the extent of the government's prior knowledge of the alleged fraud.

See U.S. v. Menominee Tribal Enters., 2009 WL 122802 (E.D. Wis. Jan. 16, 2009) at page 103.

B. Lack of Materiality

U.S. ex rel. Antidiscrimination Ctr. of Metro New York, Inc. v. Westchester County, N.Y., 2009 WL 1108517 (S.D.N.Y. Apr. 24, 2009); *U.S. ex rel. Antidiscrimination Center of Metro New York, Inc. v. Westchester County, N.Y.*, 2009 WL 1110572 (S.D.N.Y. Apr. 22, 2009)

The relator filed a *qui tam* action against a county alleging that the defendant knowingly submitted falsely certified claims to HUD, and that payments to the defendant were expressly conditioned on statutory compliance. The relator moved for a pretrial order declaring that the defendant's alleged false statements were material as a matter of law to HUD's decision to make payments to the defendant, or alternatively, to exclude materiality from the jury's decision. In deciding the motion, the United States District Court for the Southern District of New York, applying the natural tendency test (which concludes that a false statement is material if it has a natural tendency to influence or was able to influence the decision-making body to which it was addressed), held that the defendant's allegedly false statements were material as a matter of law, since the alleged falsity regarding statutory compliance, when HUD's payment was expressly conditioned on compliance, had a natural tendency to influence HUD's decision to pay. Therefore, the defendant's alleged falsity was material as a matter of law and the court granted the relator's motion.

The court also addressed the relator's motion for partial summary judgment on the issue of falsity, and granted that motion as well. Finally, the relator filed a motion *in limine* to exclude the issue of damages from the jury's decision, arguing that damages consisted of the entire sum paid to the defendant for the alleged knowing false claims. In response, the defendant contended that it still provided a service to HUD and that the court should apply the "benefit of the bargain" theory when calculating the government's damages. Under that approach, the government's damages would be offset by the benefits the government received. However, the court pointed out, the federal funds the defendant received were expressly conditioned upon statutory compliance. Thus, the court concluded, if a jury were to find that the defendant knowingly submitted claims containing false certifications, then HUD did not receive the benefit of its bargain. Accordingly, the court granted the relator's motion *in limine* and prohibited the defendant from arguing before the jury that damages should be decreased by any benefit the defendant provided to HUD.

U.S. ex rel. Romano v. New York-Presbyterian Hospital, 2008 WL 2775703 (S.D.N.Y. July 16, 2008)

Relator filed an action in the United States District Court for the Southern District of New York against New York Presbyterian Hospital, alleging that the hospital violated section 3729(a)(2) of the False Claims Act by assisting and causing

Columbia University to create and use false patient charts and records in order to get false Medicaid claims paid. The hospital filed its first motion for summary judgment, arguing that the submission of the Medicaid claims at issue could not satisfy the statute's "presentment" requirement, since those Medicaid claims were not presented to a federal agency, but rather to the state's Medicaid office. The court denied that motion, at *U.S. ex rel. Romano v. New York-Presbyterian Hosp.*, 2008 WL 904730 (S.D.N.Y. Apr. 2, 2008), holding that section 3729(a)(2) does not include a presentment requirement. The hospital renewed its summary judgment motion, following the Supreme Court's recent ruling in the Allison Engine Co., Inc. v. United States ex rel. Sanders case. The hospital alleged that section 3729(a)(2) only imposes liability on one who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government," and that its Medicaid claims were not paid or approved by the federal government, but by the state Medicaid agency. Moreover, the hospital argued that the Supreme Court, in *Allison Engine*, held that, in order to maintain a claim under section 3729(a)(2), a relator would have to show that the defendant intended the false statement to be used and be material to the government's decision to pay or approve the false claim. The court, however, again denied the hospital's motion, first holding that under section 3729(a)(2), claims need not be submitted directly to the federal government but can be submitted to a third party. The court then held that that the relator's complaint conformed to the standards outlined in *Allison Engine*, since the complaint showed that the even though the hospital's Medicaid claims were submitted to the state agency, which then sought payment from the federal government, the hospital's alleged false statements were ultimately made with the intent that they would be material to the federal government's decision to pay or approve those claims.

***See Laymon, Jr. v. Bombardier Transp. (Holdings) USA, Inc.*, 2009 WL 793627 (W.D. Pa. Mar. 23, 2009) at page 11.**

C. Noerr-Pennington Immunity

U.S. ex rel. Wilson v. Maxxam, Inc., 2009 WL 322934 (N.D. Cal. Feb. 16, 2009)

The plaintiffs brought a *qui tam* action against a company and its CEO, alleging that the defendants defrauded the government by submitting false statements. Specifically, the relators alleged that the defendants submitted a fraudulently modeled sustained yield plan in order to defraud the government into contributing $250 million dollars toward a governmental purchase of two of the defendants' forests. The government declined to intervene and the defendants moved for judgment on the pleadings. The defendants sought immunity under the *Noerr-Pennington* doctrine, arguing that their alleged activities were protected by their First Amendment right to petition the government. The United States District Court for the Northern District of California found that the defendants' interactions with the government did not constitute petitioning activity and thus did not implicate *Noerr-Pennington* immunity. Rather, the court found that the defendants entered into a contract with the government for purchase of their land. The court also noted that the plaintiffs sought to impose liability not for the act of petitioning, but for specific acts committed in the course of petitioning the government. The court held that the First Amendment does not provide blanket immunity for any conduct occurring while petitioning the government. Accordingly, while citizens have a First Amendment right to petition the government, they do not have a First Amendment right to lie while doing so. Otherwise, the application of the FCA itself would be unconstitutional in many cases. Hence, the defendants' motion was denied.

D. Not a Condition of Payment

U.S. ex rel. Lobel v. Express Scripts, Inc., 2008 WL 5083115 (E.D. Pa. Dec. 1, 2008)

The relator brought a *qui tam* action against his former employer, a pharmacy benefit manager, alleging that the defendant falsely certified compliance with relevant federal regulations when seeking payment from the government for prescriptions. The government declined to intervene. The defendant moved to dismiss. The United States District Court for the Eastern District of Pennsylvania held that the complaint did not allege that any of the prescriptions were fraudulent or that the government was billed for any unfilled prescriptions. Furthermore, the relator failed to allege that payment was conditioned upon regulatory compliance or that the alleged regulatory violation was material to the government's decision to pay. The court granted the defendant's motion and dismissed the complaint.

U.S. ex rel. Conner v. Salina Regional Health Center, Inc., 2008 WL 4430668 (10th Cir. Oct. 02, 2008)

The relator, an eye doctor, alleged that the medical center he'd worked for violated the FCA by certifying in its annual cost reports that it had complied with all Medicare statutes and regulations, when in fact, it had not. As a result, the relator contended, all of the defendant's Medicare claims were false. The relator also alleged that the defendant medical center violated the FCA and the Anti-Kickback Statute by encouraging him to hire his own scrub staff when he was dissatisfied with the center's staff, and by agreeing to renew his contract and reappoint him to the medical staff only if he consented to certain conditions—he did not agree, and he was not reappointed. The government declined to intervene in the case and the defendant moved to dismiss under Fed.R.Civ.P. 12(b)(6). The U.S. District Court for the District of Kansas dismissed the relator's FCA allegations, finding that the relator failed to state an FCA claim. The relator appealed to the Tenth Circuit. The Tenth Circuit affirmed the dismissal of the FCA claims, finding that the relator did not allege a recognizable false claim or a kickback under Anti-Kickback Statute.

Non-Compliance with Medicare Laws Does Not Constitute an FCA Violation

The relator asserted that the defendant's annual cost reports certified that the defendant had complied with the applicable Medicare statutes and regulations, when it had not. This certification, the relators argued, mandated that any failure by defendant to comply with any underlying Medicare statute or regulation rendered the certification false. As a result, any related reimbursement would be fraudulent. Under this theory, the relator alleged over $100 million dollars in damages per year to the government.

The Tenth Circuit rejected this argument and noted that none of the Medicare statutes and regulations at issue condition payment upon compliance. Although the defendant's cost reports themselves included language that explicitly condition payment on compliance, the court stated that that language was too general to actually require perfect compliance, at all times, with all Medicare statutes and regulations. The court stated that if it accepted the relator's view, then "any failure by [the defendant] to comply with any underlying Medicare statute or regulation during the provision of any Medicare reimbursable service renders this certification false, and the resulting payments fraudulent." The court determined that such an interpretation stretched the FCA too far, since it did not account for the various Medicare agencies' discretion to determine whether an instance of non-compliance with the Medicare statutes and regulations was material to the agencies' respective decisions to make Medicare payments—if non-compliance does not affect an agency's decision to pay, then it is immaterial and not actionable under the FCA. The court also distinguished conditions of payment from conditions of participation, and determined that "although the government considers substantial compliance a condition of ongoing Medicare *participation*, it does not require perfect compliance as an absolute condition to receiving Medicare *payments* for services rendered. (emphasis in original)" The court concluded that the language contained in the defendant's annual cost reports constituted a condition of participation, which is enforceable through administrative means, including removal from the Medicare program. As such, it did not give rise to an FCA claim, since it did not establish that the defendant's claims were false.

Failure to State a Claim Under the Anti-Kickback Statute

The circuit court reached a similar conclusion with respect to the relator's argument that the defendant violated the FCA by violating the Anti-Kickback statute, holding that the relator failed to properly allege a kickback under the Anti-Kickback statute. The relator had argued that the defendant violated the Anti-Kickback statute by forcing him to hire his own scrub staff in exchange for hospital privileges, including Medicare patient referrals. The court rejected this argument, however, finding that the relator was not forced to hire his own staff, since the defendant did not refuse to provide a staff to him. Rather than solicit a kickback, the defendant merely offered a compromise to the relator, in the face of his growing dissatisfaction with the medical center's scrub staff. The court further rejected the relator's argument that the defendant violated the Anti-Kickback statute by imposing certain conditions that had to be met before the relator would be reappointed to the center's medical staff. The court held that this arrangement did not violate the Anti-Kickback statute because the center's decision not to reappoint the relator treated Medicare patients the same as non-Medicare patients, as it prevented the relator "from operating on any patient at [the defendant's center], not just Medicare patients referred by the hospital or another doctor. It applied equally to a patient paying out of pocket or with private insurance." Since the defendant's actions "involved only [the relator's] underlying appointment on the hospital's medical staff, and not his right to receive Medicare referrals," there was no solicitation of a kickback, no violation of the Anti-Kickback statute, and thus, no violation of the FCA.

Therefore, the Tenth Circuit affirmed the district court's decision to dismiss the relator's FCA claims.

See U.S. ex rel. Wilson v. Maxxam, Inc., 2009 WL 691224 (N.D. Cal. Mar. 10, 2009) at page 13.

See Abner v. Jewish Hosp. Healthcare Services, Inc., 2008 WL 3853361 (S.D. Ind. Aug. 13, 2008), at page 136.

E. Not a "Person"

U.S. v. Menominee Tribal Enters., 2009 WL 122802 (E.D. Wis. Jan. 16, 2009)

The government sued an Indian tribe and two of its employees, alleging violations of the FCA, as well as contract and common law claims. The government's complaint alleged that the tribe provided false invoices to the government under a contract to manage the Menominee Forest and its roads. The defendants all moved for a summary judgment on all of the claims. The government moved for partial summary judgment. The United States District Court for the Eastern District of Wisconsin granted the tribe's motion for judgment on the pleadings, finding that the tribe was not a "person" for FCA purposes. The court also granted the tribe's motion for summary judgment on the contract claims. It denied the employees' motion for summary judgment, finding that the employees were considered 'persons" under the FCA, and also finding that the alleged falsity was material to the government's decision to pay, the government was not involved in the submission of any false claim, and the alleged falsity constituted a false claim instead of a contract dispute. Finally, the court denied the government's motion for partial summary judgment, finding that the issues of intent and knowledge could not be decided on the pleadings.

The government sued the Menominee Tribe of Wisconsin and two tribal employees. It alleged that the tribe contracted with the Bureau of Indian Affairs (BIA) to perform brush removal and road grading in the Menominee Forest and along its roads. The government alleged that in 2001, the tribe submitted questionable invoices to the BIA under the contract. The BIA expressed concern that the work had either not been performed or had been performed inadequately. The government alleged that the tribe then stated the invoices would be cancelled and resubmitted. Subsequently, the BIA instituted a new policy in which invoices would require a certification of accuracy. The tribe and the BIA then met and the tribe agreed to resubmit certain invoices with the required certification. It did so with one of the individual defendants signing the certification. After receiving the resubmitted invoices, a BIA official conducted field inspections and found inadequate work or no work done at all. The government estimated that the tribe failed to brush roughly 200 miles of road and to install 10 culverts. This litigation followed.

The Tribe Is Not a Person under the FCA

The court held that the tribe was not a "person" under the FCA. It found that there was no case on point. Instead, it parsed the meaning of two Supreme Court cases, *U.S. ex rel. Chandler v. Cook County, Ill.*, 538 U.S. 119 (2003) (which held that municipalities are persons under the FCA) and *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000) (which held that states are not persons under the FCA). The court then analyzed whether Indian tribes have more in common with municipalities or with states.

It found that Indian tribes are more akin to states. First, it found that *Chandler* did not expand the meanings of persons. Instead, it recognized that municipalities have always been amenable to suit and there was no reason to exclude them from the FCA. Second, the court found that Indian tribes were more like states because they both enjoy sovereign immunity. As a result, the court found that there was a presumption that Indian tribes were not persons under the FCA. Hence, without any evidence that Congress intended otherwise, the court held that Indian tribes are not persons under the FCA.

The court rejected the government's argument that the tribe could be a person when the government, as opposed to a private individual, is the FCA plaintiff. It found that FCA claims are always on behalf of the government whether the government participates in the litigation or not. Since the government is always the real party in interest, the court found no reason to change the meaning of the term person depending on the plaintiff's identity.

The Tribal Employees Are Persons under the FCA

The court held that the tribal employees are persons under the FCA, as they were sued as individuals, and not in their official capacities. The court likened the claim against the employees to Section 1983 claims against state employees and allowed the FCA claims against them to proceed. The court also noted that recovery against the employees would not be a recovery against the tribe or impact its sovereignty.

The Court Denied the Employees' Motion for Summary Judgment

The employees presented three main arguments to support their summary judgment motion: (1) although some of the information on the invoices was incorrect, the billed expenses were actually incurred and hence, not false; (2) the invoices were not false under the FCA because the government knew about the false invoices before they were presented; and (3) the claims were contract disputes that should not be resolved under the FCA. The court rejected all of their arguments.

The employees argued that since the tribe was entitled to its actual expenses under the contract with the BIA, the fact that the amount of work was less than claimed was immaterial to the government's decision to pay. Hence, a false claim would not exist. The court disagreed and held that the fact that actual expenses were reimbursed did not entitle the tribe to mislead the government as to how the expenses were incurred. More importantly, the court found that the amount of work done was material to the government's decision to pay. The court held that the record could support a finding that a false submission was made.

The employees next argued that since the government knew the invoices contained false information, no false claims were submitted. The court rejected this argument as well and held that government knowledge only precludes an FCA claim when there is government encouragement and involvement in the claim submission. In the present case, the court found that there was no encouragement from the BIA to submit false claims. Instead, the new rules requiring certification were implemented to specifically discourage the tribe from submitting false claims. The court held that the government knowledge defense was inapplicable.

Finally, the employees argued that the dispute should be resolved as a contract dispute since the contracts did not contain any concrete performance standards. The court also rejected this argument, finding that the government was not quibbling about performance standards. Instead, the dispute arose out of work not done at all or done in such a way that no one could plausibly argue it was satisfactory. The court held that there could be no reasonable interpretation of the contract that would consider the work done by the tribe as complete. Hence, the court found that the government's claims did not rest upon contract interpretation and denied the employees' motion for summary judgment.

The Court Denied the Government's Motion for Summary Judgment

The court denied the government's motion for summary judgment because it could not decide the knowledge of falsity issue at summary judgment. The government argued that the tribal employees acted in reckless disregard of the truth or falsity of the information in the invoices because they took no steps to verify them. In particular, the government argued that the employees could not bury their heads in the sand and then claim that they did not know the invoices were false. While the court acknowledged the government had a strong case, it found that there were inferences that could made in favor of the employees. Specifically, the employees' act of resubmitting the false invoices after the BIA expressed concern about their veracity could have been innocent, especially since there was no allegation that the tribal employees personally profited from the alleged fraud. Accordingly, the court denied the government's motion for summary judgment.

F. Release from/Waiver of FCA Claims

U.S. ex rel. Ritchie v. Lockheed Martin Corp., 2009 WL 565517 (10th Cir. Mar. 6, 2009)

The relator, Ruth Ritchie, a former employer of Lockheed Martin Corp., filed her *qui tam* suit in the U.S. District Court for the District of Colorado, alleging that Lockheed Martin Corp. and Lockheed Martin Space Systems Co. (collectively, "Lockheed" or "defendants") violated the FCA by falsifying records in order to fraudulently increase incentive payments to Lockheed employees under contracts Lockheed entered with the US Air Force. Ritchie initially reported her concerns about potential fraud to Lockheed, which commenced an internal investigation, but determined that her allegations were unsubstantiated. Lockheed also informed the Air Force of Ritchie's allegations and of the findings of its internal investigation. Shortly thereafter, the federal government conducted its own audit, with Ruthie's assistance. Subsequently, Ruthie, believing that she was the subject of retaliation for her whistleblowing, sought damages from Lockheed. That claim was eventually mediated, resulting in a settlement agreement between the parties. As part of the settlement, Ritchie signed two releases, waiving all claims she might have had against the defendants under federal, state, or local law. Ten days after signing the release, Ritchie filed her *qui tam* suit.

The defendants filed a motion for summary judgment, arguing that the releases Ritchie signed barred her suit. Before responding to the motion, Ritchie sought to amend her complaint and add an additional, or substitute relator. However, her request was deemed untimely and was denied, and the district court granted summary judgment in the defendants' favor. In addition, the district court awarded costs to the defendants. Ritchie appealed the district court's rulings to the Tenth Circuit. The Tenth Circuit affirmed the district court's rulings, holding that government consent was not required to dismiss her complaint, because she was precluded from bringing the action in the first place. Moreover, the circuit court held that public policy favored enforcement of the releases. The Tenth Circuit also affirmed the award of costs, making the distinction between "costs" and "expenses" under the applicable statutory and regulatory schemes at issue.

Enforceability of Releases

The circuit court first affirmed the district court's denial of the relator's request to add a new relator, holding that the district court did not abuse its discretion, but properly denied Ritchie's motion. The appeals court stated that since Ritchie waited until after discovery was completed and after a dispositive motion had been filed before moving for leave to amend her complaint, Lockheed would have been unduly prejudiced if Ritchie's motion had been granted, since it would then have been necessary to reopen discovery, and Lockheed's time and other resources in preparing its summary judgment motion would have been wasted.

The Tenth Circuit also affirmed the district court's grant of summary judgment in Lockheed's favor, finding that, as a relator, Ritchie had an interest in the suit separate from the government's interest. The circuit court rejected Ritchie's arguments that the releases she signed were unenforceable, since, by statute, her case could not be dismissed without the consent of the Attorney General, and that enforcement of those releases would frustrate the policies behind the FCA. The Tenth Circuit held that consent of the Attorney General is only required when a relator wishes to dismiss a *qui tam* action, but that such consent is not required when the relator is actually precluded from bringing the action in the first place. Thus, the court held, the FCA's provision regarding Attorney General consent only applies to the enforceability of releases executed *after* a *qui tam* action has been properly filed.

The court also determined that the purposes of the FCA are not frustrated by enforcing the releases Ritchie signed. The court, adopting the approach taken by the Ninth Circuit, reasoned that since the government was aware of Ritchie's allegations prior to her signing the release (since Lockheed reported Ritchie's allegations to the government, and Ritchie assisted in the government's audit), the government could still pursue remedies against Lockheed, effectively preserving the FCA's goals of preventing and rectifying fraud against the government.

Costs

Finally, the Tenth Circuit affirmed the district court's decision to award costs to Lockheed, noting that, pursuant to FRCP 54(d), costs are ordinarily awarded to prevailing parties. Ritchie argued that the FCA only allows for awards of costs to defendants if the relator's claim is "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment," and that since the district court did not make any such finding, its award of costs was improper. The circuit court rejected that argument, though, finding that the applicable FCA provision only applies to "attorneys fees" and "expenses," and that both FRCP 54 as well as other provisions of the FCA make clear that "costs" are in a separate category from attorneys' fees and expenses. Ritchie further argued that the district court should have exercised its discretion to refuse to award costs to Lockheed, since awarding costs to prevailing defendants would disincentivize future *qui tam* relators. The Tenth Circuit rejected this argument, and held that such a ruling would be akin to stating a *per se* rule that prevailing FCA defendants can never recover their costs. Accordingly, the court affirmed the award of costs.

Concurring/Dissenting Opinion

One of the circuit court judges filed a separate opinion, concurring and dissenting. This opinion disagrees with the majority's view that the releases Ritchie signed barred her *qui tam* suit, since all FCA claims ultimately belong to the United States and not the relator. The dissenting opinion also took issue with the majority's description of the policy considerations at issue when settlement agreements are enforced to bar subsequent *qui tam* suits. The dissent notes that when the government becomes aware of allegations of fraud against the United States, it has two potential reasons for declining to pursue an FCA claim independently: (1) it believes the case lacks merit; or (2) it does not have the resources to pursue the claim on its own. The dissent determined that this second consideration was not given enough weight by the majority, and that enforcing releases that have the effect of barring meritorious *qui tam* suits allows fraud that the government does not have the resources to pursue to go unpunished. The dissent proposes that pre-filing releases which bar FCA *qui tam* claims should only be enforceable if the Attorney General has provided express written consent, and that the government can withhold such consent if it would like the relator to bring a suit on the government's behalf, to recoup lost government funds. Of course, since the government did not consent to Ritchie's release, the dissent would reverse the district court's grant of summary judgment in Lockheed's favor, and, consequently, would reverse the district court's award of costs to Lockheed as well.

***See U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 2009 WL 1457036 (D. Ariz. May 21, 2009) at page 80.**

G. Sovereign Immunity

Kendall v. Chief Leschi School, Inc., 2008 WL 4104021 (W.D. Wash. Sep. 03, 2008)

The plaintiff brought a *qui tam* action against the defendants, a school and an Indian tribe, seeking relief under the Federal Whistle Blower Protection Act, 31 U.S.C. §1730, and the FCA. The government declined to intervene in the action. The plaintiff alleged that the defendant school fired her in retaliation for investigating fraud against the government. The defendants filed a motion to dismiss for lack of subject matter jurisdiction based on the tribe's sovereign immunity. In response, the plaintiff sought a stay for the purpose of conducting discovery into an alleged waiver of sovereign immunity. The United States District Court for the Western District of Washington granted the motion to dismiss. The court held that the FCA does not waive sovereign immunity. Hence the tribe and its school, acting as an "arm of the tribe," were immune from FCA claims as long they did not consent to a waiver. The court then found that the there was nothing in the pleadings indicating such a waiver. Accordingly, the court determined that it lacked subject matter jurisdiction over the defendants and dismissed the case.

H. Statute of Limitations

U.S. ex rel. Sanders v. North American Bus Industries, Inc., 2008 WL 4793577 (4th Cir. Nov. 5, 2008)

The relator filed a *qui tam* action against his former employer—a manufacturer of transit buses—as well as the company's accountant. He alleged that the company falsely certified that its buses were eligible for federal "Buy America" subsidies and falsely described its imported bus shells for reclassification under the Harmonized Tariff Schedule of the United States (HTSUS). The relator also alleged retaliatory discharge. The government declined to intervene. The United States District Court for the District of Maryland granted summary judgment in favor if the defendants, holding that the claims regarding alleged false certification, false description for reclassification, and wrongful discharge were time barred. The district court also found that the relator failed to establish his claim of underpayment of duties. The relator did not oppose the dismissal of the retaliatory discharge claim, but appealed the other causes of action to the Fourth Circuit. The circuit court affirmed the lower court's decision, and held that the ten year limitations period under Section 3731(b)(2) only applied in cases where the federal government is a party. It also found that the defendants' alleged misrepresentations were not material to the reclassification under the HTSUS.

Claims Barred by the Statute of Limitations

The relator argued that the ten-year limitations period under Section 3731(b)(2) applied to all civil actions under the FCA. The Fourth Circuit disagreed, holding that the limitation period was extended to ten years only in cases where the government itself was a party. The court found that any other interpretation of the statute would be problematic. Specifically, it found that the relator's argument would produce a bizarre scenario in which the limitations period would depend on the knowledge of a non-party to the action. The court also noted that the relator's interpretation would also allow relators to sit on their claims in order to allow more false claims to occur, thereby increasing their potential recovery. This delay would render the six-year limitations period under Section 3731(b)(1) superfluous and possibly cause the government to lose its ability to prosecute fraud under 18 U.S.C. §§ 287, 3282. Moreover, the court stated that the phrase "a civil action" in Section 3731(b)(2) does not encompass all FCA claims. Relying on *Graham County Soil & Water Conservation District v. United States ex rel. Wilson,* 545 U.S. 409 (2005), the court found that when "a civil action" is read in context with the whole statute, it becomes clear that the extended limitations period only applies in actions where the government is a party. Accordingly, the district court's opinion was affirmed.

Failure to State a Claim

The relator alleged that the defendants fraudulently caused the government to reclassify their imported bus shells, allowing the defendants to obtain duty free treatment. Specifically, he alleged that the defendants misrepresented information in the protest filed to change the company's classification under HTSUS. The court found, however, that the relator failed to state a valid claim because the alleged misrepresentations were not material to the government's reclassification decision. Specifically, since the government took a holistic view in making its determination, the court found that the minute alleged misrepresentations could not have materially influenced its decision. Accordingly, the court affirmed the grant of summary judgment on those claims.

Finally, the relator contended that the defendants did not include engineering and technological services fees in the value of the bus shells and therefore, underpaid its duties. The court held that since the government determined that the bus shells qualified for duty free treatment, the relative value of the bus shells was immaterial as no duty was due under either value. The relator also creatively argued that since the defendants could not recover all of the duties paid under the earlier classification due to the limitations period, the government suffered a loss in the additional amount it would have received and kept under the unrefunded duties. The court rejected this argument because the defendants actually had no obligation to pay any duty. It held that the fact that the government did not receive an additional windfall in the unrefunded duties could not be the basis for an FCA claim and affirmed the grant of summary judgment.

U.S. ex rel. Herndon v. Appalachian Regional Community Head Start Inc., 2008 WL 2873363 (W.D.Va. July 25, 2008)

Relator, G. Wayne Herndon, originally filed a claim for retaliation under the FCA, against his former employer, Appalachian Regional Community Head Start Inc. Herndon alleged that Appalachian wrongfully terminated his employment after he reported their "wrongdoing" and "misappropriation of funds." Subsequently, Herndon voluntarily dismissed his lawsuit. Thereafter, he brought the present suit against Appalachian, in which he alleged similar claims. Appalachian moved for summary judgment, and argued that Herndon's retaliation claim was barred by the applicable statute of limitations. In deciding this issue, the United States District Court for the Western District of Virginia was required to apply the statute of limitations period found in the state statute that is most analogous to the FCA's retaliation provision. The court decided that the applicable limitations period was two years, as prescribed by Virginia statute. Although Herndon's suit was filed more than two years after he was discharged, the court applied Virginia's tolling statute, which provides that a party who voluntarily dismisses a cause of action may recommence it, in state or federal court, within six months. Herndon had refiled his case within six months, which tolled the period of limitations. Therefore,

the court found Appalachian's statute of limitations defense to be without merit, and denied Appalachian's motion for summary judgment.

***See U.S. ex rel. Foster v. Bristol-Myers Squibb Co.*, 2008 WL 4360697 (E.D. Tex. Sep. 24, 2008), at page 130.**

***See U.S. ex rel Gonzalez v. Fresenius Medical Care North America*, 2008 WL 4277150 (W.D. Tex. Sep. 02, 2008), at page 134.**

***See U.S., ex rel. Ramadoss v. Caremark Inc.*, 2008 WL 3978086 (W.D.Tex. Aug. 27, 2008), at page 69.**

***See U.S. ex rel. Serrano v. Oaks Diagnostics, Inc.,* 2008 WL 2930348 (C.D.Cal. July 25, 2008), at page 138.**

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Tucker v. Nayak, 2009 WL 1684484 (S.D. Ill. June 15, 2009)

The plaintiff brought a *qui tam* action against a physician, alleging False Claims Act violations based on the physician's alleged submission of false claims and making of false statements in order for the government to pay Medicare claims for procedures performed by the physician's staff, in the absence of required supervising personnel. The government declined to intervene. The physician moved for summary judgment, contending that the plaintiff failed to identify any claim that was submitted which was knowingly false. The plaintiff asserted that the defendant prevented her from obtaining evidence of a specific false claim by failing to comply with discovery, but that the defendant's treatment scheduling and billing policies supported an inference of probable false claims. The United States District Court for the Southern District of Illinois agreed with the defendant and held the plaintiff failed to identify any concrete false claim the defendant submitted to the government concerning procedures performed without the required supervision. The court held that probabilities were insufficient to defeat a motion for summary judgment, and found that the plaintiff should have moved to compel the defendant to participate in discovery or for an extension of time to respond to the defendant's motion until she could conduct further discovery. Since she failed to do either, the court held she could not complain about the defendant's participation in discovery. Consequently, the court rejected the plaintiff's argument and granted the defendant's motion for summary judgment. The court also rendered moot the defendant's motion for sanctions and the court's outstanding orders to show cause.

Mason v. Medline Indus., Inc., 2009 WL 1438096 (N.D. Ill. May 22, 2009)

The plaintiff brought a *qui tam* action against his former employer, a medical supplies manufacturer, and its affiliate, alleging payment of unlawful kickbacks, noncompliance with procurement contracts, and overbilling of the government. Specifically, the complaint alleged that the defendants paid unlawful kickbacks and bribes in order to solicit business from healthcare providers, and caused those providers to submit false Medicare and Medicaid cost reports—the cost reports were allegedly false because they included a certification that the providers were in compliance with the anti-kickback laws. The complaint also alleged that the

defendants failed to offer the government (the Department of Veterans Affairs) the same lower prices, rebates and other benefits that were being offered to the defendants' most-favored private healthcare provider customers, thereby inflating the defendants' claims to the government. Finally, the plaintiff alleged that the defendants overbilled the government's mail-order pharmacy program by inflating the amount of their actual costs when submitting claims for payment. The government declined to intervene. The United States District Court for the Northern District of Illinois granted the defendants' motion to dismiss for failure to plead fraud with particularity. The court found that the plaintiff failed to allege specific false claims submitted for payment in connection with the alleged kickbacks, failed to plead specifics of the alleged fraud, failed to establish a link between the alleged fraud and any specific false claim. Accordingly, the court dismissed the complaint without prejudice.

Pleading Cost Reports as False Claims and with Particularity

The defendants argued that the plaintiff's allegations regarding false certifications in Medicaid/Medicare costs reports could not constitute a violation of the False Claims Act, since costs reports are not "claims," as they do not request payment—cost reports are not requests for payment, but instead are used at the end of an accounting period to make retroactive adjustments to reimbursements that were made based on a provider's estimated costs. The district court disagreed, however, and found that since the cost reports at issue were an integral part of the government's reimbursement calculation, they constituted claims. Still, the court determined that the plaintiff's complaint was deficient, since it did not describe with particularity how the costs reports at issue were false. The court noted that the complaint did not link any alleged bribe or kickback to any particular cost report submitted to the government that was alleged to have been false. Thus, the court dismissed the plaintiff's allegations involving kickbacks and bribes, for failure to meet the requirements of Federal Rule of Civil Procedure 9(b).

Pleading Procurement Fraud with Particularity

The plaintiff alleged that the defendants did not provide current, complete, and/or accurate information to the government, when describing the pricing offered to the defendants' benchmark customers. However, the court also ruled that this allegation was deficient, since the complaint did not identify the source, the context, the timeframe, or the content of the defendants' alleged misstatements to the VA. In addition, the complaint failed to identify the customers who allegedly received better pricing than the government. Consequently, the court dismissed those allegations for lack of particularity.

Pleading Pharmacy Overbilling with Particularity

The plaintiff alleged that the defendants overbilled the government's Consolidated Mail Outpatient Pharmacy (CMOP) program by submitting claims that exceed the defendants' actual costs. Although the complaint cited four CMOP contracts, it did not attach any of them, nor did it connect this allegation with any false claim. Thus, the court dismissed those allegations for lack of particularity. The plaintiff also alleged the defendants purchased prescription items on the gray market but charged the government as if the defendants purchased the items through normal purchasing channels. The court found that the plaintiff failed to provide the specifics of any such purchase made from the gray market, and failed to tie such alleged purchases to claims actually submitted to Medicare. Thus, the court dismissed this allegation for lack of particularity.

U.S. ex rel. Polansky v. Pfizer, Inc., 2009 WL 1456582 (E.D.N.Y. May 22, 2009)

The relator brought a *qui tam* action against his former employer, a pharmaceutical company, alleging that the defendant marketed the prescription drug Lipitor, a cholesterol lowering drug, for cases that the drug's label did not recommend. The relator also alleged that the defendant violated various false claims provisions of state law. The United States District Court for the Eastern District of New York granted the defendant's motion to dismiss for failure to plead fraud with particularity. The court found that the relator's complaint failed to identify a single false claim or any physician who received or viewed the Lipitor marketing materials and then prescribed the drug to a patient for whom it was not recommended. Furthermore, the complaint also failed to identify any pharmacist who filled a prescription from such a physician, or any person who sought reimbursement from the government for the cost of that prescription. Hence, the court granted the defendant's motion to dismiss the complaint, granted the relator leave to amend, but denied the relator's request to conduct discovery in order to obtain information to bolster his fraud allegations.

U.S. ex rel. Westfall v. Axiom Worldwide Inc., 2009 WL 1424213 (M.D. Fla. May 20, 2009)

The relators filed a *qui tam* action against their former employer, a medical equipment manufacturer, its network partner, and the individuals responsible for developing the corporate defendants, alleging that the defendants submitted false claims to the government and used false records to get those false claims paid. The relators further alleged that the defendants engaged in a conspiracy to defraud the government by misleading physicians and thereby causing those physicians to sub-

mit false claims to Medicare. The government declined to intervene in the relators' suit. The United States District Court for the Middle District of Florida granted the defendants' motion to dismiss the relators' second amended complaint with prejudice, finding that the complaint did not plead fraud with particularity. The court noted that although the relators identified allegedly false claims that two physicians allegedly submitted to Medicare for payment, the relators did not make any allegations regarding the actual services (or lack thereof) that the physicians rendered. Thus, the court held that the relators did not plead the alleged falsity of the claims with particularity. The court also found that neither of the relators ever worked in the offices of the physicians referenced in the suit and, therefore, did not have first-hand knowledge that those physicians actually billed Medicare. Consequently, the court also held the relators failed to plead the alleged submission of false claims with the specificity. Thus, the court concluded that the relators' second amended complaint failed to allege false claims and false records with requisite specificity and granted the defendants' motion to dismiss those claims. Regarding the conspiracy claim, the court noted that the complaint did not describe the alleged agreement to defraud the government. The court also noted that the complaint did not refer to any communication between or among the defendants that showed any alleged agreement to defraud the government. Thus, the court also dismissed the relators' conspiracy claim for lack of particularity. Finding that the relators continually failed to comply with the particularity requirement, the court granted the motion to dismiss with prejudice.

U.S. ex rel. Shurick v. Boeing Co., slip op., 2009 WL 1385928 (11th Cir. May 19, 2009)

The relator filed a *qui tam* action against his employer, a manufacturer of commercial and military aircraft, alleging that the defendant violated the FCA by failing to comply with federal safety regulations. Specifically, the relator alleged that a contract between the government and the defendant required compliance with such regulations, and that even though the defendant failed to comply with the regulations, it nevertheless billed the government under the contract. The United States District Court for the Middle District of Florida granted the defendant's motion to dismiss for failure to state a claim. The court held that the relator's complaint failed to satisfy FRCP 9(b), since the complaint did not allege specific facts to establish that the defendant submitted false claims to the government or received payment for such claims. The relator appealed the district court's decision to the Eleventh Circuit, arguing that his complaint did plead his FCA claims with sufficient specificity, and that if it was deficient, then the district court should have allowed him to amend his complaint. The Eleventh Circuit found that the relator did not plead with particularity, with respect to the issue of how the contract at issue required the defendant's compliance with safety regulations. The circuit court also noted that the relator failed to allege facts that showed that the defendant submitted any false claims to the government. Thus, the circuit court held that the relator's complaint was not pled with sufficient particularity. Accordingly, the Eleventh Circuit affirmed the district court's dismissal of the relator's complaint, for failure to state a claim. Regarding leave to amend, the Eleventh Circuit noted that the relator never sought leave to amend from the district court, nor was the relator able to demonstrate to the circuit court how an amended complaint would cure the defciencies in the original complaint. Consequently, the Eleventh Circuit affirmed the district court's decision.

U.S. ex rel. Gagne v. City of Worcester, 2009 WL 1260412 (1st Cir. May 8, 2009)

Two relators brought a *qui tam* action in the U.S. District Court for the District of Massachusetts, and alleged that the City of Worcester, Massachusetts and one of its city officials violated sections 3729 (a), (b), and (c) of the False Claims Act, by misappropriating federal funds the city received under the Workforce Improvement Act ("WIA"). The relators alleged that the defendants falsified city employees' time sheets and paid those employees with WIA funds for work that was unrelated to the WIA, used WIA money to provide cars to city officials, and used WIA money to settle an employment discrimination suit filed by one of the relators. The government did not intervene in the case. Over the course of about three years, the relators filed an original complaint and two amended complaints, all of which were dismissed for failure to plead fraud with particularity, in accordance with the requirements of Federal Rule of Civil Procedure 9(b). When the district court dismissed the relators' second amended complaint, it also denied their request to file a third amended complaint, finding that such an effort would be futile. The relators appealed the district court's decision to the First Circuit, but the circuit court affirmed the district court's dismissal of the relators' complaint.

The First Circuit first clarified that Rule 9(b)'s heightened pleading requirements apply to all three of the relators' claims—claims under False Claims Act section 3729(a) (presenting a false claim to the government), under section 3729(b) (making or using a false statement or record to get a false claim paid or approved by the government), and under section 3729(c) (conspiring to defraud the government). The relators apparently conceded that their complaints did not plead fraud with particularity with respect to their section 3729(a) claim, and therefore the appeals court considered that argument to have been waived. The circuit court then examined the relators' allegations under sections 3729(b) and (c) and found that those allegations did not meet Rule 9(b)'s pleading standard either. With respect to those claims, the relators had argued that the district court erred by incorrectly applying the False Claims Act's "presentment" requirement to FCA sections 3729(b) and (c), noting that the presentment requirement only applies to claims under section 3729(a). However, the First Circuit found that the district court properly understood the presentment requirement and properly applied that requirement only to the relators' section 3729(a) claim. The appeals court determined that the district court correctly held that the relators' claims under sections 3729(b) and (c) failed to plead fraud with the requisite particularity, since, although the relators thoroughly discussed the beneficiaries of the alleged fraud, they did not plead the fraud itself with particularity. The circuit court noted that the "[r]elators provide[d] no details on what the alleged 'false, misleading and fraudulent pretenses and representations' consisted of, who made them, or when they were made 'to get a false or fraudulent claim paid or approved by the Government.'" The court also found that the relators failed to connect the alleged falsity to an effort by the defendants to get the Government to pay or approve a false claim, noting that the relators did not provide any details regarding the defendants' time sheets or whether those time sheets were even material to the Government's decision to pay the defendants' claims. Finally, the First Circuit affirmed the district court's decision to deny the relators leave to file a third amended complaint, noting that the district court acted within its discretion, and that there was no indication that allowing the relators to file a third amended complaint would cure the deficiencies in their pleadings.

U.S. ex rel. Grubbs v. Kanneganti, 2009 WL 930071 (5th Cir. Apr. 8, 2009)

A relator originally brought a *qui tam* action in the U.S. District Court for the Eastern District of Texas, alleging that his employer—a hospital—and seven of the hospital's doctors, violated sections 3729(a)(1), (2), and (3) of the False Claims Act. Specifically, the relator alleged that soon after he was hired by the hospital, he was approached by two of the defendant doctors, who disclosed to him that they, along with a group of other doctors would meet with the nursing staff to get updates on patients, but would only actually see the patients themselves if there was a pressing need to do so. However, the doctors would always bill Medicare and Medicaid as if they'd had face-to-face visits with the patients. The United States declined to intervene in the suit and each of the defendants moved to dismiss, on the grounds that the complaint was not plead with particularity, as is required by Federal Rule of Civil Procedure 9(b). The district court agreed with the defendants and dismissed the relator's complaint with prejudice. The relator appealed the district court's ruling to the Fifth Circuit. On appeal, after announcing its FCA pleading standard under Rule 9(b), the Fifth Circuit found that the relator's complaint adequately pled the circumstances constituting the alleged fraud and conspiracy between the individual defendants. However, the circuit court also found that the relator failed to plead that the defendant hospital was vicariously liable for the conduct of the doctors, held that some of the relator's claims were properly pled against some—but not all—of the doctors, and noted that the district court's finding that the relator was not the original source of the facts on which his allega-

tions were based was misplaced because the complaint was not based on publicly disclosed information. Thus, the district court's decision was affirmed in part and reversed and remanded in part.

Rule 9(b)'s Particularity Requirement

The Fifth Circuit first held that that the district court wrongly dismissed the relator's FCA claims on the basis of Rule 9(b)'s particularity requirement. The court stated that, traditionally, fraud complaints filed in courts in the Fifth Circuit must include "the time, place, and contents of the false representation, as well as the identity of the person making the representation and what that person obtained thereby." However, the court also recognized that a plaintiff can satisfy Rule 9(b)'s requirements "without including all the details of any single court-articulated standard—it depends on the elements of the claim at hand." The court then contrasted traditional fraud claims with claims brought under the False Claims Act, noting that since FCA claims do not include the elements of reliance and damages, in FCA cases, "[i]t is adequate to allege that a false claim was knowingly presented regardless of its exact amount; the contents of the bill are less significant because a complaint need not allege that the Government relied on or was damaged by the false claim."

Specifically, with respect to claims brought under section 3729(a)(1) of the False Claims Act—which includes a requirement that the false claim or false statement be presented to the Government—the Fifth Circuit held that "[f]raudulent presentment requires proof only of the claim's falsity, not of its exact contents." Moreover, since defendants often have the most relevant documents reflecting alleged fraud schemes, the court held that "to plead with particularity the circumstances constituting fraud for a False Claims Act § 3729(a)(1) claim, a relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." Although the court acknowledged that the exact dollar amounts fraudulently billed to the government are generally required for calculating damages, it determined that "a plaintiff does not necessarily need the exact dollar amounts, billing numbers, or dates to prove to a preponderance that fraudulent bills were actually submitted. *To require these details at pleading is one small step shy of requiring production of actual documentation with the complaint, a level of proof not demanded to win at trial and significantly more than any federal pleading rule contemplates.*" (emphasis added)

With respect to the pleading requirements of claims under section 3729(a)(2) of the FCA—which imposes liability for knowingly making or using a false statement or record to get a false claim paid, but which does not include a presentment requirement—the court held that "the recording of a false record, when it is made with the requisite intent, is enough to satisfy the statute; we need not make the step of inferring that the record actually caused a claim to be presented to the Government."

Finally, with respect to the pleading requirements of claims under section 3729(a)(3) of the FCA—which imposes liability on those who conspire to defraud the Government—the Fifth Circuit stated that "to prove a False Claims Act conspiracy, a relator must show (1) the existence of an unlawful agreement between defendants to get a false or fraudulent claim allowed or paid by the Government and (2) at least one act performed in furtherance of that agreement." The particularity requirements of Rule 9(b) apply to the False Claims Act's conspiracy provision with equal force as to its 'presentment' and 'record' provisions." However, the court was also quick to point out that "[a]s in § 3729(a)(2), the conspiracy provisions lacks a present element, thus presentment of a false claim need not be proven nor plead to prevail on a False Claims Act conspiracy charge."

Applying that rule to the facts of the case, the Fifth Circuit determined that the relator's section 3729(a)(1) claims against the doctors were sufficiently pled, since his complaint effectively laid out the alleged fraud scheme and included the date, place and participants associated with the fraud, as well as the relator's own first-hand experiences with being invited to participate in the fraud scheme himself. Thus, the district court's dismissal of the relator's section 3729(a)(1) claims against the doctors was reversed and remanded. However, the circuit court was unable to reverse the dismissal of the relator's section 3729(a)(1) claim against the hospital, as the court did not find the same level of detail with respect to the relator's section 3729(a)(1) claim against the hospital. The court found that the relator failed to allege that the hospital had the requisite intent to defraud the Government or that the hospital was vicariously liable for the doctors' and nurses' alleged actions. The court, though, likely in a directive to the district court, stated that, in fairness, the relator should be allowed to amend his complaint and re-plead his section 3729(a)(1) claim against the hospital.

The appeals court then moved on to the relator's claims under section 3729(a)(2). Applying the rule of law to those claims, the court determined that the relator's allegations against three of the doctors were sufficiently pled, since the complaint included allegations of personal experiences in which two of those defendants discussed the fraud scheme with him and included specific allegations regarding the other doctor's fraudulent billing. Therefore, the Fifth Circuit reversed and remanded the district court's dismissal of those claims against those three doctors, but affirmed the dismissal with respect to the other defendants.

The court ended its analysis by evaluating the relator's conspiracy claim under section 3729(a)(3) and determined that, with respect to the two doctors who were alleged to have divulged the fraud scheme to the relator, the relator had sufficiently pled conspiracy, as his complaint described his conversation with those two defendants and included allegations that they submitted fraudulent bills—acts in furtherance of the alleged conspiracy. The court also rejected the district court's finding that the relator's complaint was defective because it was not based on independently obtained knowledge. The Fifth Circuit pointed out that such an analysis is only required when a relators allegations are based on a publicly disclosed information, and there was no such public disclosure prior to the relator's complaint being filed. Hence, the district court's dismissal of the conspiracy claim against those two doctors was reversed and remanded. However, the relator did not allege enough for the court to infer that any of the other defendants were part of a conspiracy to engage in Medicare and Medicaid fraud. Thus, the circuit court affirmed the district court's dismissal of the conspiracy claim against the remaining defendants.

U.S. ex rel. Snapp, Inc. v. Ford Motor Co., 2009 WL 960482 (E.D. Mich. Apr. 7, 2009)

A relator plaintiff brought a *qui tam* action against an automobile company, alleging that it used false records and submitted false claims to the government. The relator alleged that since the defendant was a prime government contractor, it was required to file yearly reports documenting the percentage of subcontracts made to small or minority owned businesses. The relator asserted that the defendant induced the government to award contracts by fraudulently inflating the amounts it paid to small and minority owned businesses, since the relator itself—a subdivision of the defendant that was controlled by the defendant—did not qualify as a minority-owned business. Despite this alleged fact, the relator alleged that the defendant filed official reports with the government stating that it made significant improvements in the amount of business it subcontracted to small and minority-owned businesses.

The government declined to intervene and the defendant moved to dismiss for failure to plead fraud with requisite particularity. The United States District Court for the Eastern District of Michigan granted the motion and dismissed the relator's first amended complaint and denied the relator's motion for leave to amend. On appeal, the Sixth Circuit affirmed the dismissal but remanded the case for further consideration of the relator's motion for leave to amend the complaint. The district court then held that the relator's second amended complaint also failed to plead a specific false "claim" under the FCA, and thus failed to plead fraud with particularity. Consequently, the court dismissed the complaint.

Particularity Requirement

The court held that the relator's second amended complaint failed to meet Federal Rule of Civil Procedure 9(b)'s particularity requirement in light of the pleading standards outlined in *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493 (6th Cir. 2007), which required a relator to plead specific examples of false claims in support of allegations regarding complex fraudulent schemes to defraud the government as in the present case. In the present case, the court held that the government contracts identified by the relator were not characteristic examples of the alleged false claims because those contracts did not amount to a claim for payment. The court also noted that the relator's second amended complaint failed to draw a nexus between the defendant's alleged false statements and its award of government contracts. Furthermore, the court found that relator failed to show that the payments were received as a result of the defendant's submission of allegedly false records. The court concluded that the relator's conclusory allegations did not fulfill Rule 9(b)'s pleading requirements because the relator failed to identify any specific false claim submitted by the defendant. Hence, the court held that the relator's second amended complaint also failed to plead fraud with particularity and dismissed that complaint accordingly.

U.S. ex rel. Klusmeier v. Bell Constructors, Inc., 2009 WL 936674 (S.D. Fla. Apr. 6, 2009)

The relators brought an action against a construction company, alleging that the company defrauded the government by failing to fulfill contract specifications under a government-funded plan. The defendant moved for dismissal for failure to plead the alleged fraud with particularity. The United States District Court for the Southern District of Florida found that the complaint failed to adequately plead the alleged fraud. The court found that even though the relators sufficiently alleged the defendants' failure to fulfill specific requirements of the government contract, the relators did not identify any fraudulent claim the defendants allegedly submitted to the government. Accordingly, the court granted the defendants' motion to dismiss but granted the relators' request for leave to amend their complaint.

U.S. ex rel. Roop v. Hypoguard USA, Inc., 2009 WL 674142 (8th Cir. Mar. 17, 2009)

The relator brought a *qui tam* action against a medical device manufacturer, alleging that the defendant submitted false Medicare reimbursement claims. He also alleged that the defendant knowingly failed to file medical device defect reports, which were required by applicable regulations. The government declined to intervene. The defendant filed a motion to dismiss for failure to plead fraud with specificity. The United States District Court for the District of Minnesota granted the defendant's motion and dismissed the case with prejudice. The court then denied the relator's motions to alter the judgment and to amend his complaint. On appeal, the Eighth Circuit held that the relator's motions and memorandum failed to explain how his proposed amended complaint would plead fraud with particularity, since the proposed amended complaint did not detail the submission of any false claim or any payment received from the government or its agent, and failed to plead any false certification of compliance with applicable regulations or how the defendant's alleged failure to report device defects was material to a government decision to pay a claim. Finally, the appeals court found that the district court did not abuse its discretion in denying the relator's motion to amend under the Federal Rules of Civil Procedure. Hence, the circuit court affirmed the district court's decision.

U.S. ex rel. Sharp v. E. Okla. Orthopedic Ct., 2009 WL 499375 (N.D. Okla. Feb. 27, 2009)

The relator brought a *qui tam* action against her former employer, an orthopedic center. She alleged that the defendant violated the FCA. She specifically alleged that the defendant (1) altered diagnosis codes after Medicare denied payments and then resubmitted false claims to Medicare; (2) billed existing patients as new patients; (3) upcoded pre-operation visits that lasted less than five minutes; (4) submitted fraudulent claims in conjunction with a clinical study; (5) delivered durable medical equipment to patients without maintaining written records of delivery; (6) failed to disclose the existence of primary payers on Medicare claims and then retained overpayments by Medicare that should have been refunded after the primary payer paid; and (7) waived Medicare co-insurance and/or deductible requirements for certain patients, resulting in (a) claims containing misstated amounts actually charged to the Medicare patient and (b) violations of Medicare's anti-kickback provisions. She also alleged that after reporting the fraud to her employers, she was terminated, and consequently, her complaint included a claim for retaliatory discharge as well. The government declined to intervene. The defendant moved to dismiss for lack of subject matter jurisdiction, failure to state a claim, and failure to plead fraud with particularity. The United States District Court for the Northern District of Oklahoma granted the motion to dismiss in part. It held that it had subject matter jurisdiction because the relator's allegations were based on information obtained during her employment with the defendant. The court also held that most of the claims were properly pled. However, the court dismissed some of the false certification, anti-kickback, and fraudulent billing claims.

Subject Matter Jurisdiction

The defendant asserted that the district court lacked subject matter jurisdiction over the relator's FCA claims because she was not an "original source." However, the court determined that there was no previous public disclosure of the relator's claims. Instead, the court found that the relator's allegations of fraud were based solely on information she obtained during her employment with the defendant. Accordingly, the district court denied the motion to dismiss for lack of subject matter jurisdiction.

Failure to State a Claim and Particularity Requirement

The court then addressed the relator's allegations of fraud in light of the defendant's motion to dismiss for failure to state a claim and failure to plead fraud with particularity. In deciding whether fraud had been pled with particularity under Federal Rule of Civil Procedure 9(b), the court relied on the list of factors announced by the Tenth Circuit in *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702 (10th Cir. 2006), which held that a fraud claim must state at least some of the following details: (1) the dates of the false claims, (2) the content and identification numbers of the forms or the bills submitted, (3) the fees charged to the government, (4) the goods and services for which the government was billed, (5) the persons involved in the billing, and (6) the length of time between the alleged fraudulent practices and the submission of the claims based on those practices. The court held that the relator properly pled claims regarding the defendant's alleged alteration of diagnosis codes, alleged upcoding for pre-operation visits, alleged submission of false claims in connection with a clinical study, and alleged failure to disclose primary payers, as each of those claims included specific relevant date, patient identification, claim number, and billing information. The court also allowed the relator to maintain one of her claims alleging fraudulent waiver of co-insurance and deductible requirements for certain patients, including the defendant's employees and their families. The court only allowed the claim that was based on supporting information, but dismissed similar claims regarding thirteen other patients, since no supporting information was pled. In addition, the court dismissed the relator's claims alleging that the defendant billed existing patients as new patients and delivered durable medical equipment without maintaining proper records, finding that those claims were too general and speculative to be maintained.

Anti-Kickback Claim

The relator also alleged that the defendant's alleged waiver of a Medicare co-payments violated Medicare's anti-kickback statute, stating that a waiver of co-insurance could qualify as remuneration if it induced patients to purchase services. The court found that this allegation could not form the basis for a claim for FCA liability, since the relator failed to show that the alleged waivers were given in order to induce patients to purchase services. Thus, this claim was dismissed as well.

Retaliation Claim

The court held that the relator adequately pled her retaliatory discharge claim, since she alleged that she had informed the defendant of her investigation into their alleged fraudulent practices, and even specifically used the words "fraud" and "illegal" when notifying the defendant. Thus, at the time the relator was terminated from her employment, the defendant was well aware that the relator's investigation could lead to FCA litigation, which was sufficient for her to maintain her claim for retailiatory discharge.

U.S. ex rel. Radcliffe v. Purdue Pharma, L.P., 2009 WL 161003 (W.D. Va. Jan. 25, 2009)

The relator brought a *qui tam* action against two related pharmaceutical companies, alleging that the defendants misrepresented the relative potency of Oxycontin, which resulted in overpayments of federal reimbursements. Earlier in the litigation, the court dismissed the relator's complaint, finding that the relator failed to plead fraud with particularity. After giving the relator leave to amend, the court

then dismissed the relator's fourth amended complaint, for the same reason. In particular, the court found that the only specific allegations of a fraudulent claim for payment occurred outside the statute of limitations. The court also found that the alleged misrepresentations during a sales call to a VA hospital and a call between the defendant and unnamed state Medicaid officials were insufficient to plead fraud. Accordingly, the court dismissed the action with prejudice.

U.S. ex rel. Howard v. USA Envtl., Inc., 2009 WL 113444 (M.D. Fla. Jan. 19, 2009)

The relator brought a *qui tam* action against a company that contracted with the Army to destroy unexploded weaponry in Iraq. She alleged that the company failed to provide proper personnel safety equipment and then submitted false claims to the government for payment. She also alleged a claim for retaliatory discharge under the FCA and state law. The government did not intervene. The United States District Court for the Middle District of Florida adopting much of the report and recommendations of the appointed magistrate judge, dismissed the relator's claims, finding that the relator's fraud claims failed to allege that the defendant actually submitted any false claims and finding that the relator's retaliation claim did not allege that she engaged in any protected activity. Although the relator's fraud claims were dismissed with prejudice, the court allowed her to amend her FCA retaliatory discharge claims.

The Relator Failed to Allege Fraud with Particularity

The court adopted the magistrate judge's recommendation to dismiss the relator's FCA claims because the relator failed to specifically allege that the defendant submitted a false claim to the government. Instead, the relator focused on the defendant's alleged health and safety violations, including allowing employees to work in abandoned bunkers filled with dead birds and bird feces. The court refused to assume that the defendant must have billed the government under a contract, and held that, absent any specific allegations of a false claim submission, the relator's FCA claims should be dismissed with prejudice.

The Relator Failed to Allege Retaliatory Discharge

The court also dismissed the relator's retaliatory discharge claim, since the relator did not allege that she engaged in protected activity. The court found that the only activity the relator alleged to have engaged in was aimed at improving the health and safety conditions under the defendant's contract with the government, and was not related to any suspected fraud or illegal conduct. The court held that because the relator did not mention fraud while working for the defendant, she could not have engaged in protected activity under the FCA. Hence, she could not allege an FCA retaliatory discharge claim. The court dismissed the relator's retaliation claims, but did so without prejudice.

U.S. ex rel. Carter v. Halliburton Co., 2009 WL 90134 (E.D. Va. Jan. 13, 2009)

The relator brought a *qui tam* action against Halliburton and related entities, alleging that the defendants failed to test and provide potable water in Iraq military bases under a government contract. The relator alleged that after being assigned to a military base, he discovered that none of the water in the base was chlorinated. He then allegedly learned that the base's water had never been treated or tested. Moreover, he further alleged that the defendants failed to test and treat water at all U.S. military bases in Iraq as required under their contract. The case was originally brought in the U.S. District court for the Central District of California, but the defendant then moved to either dismiss or transfer venue. The California district court transferred the case to the United States District Court for the Eastern District of Virginia. After allowing supplemental briefing on the motion to dismiss, the court dismissed the complaint, finding that it did contain the necessary facts to support the allegations of fraud.

The Court Held That the Allegations of Fraud Were Not Pled with Particularity

The court held that the relator failed to plead his FCA claims with particularity. It found that he only alleged that the defendants billed the government under the contract as if they had complied with the water testing requirements. The court found this pleading deficient because it did not state the time, place or contents of a false claim submission to the government. As a result, the court held that it had no basis to conclude that the relator had any substantial pre-discovery evidence of the relevant facts. Furthermore, the court held that a formulaic recitation of fraud was insufficient to plead fraud with particularity. Accordingly, the court granted the motion to dismiss.

U.S. ex rel. Rafizadeh v. Continental Common, Inc., 2008 WL 5265188 (5th Cir. Dec. 19, 2008)

The plaintiff filed a *qui tam* action, alleging that the defendant property owners and managers overcharged the Louisiana Departments of Social Services and Health and Hospitals (the "Departments") under several lease agreements. The relator argued that since the Departments submitted budgets that included the lease agreements to the federal government for funding, they caused false claims to be submitted to the federal government for payment. The government declined to intervene. The defendants moved to dismiss, arguing that the complaint inadequately pled presentment and failed to plead fraud with particularity. The United States District Court for the Eastern District of Louisiana granted the motion to dismiss. The district court then denied the defendants' motion for attorneys' fees. Both parties appealed. The Fifth Circuit affirmed, holding that the complaint

failed to identify the particulars of the alleged false statements and any impact on the government's decision to pay. The Fifth Circuit also affirmed the denial of attorneys' fees because the plaintiff's action was not clearly vexatious or brought only for the purpose of harassing the defendant.

Particularity Requirement

The court first held that the complaint failed to plead presentment with particularity. It found that the plaintiff failed to describe the allegedly false statements, failed to identify who prepared the budgets, and failed to state the role the budget played in obtaining funding. Further, it found that the mere incorporation of false claims into a budget did not satisfy Rule 9(b)'s pleading requirements. Accordingly, the court upheld the dismissal of the FCA claims.

Attorneys' Fees

After the district court dismissed the plaintiff's complaint, the defendants moved for attorneys' fees. The defendants argued that the plaintiff had previously filed four suits against them, that the plaintiff had threatened revenge against the defendants, and that the complaint was frivolous, as it was based on vague factual allegations. The Fifth Circuit, however, affirmed the district court's denial of attorneys' fees, noting that the *qui tam* issues had not been raised in the earlier state suits. Further, the court held that although the plaintiff had failed to plead with sufficient particularity, the *qui tam* claims in the present action were non-frivolous.

U.S. ex rel. Kennedy v. Aventis Pharmaceuticals, 2008 WL 5211021 (N.D. Ill. Dec. 10, 2008)

The relators brought a *qui tam* action against a pharmaceutical company, alleging the illegal marketing of Lovenox for off-label uses not approved by FDA. The government declined to intervene. The defendant moved to dismiss the complaint. The United States District Court for the Northern District of Illinois granted the motion in part and the relators filed a second amended complaint. The defendant again moved for dismissal. The court then allowed discovery by the relators to identify specific false claims. After completion, the relators filed a third amended complaint. This complaint alleged violations of the Anti-Kickback Statute and that the defendant's marketing scheme caused hospitals to submit false claims to the government for reimbursement of off-label uses of Lovenox. The relators also alleged that cost reports submitted to the government amounted to false records used to get fraudulent claims paid by the government. The defendant moved for dismissal for failing to allege fraud with particularity. The court dismissed the complaint, holding that the relators failed to identify specific instances supporting their allegations. The motion to dismiss was accordingly granted.

Falsity Element

The relators alleged that the defendant's marketing scheme caused the hospitals to submit false claims for reimbursement. Though the relators identified specific prescriptions for off-label uses, they did not qualify as false claims because they were immaterial to the government's decision to pay. The reimbursements paid by the government were based on a fixed prospective payment system based on national average for the costs of treating a particular illness. Hence, individual charges on a patient bill were immaterial to the government's decision to pay. The court accordingly held that the relators failed to properly allege fraud.

The relators also alleged that the hospitals claimed compensation above the fixed Medicare payment for patients with extraordinarily costly treatments in cases where Lovenox was prescribed. While the court acknowledged this could be a false claim, it held that the relators failed to allege the claim with particularity. After allowing the relators discovery on this claim, the court found that the relators had failed to identify any particular instance of this claim or even any off-label uses of Lovenox.

The court then addressed the allegation that the defendant had caused fraudulent cost reports to be submitted to Medicare. The court held that submission of a cost report was too attenuated to be a false claim because a cost report would only be used to set future reimbursement rates and that an individual cost report is only a small part of the data used to calculate Medicare reimbursement. The court also found that the relators failed to identify a particular cost report containing an off-label use of Lovenox. Accordingly, it dismissed this claim because it was not pled with particularity.

Lastly, the relators alleged that the defendant violated the Anti-Kickback Statute by inducing hospitals and doctors to prescribe Lovenox for off-label uses. The court held that the relators failed to identify any specific false certification of compliance by the hospital as a result of receiving kickbacks from the defendant. The court also noted that the relators were unable to identify any link between the allegedly false certification of compliance with the Anti-Kickback Statute and the payments made by the government. The complaint was accordingly dismissed for failure to meet the particularity standards.

U.S. ex rel. Shurick v. Boeing Co., WL 5054739 (M.D. Fla. Nov. 21, 2008)

The relator filed a *qui tam* action against his employer, a manufacturer of commercial and military aircraft, alleging that the defendant did not provide properly fitted respirators to its employees during the performance of a government contract. The government declined to intervene. The defendant moved to dismiss on the grounds of failure to plead fraud with particularity and failure to plead actual submission of false claims. The United States District Court of the Middle District of Florida held that the relator could not state a claim for relief under the FCA on a

theory of alleged safety violations. The defendant's motion to dismiss was granted and the case was dismissed with prejudice.

The relator alleged that the defendant entered into a contract with NASA for various services. While providing services under the contract for the defendant, the relator allegedly was exposed to anhydrous ammonia, a toxic substance. The relator alleged that, as a safety measure, the defendant was to provide fitted respirators to certain employees, and that it failed to do so, in violation of the applicable safety regulations. The relator claimed that the safety violations created a false claim because the government did not obtain the safe and lawful services which were required under the contract.

Particularity Requirement

The court found that there was no allegation that the defendant failed to deliver the services under the contract or that the defendant improperly billed the government for any services. Instead, it found that the relator only alleged that the defendant's practices were allegedly unsafe to some of its employees in violation of certain government regulations. The court observed that the relator did not allege the submission of any claims that expressly conditioned payment on a certification that the services were performed in compliance with any safety regulations. Furthermore, the court noted that even if the defendant's conduct amounted to a breach of contract, it did not give rise to an FCA claim based on a theory of alleged safety violations. Thus the defendant's motion to dismiss was granted.

Barys ex rel. U.S. v. Vitas Healthcare Corp., 2008 WL 4768856 (11th Cir. Nov. 3, 2008)

The relators filed a *qui tam* action against hospice service providers. They alleged submission of false claims and fraudulent certification of patients for the Hospice Medicare Benefit (HMB). The amended complaint was dismissed with prejudice by the United States District Court for the Southern District of Florida for failure to plead fraud with particularity. The relators appealed to the Eleventh Circuit. The Eleventh Circuit held that the conclusory allegations in the complaint were not supported by any factual allegations and affirmed the district court's decision. The court also held that the relators were not entitled to a relaxed pleading requirement.

Particularity Requirement

The relators alleged that the defendants fraudulently certified that patients were eligible to receive HMB. In particular, they alleged lengthy hospice stays, aggressive discouragement of decertification of non-terminally ill patients, promotion of HMB certification of patients without a physician's judgment, willful blindness to information regarding eligibility for HMB, and managerial instruction that patients not be discharged from HMB. The Eleventh Circuit, however, found that the facts offered by the relator failed to explain how the allegations caused fraudulent activity. Specifically, the defendants' training guide that directed physicians to be cognizant of good symptoms in their diagnosis did not suggest that any specific prognosis was fraudulent. Similarly, the court found, requiring an extra layer of physician review after an initial assessment, which allegedly caused extended hospice stays pending assessment, did not amount to fraudulent recertification. The court also held that the relators failed to allege any instances of how cash bonuses for maintaining high patient populations caused fraud. Accordingly, the court affirmed the dismissal.

Relaxed Pleading Requirement

The relators alternatively contended that a relaxed pleading standard should apply, because they did not have access to the medical records required to specifically demonstrate the fraudulent re-certifications. The court disagreed because the relators alleged that they had first-hand knowledge of the fraudulent activity but still failed to allege the factual basis for their claims. Thus, the court held that the relators were not entitled to a relaxed pleading standard.

Unterschuetz v. In Home Personal Care, Inc., 2008 WL 4572512 (D. Minn. Oct. 14, 2008)

The relator filed a suit against her former employer, a home care service provider, its owner, and the accountant of the company. The complaint alleged, among other things, FCA violations, accusing the defendants of receiving overpayments from the government by fabricating records of reimbursable services. The complaint also alleged that, as a result of the relator's discovery, she was terminated from her job. The defendants moved to dismiss the FCA claims. The United States District Court for the District of Minnesota dismissed the FCA claims after finding that the claims were not pled with particularity. Specifically, the court observed that none of the relator's FCA claims contained any specific details of fraud. The relator did not identify specific timecards alleged to be falsified, failed to specify the dates or presentment of false billings, the sum allegedly obtained by fraud, or any specific instances where the defendant failed to refund the government. Thus, the FCA claims did not meet the particularity requirements of Fed.R.Civ.P. 9(b), and were dismissed.

U.S. ex rel. Foster v. Bristol-Myers Squibb Co., 2008 WL 4360697 (E.D. Tex. Sep. 24, 2008)

The relator brought a *qui tam* action against a pharmaceutical company, alleging that the defendant illegally bribed and gave kickbacks to a HMO in order to induce doctors to prescribe the defendant's drugs. The relator also alleged that the defendant reported inflated prices for those drugs to avoid paying Medicaid rebates to

the government and overcharged federally qualified entities for drugs under the Public Health Service Act. The government declined to intervene. The defendant moved to dismiss on the following grounds: (1) that the claims were barred by the statute of limitations; (2) that the claims were not plead with particularity under Fed.R.Civ.P. 9(b); (3) that the relator failed to state an actionable claim under the FCA; and (4) that the relator failed to comply with statutory service and filing requirements. The United States District Court for the Eastern District of Texas held that the relator was subject to a six year statute of limitations and that all federal and state FCA violations based on false claims submitted before March 31, 1999 were barred. The court also held that the relator did not satisfy the pleading requirements under Fed.R.Civ.P. 9(b) because he failed to plead sufficient facts in support of his allegations. The court thus dismissed all federal and state FCA claims and granted in part the defendant's motion to dismiss. The court declined to exercise supplement jurisdiction over the relator's remaining claims brought under the California FCA.

The relator previously worked as National Account Manager for one of the defendant's competitors. He claimed that both his company and the defendant used financial rewards to fight to be included on an HMO's formulary (a list of medications for which an HMO provides coverage). After a competitive bidding war, the defendant's similar drug Pravachol was included in the formulary as the defendant's incentives were allegedly better. The relator alleged that he subsequently learned the defendant did not include their incentives in the "best price" amount it reported to Medicaid for Pravachol and another drug called Glucophage and that this omission resulted in lowering or eliminating the defendant's obligation to pay Medicaid rebates and allowed the defendant to offer greater incentives for including its drugs in a formulary. The relator alleged that this scheme violated the FCA by underreporting the amount of Medicaid rebates due to the government. Furthermore, under an apparent implied certification theory, the relator alleged that claims for reimbursement for drugs prescribed because of the unlawful kickbacks would not have been paid by the government. Finally he alleged that by underreporting the amount of Medicaid rebates owed, the defendant also caused entities covered by the Section 340B program of the Public Health Service act to overpay for prescriptions, which constituted a false claim.

Statute of Limitations

The relator argued that he should have the benefit of the ten year limitations period applicable to the government under § 3731(b)(2). The court, however, held that relators are distinct entities from the government under the FCA, and that actions brought by a relator are governed by the six year limitations period under § 3731(b)(1). Accordingly, the court held that a portion of the relator's FCA claims were barred by the statute of limitations.

Particularity Requirement

The court found that the relator's complaint was deficient as he failed to plead sufficient facts in support of his allegations under Fed.R.Civ.P. 9(b). The court first addressed whether or not the relator was entitled to a relaxed pleading standard because (1) the information of the alleged fraud was in the defendant's possession; or (2) the alleged fraud was part of a complex scheme that occurred in a multi-year period. The court found that the first exception did not apply because the information the relator alleged he did not have was not solely in the possession of the defendant, since the government and healthcare providers also held information necessary to realtor's claims. However, the court relaxed the pleading requirements because the fraud alleged by the relator consisted of a scheme that occurred over the course of several years and involved numerous acts.

The court then addressed whether the relator's complaint satisfied even the relaxed pleading requirements. With respect to the kickback allegations, the court observed that the relator did not list a single instance in which a doctor selected the defendant's drug over that of the competitor because of a kickback. Nor did he allege how any such prescription was connected to Medicaid or how a false claim was presented to the government. Accordingly, even under the relaxed pleading standard, the court found that the relator's allegations were not pled properly. Likewise, the court found that the relator failed to allege any facts that would support his claims that the defendant underreported the amount of Medicaid rebates due to the government and overcharged Section 340(b) entities. As a result, the court granted the defendant's motion to dismiss. The court then declined to exercise supplemental jurisdiction over the remaining claim under the California FCA, denied relator's request to amend his complaint, and dismissed the suit with prejudice.

U.S. ex rel. Rost v. Pfizer, Inc., 2008 WL 4293642 (D. Mass. Sep. 18, 2008)

The relator, a former vice president of one of the defendant pharmaceutical companies, filed a *qui tam* action alleging that the defendants unlawfully promoted the non-FDA approved, off-label use of a growth hormone medication. The relator alleged that once the defendants began marketing the drug for off-label uses, sales of the drug dramatically increased. He alleged that since Medicare did not authorize reimbursement for the non-FDA approved usages, Medicare claims for reimbursement associated with the off-label use of the drug were violated the FCA. The relator further alleged that the reimbursement claims for the drug were the result of unlawful kickbacks. The government declined to intervene. The initial complaint was dismissed for failure to meet the particularity requirement of Fed.R.Civ.P. Rule 9(b). The relator then filed an amended complaint and the defendants again moved to dismiss. The United States District Court for the District of Massachu-

setts denied the motion in part, holding that the amended complaint was properly pled and that the relator's allegation of unlawful kickbacks necessitated discovery. The court, however, dismissed the allegations relating to off-label uses.

Particularity Requirement

The court held that the amended complaint satisfied Fed.R.Civ.P. Rule 9(b)'s heightened pleading requirement, as it observed that the relator's amended complaint detailed more than 200 false claims submitted to Medicare and other federal programs from citizens of Indiana. The relator described in detail the drug for which reimbursement was sought, the medical diagnosis accompanying the claim, the diagnosis and dispensation dates, and the dosage. The court held that such a detailed description fulfilled the heightened pleading requirement.

Falsity of Claims

The defendants argued that the alleged claims were not false because the State of Indiana had approved the off-label usages of the drug. While the court seemingly agreed with this point, it held that the relator's additional allegations of unlawful kickbacks were sufficient to properly plead his claim under the FCA. The court observed that the relator had generally alleged that the defendants engaged in a marketing campaign that had caused the submission of false claims by doctors. While the relator would be required to specifically demonstrate this allegation to ultimately prevail, the court found that the relator was unable to allege this information in the complaint as it was not in his possession. Accordingly, the court permitted limited discovery relating to the sales and marketing region of defendants that included Indiana.

Hopper v. Solvay Pharmaceuticals, Inc., 2008 WL 4177927 (M.D. Fla. Sep. 08, 2008)

The relators brought a *qui tam* action alleging that the defendant pharmaceutical company illegally marketed Marinol, a prescription drug that is a derivative of marijuana, for uses not approved by the U.S. Food and Drug Administration. The government declined to intervene in the case. After the lawsuit was unsealed, the relators filed a second amended complaint that alleged that the defendant's marketing campaign caused physicians to prescribe Marinol for off-label uses. As a result, false claims for Marinol prescription reimbursement were allegedly submitted to government healthcare programs. The defendants moved to dismiss under Fed. R. Civ. P 9(b) and lack of subject matter jurisdiction. The United States District Court for the Middle District of Florida referred the motion to dismiss to a magistrate judge and adopted the magistrate's recommendations to deny the motion to dismiss on the basis of subject matter jurisdiction and to grant the motion to dismiss for failing to plead with particularity.

Particularity Requirement

The court held that the relators failed to state with particularity their claim that the defendants' illegal marketing scheme caused the submission of false or fraudulent claims to the government. The defendant argued that the relators failed to plead a specific allegation of an actual false claim that was submitted to the government. The relators conceded that they had no evidence of a false claim but argued that an inference could be made from the allegations that a false claim was submitted to the government. The court concluded that the Eleventh Circuit dictated that FCA claims must specifically allege that a false claim was actually submitted to the government. Furthermore, a court cannot infer that false claims were submitted to the government even with detailed allegations of an underlying fraudulent scheme. Therefore, the court held that the relators failed to state their claim with particularity.

Lack of Subject Matter Jurisdiction

The defendant contended that the FCA barred jurisdiction over the second amended complaint because it contained allegations from publicly disclosed documents and that the relators were not the original source of the information in the complaint. The court held that by specifically pleading that their information was not based on a public disclosure and that they were an original source of the facts was sufficient to establish jurisdiction over the relators' claims. Hence, the court denied the defendant's motion to dismiss to the extent that it challenged subject matter jurisdiction.

U.S. ex rel. Gonzalez v. Fresenius Medical Care North America, 2008 WL 4277150 (W.D. Tex. Sep. 02, 2008)

The plaintiff brought *qui tam* and retaliatory discharge actions against a medical facility and its director before the United States District Court for the Western District of Texas. The relator alleged that the defendants falsified medical records and submitted false claims for dialysis services to Medicare in violation of the FCA. In particular, she alleged that the defendants billed for medical services provided by two persons who were not licensed to provide those services and that the defendants instructed their employees to conceal and alter medical records to avoid detection by Medicare officials. She further alleged that after learning of her whistle-blowing activities, the defendants forced her to tender her resignation. The defendants filed motions to dismiss arguing: (1) the plaintiff failed to satisfy the heightened pleading standards under Fed.R.Civ.P. 9(b); (2) the plaintiff failed to state a claim for conspiracy in violation of the FCA; and (3) the application of the statute of limitations barred part of the relator's claims. The court held that the plaintiff pled sufficient details in her complaint to defeat the motions to dismiss and that the statute of limitations did not bar any of her claims. However, the court dismissed her retaliation claim because the defendant manager was not covered within the definition of "employer."

Particularity Requirement

The defendants argued that the plaintiff failed to plead three of her fraud claims without particularity under Fed.R.Civ.P. 9(b). Each is discussed below.

Factually False Medicare Submissions: The plaintiff's first fraud claim alleged the submission of factually false Medicare claims. The defendants argued that the complaint failed to allege fraud because it did not allege that the defendants incorrectly described the services billed to Medicare or that the services submitted for reimbursement were never provided. The court rejected this argument and observed that the plaintiff's complaint provided specific details regarding the creation and submission of false bills and reports, details about the alleged unauthorized treatment of patients by the two allegedly unauthorized persons, and the defendant's knowledge of the same. The plaintiff also pled examples of the same in regards to specific patients. The court held that since the defendants were responsible for ensuring that their billing complied with Medicare regulations, the plaintiff's allegations were sufficient to state a claim under the FCA.

Legally False Medicare Submissions: The plaintiff also alleged that the defendants improperly billed for the services provided by the allegedly unlicensed persons in violation of Medicare regulations. The defendants argued that the applicable regulations did not require compliance as a condition of payment. The court concluded that the plaintiff properly pled a false certification claim, finding that 42 C.F.R. § 424.520(a)(2) mandated that compliance with applicable regulations was a condition for payment as a Medicare provider or supplier.

Conspiracy Claim: Finally, the plaintiff alleged that the defendants conspired to defraud Medicare into paying false or fraudulent claims. The defendants argued that the plaintiff's conspiracy allegation was conclusory and failed to allege an agreement to defraud. The court observed that the plaintiff alleged that the medical facility knew that the director was concealing unlawful activities. Furthermore, she alleged that the facility knowingly allowed the unlicensed persons to treat patients while having their medical records falsified to indicate they were dictated by a medical director. The court held that these allegations were sufficient to plead conspiracy and denied the motion to dismiss in regards to pleading with particularity.

Statute of Limitations

The defendants argued that the limitations period of six years, pursuant to FCA section 3731(b)(1), should apply. The court disagreed and concluded that FCA section 3731(b)(2) was the applicable statute. Relying on United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., the court held that relators are included under subsection (b)(2)'s tolling provision.

Abner v. Jewish Hosp. Healthcare Services, Inc., 2008 WL 3853361 (S.D. Ind. Aug. 13, 2008)

In the United States District Court for the District of Indiana, two former employees of the two defendant healthcare providers alleged that a group of defendants committed fraud and unlawful retaliation in violation of the FCA. The relators alleged that defendants issued policy statements and instructed laboratory employees to generate fraudulent Medicare and Medicaid bills under six separate claims, and falsely certified compliance with Medicare regulations in their billing practices. The defendants moved to dismiss all of the relators' claims for failure to state a claim for relief. After describing the standards for pleading under Section 3729(a)(1) and (2), the court found that the relators' allegations on the first three allegedly fraudulent billing practices were pled with sufficient particularity because they either alleged specific transactions or they included claims regarding how the defendants allegedly defrauded the government. The court, however, dismissed two other claims—regarding the defendants' alleged ineffective testing—for failing to state a claim, noting that the relators failed to allege a specific regulation that would indicate falsity. The court noted that claims under a false certification theory must "point to a specific regulation conditioning payment of a claim on a certification of compliance." Finally, the court denied the defendants' motion with respect to the relators' retaliation claims, since the relators were fired immediately after the defendants learned of their intention to reveal the defendants' allegedly fraudulent conduct—the court held that this evidence was sufficient to support the relators' contention of an unlawful motivation.

Pleading Fraud With Particularity

The defendants argued that the relators' allegations of false billing were not pled with particularity because the relators failed to allege that the claims were actually submitted for payment, failed to submit proof that the claims were actually false, and failed to allege that the defendants knew the claims were false. The court, because of inexact pleading by the plaintiffs, analyzed the motions under both sections 3729(a)(1) and (2). The principal difference between the two sections is that subsection (a)(1) requires the relators to allege submission of a claim for payment under adequate indicia of reliability while subsection (a)(2) does not. Further, the court noted that while pleadings need not prove claims, they must describe how the relator knows or has reason to know of his/her allegations. Consequently, the court found that the relators' allegations of specific patients for whom defendants improperly billed the government, as well as the relators' positions as employees of the defendants, were adequate to survive a motion to dismiss. However, the court did dismiss those claims that were not pled with facts describing individual transactions or which failed to describe how the defendants accomplished the alleged fraud. The court also rejected the notion that a relator must "prove" a claim of falsity by evidence, noting that a specific allegation of falsity will do. Next, the court held that while fraud must be pled with particularity, intent need not be so pled. Thus, an allegation that a corporate defendant participated in a scheme of fraud through an agent is sufficient to plead that the defendant had knowledge of the fraud.

False Certification Theory

The court observed that several circuits have interpreted the FCA to apply to a party who falsely certifies compliance with a federal regulation. The court held that, in order to properly plead this theory, a relator must point to a specific regulation conditioning payment of a claim on a certification of compliance. The relators premised each of their claims of fraudulent billing on a false certification theory but failed to point to any specific regulation. As a result, the court dismissed their false certification claims. The court declined to address the implied false certification theory, noting that neither party had briefed the issue, but the court allowed the relators to amend their pleadings in order to discuss the issue.

Retaliation Claims

The relators claimed that the defendants fired them for expressing their concerns and their intent to notify authorities of the defendants' alleged fraudulent billing practices. The court held that the relators' allegation that the defendants fired them immediately after learning of their intentions to reveal fraudulent conduct sufficed to plead unlawful motivation. Thus the court denied the defendants' motion to dismiss the relators' retaliation claims.

U.S. ex rel. Staniszewski v. Washington & Jefferson College, 2008 WL 2987213 (W.D. Pa. July 31, 2008)

In his *qui tam* action, relator Matthew Staniszewski alleged that Washington & Jefferson College violated the FCA, by providing false statements, records, and claims in order to receive payment from the government. The college acted as a sub-contractor to provide a degree program and related seminars to National Guard members. This project was federally funded. During the course of the project, the college purchased various products (computers, digital cameras, etc.) for the benefit of the National Guard program, which Staniszewski argued were not used for the National Guard project, but instead were used by the college's traditional students. Staniszewski also alleged that the college submitted improper bills to the government for labor charges related to the National Guard program. The college moved to dismiss the complaint, arguing that the relator's second amended complaint failed to meet the particularity requirements of Fed.R.Civ.P. 9(b), and that motion was heard by a magistrate judge, who determined that the complaint failed to satisfy Rule 9(b)'s particularity requirements. The United States District

Court for the Western District of Pennsylvania adopted the magistrate judge's recommendation. The court determined that Staniszewski failed to explain how he came to learn of the college's alleged false claims, and that he also failed to demonstrate that the college's claims were fraudulent, or even actually made. The court found that Staniszewski's pleadings failed to make any factual averments which would support his claims of fraudulent and false statements. While the court did determine that the he leveled sufficient charges against the college to provide notice in relation to the alleged fraudulent conduct, the court found that he failed to allege facts that substantiated his claims. The court also found that Staniszewski failed to identify any sort of relationship with the college. Accordingly, the court adopted the magistrate judge's report and recommendation, and granted college's motion to dismiss, with prejudice.

U.S. ex rel. Serrano v. Oaks Diagnostics, Inc., 2008 WL 2930348 (C.D.Cal. July 25, 2008)

Relator originally brought a *qui tam* action against a diagnostic center, its owner and other employees, alleging that the defendants violated FCA sections 3729(a)(1), (a)(2), and (a)(3). The government intervened five years after the original complaint was filed, and filed a complaint in intervention. The defendants moved to dismiss the entire action with prejudice, and claimed that the government failed to state a proper claim for relief under Fed.R.Civ.P. 12(b). They also argued that the government pled claims outside the applicable statute of limitations, and failed to plead fraud claims with sufficient particularity under Fed.R.Civ.P. 9(b). The United States District Court for the Central District of California denied the defendants' motion to dismiss in part, and granted the motion in part. The court found that the relator's original complaint was filed within three years of the alleged conduct, and therefore the defendants' motion to dismiss with respect to the applicable statute of limitations was denied. The court found that the government's complaint failed to properly state a fraud claim, since it did not specify the allegedly false claims with the particularity required to satisfy the heightened pleading standard of Fed.R.Civ.P. 9(b). Accordingly, the government's claims fraud and FCA claims were dismissed. However, the government was granted a 30-day leave to amend the entire complaint.

The government contended that the defendants, Oaks Diagnostics, its owner Dr. Ronald Grusd, and Dr. Earl Fernando and other unspecified employees, violated the FCA when they engaged in a scheme to defraud the government by performing unnecessary diagnostic testing and billing Medicare for it. In addition to FCA claims, the complaint alleged causes of action for common law fraud, conversion, payment by mistake, negligent misrepresentation, and money had and received. One of Oaks' employees had previously been criminally convicted for participation in a fraudulent billing scheme, and the complaint alleged that the defendants were aware of this fraudulent activity, or (at a minimum) were deliberately ignorant of the activities. The defendants moved to dismiss the complaint for failure to meet the statute of limitations and for failure to plead fraud with specificity. The court granted the motion in part, and denied it in part. The court denied the defendants' motion with respect to the statute of limitations, and held that the original complaint was filed within the applicable statutory period. However, the court dismissed the government's FCA claims, but granted a 30-day leave to amend the Complaint.

The Complaint Was Filed within the Applicable Statute of Limitations Period

The court observed that a relator's complaint cannot be dismissed without the government's consent, and that if the government files a complaint in intervention, then the government's complaint is seen as an amendment to the original complaint, rather than as a completely new complaint. When the government chooses to intervene, there is no changing of party, or naming of party against whom a claim is asserted, since the relator was merely filling in for the government until the government determined whether to intervene. The court further held that the only section of Fed.R.Civ.P. Rule 15 that was applicable to the complaint at issue was Rule 15(c)(1)(B), which states that an amendment "relates back" when it asserts a defense or claim that arose out of the transaction, conduct, or occurrence set out, or attempted to be set out, in the original pleading. Furthermore, the court noted that this rule does not contain a notice requirement. Consequently, the court held that the FCA allegations brought in the government's complaint all arose from the same transaction, conduct, or occurrence set out in the relator's original pleading, which was filed within three years of the alleged conduct. Therefore, the court held that the government's complaint was filed within the applicable statute of limitations period. Additionally, the court found that even if notice was required, the defendants had to have been aware of the potential suit based upon the criminal prosecution of one of its employees for involvement in the alleged scheme at the heart of this suit. Accordingly, the defendants' motion to dismiss for failure to satisfy the statute of limitations period was denied.

The Government's Complaint Failed to Meet the Particularity Requirement of Fed.R.Civ.P. 9(b)

The defendants argued that the government's complaint only contained general allegations, and thus the government failed to plead any of the FCA and fraud causes of action with the necessary specificity. The court stated that a detailed report of the alleged scheme to defraud Medicare had been set out in the complaint. However, the complaint failed to identify specifics regarding dates and people involved. The court also found that the complaint did not describe the time, place, and nature of the false statements, or the identities of the parties to the misrepresentation. In addition, the court found that the complaint failed to allege the involvement of one of the defendants with specificity. Since the complaint failed to state the allegedly false claims with sufficient particularity to satisfy the heightened standard of Fed.R.Civ.P. 9(b), the FCA and common law fraud claims were dismissed. However, the government was granted leave to amend the complaint.

U.S. ex rel. Lewis v. Walker, 2008 WL 2817091 (M.D. Ga. July 18, 2008)

Relators filed *qui tam* action against the defendants, a research foundation of a university, its then vice president, and others, alleging that the defendants violated the FCA since the foundation's vice president, in his official capacity, knowingly authorized a false and fraudulent application for the grant of Federal EPA Funds. The relators further alleged that the foundation was liable for the acts of its vice president, since he was an employee, acting in his official capacity. Initially, the relators did not identify the vice president by name, and as a result, the court dismissed the claims against the foundation, since the complaint contained no verifiable allegations that the foundation actually employed the vice president. The relators amended their complaint by identifying the vice president, and moved the court to reconsider its dismissal of the claims against the foundation. The defendants moved to dismiss the relators' claims, arguing that the relators did not plead their claims with the particularity required in Fed.R.Civ.P. 9(b). The court held that the relators had alleged that the defendants at least "acted in reckless disregard of the truth or falsity of the information," pursuant to FCA section 3739(b), and therefore denied the defendants' motion to dismiss and granted the relators' motion to reconsider.

Relators, David L. Lewis, Ph.D., R.A. McElmurray, and G. William Boyce, filed a *qui tam* action against various individual defendants and the University of Georgia Research Foundation. One of the individual defendants was identified as the vice president of the foundation, but was not identified by name. The complaint alleged that the defendants violated the FCA, because the foundation's vice president, acting in his official capacity, knowingly authorized an application containing false and fabricated information regarding compliance with the Federal Grant and Cooperative Agreement Act (FGCA). The relators alleged that the vice president's acts should be imputed to the foundation. The United States District Court for the Middle District of Georgia initially found that Relators failed to state a claim against the foundation, since their complaint did not identify the vice president and therefore provided no factual allegations that the foundation was connected to that defendant. Subsequently, the relators amended their complaint by adding the identity of the vice president—Joe L. Key—and moved for reconsideration of the court's order dismissing the foundation. The defendants moved to dismiss the complaint, alleging that the relators did not meet the particularity requirements of Fed.R.Civ.P. 9(b). The court denied the defendants' motion to dismiss and granted the relators' motion for reconsideration, finding that the relators successfully demonstrated that the foundation at least "acted in reckless disregard of the truth or falsity of the information," pursuant to FCA section 3739(b).

Relators Satisfied the Particularity Requirement of Fed.R.Civ.P. 9(b)

The court easily resolved the Rule 9(b) issue, since the court had previously determined that the relators had sufficiently alleged facts that showed that the grant application at issue constituted a "false record." The court also found that the relators had also specifically claimed that Key "authorized" and "signed" the application. Therefore, the court determined that the relators had alleged sufficient facts to demonstrate that Key caused a false record to be made or used. Additionally, the defendants did not dispute that they intended for the Government to pay or approve the claim. Consequently, the only real issue before the court was whether the foundation had knowledge of the false statements contained in the application. The relators alleged that an Inspector General report from 1993 found that foundation had previously violated the FCGA Act in the submission of previous grants and agreements. The court used this information, combined with the fact that Key, as the foundation's vice president, signed the 1999 grant application, to make its determination. The court found that the relators sufficiently stated a claim that the foundation at least "acted in reckless disregard of the truth or falsity of the information" relating to their compliance with the FCGA Act, and that the relators raised a reasonable expectation that discovery would reveal evidence of the foundation's reckless disregard of the truth or falsity of the information found in the application. Therefore, the court denied the motion to dismiss claims against the defendants.

Imputed Knowledge Under the FCA

The court held that in FCA cases, an employee's knowledge is imputed to its corporate employer when the employee's acts are within the scope of his employment, and when the employee acts for the benefit of the corporation. The court found that the relators demonstrated that Key acted within the scope of his employment with the foundation when he engaged in conduct that allegedly violated the FCA. Therefore, the court held that the relators stated a claim against the foundation. Accordingly, the defendants' motion to dismiss was denied.

The court also granted the relators' motion for reconsideration, based upon its findings related to the denial of the motion to dismiss, and the foundation was reinstated as a defendant in the action.

U.S. v. Pekin Memorial Hospital, 2008 WL 2705443 (C.D. Ill. July 9, 2008)

Relator filed a *qui tam* action alleging common law claims and violations of multiple sections of the False Claims Act against the defendant hospital. The relator's complaint alleged that the defendant intentionally miscoded certain procedures and committed other acts of fraud against the United State's Medicare program. Initially, the defendant filed a motion to dismiss the complaint on the ground

that the relator's complaint failed to comply with the particularity requirement of Fed.R.Civ.P. 9(b). The court granted the motion, and found that although the relator had described the allegation with necessary particularity, she failed to describe the individuals involved in the fraud. The court also granted the relator leave to amend the complaint to include the specific details of the people involved. The relator filed the present second amended complaint and the defendant filed a new motion to dismiss, as well as a motion to reconsider. The court granted the defendant's motion to dismiss plaintiff's common law claims, without prejudice. However, the court found that defendant's reliance on new case law was misplaced, and that plaintiff could be held to a relaxed Fed.R.Civ.P. 9(b) standard, since she did not have access (before discovery) to specific details related to her claim, based on events that occurred over a period of 18 years. Accordingly, the defendant's motion to reconsider was denied.

Relator, Deborah Landrith, worked for the defendant, Pekin Memorial Hospital, as a billing coder specialist from 1984 through 2002, and was involved in Medicare billing for the defendant. Over the course of this 18-year period, Landrith became aware of illegal billing practices and other fraudulent acts committed by the defendant that were prohibited by Medicare. She brought a *qui tam* action against Pekin, alleging fraud committed against the Medicare program. Pekin filed a motion to dismiss on the grounds that the complaint failed to fulfill the particularity requirements of Fed.R.Civ.P.9(b). The court found that the complaint had sufficiently described the alleged fraud but failed to describe the individuals involved in the fraud. The court granted the motion to dismiss with a leave for Landrith to amend her complaint.

Subsequently, Landrith filed a second amended complaint, which alleged that Pekin violated the FCA on a number of counts: (1) by falsely coding routine preoperative testing as diagnostic testing so that the procedures would be covered by Medicare; (2) by directing the billing coders to fraudulently code all prostate tests so that the defendant would be reimbursed for all prostrate screening tests; (3) by directing the billing coders to fraudulently code all mammograms so that the test would be covered by Medicare; and (4) by forging signatures on claims submitted to Medicare. Landrith also asserted common law claims. Pekin filed a new motion, seeking to dismiss Landrith's common law claims, and also filed a motion to reconsider the court's previous ruling based on new case law.

Plaintiff Fulfilled the Particularity Requirements of Fed.R.Civ.P. 9(b)

The court found that several sister district courts have allowed a more lenient standard for pleading fraudulent transactions that occurred over a long period of time, or were complex in nature. The court determined that the fraud alleged by Landrith was committed over a period of 18 years, and it was not practically possible for her to describe each instance of fraud, or to provide the names of all of the people whose tests were miscoded, and that a relaxed pleading standard should apply. The defendant argued that the court should refrain from applying relaxed standards under Fed.R.Civ.P. 9(b) based on the Seventh Circuit's decision in United States ex rel. Fowler v. Caremark RX, LLC, 496 F.3d 730 (7th Cir. 2007). The court, however, rejected the defendant's argument, finding that the ruling in Caremark did not change the applicability of leniency standards in the present case, since, in that case, the appellate court did not discuss the period of time over which the fraud in that case was committed. Consequently, the court denied defendant's motion to reconsider and held that the Fed.R.Civ.P. 9(b) standard could be altered when the relator, prior to discovery, did not have access to the information required to provide sufficient details. The defendant's Motion to Reconsider, based on new case law, was denied. The court ordered the case to proceed to the discovery phase.

Plaintiff Lacked Standing To Bring Common Law Claim On Behalf Of The Government

The court held that relators may not assert common law claims on behalf of the government under the FCA. The court noted, though, that the government could have intervened and brought common law claims, but chose not to do so. Thus, the relator's common law claims were dismissed. However, the relator argued that the government could reconsider intervening in the case at a later stage, and could reinstate the common law claims at that later date, and so her common law claims should be dismissed without prejudice. The court agreed and dismissed the common law claims without prejudice.

U.S. ex rel. Gagne v. City of Worcester, 2008 WL 2721198 (D. Mass. July 9, 2008)

Relators, Edward L. Gagne and Linda Jeneski, brought a *qui tam* action against the City of Worcester, Massachusetts and a city and city official, alleging that the defendants violated the sections 3729 (a)(1), (a)(2), and (a)(3) of the FCA by misusing and diverting federal grant funds from their purported use to other city projects. Relators also alleged that the defendants defrauded, conspired to defraud, fabricated and submitted false records to the United States government, all in violation of the FCA. The United States District Court of Massachusetts held that relators failed to plead their claims with the particularity required by Fed.R.Civ.P. 9(b). Therefore, the court dismissed all the relators' FCA claims. Relators then filed a motion for reconsideration under Fed.R.Civ.P. 59(e), arguing that Fed.R.Civ.P. 9(b)'s particularity requirements did not apply to claims brought under FCA sections 3729(a)(2) and (a)(3). The court disagreed, and denied the relators' reconsideration motion, finding that the First Circuit has dismissed section 3729(a)(2) claims for failure to satisfy Rule 9(b). The court acknowledged that the First Circuit has not yet addressed the applicability of Rule 9(b) to a 3729(a)(3) claim, but noted that other circuits have found that the particularity requirements of Rule 9(b) apply to section 3729(a)(3) claims. Thus, the court dismissed the (a)(3) claim as well.

U.S. ex rel. Snapp, Inc. v. Ford Motor Co., 2008 WL 2663746 (6th Cir. July 9, 2008)

Relator brought a *qui tam* action alleging that the defendant motor company fraudulently exaggerated the extent of its dealings with small and minority-owned businesses. The relator's original complaint alleged that the defendant used the relator—a purported minority-owned company that was allegedly controlled entirely by the defendant—as a conduit for passing money through to the defendant's large, majority-owned subcontractors, and thus violated the False Claims Act by misrepresenting the extent of its dealings with small and minority-owned businesses in order to fraudulently induce the federal government to award contracts to the defendant. The relator alleged that every claim the defendant submitted to the government based on the contracts at issue was false. After the district court dismissed the relator's original complaint for failure to comply with Rule 9(b), the relator filed a first amended complaint and submitted copies of annual reports the defendant submitted to the government in order to retain its eligibility as a government contractor. The district court dismissed the first amended complaint as well. The relator moved for reconsideration and for leave to file a second amended complaint and additional new evidence. The district court denied the motion and the relator then appealed to the Sixth Circuit. The Sixth Circuit affirmed the Eastern District of Michigan's decision, which dismissed the relator's complaint for failure to plead fraud with particularity. However, the Sixth Circuit vacated the district court's order denying the relator leave to file an amended complaint—that matter was remanded to the district court.

The Sixth Circuit determined that while the relator, Snapp, Inc., identified defendant Ford Motor Company's allegedly false statements, it failed to identify even a single claim for payment that Ford submitted to the government. The court held that it was insufficient for the relator to allege generally that all of the defendant's claims, for an undetermined number of contracts, were false. The court held that "[w]hen a relator alleges such a 'complex and far-reaching fraudulent scheme' to induce the government into making payments," the relator's complaint must "include specific examples of the defendant's claims for payment from the federal government." Since Snapp did not provide any examples of claims Ford submitted to the government, the Sixth Circuit affirmed the district court's decision dismissing the first amended complaint. However, the circuit court vacated the district court's decision denying Snapp's motion to file a second amended complaint. Although it recognized that the issue was completely within the district court's discretion, the circuit court subtly encouraged the district court to allow the relator to file a second amended complaint. The circuit court observed that the district court denied the relator's motion prior to the circuit court's decision in U.S. ex rel Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493 (6th Cir. 2007) (known as Bledsoe II), and prior to the Supreme Court's decision in Allison Engine v. U.S. ex rel. Sanders, 128 S. Ct. 2123 (2008), which are directly on point.

In Bledsoe II, the circuit court made clear that a relator who alleges a "complex and far-reaching fraudulent scheme" need only provide examples of specific false claims submitted to the government, in order to proceed to discovery, and it appeared that the relator's second amended complaint may have provided overcome this hurdle. In addition, in Sanders, the Supreme Court ruled that *qui tam* plaintiffs may only prevail upon a showing that the defendant made a false statement with the purpose of getting the government to pay or approve a false claim. The circuit court reasoned that since Rule 9(b) exempts allegations of intent and knowledge, relators do not have to plead that defendants acted with a particular purpose—again implying that the relator's second amended complaint might pass muster on remand.

Raghavendra v. Trustees of Columbia Univ., 2008 WL 2696226 (S.D.N.Y. July 07, 2008)

Plaintiff, Rajagopala Raghavendra, filed a *qui tam* action against his former employer, the Trustees of Columbia University, and certain individual defendants, who were employees of the university, alleging employment discrimination. He also alleged that the defendants violated FCA section 3729 by falsely claiming to be an "Equal Opportunity" employer, and by falsely claiming to maintain affirmative action programs. Defendants filed a motion to dismiss the complaint.

The court determined that the plaintiff's FCA allegations were inadequate under Fed. R. Civ. P. 9(b) and that his complaint should be dismissed for vagueness, and failure to state when or how the University defrauded the government, who made false statements to the government, and what false information those statements contained. Relying on the Supreme Court's ruling in Allison Engine Co. v United States, 128 S. Ct. 2123 (2008), the court found that in order to sufficiently state an FCA claim, the plaintiff must have alleged that the defendant's intention, in making the false statement, was to defraud the government. The mere fact that the University received federal funding, combined with the plaintiff's dissatisfaction with his treatment by the defendants, did not constitute an adequate FCA claim or allegation. Thus, the plaintiff's FCA claim was dismissed.

See U.S. ex rel. Lusby v. Rolls-Royce Corp., 2009 WL 1855179 (7th Cir. June 30, 2009) at page 182.

See U.S. ex rel. Lusby v. Rolls-Royce Corp. 2008 WL 4247689 (S.D. Ind. Sep. 10, 2008), at page 188.

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

U.S. v. Aguillon, 2009 WL 1789894 (D. Del. June 24, 2009)

The United States brought an FCA action against a doctor, alleging that he consistently upcoded Medicare claims, in an attempt to receive a higher rate of reimbursement from the government than he was entitled to. The government noted that the private Medicare administrative contractor that processed the doctor's Medicare claims, as well as the "program safeguard contractor" that was responsible for detecting and investigating allegations of the doctor's Medicare fraud, determined that the doctor was engaging in massive upcoding, which resulted in the majority of the doctor's Medicare claims being denied or reduced before they were ever submitted to the government for reimbursement. As a result, the government never paid any inflated claims. Although the government did not suffer any actual damages, the United States still filed an FCA action against the doctor, claiming that he violated sections 3729 (a)(1)(a) and (a)(1)(b)—sections which, prior to the enactment of the Fraud Recovery & Enforcement Act ("FERA"), were codified at FCA sections 3729(a)(1) and (a)(2), respectively—and seeking a statutory penalty of $5,500 to $11,000 for each of the doctor's 2,420 allegedly false claims. The doctor moved to dismiss the government's complaint, for failure to state a claim.

The United States District Court for the District of Delaware held the Government stated a valid claim under FCA section 3729(a)(1) but that the Government did not state a valid claim under FCA section 3729(a)(2). The court accordingly granted the defendant's motion to dismiss in part and denied the motion in part.

Claims under FCA Section 3729 (a)(1)

The district court first determined that the government had indeed stated a valid claim under FCA section 3729 (a)(1)(a)—which requires presentment of a false claim to a government contractor, grantee, or other recipient for payment or approval—since the Government asserted that: (1) the defendant doctor presented false claims to the Medicare administrative contractor—a government contractor; (2) the defendant doctor intentionally engaged in upcoding, and thus had knowledge that his Medicare claims were false; and (3) the defendant doctor's allegedly false claims were sufficient to establish liability under FCA section 3729(a)(1)(a), since, as the court agreed, those claims would have caused economic loss to the government if they had actually been paid.

Claims under FCA Section 3729 (a)(2)

The rationale for the court's decision with respect to the section 3729(a)(1)(b) claim seems flawed. The court observed that the FCA does not specifically address whether or not claims under section 3729(a)(1)(b) require actual payment by the Government in order to be actionable, and, relying almost exclusively on John Boese's treatise, determined that, unlike FCA section 3729(a)(1)(a), section 3720(a)(1)(b) only imposes liability when a false claim is actually paid or approved by the Government. Oddly, the district court made no mention of the Supreme Court's 2008 decision in *Allison Engine v. U.S. ex rel. Sanders*, in which the Court made clear that liability under FCA section 3729(a)(2) attaches at the moment when a defendant makes a false statement with the intent of having the government pay a false claim. Notably, the Supreme Court's analysis was not based on whether or not the false claim was actually ever paid by the government. The Delaware district court did recognize that the FCA was recently amended by FERA—now, former FCA section 3729(a)(2) appear at section 3729(a)(1)(b). While referencing FERA's recent amendments to the FCA *sua sponte*, the court observed that "the amended FCA arguably would allow civil penalties without proof of actual payment or approval of the false claims." However, the court refused to apply the recently announced new standard to the case before it, stating that "only Congress's clear intent to apply the statute retrospectively will overcome the presumption against applying statutes with retroactive effects," (emphasis in original) and declaring that "Congress has not provided the requisite instruction necessary for the amendments to be used to cause retroactive effects." The district court seemingly ignored the fact that Congress did express its clear intent that the amendments to the liability provisions at issue be applied retroactively, and provided explicit instructions regarding the date on which those provisions should be given retroactive treatment—June 7, 2008, two days before the *Allison Engine* decision was published. To be sure, FERA explicitly states that the amendments to the FCA's liability provisions—the provisions that clarify that liability under section 3729(a)(1)(b) attaches even when the defendant's false claims have not been paid by the government—"shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date." Clearly then, FERA's amendments to the FCA's liability provisions should have been applied in this case, and the court erred when it announced that "the 2009 FCA is not retrospective and the claims under 31 U.S.C. § 3729(a)(2) must be dismissed because plaintiff has not alleged that defendant's purportedly false claims were actually paid or approved."

U.S. ex rel. Chabot v. D&G Discount Homes, LLC, 2009 WL 1767625 (M.D. Fla. June 23, 2009)

A relator plaintiff brought a *qui tam* action against a residential constructor, alleging that the defendant corporation falsely certified its licensure under a government contract and knowingly made or used false certifications and presented false claims to the government. The defendant filed an answer pro se, and the United States District Court for the Middle District of Florida struck its answer, determining that the corporation could not proceed pro se. The defendant failed to retain counsel, and the clerk entered a default judgment against the defendant. The plaintiff then moved for entry of a final default judgment. The magistrate judge

recommended denial of the relator's motion and entry of an order to show cause regarding why the court should not dismiss the complaint without prejudice. The magistrate judge concluded that the relator's allegations were insufficient to establish the defendant's liability under the FCA, finding that the documents the relator submitted as evidence for penalties and damages did not contain the defendant's allegedly false certification. Specifically, the magistrate found that while the relator's complaint alleged that the defendant did not have the necessary license, it did not expressly allege the defendant failed to employ licensed personnel. The magistrate also held that the relator's evidence was insufficient to show that the defendant sent invoices to the government related to contracts awarded pursuant to the allegedly false certifications. Accordingly, the magistrate recommended that the court not award damages. The court adopted the magistrate judge's report and recommendation with respect to the denial of the relator's motion for entry of a final order, but the court disagreed with the magistrate's recommendation that the relator be ordered to show cause why the court should not dismiss the complaint. The court then gave the relator an opportunity to amend his complaint to address the deficiencies that the magistrate judge identified.

U.S. ex rel. Monahan v. Robert Wood Johnson Univ. Hosp. at Hamilton, 2009 WL 1288962 (D.N.J. May 7, 2009)

Two relators filed separate *qui tam* actions against an acute care hospital, alleging that the defendant submitted false claims in order to receive outlier payments. The United States District Court for the District of New Jersey consolidated the actions, and the government intervened. The defendant moved to dismiss for failure to state a claim [arguing that the government did not allege that any of its claims were false or fraudulent], failure to plead fraud with particularity, and expiration of the statute of limitations. The court denied the motion.

Failure to State a Claim under 3729(a)(1)

The court held the government stated a claim under section 3729(a)(1) and denied the defendant's motion to dismiss for failure to state a claim. Specifically, the court noted that the government's complaint alleged that the defendant presented claims to Medicare for reimbursement, and alleged that the defendant increased its charges far beyond the costs of care in order to obtain increased outlier payments from Medicare. The court also noted that the complaint alleged that Medicare uses charges as a proxy for costs, and that the complaint alleged that the defendant's manipulation of the charges convinced the government that the defendant's costs were higher than they actually were, which led to increased outlier payments. The court also stated the complaint indicated the defendant knew increasing its charges far beyond costs was fraudulent and increased charges nevertheless. Thus, the court denied the defendant's motion with respect to the government's claim under section 3729(a)(1).

Failure to State a Claim under 3729(a)(2)

In determining if the government stated a claim under Section 3729(a)(2), the court examined portions of the complaint, which alleged that the defendant submitted claims with charges so high they did not reasonably reflect costs. The complaint also alleged that the high charges would exaggerate actual costs and result in outlier payments. Thus, the court concluded the government stated a claim under 3729(a)(2) and denied the defendant's motion.

Failure to Plead Fraud with Particularity

In assessing whether the government's complaint was pled with particularity, the court noted that the complaint alleged that the defendant filed claims containing charges unrelated to its costs, in violation of applicable statute and regulations. The complaint also alleged that the defendant did not inform the government of the higher charges, which could have led to outlier payments that did not accord with the purposes of the outlier program. The court concluded that these allegations demonstrated non-disclosure and intentional misrepresentation—two hallmarks of fraud. Thus, the court held that the government pled fraud with particularity, and denied the defendant's motion to dismiss on that ground.

Statute of Limitations

The court allowed the government's claims to relate back to the relators' claims, finding that relation back was appropriate, since the FCA gives the government great latitude to conduct a possibly lengthy investigation. Since the FCA's statute of limitations did not bar the relators' claims, the court held the government's intervened claims were likewise not barred by the FCA's statute of limitations. Thus, the court denied the defendant's motion to dismiss on statute of limitations grounds as well.

U.S. ex rel. Barlett v. Tyrone Hosp., Inc., 2009 WL 1010479 (W.D. Pa. Apr. 14, 2009)

A relator brought an action against a hospital and its subsidiary, a healthcare management consulting firm, and several physicians, alleging violations of the FCA. Specifically, the relator alleged that the defendants conspired to defraud the government. One of the physician-defendants proceeded pro se and moved for judgment on the pleadings, contending that the plaintiff failed to sufficiently allege the conspiracy claim against him. The United States District Court for the Western District of Pennsylvania noted that, though that defendant received kickbacks for referring patients to the hospital, the complaint failed to allege that the defendant entered into any agreement with the other defendants to defraud the government. The court found that the relator failed to allege the defendant's knowledge or assent to the alleged conspiracy among the other defendants. Furthermore, the

court found that the plaintiff did not allege that this defendant controlled the subsidiary or that it established any financial relationship with the hospital to facilitate kickbacks. Thus, the court held that no conspiracy claim stood against this physician-defendant because the plaintiff failed to allege sufficient facts in support of the claim. Accordingly, the court granted the defendant's motion for judgment on the pleadings.

U.S. ex rel. Wilson v. Counseling Consultants, Inc., 2009 WL 57489 (E.D. Ark. Jan. 7, 2009)

The relator brought a *qui tam* action against a mental health care provider. She alleged that the defendant presented fraudulent bills to Medicare and Medicaid for reimbursement. Specifically, she alleged that the defendant billed for services provided by case managers at the higher therapist rate. The government did not intervene. The defendant moved for summary judgment. The United States District Court for the Eastern District of Arkansas granted the motion, finding that the relator stated at her deposition that she had no personal knowledge of the billing process or of any payment received by the defendant from the government. She also admitted that she did not know whether the defendant billed Medicaid for the fraudulent therapist time. The court found no other evidence supporting the relator's claim. The court, finding no evidence of fraud, dismissed the action.

U.S. ex rel. Brown v. Aramark Corp., 2008 WL 5386445 (D.D.C. Dec. 29, 2008)

The relator, who became the substitute plaintiff, litigated a *qui tam* action originally filed by her husband, who died before the case was unsealed. The complaint was filed against a contract food service provider and its healthcare support service, and alleged that the defendants contracted with an acute care hospital to manage their food service department. The complaint further alleged that the defendants violated the FCA by improperly billing the federal government for recycled food and resources used at private functions unrelated to Medicare, and that the defendants created fraudulent and inflated cost reports and submitted false claims to the hospital, which were ultimately submitted to the government for reimbursement as Medicare and Medicaid related expenses. The complaint also alleged that the food service provider terminated the original relator from his employment, in violation of the FCA's anti-retaliation provision. The government declined to intervene. The defendants moved to dismiss for failure to state a claim. The relator sought a stay of decision on the retaliation claim, pending discovery. The United States District Court for the District of Columbia held that the relator failed to plead fraud with particularity and hence failed to state a claim. The court also concluded that the relator's complaint, on its face, "failed to allege facts sufficient

to state a viable claim for retaliation under section 3730(h) of the FCA." Accordingly, the defendants' motion was granted.

Failure to State a Claim

The court held that the relator's complaint failed to plead fraud with particularity as required by Fed.R.Civ.P. 9(b). It noted that the complaint did not identify a single cost report containing false information or any specific instance of submission of a fraudulent cost report seeking payment from the government. Furthermore, the complaint failed to allege the date of cost reports or their submission, the names of employees involved in the alleged fraud, the content of the reports, or an actual presentation of false claims to the government for payment. The court observed that although the complaint alleged fraud, it failed to identify the circumstances necessary to state a claim. Accordingly, the court dismissed the claims under Section 3729(a)(1) and (2) of the FCA.

Anti-Retaliation Claim

The court also dismissed the retaliation claim, and held that the original relator's claim that he refused to participate in the defendants' allegedly illegal conduct did not amount to "protected activity" under the FCA. The court held that the complaint failed to demonstrate that the original relator investigated the alleged fraud or that the defendants had the knowledge of his alleged investigatory activities. Accordingly, the court rejected the request to stay decision on the retaliation claim and held that the complaint failed to allege facts sufficient to state a claim for retaliation.

U.S. ex rel. Sanders v. American-Amicable Life Ins. Co. of Texas, 2008 WL 4724719 (3rd Cir. Oct. 29, 2008)

The relator filed a *qui tam* action against an insurance company and bank that sold life insurance policies to military personnel. The relator had been employed as an insurance agent for the insurance company, and alleged that the defendants violated the False Claims Act by engaging in an illegal scheme to sell life insurance policies, disguised as "savings plans," to military personnel. The suit specifically alleged that the defendants misused the military's allotment system, a method of direct deposit, so that once a military service member agreed to participate in the plan, the defendant bank would withdraw funds from the person's military paycheck to be directly deposited with the defendant insurance company. The relator's complaint alleged that the defendants' program was disguised as a savings program as a means to circumvent various military regulations, including regulations governing the use of the military's allotment system to pay insurance premiums. The complaint concluded that the defendants violated the FCA by preparing false claims—the military allotment forms—and causing various members of the mili-

tary to submit those false claims to the U.S. Government, which in turn diverted various amounts of military salaries (alleged to be millions of dollars) to the defendants. The government declined to intervene, but did sue the insurance company under the Fraud Injunction Statute, alleging the same facts as those alleged by the relator. That suit resulted in a $10 million settlement to the defrauded military personnel and an agreement by the insurance company to change the way it marketed to members of the military. The defendants moved to dismiss for failure to state a claim and that motion was granted by the United States District Court for the Eastern District of Pennsylvania. The relator filed an appeal. The Third Circuit affirmed the decision of the district court because the relator failed to allege a claim against government money or property.

Failure to Establish a False Claim

The district court held that the relator did not plead the existence of a false "claim," since the defendants' alleged conduct could not possibly have caused an economic loss to the United States. The Third Circuit affirmed, finding that the relator did not show that a claim had been submitted to the Government, since the defendants did not make, and did not cause anyone else to make, a request for Government money. The court determined that the defendants did not make a claim against federal funds, but merely sought funds that were released by the Government to pay its military employees' salaries. The court noted that "it was the defrauded military personnel who furnished or made money available to the defendants—and not the federal government—because it was those personnel who decided to participate in the fraudulent 'savings programs.' " Although the circuit court made no explicit statement, it appears that the court's rationale was that government employees' salaries are private funds, and not "government money or property," for FCA purposes. Simply stated, no federal funds were expended because the allotment payments were not made on behalf of the government. Since the circuit court found that the relator did not allege a "claim," he could not maintain an FCA action. Therefore, the court held, the relator's complaint did not state a claim for relief and was properly dismissed.

U.S. ex rel. Sterling v. Health Ins. Plan of Greater New York, Inc., 2008 WL 4449448 (S.D.N.Y. Sep. 30, 2008)

The relator filed a complaint against her former employer, a corporation providing health benefits and health management services. She alleged violations of sections 3729(a)(1), (a)(2) and (a)(3) of the FCA, based on the allegation that the defendant defrauded the government by altering data to obtain an accreditation from an independent agency, which the defendant needed to maintain its contract with the government to provide health benefits to federal employees. The government declined to intervene in the case. The defendant moved to dismiss the complaint. The United States District Court for the Southern District of New York granted

the defendants' motion, and held that the relator did not allege a false claim or conspiracy under the FCA.

Failure to State a Claim

The court, relying on the Supreme Court's decision in Allison Engine Co. v. United States ex rel. Sanders, 128 S.Ct. 2123 (2008), held that there must be a direct link between a false statement and the government's decision to pay. Hence, the court held that the relator's allegation that the defendant fraudulently altered data in order to obtain accreditation from an independent, non-governmental accrediting agency did not constitute a false claim under section 3729 (a)(2) of the FCA. The court found that the allegedly altered data was intended to deceive only the accrediting agency and not the government. Furthermore, the fact that the government relied on the accreditation to continue contracting with the defendant did not establish a direct link between the defendant's alleged fraud and the government's decision to pay. Likewise, the court held that the relator did not allege a claim under Section 3729(a)(1); the defendant's presentment of the allegedly false data to the accreditation agency was not presentment to the government under the FCA, since the accreditation agency was a separate and independent entity from the government.

Finally, the court dismissed the relator's conspiracy claim under the FCA. It found that in the relator's only specific allegation of fraud in the complaint, she mentioned the name of only one person. Since a conspiracy claim requires that two or more people participate, the court held that the relator failed to state a claim in this regard.

U.S. ex rel. Lacy v. New Horizons, Inc., 2008 WL 4415648 (W.D. Okla. Sep. 25, 2008)

Plaintiff brought a *qui tam* action against companies and individuals managing intermediate care facilities for mentally disabled adults. The plaintiff's first amended complaint was dismissed because it was not pled with particularity. The plaintiff then filed a second amended complaint alleging presentment of false claims, usage of fraudulent reports, conspiracy, anti-kickback violations and retaliatory discharge. The United States District Court for the Western District of Oklahoma held that the plaintiff's complaint was again deficient, since, with respect to almost all of the allegations, the plaintiff failed to state a claim for relief under the FCA. Thus, the court dismissed much of the plaintiff's second amended complaint. However, the court found that one of the plaintiff's claims could possibly satisfy the pleading requirements and the court granted the plaintiff leave to amend that claim only.

Failure to State a Claim under the FCA

The court dismissed the plaintiff's claims alleging false certifications of statutory compliance, finding that those allegations did not state a claim for relief. The plaintiff had argued that defendants' submission of reports certifying compliance with statutory requirements represented both an express and an implied false certification to the government. The court held the alleged certifications were required only to be eligible for participation in the medical program and did not constitute conditions for government payments. The court agreed and held that this claim did not constitute a viable action for false payment under FCA. The plaintiff's claims of anti-kickback violations were also dismissed for failure to state a claim, since the plaintiff failed to present an offer of payment and/or a solicitation or receipt of payment that could constitute a kickback. Moreover, the court found that the plaintiff's allegations that the defendants falsely certified compliance with Medicare regulations could not be a basis for an FCA claim, because compliance only affected participation in the Medicare program and was not a basis for reimbursement. Hence, the court held that these allegations failed to plead a claim for payment because no relationship between the alleged fraud and a claim for payment was made. Likewise, the court dismissed the plaintiff's conspiracy claim, finding that it was barred by the intracorporate conspiracy doctrine. The court found that the defendants and their employees, who were acting as the agents of the defendants, constituted a single entity and could not possibly form a conspiracy. Thus the plaintiff's conspiracy claim could not be maintained. After the court dismissed these substantive FCA claims, it dismissed the plaintiff's retaliation claim as well. The court reasoned that since the substantive violations alleged by the plaintiff could not have constituted a viable FCA claim, it followed that the plaintiff's reporting of those purported violations to any of the defendants could not be a protected activity under the FCA. Hence, the court held that the plaintiff's claim for retaliatory discharge was not actionable under the FCA.

The court did find, however, that the plaintiff's allegations regarding per diem billing came close to stating a cognizable claim. The plaintiff had identified specific patients who may have been inappropriately billed for, and had specified some of the dates and dollar amounts involved. Consequently, the court granted the plaintiff leave to again amend the complaint and provide additional factual details, including the specific facilities involved, the dates on which the alleged over-billing occurred, how many patient days were over-billed for, and an estimate of the amount over-billed for each patient.

U.S. ex rel. Mason v. State Farm Mut. Auto. Ins. Co., 2008 WL 2857372 (D. Idaho July 23, 2008)

Plaintiffs filed a complaint against an automobile insurance company, alleging that the defendant violated the FCA. One of the Plaintiffs ("Plaintiff 1") was insured by the defendant and incurred substantial medical expenses, including expenses related to a spinal surgery, following a car accident. The defendant disputed its duty to pay Plaintiff 1's medical bills, and Plaintiff 1 hired Plaintiff 2—an insurance coverage attorney—to help him obtain coverage. After an independent medical examination, it was determined that the defendant insurance company was liable for sixty percent of Plaintiff 1's medical bills. Eventually, the defendant

began to pay Plaintiff 1's medical bills. However, the defendant never paid the bill for Plaintiff 1's back surgery. The hospital that performed the surgery requested payment from Medicare, and Medicare made a contingent payment. The plaintiffs alleged that the defendant, by neglecting to pay the spinal surgery bill, caused the hospital to seek payment from Medicare in violation of the FCA. The defendant moved to dismiss the plaintiffs' complaint for lack of subject matter jurisdiction, failure to state a claim, and failure to plead with the specificity required under Fed.R.Civ.P. 9(b). The court denied the defendant's motion, on the subject matter jurisdiction grounds, granted the defendants' motion, without prejudice, on failure to state a claim and failure to plead fraud with specificity grounds. The court also granted the plaintiffs leave to amend the complaint.

Eugene Mason was involved in an automobile accident and was duly covered under an insurance policy with the defendant, State Farm Mutual Automobile Insurance Company. State Farm disputed its duty to pay medical bills under Mason's policy, and Mason hired Patrick Brown, an insurance coverage attorney, to assist him in obtaining coverage from State Farm. An independent medical examination determined that State Farm's financial liability was sixty percent of Mason's medical treatment. State Farm then began paying Mason's medical bills. State Farm paid for some of the medical services, but did not pay for the bill for a spinal surgery Mason underwent. Mason was eligible for Medicare, and the hospital that performed the surgery later requested payment from Medicare. Medicare made a contingent payment to the hospital. The plaintiffs then filed suit against State Farm, alleging that the insurance company violated the FCA by causing the hospital to submit a false claim to Medicare to cover the bill for Mason's spinal surgery. The4 plaintiffs further alleged that State Farm committed a reverse false claims violation, by knowingly concealing its obligation to repay Medicare for the money that had been spent to pay for Mason's surgery. State Farm moved to dismiss the complaint for lack of subject matter jurisdiction, failure to state a claim, and failure to plead with the specificity required under Fed.R.Civ.P. 9(b). The United States District Court for the District of Idaho denied the motion on lack of subject matter jurisdiction grounds, but granted the motion, without prejudice on the grounds that the plaintiffs failed to state a claim and failed to plead fraud with specificity. The court also granted the plaintiffs leave to amend their Complaint.

State Farm's Motion to Dismiss for Lack of Subject Matter Jurisdiction Was Denied

State Farm argued that there was no false claim, and even if there was, it had no knowledge of it. The court observed that the substantive and jurisdictional elements were sufficiently intertwined for the court to treat State Farm's motion to dismiss for lack of subject matter jurisdiction as a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6). Therefore, State Farm's motion to dismiss for lack of subject matter jurisdiction was denied and the court turned to State Farm's Rule 12(b)(6) and Rule 9(b) grounds.

The Complaint Failed to State a Claim Under Fed.R.Civ.P. 12(b)(6)

Presentment:

The plaintiffs alleged that State Farm caused the hospital to submit a false Medicare claim when it denied liability and refused to pay Mason's medical bills associated with his spinal surgery. State Farm contended that it was not aware of an alleged duty to pay the bill for the spinal surgery. The court observed that the complaint failed to allege when and if State Farm received a surgery bill, or that State Farm had refused to pay it. Therefore, the court found that the complaint failed to allege a cause and effect relationship necessary to state a claim under the FCA.

"False" or "Fraudulent" claim:

The court determined that the in order to maintain their cause of action, the plaintiffs needed to allege that the claims submitted to Medicare by the hospital contained false misrepresentations or statements. State Farm contended that the hospital's claim to Medicare was not fraudulent, because the hospital had a statutory right to submit a bill to Medicare for Mason's bills. The plaintiffs countered that the hospital's claim was fraudulent, because State Farm—not Medicare—was primarily liable for Masons' medical expenses. Therefore, the plaintiffs argued, any request for payment of those covered expenses from Medicare was fraudulent. The court found that the plaintiffs failed to demonstrate that the hospital used false information to receive the Medicare payment. Therefore, the court held that the plaintiffs failed to adequately plead the false claim element.

Knowledge:

The court held that in order to maintain their cause of action, the plaintiffs needed to show that State Farm had received the bill for Mason's surgery and did not pay it, knowing that doing so would cause the hospital to bill Medicare. If the hospital did not have specific knowledge of the bill, then the plaintiffs needed to allege facts that showed that State Farm recklessly ignored information that would have given it knowledge. State Farm contended that it did not knowingly cause the hospital to submit the alleged false claim and that its alleged duty to cover that expense was in dispute. Thus, State Farm argued, there was no "knowing" falsity under the FCA. The plaintiffs alleged that the State Farm had specific knowledge of its liability or, at the very least, it should have known of its liability. The court, however, disagreed with the plaintiffs' assessment and observed that the plaintiffs' complaint failed to show that the State Farm knowingly caused the hospital to bill Medicare. In addition, the court found that the plaintiffs' complaint failed to show that State Farm deliberately ignored the surgery bill, or that it acted with reckless disregard. Accordingly, the court held that the plaintiffs failed to demonstrate "knowledge" as required under the FCA.

As a result of these findings, the court granted State Farm's motion to dismiss the complaint for failure to state a claim. However, the complaint was dismissed without prejudice.

Plaintiffs' Reverse False Claim Allegation Failed

False statements:

To prove a violation of the reverse false claims provision, the plaintiffs' complaint must have alleged that State Farm had a mandatory obligation to reimburse Medicare, and that it made false statements while this duty existed. The court found that the complaint sufficiently alleged that State Farm was liable for reimbursing Medicare (according to statute), and that the complaint sufficiently alleged false statements or misrepresentations by State Farm. Therefore, the court held that the plaintiffs' allegations were sufficient to trigger a reverse false claim. However, the court's analysis did not stop there.

Causation:

State Farm argued that the alleged false statements were directed to Brown, and not to the government or the hospital, and therefore could not have caused Medicare to lose money. State Farm further contended that it could not have avoided a duty to pay Medicare, since it was not aware of any duty to pay. The court observed that the plaintiffs needed to allege that State Farm made the false statements to the plaintiffs in order to avoid repaying Medicare, and that this was done knowingly. However, the court found that the complaint failed to show that State Farm had knowledge of a duty to reimburse Medicare. Therefore, the court found that any of State Farm's allegedly false statements could not have been said knowingly in order to avoid payment. The court further held that the complaint failed to establish how State Farm's statements caused the government to not be reimbursed. Accordingly, the court held State Farm's allegedly false statements, by themselves, were insufficient to state a violation of the FCA. Therefore, the court granted State Farm's motion to dismiss, without prejudice, for failure to state a claim.

Pleading Fraud with Specificity:

Plaintiffs argued that Fed.R.Civ.P 9(b) did not apply to reverse false claims, because the FCA fraud is different from the common law fraud addressed under Fed.R.Civ.P 9(b). The court, however, had already determined that the plaintiffs failed to state a claim under Fed.R.Civ.P 12(b)(6). This finding led the court to hold that the plaintiffs failed to plead the alleged facts of fraud with the particularity required in Fed.R.Civ.P 9(b). The court also held that the complaint failed to meet even the relaxed pleadings requirements. Although the plaintiffs outlined State Farm's alleged plan of fraud, they failed to make out the elements of causation or knowledge necessary to state a claim or, to state facts on which the belief was based. Therefore, State Farm's motion to dismiss for failure to plead fraud with specificity was granted, without prejudice.

See U.S. ex rel. Kirk v. Schindler Elevator Corp., 2009 WL 857075 (S.D.N.Y. Mar. 30, 2009) at page 43.

See U.S. ex rel. Pritsker v. Sodexho, Inc., 2009 WL 579380 (E.D. Pa. Mar. 6, 2009) at page 49.

See U.S. ex rel. Smart v. Christus Health, 2009 WL 151590 (S.D. Tex. Jan. 22, 2009) at page 53.

See U.S. ex rel. Rodriguez v. Our Lady of Lourdes Med. Ctr., 2008 WL 5411717 (3rd Cir. Dec. 30, 2008), at page 162.

See U.S. ex rel. Sanders v. North American Bus Industries, Inc., 2008 WL 4793577 (4th Cir. Nov. 5, 2008), at page 110.

C. Rule 15 Relation Back Doctrine

Makro Capital of America, Inc. v. UBS AG, 2008 WL 4402701 (11th Cir. Sep. 30, 2008)

Plaintiff filed a complaint against the defendant company alleging, among other things, fraud and misrepresentation. In the same complaint, the plaintiff asserted an unjust enrichment claim against the government. The claims arose out of a settlement between a predecessor of the defendant company and the United States after the government seized assets of the company during World War II. The complaint was dismissed without prejudice. The plaintiff then filed an amended complaint that alleged the same facts but put forth FCA claims against the defendant. Specifically, the amended complaint alleged that the defendant's predecessors mischaracterized facts that resulted in the improper receipt of settlement money from the government. Meanwhile, before the plaintiff's amended complaint was filed, another relator filed a *qui tam* action against the defendant based upon the same facts as those in the plaintiff's original complaint. When both complaints were unsealed, the defendant moved to dismiss the plaintiff's complaint for lack of subject matter jurisdiction, on the grounds that the plaintiff's *qui tam* action was not the first *qui tam* action based on the alleged facts and that the government had information regarding the alleged false claims before the plaintiff's claim was filed. The District Court for Southern District of Florida granted the motion to dismiss. The plaintiff then moved for reconsideration arguing that Fed.R.Civ.P 15 allowed its amended complaint to relate back to the original complaint, and that, as a result, the plaintiff's original complaint was first. The court denied the motion and the plaintiff appealed the decision to the 11th Circuit Court of Appeals. The appellate court affirmed.

Plaintiff's Complaint Did Not Relate Back under Fed.R.Civ.P 15

The plaintiff argued that, under Fed.R.Civ.P. 15, its amended complaint related back to the date of its original complaint, since the amended filing relied on the same factual basis as the original pleading and since the defendant had sufficient notice and knowledge of the potential *qui tam* action so that no prejudice would result. The court rejected this argument, holding that a pleading can only relate back if a defendant would have had knowledge of the existence of the subsequent claim in the allegations of the original complaint. The court found that the plaintiff's *qui tam* action, especially since the government was named as a defendant, was so divergent from the original complaint that it did not relate back to original complaint. The court stated that "[t]here is an intrinsic distinction between a non-*qui tam* action brought against the United States and other parties and a *qui tam* suit brought on behalf of the United States against its former co-defendant." For the same reasons, the court found that the defendant would not have been on notice of the plaintiff's *qui tam* claim. The court also found that permitting *qui tam* claims to relate back to non–*qui tam* claims would frustrate the purpose of the FCA by allowing multiple private suits in situations where the government has chosen not to act. Accordingly, the court affirmed the decision of the district court.

A. Appellate Issues

U.S. ex rel. Eisenstein v. City of N.Y., 2009 WL 1576570 (U.S. June 8, 2009)

The petitioner filed a *qui tam* action against the City of New York and four of its employees, alleging that the city deprived the government of tax revenue by deducting fees that it charged to non-resident workers from their taxable income. The government declined to intervene but requested continued service of pleadings. The United States District Court for the Southern District of New York granted the City's motion to dismiss and entered final judgment. The relator, who was proceeding pro se, filed a notice of appeal in the Second Circuit 54 days after the district court entered judgment. The Second Circuit dismissed the relator's appeal as untimely, holding that since the government did not intervene in the action, it was therefore not a party to the action, and thus, pursuant to Rule 4 of the Federal Rules of Appelate Procedure, the relator had 30—not 60—days in which to file his notice of appeal. The relator (who was now represented by counsel) appealed to the United States Supreme Court and the Court granted certiorari.

The Court determined that the government did not become a party to privately filed *qui tam* actions until it intervened in the case. The relator argued the government was a party to such actions even without intervening, because it is always named in the caption and is always the real party in interest all FCA cases, it has the ability to request pleadings and deposition transcripts, and it is always bound by the judgment in non-intervened cases. The Court rejected this argument and reasoned that conferring party status on the government when it declined to intervene would render the FCA's intervention procedure superfluous, since the government would not need to intervene in FCA cases if it was already a party. The Court noted that the FCA and FRAP 4 use the term "party," not "real party in interest," that a case caption can contain the name of a person or entity without that person or entity necessarily becoming a party, and that a judgment's ability to bind the government does not provide a basis to conclude the government was a party to the action. The Court further reasoned that if the government was a party to non-intervened actions, then it would already have the right to receive pleadings and deposition transcripts and would not need to request them. Ultimately, the Court determined that the FCA's intervention provisions demonstrated Congress's intent to give the government the discretion to intervene, and the Court did not want to disregard this intent by forcing party status upon the government when it chose not to intervene. Thus, the Court rejected the petitioner's arguments and held when the government declines to intervene in a *qui tam* action, it is not a party to the action

for purposes of filing an appeal. Consequently, since the petitioner filed his notice of appeal more than 30 days after entry of the district court's judgment, the Court affirmed the Second Circuit's dismissal of the appeal as untimely.

U.S. ex rel. Rodriguez v. Our Lady of Lourdes Med. Ctr., 2008 WL 5411717 (3rd Cir. Dec. 30, 2008)

The relators, filed a *qui tam* action against the medical center that had formerly employed them as nurses, alleging that the defendant operated federally funded medical services programs for the homeless, poor and uninsured, and that beneficiaries of the programs could have prescriptions filled by persons who were not licensed pharmacists under New Jersey law. The relators contended that this practice amounted to a false certification of compliance with state law, and thus, a violation of the FCA. The government declined to intervene in the case, and the defendants moved to dismiss, under Federal Rules of Civil Procedure 12(b)(6) and 9(b). The district court granted the motion, finding that the relators failed to allege a violation of the FCA, presumably because they did not identify any instances of false claims being submitted. The relators appealed to the Third Circuit, arguing that they adequately pled an FCA violation under an implied false certification theory by alleging that the defendant received payments without disclosing that it had violated New Jersey law.

The Third Circuit first noted that the relators' appeal was filed 56 days after the district court entered judgment. Thus, the circuit court initially needed to determine whether the relators' appeal was timely, pursuant to Federal Rule of Civil Procedure 4(a)(1), which provides for a general 30-day appeals period and only extends that period to 60 days when the United States is a party. The Third Circuit noted that the Fifth, Seventh and Ninth Circuits apply the 60-day deadline even when the government does not intervene, while the Second, and Tenth Circuits apply the 30-day deadline under those circumstances. The Third Circuit agreed that the 60-day deadline should apply, because even if the government does not intervene, it is still the "party" to the action, as the government's name is still on the caption, the government retains the right to stay involved in the litigation and settlement of the case, and the government is entitled to at least 70 percent of any recovery. The court also observed that applying the 60-day period avoids confusion.

The court then determined that the district court failed to acknowledge the relators' theory of liability—that the defendant falsely certified that it complied with applicable state law in connection with its receipt of federal funds. The court noted, though, that the false certification theory of FCA liability—both express and implied—has not been adopted by the Third Circuit. The court also stated that even if the false certification theory had been adopted in the Third Circuit, the relators' case still should have been dismissed, finding that the relators failed to

assert that the defendant's receipt of federal funds was conditioned on—or at least relevant to—its compliance with the regulations governing pharmacists' licenses. Consequently, the Third Circuit affirmed the district court's dismissal of the relators' complaint for failure to state a claim.

U.S. ex rel. Shutt v. Community Home and Health Care Services, Inc., 2008 WL 5220273 (9th Cir. Dec. 16, 2008); *U.S. ex rel. Shutt v. Community Home and Health Care Services, Inc.*, 2008 WL 5233478 (9th Cir. Dec. 16, 2008)

The relator brought a *qui tam* action against a home health service provider and its owner, alleging Medicare fraud. The government also brought a criminal action arising out of the same fraud, in which the owner entered a guilty plea and agreed to pay full restitution. Subsequently, the government intervened in the *qui tam* action. The United States District Court for the Central District of California granted the government's motion for summary judgment and trebled the damages admitted by the owner in her plea agreement. The government's non-FCA claims were dismissed without prejudice. The district court, however, retained jurisdiction over the issue of relator's share. The defendant appealed the district court's summary judgment ruling to the Ninth Circuit, arguing that the district court's judgment subjected her to double jeopardy and was an excessive fine under the Eighth Amendment. The Ninth Circuit first determined that the district court's judgment was final and appealable, notwithstanding the fact that the district court retained jurisdiction over the issue of relator's share. The circuit court then affirmed the district court's judgment with respect to damages under the FCA.

Appeal When District Court Retains Jurisdiction over Collateral Issues

Although neither party disputed appellate jurisdiction, the Ninth Circuit's opinion focused primarily on whether it had jurisdiction to hear the appeal. The circuit court recognized that the district court's grant of summary judgment was final and appealable, but noted that the district court still retained jurisdiction over the relator's share issue. It noted that the issue of a relator's share involved distinct factual inquiries than the main action and that the relator's share guidelines are generally not relevant to a defendant's FCA liability. The Ninth Circuit also observed that relator's share issues might become moot if the appeals court determines that the underlying FCA claim should have been dismissed or that summary judgment should have been granted in the defendant's favor. Hence, the court decided that the issue of a relator's share was collateral to the main action and held that the judgment on the merits of an FCA claim is a separate, final and appealable decision even when the issue of a relator's share is still pending. Finally, without further explanation, the circuit court stated: "[w]e therefore reach the merits of this appeal and affirm the district court's grant of summary judgment for the reasons stated in an *unpublished memorandum disposition* filed herewith."

Calculation of FCA Damages

In the unpublished memorandum disposition, the Ninth Circuit noted that, prior to the FCA litigation, the owner pled guilty to various health care fraud charges, and agreed to make restitution. On appeal, the owner challenged the district court's judgment in the FCA case on the grounds that the FCA case subjected her to double jeopardy, in violation of the Fifth Amendment, and both defendants argued that the district court's judgment violated the "excessive fines" provision of the Eighth Amendment. The circuit court observed that the owner's plea agreement—which she said she voluntarily agreed to after carefully discussing the matter with her attorney—specifically stated that she agreed "not to make any double jeopardy challenge to any administrative or civil forfeiture or civil fraud action arising out of the course of conduct that provides the factual basis for the [criminal] information." The court further held that a defendant cannot maintain a claim for double jeopardy, simply because she did not know the severity of the civil penalties against her at the time of her plea agreement. The court stated that this defendant "need not have been aware of all the possible circumstances that might ensue from the waivers obtained in the plea agreement for the waivers to be knowing and voluntary." In addition, with respect to the defendants' argument that the damages and penalties assessed by the district court were excessive, the circuit court found that the single $5,500 civil penalty and the $1.8 million in treble damages were not grossly disproportionate to the offense, as the district court found that the government's actual damages due to false claims were considerably higher than what was agreed to as part of the criminal plea agreement and may have even exceeded the treble damages award in the civil case, especially once the government's costs of investigating and litigating the fraud are factored in. Even if the district court's damages award exceeded the government's actual damages, the Ninth Circuit continued, "[g]iven the seriousness of the offense, the resulting non-pecuniary harm caused to the government, and the need to deter difficult-to-detect fraudulent claims, Congress's decision to impose a penalty that may sometimes substantially exceed actual damages is not unreasonable." Finally, the court found that the civil and criminal proceedings could have resulted in a maximum penalty of over $2 million and ten years in prison. Therefore, the damages and penalties assessed were below the statutory maximum, and thus, not excessive. Accordingly, the court affirmed the district court's summary judgment decision.

U.S. ex rel. Eisenstein v. City of New York, 2008 WL 3840447 (2nd Cir. Aug. 19, 2008)

A group of relators filed a *pro se qui tam* suit against the City of New York and Mayor Bloomberg in the U.S. District Court for the Southern District of New York, alleging that the city violated the FCA by requiring non-resident city employees to pay a fee equivalent to the city taxes paid by city employees who were residents. The relators' theory was that the federal government was being deprived

of tax revenue because non-resident city employees who were required to pay the fee could take a tax deduction for the fee, and thereby reduce their taxable income. The federal government declined to intervene and the district court dismissed the relators' complaint for failure to state a claim. The relators filed a notice of appeal 54 days later. The circuit court then asked both the relators and the United States to explain whether the typical 30-day time limit for filing a notice of appeal applied, or whether the 60-day time limit (which is reserved for appeals in which the United States is a party) applied. Soon after, the city moved to dismiss the appeal, arguing that the notice of appeal was not filed in time.

The circuit court, after reviewing Federal Rule of Appellate Procedure 4(a)(1), held that the extended 60-day time limit only applies when United States is a "party." The court noted that "the word 'party' refers to the person participating in the proceedings with control over the litigation." Notwithstanding the fact that all *qui tam* cases are brought in the name of the United States and that the United States, as the "real party in interest," must still approve the settlement of any non-intervened *qui tam* case, the circuit court held that the United States is not a party to non-intervened cases. The court's reasoning was based on the fact that: (1) once the United States declines intervention, it can only intervene upon a showing of good cause; (2) the United States is no longer served with pleadings in non-intervened cases, unless it specifically requests to be served; and (3) the United States is not liable for any expenses incurred by a relator who proceeds in a non-intervened case. The court rejected the relators' argument that the United States was necessarily a party, since it was the real party in interest to the litigation. The court also rejected the respective holdings of other circuit courts and determined that "the United States' status as a real party in interest is by itself insufficient to trigger the 60-day filing period." The Second Circuit reasoned that Rule 4(a) could have explicitly specified that the 60-day period applies to situations where the United States is either a party or the real party in interest, but it does not. The court further declared that "the term 'real party in interest' exists only to distinguish the litigation interest it covers from those of a 'party' who is the person responsible for prosecuting the action." Thus, the court held, for purposes of Rule 4(a), the United States was not a "party" to the litigation, since it "played no role in this matter before the district court." Consequently, since Rule 4(a) confers subject matter jurisdiction on appellate courts, the circuit court determined that it was without authority to hear the relators' appeal, since their notice of appeal was filed out of time.

In addition, although the circuit court did not reach the issue, in a footnote referencing its decision in *U.S. ex rel. Mergent Servs. & John Bal*—a case decided on the same day (and discussed below)—the court also mentioned that relators are barred from pursuing FCA actions as *pro se* litigants, which would have provided another grounds for affirming the district court's decision and for dismissing the relators' appeal.

B. Calculating Damages and Civil Penalties

U.S. ex rel. Resnick v. Weill Medical College of Cornell University, 2009 WL 637137 (S.D.N.Y. Mar. 5, 2009)

The relator brought a *qui tam* action against her former employer, a university, and a professor, alleging that the defendants submitted false claims to the government in order to receive research funds. Specifically, the relator alleged that the professor over-committed her professional time, misrepresented data regarding the research, fraudulently accounted for the grant funds, and submitted the same project multiple times. Upon investigation, the government identified ten grants misstating professional time and estimated that the value of the grants should be reduced by nine percent. Subsequently, the government intervened and reached a tentative settlement. The relator opposed the settlement and sought additional discovery. The United States District Court for the Southern District of New York found that the calculation of damages in the case was complex because damages could be calculated either by considering the whole value of the grant or by finding the difference between the amount paid and the amount that should have been paid. Accordingly, the court held that the settlement was reasonable, especially considering the complexity of the legal issues of the case. Furthermore, the court also denied the relator's request for additional discovery.

Daewoo Engineering and Const. Co., Ltd. v. U.S., 2009 WL 415490 (Fed. Cir. Feb. 20, 2009)

A contractor brought a breach of contract action against the government in the United States Court of Federal Claims, alleging that the government breached its duties to cooperate and share its superior knowledge in a road construction contract. As a result, it sought adjustment of the contract price, including greater projected costs of contract completion. The government counterclaimed, alleging violations of the FCA and the Contract Disputes Act. The Court of Federal Claims awarded the government the statutory penalty under the FCA, as well as a remedy under the Contract Disputes Act. The Court of Appeals for the Federal Circuit affirmed, finding that the claim for projected costs was fraudulent because it was based on erroneous assumptions, was unsupported by evidence, and was used as a negotiating ploy. Accordingly, the court affirmed the statutory penalty award under the FCA as well as the award under the Contract Disputes Act.

U.S. v. Incorporated Village of Island Park, 2008 WL 4790724 (E.D.N.Y. Nov. 3, 2008)

The FCA claim arose from the alleged misuse of HUD funds in a Community Development Block Grant Program and a section 235 Housing Program. The government's motion for summary judgment on its FCA claims was granted. The matter was then referred to a magistrate judge, who issued a report and recommendations regarding money damages and penalties. Specifically, the magistrate recommended that the government was entitled to double the amount of damages before deducting any compensatory payments. The Village of Island Park then filed a motion for reconsideration of the original order granting summary judgment. It also objected to the magistrate judge's damages calculation, arguing that it violated the Eight Amendment's Excessive Fines Clause and that it improperly calculated which damages should have been doubled. The court denied the motion for reconsideration, concluding that there was no equitable consideration in favor of it. It then denied the motion objecting to the damages calculation because it found the damages were completely remedial in nature. In particular, the court held that double damages under the FCA were remedial because the additional damages were necessary in order to make the government whole. Hence, the double damages did not violate the Eighth Amendment's Excessive Fines Clause. The court then held that the magistrate correctly calculated the damages. It held that the make-whole purpose of the Act was best served by doubling the government's damages before deduction of any compensatory payments. Accordingly the court denied the defendant's objection and adopted the magistrate judge's report and recommendations.

U.S. v. United Technologies Corp., 2008 WL 3007997 (S.D. Ohio. Aug. 1, 2008)

The government filed a complaint asserting allegations against the defendant corporation for violating the FCA, as well as for common law fraud, breach of contract, payment by mistake, and unjust enrichment. The government alleged that the defendant concealed relevant materials when it submitted a cost estimation. The United States District Court for the Southern District of Ohio concluded that the government suffered no actual damages, but that each invoice the defendant submitted to the government constituted a violation of the FCA. As a result, the court awarded civil penalties under the FCA in the amount of $10,000 per invoice submitted, for a total of $7,090,000. The court's rationale, in part, stemmed from its application of the "natural tendency" test. Under this test, focus is placed, not on the actual effect of the false statement when it is discovered, but rather, on the false statement's potential effect at the time it was made. Additionally, under the test, materiality is presumed if the "natural tendency" of the false statement has the potential effect of causing the payment of a false claim. The court observed that the probable and natural consequence of defective pricing data is to cause an overstated price, and thus found that each invoice submitted by the defendant violated the FCA, since the defendant knowingly made a false statement or record to get a fraudulent or false claim paid by the government. Although the defendant argued that the government did not rely on the false assertions, the court held that reliance is not an element of a cause of action under the FCA.

***See U.S. v. Dolphin Mortg. Corp.*, 2009 WL 153190 (N.D. Ill. Jan. 22, 2009) at page 186.**

***See U.S. v. Eghbal,* 2008 WL 5101943 (9th Cir. Dec. 5, 2008), at page 18.**

***See U.S. ex rel. Shutt v. Community Home and Health Care Services, Inc.*, 2008 WL 5220273 (9th Cir. Dec. 16, 2008); *U.S. ex rel. Shutt v. Community Home and Health Care Services, Inc.*, 2008 WL 5233478 (9th Cir. Dec. 16, 2008), at page 163.**

C. Circumstantial Evidence

U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, 2008 WL 4277153 (D.D.C. Sep. 19, 2008)

The relator filed a *qui tam* action against a medical treatment center company, various directors, and affiliated hospitals. The complaint alleged that the defendants were involved in a fraudulent scheme of hiring medical directors and paying them to generate referrals to the treatment center. The defendant treatment center moved for summary judgment which was granted in part and denied in part by the United States District Court for the District of Columbia. In particular, the district court held that direct claim evidence relating to 89 of the 276 medical directors was sufficient evidence of claim submission in general for the court to allow claims against the remaining 187 medical directors. Subsequently, the treatment center moved to reconsider that portion of the court's opinion. Using the same reasoning, the court denied the defendant treatment center's motion to reconsider. It also denied the defendant's motions for certification of the denial of summary judgment and to reopen discovery.

Circumstantial Evidence

The relator produced Medicare claim evidence regarding 89 of the 276 medical directors involved in the case. The defendant contended that summary judgment should be granted in the absence of direct evidence as to each specific director's claim submissions. The court disagreed and held that evidence of fraud as to a subset of individuals can create a genuine issue of material fact as to a related subset of individuals. Accordingly, the claim evidence relating to a subset of medical directors created circumstantial evidence sufficient to create a genuine issue of material facts as to the entire subset of medical directors. The court cautioned, however, that this approach is not appropriate in all cases and was applicable in this case because the relator alleged a scheme of hiring medical directors and paying them to generate referrals to the medical center. Hence, it found that the evidence of fraud was not in the claim forms themselves but in the relationship between the medical directors and the medical center. Accordingly, the court denied the motion to reconsider the summary judgment order.

D. Costs and Attorney's Fees

U.S. ex rel. Thompson v. Walgreen Co., 2009 WL 1405450 (D. Minn. May 18, 2009)

The relators filed a *qui tam* action against a pharmacy, alleging submission of false bills to Medicaid. The government intervened, and the parties settled. The relators moved for attorneys' fees and costs. In response, the defendant contended that the relators' request included fees for unnecessary and unrelated work and sought a reduction in the number of hours allowed.

A magistrate judge was assigned to resolve the issue. The magistrate first observed that attorneys, especially those from smaller firms and sole practitioners, often continue to conduct research throughout their careers. As a result, she recommended allowing the relators' motion with respect to those hours. However, she concluded that some of the hours that claimed in the relators' motion were not spent on matters that advanced the FCA litigation against the defendants. As a result, the magistrate issued a report, recommending that the relators' motion be granted in part. Specifically, the magistrate recommended disallowing hours spent if the attorney's level of experience indicated that the work was duplicative. She also ruled that the relators' attorneys' discussions with the media constituted marketing, not substantive legal work and also recommended that those hours be disallowed. Moreover, she recommended disallowing time spent contacting officials in states that did not join or did not remain in the litigation through settlement. In addition, she held that hours spent on activities that did not advance the *qui tam* litigation, such as a relator's severance from the defendant and the tax implications of settling the case were not allowed. She recommended that fees and costs incurred regarding recovery of the relators' share from the government be disallowed, since the defendant was not involved in that collateral proceeding. She also found that some of the relators' attorneys' billing entries were imprecise and recommended that any billing entries that were not precise enough to enable the court to determine the reasonableness of the hours should be disallowed. She ruled that time spent solely on travel was not compensable and recommended that those hours be disallowed.

Neither part timely filed an objection to the magistrate's report and recommendation. Thus, the United States District Court for the District of Minnesota granted the relators' motion in part, consistent with the magistrate's report and recommendation.

U.S. ex rel. Woodruff v. Hawaii Pacific Health, 2009 WL 734057 (D. Haw. Mar. 18, 2009)

The plaintiffs brought a *qui tam* action against three health care providers, alleging submission of false claims for procedures performed by unauthorized nurses or without the required physician supervision. They also alleged retaliatory discharge. The government declined to intervene. After two amended complaints, the United States District Court for the District of Hawaii granted the defendants' motion for summary judgment. The defendants then moved for attorney's fees and expenses. The court referred the matter to a magistrate judge, who noted that the plaintiffs' claims were not clearly frivolous, as they made a *prima facie* case and had some evidentiary support for their allegations. The magistrate judge also found that the defendants failed to offer any evidence suggesting that the plaintiffs intended to harass the defendants. The magistrate judge accordingly recommended that the defendants' motion be denied.

Clearly Frivolous

The magistrate judge concluded that the plaintiffs' claims were not clearly frivolous, since, as a general rule, a finding that a prima facie case has been made weighs strongly against a finding of frivolousness. Since, in the order granting the defendants' summary judgment motion, the district judge had ruled that a *prima facie* case had been made, the magistrate judge found that it was unlikely that the plaintiffs' allegations were clearly frivolous. In response, the defendants argued that the *prima facie* showing did not apply to all of the plaintiffs' allegations, some of which were dismissed as the litigation progressed. Hence, the defendants argued, the fact that the plaintiffs made a *prima facie* showing with respect to some of the claims should be given little weight. The magistrate judge disagreed, however, finding that the plaintiffs' *prima facie* showing contained a significant number of false claims and finding that the fact that some claims were dismissed did not mean that they were frivolous.

The magistrate judge then rejected the defendants' argument that the plaintiffs' claims were frivolous because they had no factual basis. Even though the court ultimately found that the plaintiffs' factual allegations were wrong, the judge held that deposition testimony and the plaintiffs' disclosure statement contained some basis for the allegations. Accordingly, the court found that the plaintiffs' claims were not frivolous.

Clearly Vexatious

The magistrate judge also found that the plaintiffs' allegations were not clearly vexatious, noting that there was no evidence of a desire for revenge against the defendants because the plaintiffs had no heightened personal stake in the litigation. Second, the magistrate found that the plaintiffs did not deliberately delay the case. Third, the judge held that even though this case was the third case between the parties, a finding that the case was clearly vexatious would be inappropriate, since each case raised distinct issues. Finally, the judge found that though the claims were inarticulately pled, the basic allegations were consistent throughout the litigation. Hence, the court found that the action was not clearly vexatious and denied the defendants' motion for fees.

U.S. ex rel. Woodruff v. Hawaii Pacific Health, 2008 WL 5115051 (D. Haw. Dec. 5, 2008)

The plaintiffs filed a *qui tam* action against their former employers, alleging submission of false claims for procedures performed by unauthorized nurses or without the required physician supervision. The plaintiffs also alleged anti-retaliatory termination from their employment. The government declined to intervene. The defendants' motion for summary judgment was granted and, pursuant to Fed.R.Civ.P. 54(d)(1). The defendants filed a bill of costs. The plaintiffs objected to the bill of costs, arguing that the FCA, in anti-retaliation claims, precluded the award of costs under Fed.R.Civ.P. 54(d)(1) to defendants. The United States District Court for the District of Hawaii, however, noted that the plaintiffs' action was dominated by *qui tam* claims, and held that, while section 3730(d)(4) references "reasonable attorneys fees and expenses," nothing in section 3730(d)(4) precludes or displaces awards of costs under Fed.R.Civ.P. 54(d)(1). Thus, the court held that the defendants were entitled to costs to the extent they prevailed on the *qui tam* claims.

U.S. ex rel. Marchese v. Cell Therapeutics, Inc., 2008 WL 4950938 (W.D. Wash. Nov. 18, 2008)

After settling a *qui tam* action against a biopharmaceutical company, the relator filed a motion for reasonable attorney fees and costs. Although the United States District Court for the Western District of Washington granted the relator's motion, it denied many of the relator's claimed costs and fees. The court first noted that although the relator's primary counsel was from a different jurisdiction, the relator hired local counsel to assist in his representation. Consequently, the court required the relator to use the local counsel's billing rates to calculate attorney's fees. The court also held that the relator was not entitled to attorney fees that were not related to the issues on which the relator prevailed. As a result, the court denied fees that (1) were incurred after the settlement with the defendant; (2) related to prosecution of defendants not included in the settlement; and (3) related to the relator's employment claims against the settling defendant. Moreover, the court found that the costs the relator claimed for retaining co-counsel were excessive, since the relator's original counsel already had extensive litigation experience. For this reason, the court also determined that the claimed costs incurred for retaining an outside trial consultant were unreasonable. Additionally, the court capped all travel costs at the per diem rate allowable for government attorneys, since the case was a *qui tam* action. Furthermore, the court found the relator's requested fees re-

lated to preparing the fee motion at issue were intolerably high, and held that the substance of the motion did not justify the number of hours claimed—the parties were ordered to meet and confer in order to recalculate the fees associated with filing the fee motion. Finally, the court did allow fees for time spent in defending the relator against criminal liability, noting that those efforts related to the *qui tam* action and that the relator "was required to present his position to the government and demonstrate that he should not be considered a target of the investigation in order to assist the government in its prosecution."

***See U.S. ex rel. Ritchie v. Lockheed Martin Corp.*, 2009 WL 565517 (10th Cir. Mar. 6, 2009) at page 106.**

***See U.S. ex rel. Vuyyuru v. Jadhav*, 2009 WL 331967 (4th Cir. Feb. 12, 2009) at page 51.**

***See U.S. ex rel. Rafizadeh v. Continental Common, Inc.*, 2008 WL 5265188 (5th Cir. Dec. 19, 2008), at page 126.**

E. Government Intervention

U.S. ex rel. Roberts v. Sunrise Senior Living, Inc., 2009 WL 499764 (D. Ariz. Feb. 26, 2009)

The relators brought a *qui tam* action against a senior care facility, a hospice services provider, an investment consultant, and its affiliates, alleging submission of false claims to Medicare. The defendants moved to dismiss the complaint. Initially, the government declined to intervene because its investigation was incomplete. However, while completing its investigation, the government discovered additional evidence of fraud and then moved to intervene. The United States District Court for the District of Arizona granted the motion. It found good cause for intervention because there was newly discovered evidence, the defendants had not answered the relators' complaint, and no discovery had occurred. The court then denied the defendants' motion to dismiss as moot, since the government intervened and the claims asserted were subject to change.

F. Government Employee Relators

See U.S. ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp., 2008 WL 4149638 (10th Cir. Sep. 10, 2008), at page 62.

G. Identifying Federal Government Funds

U.S. ex rel. DRC, Inc. v. Custer Battles, LLC, 2009 WL 971017 (4th Cir. Apr. 10, 2009)

The case was originally filed in the U.S. District Court for the Eastern District of Virginia, by a group of relators alleging False Claims Act violations against Custer Battles and a group of its affiliates and subsidiaries—a group of defendants who entered into a contract with the Coalition Provisional Authority ("CPA"), which governed Iraq from 2003–2004. The defendants ("Custer Battles") entered into two contracts with the CPA. The first contract provided for Custer Battles to assist the CPA in coordinating a program to exchange Iraq currency bearing Saddam Hussein's likeness, for currency that did not. Pursuant to the contract, the defendants were to be reimbursed for their actual expenses, plus an additional 25%. Although Custer Battles submitted its invoices to U.S. military personnel who were working with the CPA, the CPA used a combination of U.S. Treasury funds and funds from non-U.S. sources to make payments under the contract. The second contract with the CPA required Custer Battles to provide security at the Baghdad airport. This was a fixed-price contract. The relators—DRC, Inc. and its managing director, Robert Isakson ("DRC")—provided subcontractor services on Custer Battles' contracts with the CPA. DRC alleged that Custer Battles submitted inflated invoices to the CPA and did not provide sufficient staff under the airport contract. In addition, William Baldwin, a former Custer Battles employee, filed an FCA claim against individual defendant Custer Battles, alleging retaliation for his whistleblowing activity. The result was a *qui tam* action alleging violations of FCA sections 3729(a)(1), (a)(2), (a)(3), and (h). The United States declined to intervene in the case, but filed several amicus curiae briefs throughout the litigation and participated in oral argument, all on behalf of the relators.

Custer Battles moved for summary judgment, and succeeded in getting the conspiracy claim dismissed, as the district court found that each of the defendants were related entities, and thus, could not conspire with one another. The district court also limited DRC's section 3729(a)(1) and (a)(2) claims to $3 million—the amount that could be directly traced to U.S. Treasury funds—although Custer Battles received far more money under the two contracts. The district court then severed and tried the dinar exchange contract claims and the retaliation claim, and a jury found all the defendants liable on those claims. However, the district court overturned the jury's verdict and issued a judgment as a matter of law, finding that the relators failed to prove their (a)(1) claim, since they could not show that invoices were presented to the United States, but only to the CPA. The district court then considered DRC's airport contract claims and granted summary judgment in favor of the defendants, finding that the relators failed to allege the necessary elements of an FCA claim. The relators appealed to the Fourth Circuit, arguing that the district

court erred in limiting their claims on the dinar exchange contract to $3 million, that the district court erred in ruling that the relators failed to show that the defendants presented false claims to the United States, and erred in granting summary judgment on the airport contract. The Fourth Circuit held that the district court erred in limiting the fraud claim because all the claims were paid either directly by the government or from funds provided by the government. Furthermore, it held that the district court erred in granting judgment as a matter of law because the alleged false claims were presented to instrumentalities of the government. Lastly, it affirmed that the relators failed to demonstrate fraud regarding the second contract. Accordingly, the circuit court affirmed in part, reversed in part and remanded.

Lack of Government Funds

The Fourth Circuit first considered whether or not the district court properly restricted DRC's claims on the dinar exchange contract to $3 million, and found that, as a matter of fact, "Custer Battles made claims to a grantee of U.S. money, *i.e.*, the Coalition Authority, and that the claims were paid from the grantee's funds, *i.e.*, the Development Fund for Iraq, a portion of which was provided to the grantee by the U.S. government, *i.e.*, $210 million." Based on the Fourth Circuit's reading of the plain language of the statute, it determined that "a claim made to a grantee of U.S. money is not defined by the amount of money that the U.S. government paid directly to the claimant. So long as '*any portion*' of the claim is or will be funded by U.S. money *given to the grantee*, the full claim satisfies the definition of claim as used in § 3729(a)(1) or (a)(2)" (emphasis in original). Moreover, relying on the Supreme Court's holding in *Allison Engine Co. v. U.S. ex rel. Sanders*, the circuit court concluded that Custer Battles did not need to be in privity with the United States to be held liable for submitting false claims to a grantee of U.S. funds. Thus, the Fourth Circuit determined that the district court erred when it limited DRC's dinar exchange contract claims to $3 million, and reversed that decision. Although the circuit court found error in the district court's definition of "claim" for FCA purposes, it could not determine whether the United States actually suffered more than $3 million in damages. That issue was remanded to the district court, so that DRC could determine whether or not to elect a new trial regarding the dinar exchange contract claims.

Presentment Requirement

The Fourth Circuit also reversed the district court's ruling granting the defendants' motion for judgment as a matter of law. The circuit court held that the district court erred when it overturned the jury's verdict on DRC's (a)(1) claims, upon a finding that the defendants' presentment of claims to the CPA did not satisfy the FCA's requirement that claims be presented to the United States. The Fourth Circuit stated: "While we agree with the district court that § 3729(a)(1) requires that presentment be made to U.S. government personnel working in their official capacity, we conclude that the court erred in assuming that U.S. government personnel detailed to the Coalition Authority could not be working in their official capacities as U.S. government employees." In fact, the circuit court pointed to evidence presented by the relators, which showed that the U.S. military employees who contracted with the defendants were detailed to the CPA, but were always acting in their official capacities as employees of the United States, who were being paid by the U.S. Army and other U.S. agencies. The Fourth Circuit also clarified that although § 3729(a)(2) imposes liability on those who make or use false statements or records to get false claims paid or approved "by the Government," section (a)(1) does not contain the "by the Government" language. This distinction was significant to the circuit court, which held that "[s]ection 3729(a)(1) defines liability in terms of the *person* to whom the claim is presented, whereas § 3729(a)(2) defines liability in terms of the intended *source* of the payment or approval" (emphasis in original). The appellate court also made clear, based on the Supreme Court's *Allison Engine* opinion, that while section (a)(1) contains a presentment requirement, section (a)(2) does not—neither explicitly nor implicitly. Based on these distinctions, the Fourth Circuit reversed the district court's order granting the defendants motion for judgment as a matter of law, since the relators' evidence was "sufficient for a reasonable jury to conclude that Custer Battles presented or caused to be presented fraudulently inflated invoices to persons acting in their official capacity as U.S. officials or employees." However, the circuit court remanded to the district court the issues of whether the defendants' claims were materially false, whether the United States suffered damages, and whether the individual defendants had sufficient knowledge of the alleged fraud to be liable.

Fraud-in-Inducement Claim

Lastly, the Fourth Circuit considered the relators' argument that the district court erred when it granted the defendants' summary judgment motion on the airport contract. The relators argued that Custer Battles promised to provide a specific number of security personnel under the contract, but actually provided less personnel. The circuit court, however, found that the airport contract did not specify a number of security personnel to be provided, and noted that since the airport contract was a fixed-price contract, Custer Battles did not submit any invoices under that contract, which could have misrepresented the number of security personnel that Custer Battles provided. Accordingly, the circuit court affirmed the district court's grant of summary judgment in the defendants' favor regarding the relators' fraud-in-inducement claim on the airport contract. The appeals court agreed with the district court that "the relators have not presented evidence sufficient to support finding that Custer Battles violated the False Claims Act in connection with the Airport Contract."

U.S. ex rel. Irwin v. Significant Educ., Inc., 2009 WL 322875 (D. Ariz. Feb. 10, 2009)

The plaintiff brought a *qui tam* action against his former employer, a university, alleging that, in order to receive federal grants and student loans, the defendant falsely certified compliance with the incentive compensation ban, which prohibits schools receiving Title IV funds from basing enrollment counselor compensation on the number of enrollments. The relator, who worked as an enrollment counselor for the university, alleged that, in addition to that of several others, his own compensation violated the ban. The university moved to dismiss, arguing that the alleged fraud was permissible under Title IV, that the FCA did not apply because the payments were not received directly from the government, and that the complaint failed to plead fraud with sufficient particularity. The United States District Court for the District of Arizona held that the plaintiff alleged several impermissible activities under the Title IV rules, including an allegation that, on at least three occasions that his compensation would increase only with increased enrollment. In addition, the court rejected the defendant's argument that, pursuant to the Supreme Court's ruling in *Allison Engine Co. v. United States ex rel. Sanders*, the university was not liable under the FCA, because it did not receive funds directly from the government. The court held that this argument was misguided, since the issue was not whether the funds were transferred directly to the defendant, but rather, whether the defendant made a false statement to get the government to pay a claim. Since the relator alleged that the defendant falsely certified its compliance with the incentive compensation ban, in order to get the government to pay student loan funds, the court held that the relator properly pled an FCA claim. Finally, the defendant contended that the relator failed to plead fraud with sufficient particularity. The court held, however, that he pled many specific violations of the incentive compensation ban. Furthermore, he identified the defendant's employees involved in the alleged violations and how the defendant falsely certified compliance. Hence, the court held that the plaintiff pled fraud with sufficient particularity.

U.S. v. Midwest Transport, Inc., 2008 WL 4981076 (S.D. Ill. Nov. 24, 2008)

The government brought an action against a transport company alleging that the defendant submitted fraudulent fuel certification forms to the United States Postal Service. Specifically, the government alleged that the defendant's payment certification forms failed to disclose certain discounts the defendant obtained for fuel purchases. The government also asserted common law claims of payment by mistake and unjust enrichment. The defendant moved to dismiss, arguing that the FCA does not apply to claims submitted to the U.S. Postal Service. The defendant asserted that the Postal Reorganization Act specifically exempts the Postal

Service from FCA coverage and that Postal Service funds are distinct from U.S. Treasury funds, making the FCA inapplicable. The United States District Court for the Southern District of Illinois denied the defendant's motion, and held that the Postal Service is not exempted from the FCA. The court found that, notwithstanding its quasi-commercial nature, the Postal Service is still a federal agency, and that Postal Service funds are not distinct from the U.S. Treasury. Therefore, the court concluded that the U.S. Postal Service is protected by the FCA, and the defendant's motion to dismiss was denied.

H. *Pro Se* Relators

U.S. ex rel. Meidinger v. Lee Memorial Hosp, 2009 WL 1607801 (M.D. Fla. June 9, 2009)

A relator brought a *qui tam* action against a hospital, alleging violations of the FCA. The government declined to intervene, and the plaintiff proceeded pro se. The United States District Court for the Middle District of Florida dismissed the complaint without prejudice and held that a pro se relator cannot represent the government in an FCA action. Subsequently, the relator retained counsel, but his counsel withdrew. The court then granted the defendant's motion to dismiss for the plaintiff's failure to obtain counsel.

U.S. ex rel. Morgan v. Sci. Applications Int'l Co., 2009 WL 881346 (D.D.C. Apr. 3, 2009)

A relator brought a *qui tam* action against two federal contractors, alleging fraud and retaliatory discharge. The government declined to intervene, the relator's counsel withdrew, and the relator proceeded pro se. One of the defendants then moved to dismiss, arguing the relator could not litigate his FCA claims pro se and that he failed to state a retaliatory discharge claim. The United States District Court for the District of Columbia dismissed the relator's FCA claims, holding that an individual cannot represent the government pro se in an FCA action. The court also dismissed the retaliatory discharge claim, finding that the relator failed to allege any type of employment relationship between himself and the defendant. Accordingly, the court granted the motion.

Jones v. The Park at Lakeside Apartments, 2008 WL 4820083 (S.D. Tex. Nov. 5, 2008)

The relators filed a *qui tam* action acting as *pro se* litigants. The government declined to intervene. The United States District Court for the Southern District of Texas held that in a *qui tam* action the actual party in interest is the government. It found that even when the government declines to intervene, it is still bound by the outcome of the action. Accordingly, the court held that relators could not bring their FCA claims *pro se* because government interests were still at risk.

U.S. ex rel. Mergent Services v. Flaherty, 2008 WL 3840769 (2nd Cir. Aug. 19, 2008)

The relator, proceeding pro se, brought an FCA action in the United States District Court for the Southern District of New York, in which he alleged that the defendant submitted a false receipt to the government in order to receive reim-

bursement for costs never incurred. The district court dismissed the complaint, and held that *qui tam* actions cannot be brought pro se. The relator appealed, and the Second Circuit affirmed the district court's dismissal. The circuit court held that the FCA's provision requiring consent of the Attorney General prior to the dismissal of *qui tam* actions only applies in cases where the relator seeks a voluntary dismissal of an action or claim brought under the FCA, and not where the dismissal is ordered by the court. Moreover, the appeals court held that although relators have a stake in the FCA *qui tam* cases they initiate, the real party in interest is the government, and while relators are permitted to control their FCA litigation, the corresponding claims belong to the government. The court held that since relators lack a personal interest in FCA *qui tam* actions, they are not entitled to proceed *pro se*.

J. Meidinger v. Lee Memorial Hospital, 2008 WL 2704494 (M.D. Fla. July 2, 2008)

Pro se plaintiff J. Meidinger filed a *qui tam* complaint against defendant Lee Memorial Hospital, alleging that the defendant violated the FCA by filing several false Medicare claims. The government declined to intervene in the case. Relying on the Eleventh Circuit's ruling in Timson v. Timson, 518 F.3d 870 (11th Cir. 2008), the United States District Court for the Middle District of Florida dismissed the amended complaint without prejudice, holding that a pro se relator can not proceed with a *qui tam* action on behalf of the United States.

See U.S. ex rel. Eisenstein v. City of New York, 2008 WL 3840447 (2nd Cir. Aug. 19, 2008), at page 164.

I. *Res Judicata*/Collateral Estoppel

U.S. ex rel. Lusby v. Rolls-Royce Corp., 2009 WL 1855179 (7th Cir. June 30, 2009)

The plaintiff originally filed a personal employment suit against his former employer, alleging that certain of the defendant's engine parts were not properly manufactured, that the defendant misrepresented the quality of those parts when selling them to the U.S. military, and that when the plaintiff raised this issue with his superiors, they fired him in retaliation. The parties eventually agreed to dismiss the plaintiff's employment suit. However, before that suit was dismissed, the plaintiff filed a *qui tam* action against the defendant, alleging substantive violations of the FCA, based on the same facts. The United States declined to intervene in the *qui tam* case. The defendant moved to dismiss the relator's *qui tam* complaint, arguing that it did not meet Rule 9(b)'s particularity standard, and the U.S. District Court for the Southern District of Indiana dismissed the complaint on that basis. When the relator sought to amend his *qui tam* complaint, the district court refused to allow it, holding that the relator's *qui tam* action was barred by the res judicata effect of his prior employment suit, which had been dismissed. In addition, the district court held that an amended complaint would be futile, as the court determined that the relator's proposed amended complaint did not satisfy Rule 9(b) either. The relator appealed the district court's ruling to the Seventh Circuit. The circuit court held that the relator's FCA retaliation claim did not preclude his later *qui tam* action, and that although the relator's section 3729(a)(7) claim was properly dismissed for failure to satisfy Rule 9(b), his claim under section 3729(a)(1) was properly pled and could be maintained.

Claim Preclusion

The Seventh Circuit focused on the relator's argument that claim preclusion did not bar his *qui tam* complaint, because the two cases—the relator's personal employment suit and his *qui tam* suit on behalf of the government—did not involve the same parties. The Seventh Circuit agreed, and explicitly stated that "the resolution of personal employment litigation does not preclude a *qui tam* action, in which the relator acts as a representative of the public. The special status of the United States counsels against reflexive transfer of rules of preclusion from private to public litigation." The circuit court recognized the Supreme Court's recent decision in *U.S. ex rel. Eisenstein v. City of New York*, which held that the United States is not a party in *qui tam* cases in which it declines to intervene, but noted that the United States is still a real party in interest in such cases. The court also noted that combining personal claims—such as employment claims—with *qui tam* claims can be "awkward," since the FCA requires that *qui tam* complaints be filed under seal, that the seal not be lifted until the United States decides whether or not it will intervene in the case, that the relator must be represented by counsel, and that the relator be precluded from dismissing the suit unless the United States gives its permission. According to the Seventh Circuit, these controls on the relator "reflect a legislative view that the United States needs protection from bumbling relators"—presumably like the relator in this case, who initially filed an FCA retaliation action, but failed to include any claims regarding violations of the FCA's fraud anti-provisions. As a result of this awkwardness, the court concluded that it is often impractical for a plaintiff to pursue both personal claims and *qui tam* claims in one suit, and thus, a relator's "voluntary decision to file separate suits . . . should be respected." Furthermore, the circuit court took issue with the district court's conclusion that the dismissal of the relator's *qui tam* suit would not necessarily prejudice the United States, since the United States could simply file its own FCA action against the defendant. The Seventh Circuit, again relying on the *Eisenstein* decision, noted the Justice's statement that "the United States is bound by the judgment in all FCA actions regardless of its participation in the case." Thus, the circuit court held, the United States would be prejudiced by the dismissal of the relator's *qui tam* action, even though that dismissal was based on the preclusive effect given to a private employment suit that the United States neither had notice of nor could have ever joined. Consequently, the Seventh Circuit held that "a private employment suit under § 3730(h) does not preclude a suit under § 3730(a) or (b)," and stated that "as a practical matter our decision means that the outcome of a private employment suit never precludes a *qui tam* action (or a False Claims Act suit directly by the United States)." Hence, the district court's dismissal of the relator's complaint on the basis of *res judicata* was reversed.

Pleading Fraud with Particularity

The Seventh Circuit then turned its attention to the district court's holding that it would have been futile to allow the relator to amend his complaint, because his proposed amended complaint would not pass Rule 9(b) muster. The circuit court observed that the relator's claim under section 3729(a)(1) of the FCA identified the product that was alleged to have been improperly manufactured, the contracts between the defendant and the United States regarding that product, the defendant's alleged knowledge that its product did not meet contractual specifications, the defendant's alleged misrepresentations to the government, the dates the non-conforming parts were shipped, and even details of payments made by the United States to the defendant. Notwithstanding these allegations, the defendant was able to convince the district court that the relator's complaint was deficient because it failed it identify any specific request for payment from the defendant to the United States. The circuit court, though, determined that "[s]ince a relator is unlikely to have those documents unless he works in the defendant's accounting department, the district court's ruling takes a big bite out of *qui tam* litigation. We don't think it essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit." (emphasis supplied) The appeals court noted that the relator's theory of fraud was based on an inference that the must have defendant certified to the United States that its product met the contracts' specifications was false, and that the defendant knew that those certifications were false at the time they were given. The Seventh Circuit found that the relator's inference was plausible, since there was little chance that the defendant never certified the quality of its parts to the United States, and that plausibility was sufficient to meet Rule 9(b)'s heightened pleading standard. The court declared: "To say that fraud has been *pleaded* with particularity is not to say that it has been *proved* (nor is proof part of the pleading requirement)." Consequently, the Seventh Circuit reversed the district court's dismissal of the relator's claim under FCA section 3729(a)(1).

However, the court affirmed the dismissal of the relator's "reverse false claim" allegation, under FCA section 3729(a)(7), since the relator failed to allege sufficient facts in support of that claim, as he did not know what the military and miltary told each other during the negotiations of the contracts at issue and did not offer any evidence showing that the defendant committed fraud during its negotiations with the military.

U.S. v. Miller, 2009 WL 943514 (M.D. La. Apr. 7, 2009)

The government brought an FCA action against an individual, alleging that he fraudulently obtained payments from the Federal Emergency Management Administration, by allegedly obtaining disaster unemployment assistance benefits after misrepresenting that he lost his employment because of hurricane Katrina. Prior to the FCA case, the defendant pled guilty in a criminal action arising out of the same facts. The government moved for summary judgment on the FCA case and the United States District Court for the Middle District of Louisiana granted that motion, holding that the defendant's conviction precluded him from denying his liability in the subsequent civil action. Furthermore, the court found that the government was entitled to a statutory penalty and treble damages.

U.S. ex rel. Kennard v. Comstock Resources, Inc., 2009 WL 765002 (E.D. Tex. Mar. 23, 2009)

The relators brought a *qui tam* action against an energy company, alleging that the defendant submitted fraudulently undervalued royalty payments arising out of leased tribal land to the government. They also alleged that the leases had expired and the defendant improperly drilled two wells on the tribal land. The government declined to intervene. The defendant moved for summary judgment, contending that the relators' claims were precluded by the resolution of a related declaratory action. The United States District Court for the Eastern District of Texas held that the relators' claims were precluded by the declaratory action and dismissed those claims with prejudice.

Originally, the relators along with a Native American tribe brought *qui tam* actions against the defendant, alleging undervalued royalty payments, expired leases, and improperly drilled wells. The tribe eventually dropped its *qui tam* action and filed a separate suit in another court for a declaratory judgment that the leases at issue were null and void. In response, the defendant filed a declaratory action against both the tribe and the government, claiming that the leases were valid. Finally, the parties entered into a settlement agreement which, among other things, dismissed with prejudice of all claims that could have arisen out of the declaratory action. The defendants then moved to bar the relators' claims on the basis of *res judicata*.

Claim Preclusion

The court held that *res judicata* barred the relators' claims. Using the principles in *Taylor v. Sturgell*, 128 S. Ct. 2161 (2008), the court determined that there is privity between the government and a relator because they are in an assignor/assignee relationship (due to the government's partial assignment of its damages claim to the relator) and that a relator is a representative of the government. The court also found that relators are in privity with the government because relators are agents of the government. Even though the government had not intervened in the relators' case, the relators' litigation was still subject to the government's control. In particular, the government could still elect to intervene, is still served with pleadings, and still has an absolute veto over settlements. Hence, the court found that the relationship between the relators and the government was sufficiently close to trigger *res judicata*.

In response, the relators argued that since the government assigned its interest to the relators prior to filing of the declaratory action, the government could no longer give away the relators' interest in the matter. The court, however, noted that the government only gave away a partial assignment of the claim and retained the unilateral power to dismiss a *qui tam* action. The court further held that since the government may be bound by *res judicata* by a relator, it followed that the relationship between the two is close enough so that the government's actions will bind the relator.

The court then summarily found that the settlement of the declaratory judgment action occurred in a court of competent jurisdiction, was a final judgment on the merits, and arose out of the same nucleus of operative facts. Hence, the court concluded that the relators were bound by the 2006 judgment in the declaratory judgment action and dismissed the relators' action with prejudice.

U.S. ex rel. Becker v. Tools and Metals, Inc., et al. 2009 WL 577604 (N.D. Tex., Mar. 5, 2009)

A relator brought the present *qui tam* action against TMI Integrated Services, alleging violations of the False Claims Act in connection with the defendant's conduct as a government subcontractor that sold tools to Lockheed-Martin Company. Six months later, another relator filed a *qui tam* suit against Lockheed, also alleging violations of the FCA. The two cases were consolidated and additional, defendants were added. The government then elected to intervene against TMI, Lockheed, and two individual defendants (Todd Loftis, TMI's President & CEO and Linda Loehr, whom the government asserted was an officer, director, and ben-

eficial owner of TMI). However, the government only alleged common law claims against Loehr, and no FCA claims. The District Court for the Northern District of Texas dismissed the claims against Loehr with prejudice, finding that even if the court had personal jurisdiction over her (a question the court did not address), the government failed to state a claim against her, since it could not demonstrate that the corporate veil should be pierced and since it could not demonstrate that she owed a duty to the government that was breached.

Lockheed then moved to dismiss the government's FCA claims against it, arguing that the government was estopped from pursuing those claims since, when criminally prosecuting Loftis, the government took the position that Lockheed was a victim, not a cohort, of Loftis. The court rejected this argument, and found that the government never argued in Loftis' criminal case that Lockheed did not engage in any fraud, and that although Lockheed was initially a victim of the fraud, it eventually became aware of the fraud and did nothing to prevent it from continuing. The court concluded that "[g]iven that the court determines that the government has not taken inconsistent positions in the criminal prosecution of Loftis and in this case, the court determines that there is no basis for precluding the government's claims against Lockheed under a theory of judicial or equitable estoppel." Accordingly, the court denied Lockheed's motion to dismiss. In the same order, it also granted another defendant's motion to dismiss while denying a government motion to strike an argument. It also denied Lockheed's motion to dismiss the government's other claims.

U.S. v. Langley, 2009 WL 306733 (M.D. La. Feb. 9, 2009)

The government brought a civil action against an individual who was alleged to have submitted a false claim to the Federal Emergency Management Agency by falsely representing that he lived in New Orleans and sustained damages from Hurricane Katrina. Prior to the government's FCA case, the defendant pled guilty in a criminal action arising out of the same facts. Consequently, the government moved for summary judgment in the civil case. The United States District Court for the Middle District of Louisiana held that the defendant's criminal conviction precluded him from denying his guilt in a subsequent civil action and, as a result, the court granted the government's motion. Furthermore, the court found that the government was entitled to a statutory penalty and treble damages.

U.S. v. Dolphin Mortg. Corp., 2009 WL 153190 (N.D. Ill. Jan. 22, 2009)

The government brought suit against a company approved to originate HUD-insured mortgages. The suit arose out of seven fraudulent loan applications sent to HUD by an individual named Tamira. The defendant entered into an indepen-

dent contractor agreement with Tamira in which it authorized her to originate HUD-insured mortgages. While Tamira worked for the defendant, she originated the seven allegedly fraudulent loans at issue in this case, by allegedly falsifying borrowers' financial information to make them appear eligible for HUD-insured loans. Tamira also signed and submitted required documents to HUD certifying that she was an officer of the defendant. HUD approved the seven loans. The seven loans then went into default and HUD paid the mortgage insurance claims. The government brought criminal charges against Tamira and she pled guilty to one count of mail fraud in connection with those loans. This litigation then ensued.

Following Tamira's guilty plea, the government then moved for summary judgment against the defendant in this case. The court granted the motion in part, after finding that collateral estoppel did not apply. The court found that Tamira's actions violated the FCA and that the defendant was vicariously liable for her actions. It also found that the damages sought did not violate the Eighth Amendment. Finally, the court found that there was a material issue of fact in respect to one loan application and denied the motion for summary judgment as to that one application.

Tamira's Guilty Plea Did Not Estop the Defendants from Contesting Fraud

As a threshold matter, the court determined that although Tamira's guilty plea was made in a criminal proceeding and involved the same transactions, the defendant in this case was not a "defendant" in the criminal case, under FCA section 3731(d), since it was not part of the underlying criminal trial. As a result, the court held that the defendant was not collaterally estopped from challenging the government's allegations of fraud.

Tamira's Actions Did Violate the FCA

The court then analyzed whether or not Tamira's actions constituted a FCA violation. Relying on Seventh Circuit precedent, the court found that the false statements made in the HUD application could be false claims once the loans went into default. Since the defendant provided no evidence to contradict Tamira's admissions that she submitted false information, the court found that false claims were submitted. The court then found that the false statements were material to HUD's decision to approve the loan, since it only made sense that the falsified information would have influenced HUD's decision making, and since HUD regulations mandate that it deny applications that contain false statements. Accordingly, the court found that Tamira's actions violated the FCA.

The Defendant Was Vicariously Liable for Tamira's Actions

The court then determined that the defendant was liable for Tamira's actions under both actual and apparent authority theories of the doctrine of *respondeat superior*. The defendant was liable under an actual authority theory because it benefited from the false statements Tamira made while doing her job as a loan originator. The defendant was also liable under an apparent authority theory because it provided her with access to a computer program that allowed her to print out forms with the defendant's name pre-printed—forms that were necessary to receive HUD loans. She also signed documents as if she was authorized to do so on the defendant's behalf. While the defendant argued that HUD should have known that Tamira was not authorized to sign the certifications, the court stated that the defendant was in the best position to know that Tamira was acting outside of her authority. Accordingly, the court held that the defendant was vicariously liable for Tamira's actions.

The Damages Award Did Not Violate the Eighth Amendment

The court held that the damages of $1,545,237.83 were not unreasonable. The parties agreed that the government's actual damages were $980,000. Since the damages award was less than double the actual damages and the court had found that greater awards had been justified, it found that these damages did not violate the Eighth Amendment.

U.S. ex rel. Lusby v. Rolls-Royce Corp. 2008 WL 4247689 (S.D. Ind. Sep. 10, 2008)

The plaintiff, a former employee of the defendant, filed a *qui tam* action alleging that the defendant knowingly manufactured and sold defective aircraft parts to the government. The plaintiff had previously filed a complaint against the same company alleging age discrimination and unlawful retaliation in violation of the FCA. That earlier complaint was dismissed with prejudice by stipulation. In his subsequent FCA complaint (the complaint at issue), the plaintiff alleged that the defendant violated the FCA by: 1) presenting false documents to the government, certifying that the delivered aircraft parts conformed to contract specifications; and 2) inducing the government to settle the dispute over the faulty aircraft parts for a lower amount by making false statements to the government regarding its quality control procedures. The government declined to intervene. Upon motion, the United States District Court for the Southern District of Indiana then dismissed the second complaint for failing to plead claims with sufficient particularity but granted leave to the plaintiff to file an amended complaint. However, the plaintiff missed the deadline to file his amended complaint and then filed a motion for leave to file the amended complaint. The defendant opposed this motion, arguing that the proposed amended complaint was barred by res judicata, and that the plaintiff failed to plead his FCA claims with particularity as required by Fed.R.Civ.P. 9(b). The court denied the plaintiff's motion for leave to file an amended complaint and dismissed his suit.

Res Judicata

The court held that res judicata principles applied to FCA claims and compared the proposed amended complaint with the plaintiff's previous suit. The court found that the parties in both cases were identical, there was an identity of causes of action since both suits arose from the same allegations, and there was a final judgment on the merits in the first case, since a dismissal by stipulation is a final judgment with preclusive effect of barring claims that could have been raised in a prior suit. Accordingly, the court held that the proposed amended complaint was barred by the doctrine of res judicata.

Particularity Requirements Under Fed.R.Civ.P. 9(b)

The plaintiff argued that he had satisfied the heightened pleadings requirements for his allegations regarding FCA sections 3729(a) (1) & (2) by alleging the relevant contracts, the applicable regulations, the dates of shipments, and the payments made by the government. However, the court observed that he had neither identified the date nor the contents of a single claim. Instead, the court found that the plaintiff alleged an inference of fraud which can not satisfy the heightened fraud pleading requirements under Fed.R.Civ.P. 9(b). Similarly, the plaintiff's claim under section 3729(a)(7) did not identify the content or speaker of any false statement by the defendant company that induced the government to settle the contract dispute. Therefore, the court held that the proposed amended complaint did not plead its claims with particularity.

Reverse False Claims Allegation

The court also found that plaintiff's complaint failed to allege that the defendant company had an obligation to pay money to the government because the defendant did not have a pre-existing legal duty to pay the government. It held that defending a claim for payment by the government does not create an obligation under the FCA. Otherwise, it held that such an expansive reading of the term "obligation" would result in a flood of litigation. Accordingly, the court denied the motion for leave to file an amended complaint and dismissed the case with prejudice.

U.S. v. Khan, 2008 WL 2782669 (E.D. Mich. July 16, 2008)

Defendant was a member of a group that was indicted on various charges involving a scheme to defraud the Government. The Government commenced a civil action against the defendant, alleging, among other things, claims that the defendant was liable for four years of filing false claims, in violation of the FCA. Once the defendant pled guilty to one count of health care fraud in the criminal case, the Government moved for partial summary judgment on the issues of liability and civil penalties under the False Claims Act. Although the defendant had pled guilty in the criminal case, he asserted that he was only liable for one year of filing false claims, not for years, as the Government contended. The court found that

the defendant was estopped, by virtue of his guilty plea, from denying liability for all four years. The court also found the defendant liable for treble damages, and required him to pay a penalty for each claim filed. The Government's motion for partial summary judgment was granted.

The Government commenced a civil action against Amjad Khan, for his alleged involvement in a scheme to defraud the Government from 1996-1999. Khan was also criminally indicted and eventually pled guilty to one count of health care fraud. Following Khan guilty plea, the Government sought partial summary judgment on its civil claims under FCA subsections 3730(a) and (b) for presentment of false claims and false statements. Khan opposed the government's motion, arguing that his liability should be limited only to the year 1997. The Government argued that Khan should be estopped from denying liability by virtue of his guilty plea.

The U.S. District Court for the Eastern District of Michigan held that Khan was estopped from contesting liability for any of the four years, due to his guilty plea, and granted the Government's motion for partial summary judgment. The court held that a guilty plea in a criminal matter has a preclusive effect on similar, future proceedings, according to the doctrine of collateral estoppel. The court found that Khan's guilty plea estopped him from contesting his liability, since, in his plea, Khan agreed that the relevant conduct of the case included the years 1996-1999, and he agreed to pay restitution for Government losses sustained for all four years. Accordingly, the Government's motion for partial summary judgment was granted. The court also required Khan to pay three times the amount of restitution ordered by the court (totaling $3,203,097). Finally, the court imposed a penalty of $5000 for each false claim filed.

See U.S., ex rel. Ramadoss v. Caremark Inc., 2008 WL 3978086 (W.D.Tex. Aug. 27, 2008), at page 69.

J. Seal Requirements

U.S. ex rel. Summers v. LHC Group, Inc., 2009 WL 1651503 (M.D. Tenn. June 11, 2009)

A relator filed a *qui tam* action against her former employer, a health care provider, alleging retaliatory termination under the FCA. The relator's counsel did not file the complaint in camera or under seal. Eventually, the relator's counsel moved to seal the complaint, but the magistrate judge denied the motion because the motion did not include a memorandum of law and did not provide a basis for granting the motion. The defendant then moved to dismiss the complaint with prejudice for failure to comply with the FCA's mandatory filing requirements and, alternatively, moved to dismiss the complaint for lack of particularity. The defendant also moved for attorneys' fees. Subsequently, the relator moved to amend her complaint. The government filed a statement of interest without taking any formal position on the defendant's motion but contended that any dismissal of the case should occur without prejudice to the government. The relator opposed the defendant's motion to dismiss, arguing that the FCA only permits a dismissal if the Attorney General provides written consent for dismissal and the reasons for consenting. The United States District Court for the Middle District of Tennessee rejected the relator's argument, finding it to be without merit. The court noted that the FCA's seal provision gives the government time to investigate the relator's allegations and to determine whether to intervene. The seal provision also prevents alleged wrongdoers from being tipped off about a government investigation into their alleged fraud. The court concluded that the relator's failure to file her complaint in camera and under seal constituted a fatal deficiency that deprived her of the ability to pursue the statutory remedy and required the dismissal of her complaint. Her failure to file her complaint in camera and under seal defeated the underlying purposes of the FCA's procedural requirements. However, although the court dismissed the complaint with prejudice as to the relator, the complaint was dismissed without prejudice as to the government.

Since the court dismissed the complaint on the basis of the relator's failure to satisfy the FCA's seal requirements, it did not address whether or not the allegations in the complaint were pled with particularity. The court also denied the defendant's motion for attorneys' fees, determining that it lacked a basis for finding that the relator's complaint was frivolous, vexatious, or brought primarily to harass. Finally, the court denied the relator's motion to amend the complaint as moot, due to futility.

K. Substitution of Relator

U.S. ex rel. Colucci v. Beth Israel Med. Ctr., 2009 WL 766211 (S.D.N.Y. Mar. 24, 2009)

The relator brought a *qui tam* action against a medical center and other individuals, alleging that the defendants over-billed Medicare by filing false reports. He had personal knowledge of the events alleged in his complaint, as he was a former consultant to the medical center. The United States declined to intervene in the complaint and the relator's complaint was unsealed and served on the defendants. However, before the defendants responded to the complaint, the relator passed away. The relator's widow, as administrator of his estate, moved for substitution as relator. The defendants opposed the motion for substitution, but the United States District Court for the Southern District of New York allowed the substitution. Relying on *Cook County, Ill. v. U.S. ex rel. Chandler,* 538 U.S. 119 (2003), the court held that FCA claims survive a relator's death under federal common law because the damages under the FCA serve a remedial purpose. Furthermore, the court held that the FCA's policy of encouraging private enforcement actions supports the survival of *qui tam* actions after a relator's death. The court rejected the defendants' argument that the relator's widow did not meet the statutory requirements under the FCA to be a relator, since the FCA claims were based on her husband's allegations, which were publicly disclosed when his complaint was unsealed. Instead, the court held that the relator's widow did not have to meet the statutory requirements because she was a substitute, and was not suing on her own behalf. Moreover, the court noted that since the defendants did not challenge the original relator's ability to bring his FCA claims, those claims were valid, and the motion for substitution was granted.

L. Unsealing Pre-Intervention Documents

U.S. ex rel. Schweizer v. Oce, N.V., 2008 WL 4216345 (D.D.C. Sep. 12, 2008)

The relators filed an FCA suit against two companies dealing in print and document management, alleging that the defendants knowingly sold non-compliant products to the federal government in violation of the Trade Agreements Act and breached a contract guaranteeing the government a price equal to or less than the lowest price paid by non-government customers for the same product. The government declined to intervene. Thereafter, the United States District Court for the District of Columbia unsealed the relators' amended complaint. The defendants then moved to unseal all the records filed by the relators. In particular, the defendants aimed to unseal several exhibits to the original complaint, including the defendants' confidential disclosure statement. The court relied on the six factor analysis laid down in United States v. Hubbard, 650 F.2d 293 (D.C. 1980) to determine if the motion for unsealing the documents should be granted, and after applying the test, the court ordered that all documents filed by the relators be unsealed.

The court found that the D.C. Circuit has a strong presumption in favor of public access to judicial proceedings. Under Hubbard, however, the court found six factors that could overcome this presumption. The court then examined each of Hubbard's factors to determine if they favored unsealing the record.

1) Need for Public Access

The court first discussed the defendants' particular need to unseal the record. A clerical error allowed the defendant to obtain an exhibits list appended to the original complaint. After examining this document, the defendants asserted that they needed to view the relators' documents to respond to the complaint. They believed that several of the sealed exhibits were published articles which could raise subject matter jurisdiction issues. They also asserted that it would be impossible to admit or deny information in the complaint, which apparently was taken from the defendant's own files, without seeing the exhibits. The court held that the defendants asserted a pragmatic, individualized need for access to the sealed record and concluded that this factor favored lifting the seal.

2) Extent of Previous Public Access

The defendants contended that some of the sealed materials were publicly available. The court found that this factor weighed in favor of unsealing those materials to the extent that they were already in the public domain.

3) Objections to Unsealing

The relators objected to unsealing by contending that the exhibits and confidential disclosure statement filed with the complaint were protected by attorney-client and/or work product privileges. The court analyzed whether the relators had waived those privileges by filing the documents. The court found that in the D.C. Circuit any disclosure, except court-compelled disclosure, is a waiver of privilege. The court then observed that the relators needed only to file the complaint with the court and were under no compulsion to file the exhibits and confidential disclosure statement. Accordingly, the court held that by filing the confidential disclosure statement and exhibits along with their original complaint, the relators had voluntarily waived any privileges that might have attached to these documents. Consequently, the court found that this factor weighed in favor of lifting the seal.

4) Strength of Asserted Property/Privacy Interests

The court observed that other than the relators' privilege assertions, neither party argued that either property or privacy interests were at stake on this motion. Thus, this factor weighed neither for nor against unsealing the record.

5) Possibility of Prejudice

The court found the possibility of prejudice to the relators was slight. First, there was no justification in keeping factual allegations from the defendants once the relators' identities were disclosed. Second, since none of the relators remained employed with the defendant, workplace discrimination and harassment would not follow from disclosure of the sealed materials. Finally, the substance of the sealed documents, if not the documents themselves, was likely to be discoverable. Therefore, the possibility of prejudice to the relators did not weigh against unsealing the record.

6) Purpose of Sealed Materials' Introduction

The court was unable to discern why the relators filed the confidential disclosure statement and exhibits other than to assume that it was to further the prosecution of their claims. Hence, this factor favored unsealing the record.

In sum, the court found that the factors favored unsealing the record and ordered all documents filed by the relators be unsealed.

U.S. ex rel. Becker v. Tools & Metals, Inc., 2008 WL (N.D.Tex. Aug. 19, 2008)

The relator brought a *qui tam* action in the United States District Court for the Northern District of Texas, in which the government intervened. The court unsealed the relator's joint amended complaint and the government's notice of

election to intervene but ordered that all other previously filed papers remained sealed. The defendants then moved to unseal all of the court filings in the case. The relator and the government opposed the unsealing of certain documents. The government opposed the defendants' motion to unseal the "confidential government investigative reports" apparently contained in its applications for extensions of its deadline to determine whether it would intervene in the case. The relator opposed the unsealing of two of its disclosures to the government, on work product privilege grounds. The court determined that it had the authority to unseal filings before the government intervened. It further found that it had wide discretion in determining which documents, if any, should remain under seal, and how to make that determination. The court then ruled that the government's objections to unsealing were not specific to the information included in each application for an extension. Hence, the court ordered the government to review the applications, file specific objections and file proposed redactions, if any, for an in camera review in order to properly decide the motion to unseal. The court dismissed the work product privilege argument because the relator cited no case law in support of his contention. The court then ordered that all filings be unsealed except those filings to be reviewed in camera.

Judgments & Settlements

JULY 1, 2008–JUNE 30, 2009

Johns Hopkins Bayview Medical Center (D. Md. June 29, 2009)

Johns Hopkins Bayview Medical Center ("Bayview") agreed to pay $2.75 million to settle allegations that it overbilled Medicare and the Maryland Medicare program. The settlement was a result of a *qui tam* lawsuit filed by relators Margaret E. Mayer and Robin L. Emerick, former inpatient coding specialists at Bayview. The suit alleged that Bayview made false statements regarding 721 patient records in order to inflate the rates of payment it billed Medicare. The Government further alleged that Bayview submitted claims for reimbursements for treatments that were never performed. Bayview denied all of the allegations. The settlement stipulated an award of $550,000 for the relators (20% of the total), who were represented by TAF member Lon Engel. In addition, Bayview agreed to pay $25,000 for the relators' attorney's fees. The settlement came as a result of a joint effort between HHS-OIG and DOJ. Assistant US Attorney Jamie M. Bennett represented the Government.

University Loft Company (D.D.C. June 26, 2009)

J Squared Inc. d/b/a University Loft Company agreed to pay the Government $400,000 to resolve allegations that the General Services Administration contractor knowingly sold Malaysian-made furniture to government purchasers in violation of the Trade Agreements Act (TAA). University Loft Company was required to comply with the TAA under contracts with the GSA that allowed it to sell its products to the military and other government purchasers. Lee Thurston of Thuston, Inc. (a competitor of University Loft Company) filed the *qui tam* suit, and received $66,000 as a relator's share. The DOJ Civil Division, Commercial Litigation Branch; the U.S. Attorney's Office for the District of Columbia; GSA OIG; the Air Force Office of Special Investigations; the Defense Criminal Investigative Service; the Naval Criminal Investigative Service; and the Department of the Navy, Acquisition Integrity Office worked together to investigate and resolve the allegations.

Dallas Independent School District (N.D. Tex. June 26, 2009)

The Dallas Independent School District (DISD) has agreed to relinquish more than $150 million in requests for federal funds and to pay a total of $750,000 to settle claims that it violated the False Claims Act in connection with the Federal Communications Commission's E-Rate program—a program that provides funding for needy schools and libraries to connect to and use the Internet. DISD allegedly provided false information to the E-Rate program and engaged in non-competitive bidding practices for E-Rate contracts. The United States also contended that school district officials improperly received gratuities from technology vendors, including trips, meals, golfing and the free use of a yacht. The school district's former chief technology officer, Ruben Bohuchot, was convicted in July 2008 on bribery charges stemming from the receipt of federal funds under the E-Rate program. The settlement resulted from an ongoing federal investigation of fraud and anti-competitive conduct in the E-Rate program in Texas. The Civil Division, the U.S. Attorney's Office for the Northern District of Texas, and the FCC OIG jointly conducted the investigation.

David B. Hendrickson (D. Utah June 23, 2008)

David Barry Hendrickson of Highland, Utah agreed to pay more than $1.7 million to settle a False Claims Act suit alleging that Hendrickson knowingly continued to receive his father's monthly federal retirement benefits until 2007 even though his father had died in 1995. Hendrickson had collected $608,467.83 since his father's death. The United States fined Hendrickson a civil penalty of $11,000 per monthly false claim. Hendrickson, age 71, also faces 10 years in prison on and a $250,000 criminal fine. The sentencing for the criminal case is set for August 26, 2009. The U.S. Attorney's Office for the District of Utah is handling both the civil and criminal cases.

University of Medicine and Dentistry of New Jersey (D.N.J. June 9, 2009)

The University of Medicine and Dentistry of New Jersey (UMDNJ) agreed to pay the United States $2 million to resolve federal civil fraud allegations that its hospital defrauded Medicaid. According to the Government, UMDNJ routinely billed Medicare twice for the same outpatient services, submitting one claim from the hospital and another from a satellite outpatient center. Dr. Steven Simring filed the *qui tam* suit in 2004. The original complaint also led to criminal charges and a recovery of $4.9 million for the State of New Jersey, half of which was returned to the federal Medicaid program. The settlement provided Dr. Simring $801,000 as a relator's share. A spokesman for UMDNJ stated: "This settlement agreement relates to inappropriate actions and poor management decisions made during a period between 1993 and 2004…Our new leadership team has diligently implemented numerous reforms that reflect the university's full commitment to exemplary corporate citizenship, corporate governance and the highest principles of integrity and professionalism." HHS OIG and DOJ's Civil Division handled the suit.

Seradge, et al. (W.D. Okla. June 8, 2009)

A group of orthopedic surgery and care providers agreed to pay $3.5 million to settle charges of Medicare overbilling. The Government alleged that the defendants knowingly submitted false claims for payment to various federal health care programs—including Medicare, TRICARE, and the Federal Employees Health Benefits programs—by submitting charges for medical procedures not performed, charges for medical procedures not performed by a doctor, and charges for services not performed with required physician oversight.. The parties involved in the settlement were: Houshang Seradge, M.D., an Oklahoma City orthopedic surgeon; Orthopaedic & Reconstructive Center, P.C. d/b/a Orthopedic Institute, f/k/a Houshang Seradge, M.D., Inc; Tower Day Surgery; Rehab America, Inc. d/b/a The Therapy Center; Hospital for Special Surgery, L.L.C. d/b/a Orthopedic Hospital; Winfred Parker, a physician's assistant; Carrie Baer, an occupational therapist; C.L. Soo, M.D., an officer in one or more of the business entities; P. Denny Oreb, an officer in one or more of the business entities; and Pamela Landers, who handled billing for one or more of the business entities. In addition to the monetary damages, Dr. Seradge, Ms. Baer, Mr. Oreb, and Ms. Landers agreed to withdraw from involvement in the billing of federal health care programs for three years. The FBI and HHS OIG investigated the case. Assistant U.S. Attorneys Judy Copeland, Scott Maule and Tom Majors of the Western District of Oklahoma handled the litigation and settlement.

National Training and Information Center (N.D. Ill. June 3, 2009)

The National Training and Information Center (NTIC), a Chicago-based community organization that is purportedly "dedicated to building power to reclaim our democracy and advance a far-reaching racial and economic justice agenda" agreed to pay the United States $550,000 to settle allegations that it improperly used approximately $207,000 in U.S. Department of Justice grant money to lobby Congress regarding the award of future grants. The organization allegedly used DOJ grant money for food, lodging, transportation and other expenses for its members who went to Washington, D.C. to lobby Congress—a practice forbidden by federal rules and regulations. NTIC did not admit any liability. The case was brought as a result of a DOJ OIG investigation. Assistant U.S. Attorney Michelle Fox represented the Government.

Aventis Pharmaceuticals (D. Mass. May 28, 2009)

Aventis Pharmaceuticals Inc. (API) agreed to pay $95 million to the United States Government to settle claims that it inflated its calculations of Best Price on three of its prescription drugs: Nasacort®, Nasacort AQ®, and Azmacort®. The United States alleged that API knowingly excluded certain instances where they sold these drugs at a discounted rate between October 1, 1995 and September 30, 2000. Specifically, API sold the decongestant Nasacort® (also marketed as Azmacort®) to the HMO Kaiser Permanente Group at a heavily discounted rate. The United States also alleged that API used a private label sales contract (by labeling the drugs sold to Kaiser with a different code than the same drugs sold to Medicaid) in order to avoid including the discounted prices in its calculations of Best Price, and thus knowingly made false statements in order to decrease the rebates it owed to Medicaid based on Best Price. As part of the settlement, API also entered into a Corporate Integrity Agreement (CIA) with OIG HHS. The Civil Division, the U.S. Attorney's Office for the District of Massachusetts, HHS OIG and Office of Counsel to the Inspector General, and the National Association of Medicaid Fraud Control Units handled the investigation.

Regency Nursing and Rehabilitation Centers Inc. (S.D. Tex. May 21, 2009)

Regency Nursing and Rehabilitation Centers Inc. (Regency) agreed to pay the United States $4 million to settle allegations that Regency submitted false claims to Medicare and the Texas Medicaid program. The Government alleged that Regency submitted claims that were not reimbursable because the nursing home residents were not qualified for the services, the services were not medically necessary, or they were not supported by adequate documentation. The HHS OIG, the FBI and the Texas Health and Human Services Commission OIG investigated the case. The U.S. Attorney's Office for the Southern District of Texas and the Civil Division of the Department of Justice handled the litigation and settlement agreement.

Maine Department of Education (D. Me. May 21, 2009)

The Maine Department of Education (MDE) agreed to pay $1.5 million to settle a False Claims Act suit that alleged MDE submitted false information to the U.S. Department of Education regarding the state education agency's eligibility to receive federal funds under the Migrant Education Program. The United States alleges the MDE, Portland Public Schools, Maine Administrative School District #14 and the Maine Family Resource Center Inc. (a non-profit corporation responsible for identifying and servicing migrant children residing in the state) falsely represented the number of eligible migratory children residing within the state for fiscal years 2002, 2003 and 2004. This settlement was the result of collaborative efforts by the Office of the U.S. Attorney for District of Maine; the U.S. Department of Education, Office of Inspector General; U.S. Department of Education, Office of General Counsel; and the Civil Division of the Department of Justice.

HealthEast Hospitals (W.D.N.Y. May 21, 2009)

Three HealthEast Hospitals (St. Paul, Minnesota) settled a *qui tam* lawsuit alleging Medicaid fraud for $2.28 million. The charges relate to fraudulent billing for kyphoplasty, a certain type of spinal surgery that can be safely performed as an outpatient procedure, but that HealthEast allegedly routinely carried out as an inpatient operation in order to increase the amount it could bill Medicare. The lawsuit alleges that the hospitals overbilled Medicare by thousands of dollars for each kyphoplasty procedure conducted between 2002 and 2007. Last year Kyphon Inc., the company that produces the equipment used for kyphoplasty, and its corporate successor Medtronic Spine LLC, settled another *qui tam* suit over allegations that it marketed its equipment as a moneymaker for hospitals that performed the procedure as inpatient surgery. The relators in both suits were former Kryphon employees. TAF members Tim McCormack and Matthew Smith of Phillips and Cohen represented the relators. Assistant

U.S. Attorney Robert Trusiak, USAO investigator Peggy McFarland, USAO auditor Theresa Tetlow and Health and Human Services special agents Cindy Pangallo and Peggy Glynn handled the case for the Government.

Lighthouse Disaster Relief (M.D. La. April 24, 2009)

Lighthouse Disaster Relief agreed to pay $4 million to settle a False Claims Act suit alleging that Lighthouse had not fulfilled its contractual obligations to the Department of Homeland Security. Lighthouse and its partners Gary Heldreth and Kerry Farmer accepted a $5.3 million payment to build and operate a base camp to house and feed first responders who were in New Orleans to help rescue and recovery efforts after Hurricane Katrina. The Government alleged that Lighthouse failed to build and staff a base camp sufficient to house the number of first responders, and that Lighthouse made false statements to FEMA that resulted in FEMA paying Lighthouse prematurely. The U.S. Attorney's Office for the Middle District of Louisiana, the Civil Division of the U.S. Department of Justice and the Office of Inspector General of the Department of Homeland Security conducted the investigation and litigation.

Queen's Medical Center (D. Haw. April 23, 2009)

Queen's Medical Center ("QMC") of Honolulu, Hawaii agreed to pay a total of $2.5 million to settle two lawsuits alleging that QMC overbilled Medicare, the State of Hawaii Medicaid program, and TRICARE. The settlement came as the result of a *qui tam* complaint brought by two former pharmacy technicians. Following that complaint, the federal and state governments conducted an investigation that found that from September 8, 1999 until October 28, 2002, QMC submitted false claims to Medicare, Medicaid and TRICARE seeking payment for the dispensation of anti-psychotic medications allegedly ordered by a psychiatrist. However, the investigation revealed that the medications were actually ordered by non-psychiatrist physicians without the prior knowledge of a psychiatrist. In addition, the investigation found that QMC wrongfully submitted claims to Medicare, Medicaid, and TRICARE for services it represented were provided by teaching physicians when QMC did not have the documentary evidence necessary to demonstrate that the teaching physicians were involved in the services to the degree necessary to support payment of the claims. QMC denies wrongdoing, and has agreed to enter a five-year Corporate Integrity Agreement with the HHS OIG. Of the $2.5 million settlement, the relators received $400,000, and $500,000 was designated as attorney's fees. TAF member Tom Grande represented the relators. The investigation was conducted by the Office of Investigations, Office of Inspector General, U.S. Department of Health and Human Services, the Defense Criminal Investigative Service, and the State of Hawaii Attorney General's Medicaid Investigations Division.

Alta Colleges (N.D. Tex. April 20, 2009)

Alta Colleges Inc. (a chain of colleges with headquarters in Denver and over 12,000 students at 19 campuses in California, Colorado, Georgia, Illinois, Texas and Virginia), and its wholly-owned collegiate schools in Texas have agreed to pay the United States $7 million to resolve allegations under the False Claims Act that the Texas schools submitted false claims for federal student aid funds. A college must meet applicable state licensing requirements in order to qualify to receive federal student aid, and the United States alleged that Alta's Texas colleges obtained the requisite state licenses by misrepresenting to the state licensing agency that they complied with state job-placement reporting requirements and that their interior design programs complied with requirements for a professional license. Alta Colleges also allegedly promised students that credits could transfer to another school, when there was no known accredited school in Texas that would accept Alta's credits, and claimed that more than 90% of past graduates had jobs in their field with Alta's help, even if the student was signing up for a program had no past graduates. Such practices violate licensing requirements, which ban "deceptive statements to enroll students." Alta Colleges denied the allegations and released a statement that the "company had acted lawfully, but had settled because of the time and expense associated with litigation." The settlement also gives $1.19 million (17%) to the group of unnamed whistleblowers who initiated the suit. The U.S. Department of Education investigated the case. The U.S. Attorney's Office for the Northern Division of Texas and DOJ Civil Division handled the litigation and settlement.

Quest Diagnostics (E.D.N.Y. April 15, 2009)

Quest Diagnostics and its subsidiary, Nichols Institute Diagnostics (NID) have agreed to pay $262 million to resolve civil and criminal allegations that it manufactured, marketed and sold faulty diagnostic test kits to laboratories across the country until 2006. These kits produced false-positive test results, which caused doctors to present false claims to Medicare, Medicaid, the VA, and TRICARE. In addition to the civil settlement, NID agreed to pay a $40 million criminal fine and has entered into a Corporate Integrity Agreement with HHS OIG. The settlement came as a result of a *qui tam* suit that relator Thomas Cantor filed in 2004. Cantor is president and CEO of a lab that bought NID's faulty kits. The settlement provides an approximately $45 million relator's share for Cantor. TAF member Mary Louise Cohen of Phillips and Cohen LLP represented the relator. Assistant US Attorney Paul Kaufman and Pat Davis of DOJ Civil Division represented the Government.

NetApp Inc. (D.D.C. April 15, 2009)

NetApp Inc. (a computer a computer storage and data management solutions company formerly known as Network Appliances Inc.) agreed to pay the federal Government $128 million to resolve allegations that it defrauded the Government by knowingly failing to meet its contractual obligations and overcharging the Government for NetApp's products. NetApp had previously entered into a contract through the General Services Administration's Multiple Award Schedule (MAS) program, which streamlines purchases from certain companies for the Government and other GSA-approved buyers. In order to be eligible for an MAS contract, a company must agree to disclose its commercial pricing policies, particularly discounts offered to other customers. The Government alleged that NetApp knowingly made false statements to GSA about its sales practices and discounts and knowingly failed to comply with the price reduction clauses of its GSA contracts by allegedly giving higher discounts to commercial customers than it did to Government purchasers. NetApp denied all the allegations. The settlement also stipulated that relator Igor Kapuscinski will receive $19.2 million (15% of the settlement). In addition, NetApp agreed to pay Kapuscinski $75,000 in attorney's fees. TAF members H. Vincent McKnight and Altomease R. Kennedy of Aschcraft and Gerel, LLP represented the relator. Sarah McLean and Rebecca Ford of DOJ Civil Division along with Assistant US Attorney for the District of Columbia Laurie Weinstein handled the case for the Government.

Northrop Grumman (C.D. Cal. April 4, 2009)

Northrop Grumman Corporation, its subsidiary Northrop Grumman Space and Mission Systems Corp., and its predecessor TRW Inc. (collectively Northrop) agreed to pay the Government $325 million to resolve allegations that it knowingly overcharged the National Reconnaissance Office (NRO) for products and testing. The settlement arose from a *qui tam* suit Robert Ferro, Ph.D (a former employee of Northrop) filed in the US District Court in the Central District of California in 2002. Dr. Ferro claimed that Northrop continued to bill the Government for testing its products even after Northrop understood that continued testing was no longer necessary. The Government intervened in the suit in 2008. The settlement provided a 15% relator's share for Dr. Ferro, which amounts to approximately $48.75 million. The False Claims Act settlement came as part of a larger settlement regarding an unrelated claim for $1 billion that Northrop says the Government owes it for stealth cruise missiles. The Government agreed to pay $325 million to resolve that issue, which cancels out the $325 million that Northrop had agreed to pay the Government. Northrop continues to claim that it behaved appropriately under its contract. TAF member Eric Havian of Phillips and Cohen (San Francisco) represented Dr. Ferro. The settlement was the result of a joint effort between NRO OIG, the Defense Criminal Investigative Service, the Air Force Research Laboratory, Sensors Directorate at Wright Patterson Air Force Base, together with Civil Division's Commercial Litigation Branch and the U.S. Attorney's office for the Central District of California. Acting Assistant Attorney General for the Civil Division Michael F. Hertz and the U.S. Attorney for the Central District of California Thomas O'Brien represented the Government.

Leo Burnett Company, Inc. (N.D. Ill. January 6, 2009)

Leo Burnett Company, Inc. (henceforth referred to as LBUSA) will pay the United States $15.5 million to resolve allegations of defrauding the U.S. Army and False Claims Act violations. LBUSA is one of the world's largest advertising agencies with major clients such as Disney, McDonald's, and Nintendo. From June of 2000 through December of 2005, LBUSA held an advertising contract with the United States Army's advertising program and the "Army of One" campaign. Under the contract terms, LBUSA would be directly reimbursed by the U.S. Army for third-party subcontracted services. The civil complaint alleged that LBUSA frequently billed the U.S. Army for work done by third-party subcontractors when it was, in actuality, done by LBUSA—subcontractor charges are distinctly higher than work done by LBUSA. Furthermore, LBUSA allegedly established a scheme improperly titled a "blended rate" by which copywriters were billed to the government at the same hourly rate as executives. Lastly, the complaint asserted that LBUSA conveniently excluded less expensive billing rates from its calculations, resulting in grossly inflated charges to the U.S. Army. In total, the complaint estimated that the inflated charges and overbilling by LBUSA cost the United States Army an additional $20 million. The two realtors, Greg Hamilton and Michele Casey, were both employed as Vice Presidents of LBUSA when they witnessed the allegedly fraudulent activities. Out of the $15.5 million settlement, they will receive $2.79 million as their share. Hamilton and Casey were represented by Michael Behn and Steven Cohen, two members of Taxpayers Against Fraud.

Eli Lilly and Company (E.D. Pa. January 15, 2009)

Eli Lilly and Co. has entered into an agreement to pay the United States and a multitude of States roughly $800 million to settle charges of off-label marketing its drug Zyprexa. Additionally, Eli Lilly agreed to pay $515 million in criminal fines and $100 million in forfeited assets, totaling roughly $1.415 billion. The $515 million criminal fine is the highest fine ever paid by an individual corporation in the United States on criminal charges. According to the Food, Drug, and Cosmetic Act (FDCA), any company intending to seek approval of a new drug must identify specific intended uses of the drug in its initial application to the Food and Drug Administration (FDA). During the approval process, the FDA may or may not approve the drug for some or all of the uses specified in the application. Based on these approvals, pharmaceutical drug companies must limit their marketing of the drug for only those uses explicitly approved by the FDA. Conversely, it is illegal and often a False Claims Act violation, to market the approved pharmaceutical drugs to physicians and other parties for uses other than those approved. The FDA had limited Zyprexa's approved usages to include treating manifestations of psychotic disorders, short term treatment of schizophrenia and acute manic episodes relating to Bipolar I Disorder, and treating schizophrenic after eight weeks of stability. Each of these approved treatments was approved for use with adults. The host of allegations brought in four separate *qui tam* complaints included, but were not limited to: marketing Zyprexa for use treating children, marketing the drug for treatment for the elderly experiencing Alzheimer's and dementia, marketing for dosages higher than approved, and marketing for treatment of anxiety, depression, nausea, and generalized sleep disorder. Additionally, it was alleged that large sums of monetary incentives were paid to physicians for recommending Zyprexa for non-approved uses to their patients in violation of the Anti-Kickback Statute. The four *qui tam* complaints, which were all filed by former Eli Lilly sales representatives, noted egregious disregard for the approved uses of Zyprexa with marketing schemes being implemented with primary-care physicians, pediatricians, and in elderly care facilities—markets that have little or no relation to Zyprexa's approved uses. The federal government will receive $438 million and the states that joined the litigation will share $362 million. The eight relators will receive $78,870,877 as their share of the $800 million settlement sum. Brian Kenney, a longtime Taxpayers Against Fraud member, and his litigation team played a critical role in initiating the allegations against Eli Lilly and ultimately settling the charges.

SouthernCare Incorporated **(N.D. Ala. January 15, 2009)**

SouthernCare Inc. recently resolved allegations of Medicare/Medicaid fraud and False Claims Act violations by agreeing to pay the United States $24.7 million. This settlement resolves two *qui tam* cases which were originally brought by *qui tam* relators Tonja Rice and Nancy Romeo, two registered nurses who were respectively employed as the Clinical Director and Regional Clinical Coordinator in SouthernCare hospices. SouthernCare Inc. is a regional hospice provider which owns and operates approximately 99 hospices in fifteen states. Hospices provide treatment to patients who choose to focus on lessening the intensity of terminal illness as opposed to curative treatments. Patients who are Medicare beneficiaries are eligible for hospice care, including pain relief, comfort, and spiritual support, among other services, if they are deemed to have a life expectancy of six months or fewer. SouthernCare Inc. hospices allegedly defrauded the government by systematically qualifying patients for hospice care who did not fit within these guidelines. The civil complaint alleged that SouthernCare commonly billed Medicare and Medicaid for hospice patients who were in the process of chemotherapy, which is a curative treatment. The complaint asserted that evidence of SouthernCare's knowledge of this fraud was demonstrated by the nature of the company's aggressive marketing techniques to patients and its insistence that nurses enroll at least twenty patients per month. Romeo and Rice will receive a cumulative $4.9 million as their share of the settlement sum. SouthernCare Inc. has also entered into a corporate integrity agreement with the Office of Inspector General, Department of Health and Human Services.

Barrday Inc. (D.DC. January 23, 2009)

Barrday Inc. has agreed to pay the United States in excess of $1 million to resolve claims that it played a role in defectively manufacturing bullet-proof vests that included Zylon material. Zylon bullet-proof vests have been regularly purchased by United States law enforcement agencies at every governmental level. To date, there has been a multitude of cases alleging that these Zylon vests quickly lost their capabilities and particularly so when exposed to heat. Barrday Inc. weaved the Zylon fabric in bullet-proof vests which were then sold to three separate companies that distributed the final product to law enforcement agencies. The civil complaint alleged that Barrday Inc. possessed knowledge of the allegedly flawed composition of these vests in late 2001, but continued to weave the fabric and distribute the vests until 2003. The government currently has three pending lawsuits against companies that played a role in the manufacturing and distribution process of the vests, and four lawsuits against executives from these companies. Additionally, the United States has already recovered $46 million from the body armor industry for allegations relating to the alleged defectiveness of Zylon material. In 2003, Barrday was the first Zylon weaving company to terminate its role and contracts.

AT&T Technical Services Corp. (S.D. Ind. February 2, 2009)

AT&T Technical Services Corporation (AT&T-TSCO) settled allegations of False Claims Act violations by agreeing to pay the United States a total of $8,266,414.33. AT&T-TSCO held a number of contracts with the Federal Communication Commission's E-Rate program. The E-Rate program was established in 1996 to address communication opportunities and deficiencies in underfunded and needy schools and libraries. Specifically, the Telecommunications Act of 1996 created the E-Rate program to provide funds to these schools and libraries to pay for the connecting and hardware fees required for the institutions to have access to the internet. AT&T-TSCO allegedly defrauded the E-Rate program, a function of the FCC, in a number of ways. It was alleged that AT&T-TSCO submitted claims and obtained funds for services and products that did not fall under the E-Rate program. Additionally, the civil complaint stated that AT&T-TSCO inflated charges to the E-Rate program and participated in illegal bidding practices for E-Rate contracts. The investigation, which is on-going, has been undertaken by the U.S. Attorney's Office for the Southern District of Indiana, the FCC Office of the Inspector General, and the United States Department of Justice, Civil Division.

APL Ltd. (N.D. Cal. February 13, 2009)

APL Limited and Neptune Orient Lines Limited (referred to collectively as "APL") have agreed to pay the United States government $26.3 million to settle allegations of inflating bills for services provided to the Department of Defense (DOD) and the

Surface Distribution Deployment Command (SDDC). The United States and relator Jerry Brown claimed that APL knowingly submitted incorrect and overstated claims to the United States government for services not rendered, relating to a contract APL held with the DOD for shipping cargo to support United States forces in Iraq and Afghanistan. The complaint alleged that the overbilling and double billing were carried out through a variety of methods. APL allegedly billed at rates in excess of what was paid for electricity used in refrigerating goods in transit, billed DOD for services already paid by APL's subcontractor, and billed for services on dates that were incorrect or when goods were in transit already. Furthermore, it was alleged that APL billed the United States for non-reimbursable storage delay charges caused by forces outside of the control of the United States government. Relator Jerry Brown, who was represented by Taxpayers Against Fraud member Paul Scott, filed the initial complaint while employed as a Rate Clerk with APL's Customer Service Center in Denver, Colorado. As his share of the settlement sum, Brown will receive roughly $5.2 million—approximately 19% of the total settlement awarded.

Galichia Medical Group (D. Kan. March 3, 2009)

Joseph Galichia, a cardiologist based out of Wichita, Kansas, and the Galichia Medical group (collectively "Galichia") have entered into a settlement agreement with the United States to settle allegations of False Claims Act violations and Medicare fraud. The settlement sum totals $1.3 million to be paid to the United States for alleged fraud that occurred between 2001 and 2006. According to the civil complaint, Galichia submitted claims for Medicare reimbursement for services that were not provided to patients, as well as for reimbursement claims that were made without the necessary and proper documentation. The alleged failure to provide documented services and improperly documenting services rendered to Medicare patients allegedly resulted in excessive reimbursements made to Galichia and thus, violations of the False Claims Act. Similar Medicare allegations against Galichia, including allegations of up-coding and double billing, were settled in 2000 for approximately $1.5 million. Consequently, an additional stipulation of the present settlement agreement required Galichia to sign a corporate integrity agreement.

Weill Medical College (S.D.N.Y. March 5, 2009)

Weill Medical College of Cornell University resolved allegations of grant fraud and False Claims Act violations by agreeing to pay the United States roughly $2.6 million. Weill Medical College, a division of Cornell University, located in New York City, serves as both a degree-granting medical college as well as a medical research institution. The civil complaint alleged that between 1991 and 2007, one of the primary medical researchers of Weill Medical College withheld critical information when applying for a multitude of grants from the National Institute of Health (NIH) and the Pentagon (DOD grants). Specifically, this individual allegedly failed to disclose the degree and number of her other ongoing research grant projects while applying for these NIH and DOD grants. The alleged failure to disclose this information rendered her ineligible for many of the $14 million in grants that she ultimately obtained during this time span. The allegedly improperly obtained grants dealt with the development of new drugs to combat various forms of cancer. The relator in this case, Taryn Resnick, was an administrative assistant in Weill Medical College who initially noticed and exposed the alleged eleven improper grant applications. As part of the settlement agreement, Weill Medical College admitted no wrongdoing. Timothy McInnis, a member of Taxpayers Against Fraud, represented the relator and successfully negotiated the ultimate settlement agreement.

Victory Memorial Hospital (E.D.N.Y. March 7, 2009)

Victory Memorial Hospital recently agreed to pay the United States government at least $2.3 million and potentially upwards of $2.8 million to settle allegations of Medicare fraud and False Claims Act violations. Victory Memorial is a private, non-profit hospital located in Brooklyn, New York and regularly provides healthcare to patients qualifying under the Medicare Program. The civil complaint, originally initiated by relator Joseph Lee, claimed that in 1996 and 1997 Victory Memorial Hospital submitted cost reports which understated various revenues or "charges" regarding treatment of Medicare eligible patients. The result was a disproportionately high Medicare reimbursement which stemmed from an incorrectly elevated Cost to Charge Ratio for those two years. The complaint alleged that the overpayments made to Victory Memorial totaled $2.6 million. Lee uncovered the charges during his tenure as Manager of Reimbursement and Budget as well as Controller. The complaint further alleged that Lee reported the cost report understatements to higher level hospital officials but that his information was met with inaction. Furthermore, it was alleged that Empire Medicare Services, Victory Memorial's contracted auditing agency, overlooked these errors. Attorneys Timothy McInnis and Ken Nolan, both of whom are members of Taxpayers Against Fraud, represented the relator and played an instrumental role in reaching the ultimate settlement.

Cornerstone Hospital (S.D. W. Va. March 11, 2009)

Cornerstone Hospital, located in Huntington, West Virginia, has resolved False Claims Act allegations that it knowingly submitted fraudulent, inflated claims to the federal government for services not rendered or rendered at a lower cost than claimed. Jesse Dick Jr. and Tamela Bragg, the two relators in the case, were both employed with Cornerstone Hospital and allegedly witnessed improper Medicare billing practices on a routine basis during each of their respective employment tenures with the hospital. Dick supposedly witnessed frequent billing without doctors' orders and the absence of action by nurses after being given a doctor's order, in an effort to improperly recover Medicare funds. Bragg allegedly witnessed similar types of fraud, which included inflated billing, and claims made for unnecessary laboratory tests and durable medical equipment. Both relators purportedly reported their concerns to higher level officials in Cornerstone but received either indifferent responses to the alleged fraud or overt orders to continue the fraudulent practices. To settle these allegations, Cornerstone has agreed to pay the United States a sum of $690,000 while not admitting any liability for the allegations put forth in the civil complaint. Bragg and Dick will receive $138,000, which is 20% of the total settlement sum.

San Mateo County Medical Center (N.D. Cal. March 12, 2009)

San Mateo County Medical Center and San Mateo County recently agreed to pay the United States government and the State of California a settlement sum of $6,800,000 to resolve allegations that they submitted false claims and the omitted valid claims, in violation of the False Claims Act. San Mateo County, located in the Northern District of California, manages and owns the San Mateo County Medical Center (SMMC), a regional medical center. The SMMC is comprised of a public hospital, mental health center, and a mental disease treatment facility. The civil complaint, filed in August of 2006 by relator Ronald Davis, alleged that SMMC knowingly engaged in two primary methods of fraud at the expense of the federal government and the State of California. SMMC receives yearly Disproportionate Share Hospital (DSH) payments, based in part on the available bed count within the medical center. Davis, a compliance officer with SMMC from 2000 until 2005, alleged that SMMC improperly inflated the bed count in order to receive a higher rate of payment for their DSH. Additionally, he alleged that SMMC purposefully neglected to report certain mental health services to the California State Department of Mental Health, which resulted in the federal government paying for ineligible services. As part of the settlement, SMMC and San Mateo County agreed to sign corporate integrity agreements, in an effort to ensure future compliance with federal law and Medicare reimbursement provisions.

Diabetes Treatment Centers of America (D.D.C. March 25, 2009)

Diabetes Treatment Centers of America, a subsidiary of Healthways Inc. (collectively referred to as "DTCA"), recently settled claims of False Claims Act, Anti-Kickback Statute, and Stark Law violations totaling $40 million. This sum includes a $28 million total to settle the claims themselves, as well as approximately $12 million for attorneys' fees and related expenses. The allegations stemmed from purported kickbacks paid to physicians referring patients to various DTCA centers within hospitals from roughly 1984 until 1996. DTCA held contracts with approximately 120 hospitals to house diabetes treatment centers that were overseen by at least one, and frequently, multiple medical directors. The medical directors served simultaneously as physicians. The complaint alleged that these medical directors were provided with monetary incentives by DTCA to refer their regular patients to the DTCA treatment centers. The alleged kickbacks and submissions of false claims took place from 1984 until 1996 and violated Medicare and Medicaid provisions. The complaint was originally filed in the Eastern District of Tennessee in 1994, and included eight defendants in total. After roughly fourteen years of litigation, the case was due to go to trial, but the settlement agreement was reached. Only one of the defendants—DTCA—was included in the settlement. A multitude of Taxpayer Against Fraud members played roles in the litigation and ultimate settlement including Jim Helmer, Paul Martins, Jennifer Verkamp, Rick Morgan, Jamie Moncus, and Robert Rice. The relator, A. Scott Pogue, will receive $8.12 million as his share of the settlement.

Sikorsky Aircraft Company (D. Conn. March 25, 2009)

Sikorsky Aircraft Company recently entered into a settlement agreement with the United States, stipulating that it would pay approximately $2.9 million to settle allegations of fraud and False Claims Act violations. Sikorsky, a subsidiary of United Technologies Corporation based in Stratford, Connecticut, held a contract with the United States Army for the manufacture of Black Hawk helicopters. Additionally, Sikorsky held various other contracts with the other military branches for Black Hawk helicopters or helicopters with similar features. Sikorsky, according to the contract terms, was to install armored plates in two separate locations on each helicopter that it manufactured. These plates were to undergo specific ballistic tests to ensure their maintenance and the pilots' safety during combat. The civil complaint alleged that Sikorsky installed these armor plates without the required ballistic tests, breaking the contract terms and endangering members of the United States military engaged in combat. The plates were purchased by Sikorsky from Ceradyne Corporation, supposedly without the necessary tests. The alleged fraud occurred for fifteen years, between 1991 and 2006. The coordinated investigation effort was carried out by the Army Criminal Investigative Division, the Defense Contract Management Agency, the Defense Contract Audit Agency, and the U.S. Attorney's Office for the District of Connecticut.

The Methodist Hospital (S.D. Tex. March 26, 2009)

The Methodist Hospital, located in Houston, TX, recently settled allegations of Medicare fraud, by agreeing to pay the federal government a $9.9 million settlement. The False Claims Act violations were alleged to have taken place between January 2001 and August 2003 and involved alleged inflated billing by improperly claiming outlier payments. When Medicare beneficiary treatment and care costs are unusually high, the typical Medicare reimbursement to the care provider can be supplemented by outlier payments. This category of payments was established to ensure that care providers would treat still Medicare patients with exorbitantly high care costs. The complaint alleged that Methodist Hospital knowingly and erroneously elevated charges for Medicare patients, often for services that were not rendered, resulting in higher reimbursement rates from the federal government. The Methodist Hospital admitted no liability when entering into the settlement agreement. The joint investigation was undertaken by the Department of Health and Human Services, Office of Inspector General and Office of Counsel to the Inspector General as well as the Centers for Medicare and Medicaid Services, the Justice Department's Commercial Litigation Branch in the Civil Division, and the U.S. Attorney's Office for the Southern District of Texas, Affirmative Civil Enforcement Unit.

Armor Holdings Products LLC (D.D.C. October 7, 2008)

To resolve allegations that they intentionally and deceptively defrauded the United States, Armor Holdings Products LLC has agreed to pay the United States $30 million. The United States alleged that Armor Holdings manufactured and sold substandard Zylon bullet-proof vests despite its knowledge that Zylon material had rapid degradation qualities. Additionally, the United States alleged that these bullet-proof vests were unsuitable for ballistic use. The two types of Zylon vests sold by Armor Holdings to the United States had been produced by Toyobo Co. Ltd., who had previously been sued by the United States for similar allegations. Thus, the $30 million settlement is part of a larger, more pervasive investigation into the practice of the body armor manufacturing industry. Three previous settlements total roughly $16 million for similar allegations against Zylon body armor manufacturers. The allegations and ultimate settlement were brought about by an ongoing investigation by the Justice Department's Civil Division, the General Services Administration Office of the Inspector General, the Department of Homeland Security Office of Inspector General, the Defense Criminal Investigative Service, the Air Force Office of Special Investigations, the Department of Energy Office of the Inspector General, the U.S. Agency for International Development Office of the Inspector General, among other agencies.

West Jefferson Medical Center (E.D. La. October 17, 2008)

West Jefferson Medical Center has agreed to pay the United States and the State of Louisiana $3.3 million to settle allegations that the hospital fraudulently billed Medicaid programs. The allegations put forth by the United States suggested that Western Jefferson Medical Center had deceived the Medicaid program into believing that its Pediatric Intensive Care Unit (PICU) could treat patients with specific critical care services, when it realistically could not. This alleged behavior took place between March of 1998 and October of 2003 and resulted in the collection of illegitimate reimbursements by the Medicaid program on the part of Western Jefferson Medical Center. The allegations were initially filed by Leslie Klemm, the relator, who served as a nurse in Western Jefferson. Klemm will receive a total of $627,000 as her share of the settlement between the United States, Louisiana, and West Jefferson. The investigation was led in a cooperative fashion by the Justice Department's Civil Division, HHS-OIG, the Office of the U.S. Attorney in New Orleans and the Louisiana Attorney General's Medicaid Fraud Control Unit.

Cooper University Hospital and St. Joseph Healthcare System Inc. (D.N.J. October 21, 2008)

Cooper Hospital and St. Joseph's Healthcare System Inc. agreed to pay the United States $3.85 million and $1.75 million respectively to settle allegations that both defendants falsely inflated Medicare and Medicaid patient charges. The alleged result was excessive outlier reimbursements from the United States government in violation of the False Claims Act. Cooper Hospital is a major teaching hospital in Southern New Jersey and St. Joseph Healthcare System Inc. manages a number of medical facilities across northern New Jersey. The defendants allegedly accepted and applied outlier inflation schemes devised by Besler Consulting and Shusko Consulting; the implementation of which purportedly resulted in the excess payment of millions of dollars to which the defendants were not entitled. Besler Consulting previously settled allegations in March 2008 for devising the previously mentioned schemes. The relator, Anthony J. Kite, served as an independent hospital consultant in New Jersey and filed the *qui tam* suit in 2005. He received $654,000 from Cooper Hospital and $481,250 from St. Joseph's Hospital as his share stipulated in the settlement agreements. A number of other hospitals in New Jersey and Pennsylvania who allegedly implemented similar schemes from Besler and Shusko have settled these allegations for more than $22 million thus far. Investigations were handled by the Justice Department's Civil Division, Commercial Litigation Branch; the U.S. Attorney's Office for the District of New Jersey, Affirmative Civil Enforcement Unit; the U.S. Attorney's Office for the Eastern District of Pennsylvania; the Department of Health and Human Services, Office of Inspector General and Office of Counsel to the Inspector General; the Centers for Medicare and Medicaid Services; and the FBI.

Washington Savannah River Company (D.S.C. October 31, 2008)

Washington Savannah River Company (WSRC) recently resolved allegations of submitting false claims to the United States by agreeing to pay approximately $2.4 million. Throughout the course of negotiations between WSRC and the Department of Energy (DOE) over employee pensions at their Savannah River Site, there were allegedly considerable estimated increases which would require additional input to the WSRC pension fund. WSRC allegedly failed to inform the DOE and following the establishment of the contract, WSRC received over $1 million in equitable adjustments. DOE purportedly believed that WSRC was unaware that they would need such adjustments and thus granted the equitable adjustments. As anticipated, the requirements for WSRC's pension fund contribution continually increased until ultimately WSRC requested another equitable adjustment of almost $36 million. Another stipulation within the settlement terms was that WSRC drop the pending $36 million equitable adjustment request. The allegations were grounded in the belief that WSRC had specific knowledge of the predicted rise in necessary contribution to pension funds. Had the rise in cost of pension funds been wholly unanticipated by both parties, there would have been no legal basis for allegation against the WSRC. The investigation of these allegations which ultimately resulted in the settlement was undertaken by the DOJ, the DOE's Office of the Inspector General, the U.S. Attorney's Office in Columbia, SC, and the DOE's Savannah River Operations Office.

Eagle Global Logistics (E.D. Tex. November 4, 2008)

Eagle Global Logistics (EGL Inc.) recently settled allegations that they violated the False Claims Act and knowingly defrauded the United States by agreeing to pay $750,000. EGL supposedly provided gifts and gratuities as an attempt to incentivize KBR employees to administer a government subcontract. KBR is a major contractor for logistical support for the U.S. Army's overseas operations and employees of KBR allegedly received sport tickets and meals among other gifts for the securing administration of EGL's subcontract. The complaint alleged that EGL provided these gifts between March 2003 and March 2005, and stood in violation of both the False Claims Act and the Anti-Kickback Act. The two relators in these allegations, David Vavra and Jerry Hyatt, received $157,500 for their role in exposing these allegations. EGL is no stranger to alleged False Claims Act violations as they have also recently settled two separate sets of allegations for $4 million and $30,000 respectively. The FBI and the Defense Criminal Investigative Service investigated these allegations as part of the National Procurement Fraud Initiative.

NCS Pearson Inc. (D. Minn. November 19, 2008)

NCS Pearson Inc., a Minnesota corporation, recently settled allegations of false claims by paying the Transportation Security Administration (TSA) $5.6 million. The TSA was born out of the Aviation and Transportation Security Act and established in the wake of September 11th. One of the central purposes of the TSA was to identify areas where airport security personnel were needed, and then recruit, train, and deploy these personnel. TSA partially subcontracted these services to NCS Pearson Inc. The complaint against NCS Pearson alleged that the corporation knowingly billed the TSA incorrect and excessive rates for the subcontracted work. The investigation resulting in the $5.6 million settlement was carried out by the DOJ's Civil Division, the Defense Contract Audit Agency, TSA, and the Office of Inspector General for the Department of Homeland Security.

RBC Mortgage (N.D. Ill. November 25, 2008)

RBC Mortgage Company recently settled allegations in violation of the False Claims Act by agreeing to pay the United States $10.71 million. RBC, a Canadian corporation with offices within the United States, held the status of a pre-approved mortgage lender with the ability to initiate and process Federal Housing Administration (FHA) loans without prior review of the loan application by the U.S. Department of Housing and Urban Development (HUD). This status is known as "Direct Endorsement Authority" and is subject to a number of stipulations. For instance, with "Direct Endorsement Authority" RBC was accountable for verifying each borrower's qualifications and performing due diligence in providing the loans. The intended purpose of direct endorsement and specifically FHA loans is to reduce processing costs of mortgage loans for low income families. The government's allegations against RBC state over a four year period between 2001 and 2005, RBC did not proceed with due diligence in underwriting certain loans and submitted loans for HUB endorsement which fell outside of the eligibility criteria for FHA insurance. In total, the government alleged that RBC violated the False Claims Act in submitting 219 federally insured loans for low-income family mortgages to the FHA and HUD. The $10.71 million settlement resolving these allegations was reached through investigations by the U.S. Attorney's office for the Northern District of Illinois, HUD's Office of Inspector General, and the Justice Department's Civil Division.

Bayer Healthcare LLC (S.D. Fla. November 25, 2008)

In a recent $97.5 million settlement, Bayer Healthcare LLC resolved allegations that they incited 11 separate diabetic suppliers to submit false Medicare claims thereby violating the False Claims Act. Bayer, a Tarrytown-based business, supposedly provided financial incentive to these 11 suppliers to switch their customers from products of Bayer's competition to Bayer products. The alleged cash-for-patient system that Bayer had with diabetic medical suppliers dealt with equipment such as glucose monitors and diabetic self-testing supplies. The 11 direct-to-patient suppliers submitted Medicare reimbursement claims following the distribution of these products. The greatest alleged payment from Bayer to a supplier was roughly $2.5 million to Liberty Medical Supply Inc. The ten other suppliers were allegedly paid $375,000 in an attempt to convert diabetic patients and those testing for diabetes to Bayer products. In order to conceal these kickbacks, Bayer supposedly made these payments under the guise of advertising payments. The fraudulent kickbacks with Liberty Medical Supply allegedly took place between 1998 and 2002, while the FCA violations with the ten other suppliers purportedly occurred from 1998 until 2007. The terms of the Settlement Agreement stipulated that Bayer Healthcare enter into a corporate integrity agreement with the Office of Inspector General for the Department of Health and Human Services (HHS). The investigation was carried out by the FBI, the U.S. Attorney's Office for the Southern District of Florida and the Justice Department's Civil Division, Commercial Litigation Branch.

Jackson-Madison County General Hospital and Milan General Hospital (W.D. Tenn. December 1, 2008)

Both Milan General and Jackson-Madison County General Hospitals agreed to pay the United States $5.3 million and $2.6 million respectively to settle a variety of allegations of Medicare fraud in violation of the False Claims Act. As an additional stipulation within the Settlement Agreement, the Jackson-Madison County General entered into a Corporate Integrity agreement with the Office of Inspector General for the U.S. Department of Health and Human Services. The government alleged that Milan General Hospital fraudulently admitted Medicare patients to the psychiatric unit, in an attempt to falsely bill for unnecessary services. Furthermore, the United States contended that Milan General billed for Medicare patients whose lengths of stay in the hospital surpassed their Medicare coverage. Jackson-Madison General allegedly failed to adhere to Medicare's documentation and medical necessity criteria for non-emergency transportation for Medicare patients. The almost $8 million cumulative settlement was reached as a result of investigative efforts by the U.S. Attorney's Office for the Western District of Tennessee and the U.S. Department of Health and Human Services, Office of Inspector General.

MedQuist Inc. (D. Mass. December 3, 2008)

MedQuist Inc., a medical transcription service provider based out of Mount Laurel, NJ, recently agreed to pay the United States government $6.6 million to resolve allegations that it fraudulently billed a number of its federal government clients in violation of the False Claims Act. The federal government clients stated in the complaint include the Department of Defense, the Public Health Service, and the Department of Veterans Affairs. The medical transcription industry has a billing standard set forth for specific federal government contracts called the "AAMT line", while non-governmental contracts have different billing standards. From roughly 1998 through 2004, MedQuist Inc. purportedly billed transcription fees in excess of the AAMT line for the services rendered to their federal government clients. These allegations came to the knowledge of the United States from two relators; Christopher Foley and Susan Purdue. Foley and Purdue will receive $450,000 and $144,000 respectively for their roles in breaking the allegations against MedQuist Inc.

Condell Health Network and Medical Center (N.D. Ill. December 1, 2008)

Condell Medical Center and parent corporation Condell Health Network agreed to pay a sum total $36 million to the United States and the state of Illinois. To avoid a costly litigation process and the admittance of liability, Condell voluntarily disclosed a variety of False Claims Act, Stark Law, and Anti-Kickback Statute violations from 2002 through 2007. These violations included the improper rental and leasing of office space to referring physicians and reimbursing physicians who failed to submit required written agreements after performing certain patient services. Additionally, Condell disclosed providing doctors with loans that violated the Anti-Kickback Statute and Stark Laws. The loans were also provided without due assessment of community need for the physicians services, and often given to doctors who were already practicing in the hospital's service area. Condell would then bill the doctors paying off the loans at a rate higher than fair market value of the services being rendered. In addition to improper loans, incentive bonuses were paid to physicians in an attempt to provide financial incentive for physicians to refer Medicare and Medicaid patients to Condell Medical Center, a 238-bed facility located in Libertyville, IL. As a result of Condell's voluntary disclosure of these activities, a settlement was reached whereby the United States receives $33.12 million and the State of Illinois receives $2.88 million. While the False Claims Act typically holds a standard of treble damages plus civil penalties for each violation of the False Claims Act, the settlement was formulated on double damages plus $5,000–$11,000 for civil penalties for each violation because of Condell's voluntary disclosure. Assistant U.S. Attorney Linda A. Wawzenski, deputy chief of the U.S. Attorney's Office Civil Division represented the United States in the Northern District of Illinois.

L-3 Communications Corp. (N.D. Ga. December 8, 2008)

L-3 Vertex Aerospace and L-3 Communications Corporation recently resolved allegations that they submitted false claims to the United States government on a military contract with the United States Army in Iraq. L-3 Communications agreed to pay $4 million to the United States for allegedly improperly billing and overbilling the Army for work done by L-3 employees on its government contract at Camp Taji, Iraq. As stipulated by contracted, L-3 was responsible for providing helicopter maintenance services and military operations support. L-3 allegedly submitted outright false records of hours worked and exaggerated other hours worked by its employees. As part of the Settlement Agreement, the relator Henry W. Roderigas received $720,000 for his role in uncovering the allegations against L-3. The settlement was reached, at least in part, by efforts related to the National Procurement Fraud Initiative and Task Force, which was established in October 2006 and intended to enhance the United States government's ability to detect, prevent, and prosecute fraud connected with the elevated quantity of government subcontracts for national security purposes.

HMS Diagnostics Inc. (S.D. Tex. December 16, 2008)

HMS Diagnostics Inc., HMS Diagnostics LLC, and Health Management Services Inc. (collectively referred to as HMS) have recently settled allegations of fraud in violation of the False Claims Act by paying $550,000 to the United States. As an Independent Diagnostic Testing Facility (IDTF) that focuses on the treatment of sleeping disorders, HMS is required to have technicians administering sleep diagnostic tests to have certification to receive Medicare reimbursement. HMS is also required by Medicare and Medicaid rules and regulations to provide the names of licensed technicians. Additionally, Medicare and Medicaid must be notified periodically of changes in licensed personnel. HMS was alleged to have neglected all of the above requirements while requesting Medicare and Medicaid reimbursements for nearly 5 years from 2002 until August of 2007. As a result of the settlement, HMS agreed to pay the United States $4 million but did not admit liability for the allegations as part of the agreement. Furthermore, HMS entered into a corporate integrity agreement that will last for the next five years with the intent of encouraging closer adherence to Medicare and Medicaid guidelines.

Yale University (D. Conn. December 23, 2008)

Yale University recently entered into a settlement agreement to pay the United States $7.6 million which resolved allegations of misuse in federally funded research grants violating the False Claims Act. There were two primary charges of misuse which both ran counter to the common standard that federal grant recipients may only charge the grants for expenses directly related to the objective of the grant, otherwise known as "allocable" costs. The first allegation stated that certain researchers would spend grant funds on non-allocable expenses as the time limit for their grant was running out. The incentive being that any remaining grant money at the expiration date must by law be returned to the federal government. The second set of allegations dealt with federally funded grant researchers billing their grants for hours worked on projects that fell outside of the terms of certain grants. This allegedly occurred throughout summer months during which Yale University researchers were not paid their academic year salary, thereby creating monetary incentive for these researchers to bill non-allocable grant hours to the federal government. The U.S. Attorney's Office noted Yale's full cooperation and efforts to improve their federal grant management throughout the investigation process. The False Claims Act violations supposedly occurred between 2000 and 2006 spanning six year. The settlement agreement was a result of investigative and joint efforts by the Department of Health and Human Services, the National Science Foundation, the Department of Energy, and numerous other government agencies.

Spartan Motors (D.S.C. December 23, 2008)

Spartan Motors and Spartan Chassis recently settled allegations of illegal kickbacks by paying the United States $1.7 million. In its complaint, the United States claimed that Spartan Motors and Spartan Chassis paid roughly $100,000 to an employee of Force Protection Inc. in order to receive a subcontract with the United States Military. In return, it was alleged that Force Protection Inc. agreed to purchase truck chassis's used for Marine Corps and Army Mine Resistant Ambush Protected vehicles from Spartan. The payment of $1.7 million resolves allegations of both the Federal False Claims Act as well as the Anti-Kickback statute. The case was brought forth through the National Procurement Fraud Initiative and investigated in joint effort by the Department of Defense's Defense Criminal Service Office, the Army's Criminal Investigation Command's Major Procurement Fraud Unite and the Defense Contract Audit Agency. As stipulated by the settlement agreement, Spartan accepts no liability for the allegations.

Cooper University Hospital and St. Joesph Healthcare System Inc. Settlement: U.S. ex rel. Kite v. Besler Consulting et al. (D.N.J. October 21, 2008)

Cooper Hospital and St. Joseph's Healthcare System Inc. agreed to pay the United States $3.85 million and $1.75 million respectively to settle allegations that both defendants falsely inflated Medicare and Medicaid patient charges. The alleged result was excessive outlier reimbursements from the United States government in violation of the False Claims Act. Cooper Hospital is a major teaching hospital in Southern New Jersey and St. Joseph Healthcare System Inc. manages a number of medical facilities across northern New Jersey. The defendants allegedly accepted and applied outlier inflation schemes devised by Besler Consulting and Shusko Consulting; the implementation of which purportedly resulted in the excess payment of millions of dollars to which the defendants were not entitled. Besler Consulting previously settled allegations in March 2008 for devising the previously mentioned schemes. The relator, Anthony J. Kite, served as an independent hospital consultant in New Jersey and filed the *qui tam* suit in 2005. He received $654,000 from Cooper Hospital and $481,250 from St. Joseph's Hospital as his share stipulated in the settlement agreements. A number of other hospitals in New Jersey and Pennsylvania who allegedly implemented similar schemes from Besler and Shusko have settled these allegations for more than $22 million thus far. Investigations were handled by the Justice Department's Civil Division, Commercial Litigation Branch; the U.S. Attorney's Office for the District of New Jersey, Affirmative Civil Enforcement Unit; the U.S. Attorney's Office for the Eastern District of Pennsylvania; the Department of Health and Human Services, Office of Inspector General and Office of Counsel to the Inspector General; the Centers for Medicare and Medicaid Services; and the FBI.

Cephalon, Inc. (E.D. Pa. September 29, 2008)

Cephalon, Inc. agreed to pay the federal government and thirteen states a sum total of $425 million to settle allegations of "off-label" marketing Gabitril, Actiq, and Provigil prescription drugs. All three pharmaceutical drugs were previously approved for the treatment of specific medical conditions by the FDA. Cephalon allegedly implemented marketing schemes to promote Gabitril, Actiq and Provigil for non-approved treatments in order to increase the sales base of each product and generate new revenue. Gabitril is solely approved for the treatment of partial seizures for individuals over the age of 12. The approved treatment for Provigil was for excessive sleepiness related to narcolepsy, sleep apnea, and shift work sleep disorder only. Actiq was approved by the FDA as a drug treatment for breakthrough cancer pain. Each drug, through a variety of means, was allegedly marketed for alternate uses than FDA approved. The purported "off-label" marketing stood in violation of the Food, Drug, and Cosmetics Act and FDA regulations. Additionally, allegations stated that Cephalon provided financial incentives in the form of kickbacks to physicians for speaking on behalf of Gabitril and

Provigil for non-approved treatments. The alleged kickbacks and "off-label" marketing resulted in illegitimate billing to Medicaid seeking repayment from the United States and the respective states, which would violate the False Claims Act. The four relators in the case were represented by Frederic Ellis and TAF members Kirk Chapman, Peter Chatfield, Brian Kenny, and David Stone.

U.S. ex rel. McMillan et al. v. General Dynamics Armament and Technical Products Inc. (E.D.N.Y. August 18, 2008)

General Dynamics Armament and Technical Products (henceforth referred to as GDATP) agreed to pay $4 million to settle allegations of purposively selling untested parts to the Navy intended for use in aircraft and submarines. GDATP is a wholly-owned subsidiary of General Dynamics Corporation and operates a facility in Glen Cove, Long Island. At the Glen Cove facility where relators Lourdes McMillan, Charles Palmer, Rudy Tanawots, and David Ginsburg were employed, it was alleged that GDATP manufactured defective parts and deliberately failed to meet testing standards. The components were sold for use on various transport aircraft and two separate types of naval submarines. Additionally, it was alleged that both GDATP and General Dynamics Corporation had knowledge of the failure to meet testing standards and these defective components being sold. Relators' shares totaled roughly 14.3% of the total settlement and defendant's agreed to pay $191,250 for relator's attorney fees and expenses incurred. The complaint was made by relators in August of 2003 and the United States intervened in July of 2007. The allegations were investigated by the United States Attorney's Office and the Defense Criminal Investigative Service, New York.

U.S. ex rel. Thompson et al. v. Walgreen Co. (D. Minn. September 9, 2008)

Walgreen Co. agreed to pay four states and the United States $9.9 million to settle allegations that they knowingly and deceptively improperly billed Medicaid programs. Individuals who are covered by both private party insurance as well as Medicaid do not have to make a co-payment to account for the gap between the total drug cost and the cost covered by the private insurance. Instead, Medicaid is legally obligated to reimburse Walgreens the difference between what the private party insurance pays and total cost of the prescription drug. Rather than seeking reimbursement for the aforementioned amount, Walgreen Co. allegedly billed Medicaid programs to be reimbursed for the full cost an individual would pay if they did not have private insurance in addition to Medicaid. Walgreen allegedly improperly billed these excess sums knowingly and in violation of the False Claims Act. The alleged result was thousands of false cost claims being submitted by Walgreen to Medicaid since 1998 and continuing to the present. The complaint was brought by two pharmacists Neil Thompson and Daniel Bieurance who were represented by Robert Christensen, James VanderLinden, and TAF member Brian Wojtalewicz. Of the $9.9 million Walgreen Co. has agreed to pay to settle allegations, relators will receive approximately $920,794 on top of reasonable attorneys' fees and expenses. The allegations were investigated by the U.S. Department of Justice and Office of the Inspector General of the Department of Health and Human Services.

Staten Island University Hospital (E.D.N.Y. September 11, 2008)

Staten Island University Hospital (SIUH) recently agreed to pay a total of $88.9 million to settle allegations that the Hospital was intentionally defrauding the United States through a variety of means. Miguel Tirado, the former head of chemical dependency services at SIUH, brought both a United States and state of New York *qui tam* complaint alleging improper billing of inpatient detoxification treatment. In another complaint, a widow of a former cancer patient treated at SIUH claimed that SIUH knowingly used erroneous billing codes to be reimbursed for non-reimbursable cancer treatments. SIUH was the only hospital providing the specific treatment and as such, was not eligible for reimbursement from Medicare or TRICARE. Rather than using the correct billing codes for this treatment, SIUH allegedly fraudulently used billing codes which would, in fact, receive reimbursement. Elizabeth Ryan, the relator in this case, received $3.8 million as her share of the settlement recovery. Two smaller settlements were borne out of allegations that SIUH purposively overstated its resident count as well as treated psychiatric patients in unlicensed beds. The aggregate result of these four allegations was settlements totaling $88.9 million with whistleblowers shares totaling $9.9 million.

U.S. ex rel. Holbrook v. W.W. Grainger, Inc. (E.D. Wis. July 25, 2008)

W.W. Grainger Inc. paid the United States $6 million to resolve allegations that it defrauded various U.S. government agencies. Grainger, which is based in Illinois and sells industrial equipment and supplies, held a contract with the General Services Administration (GSA). The contract stipulated a fix-percentage mark up of 26% for special goods. The relator, Mr. Brian Holbrook, held the position government sales manager in five states for W.W. Grainger. In this position, Mr. Holbrook allegedly witnessed a mark up of goods higher than the 26% stipulated in Grainger's contract with the GSA. Additionally, Grainger is legally bound to provide the federal government with high-volume discounts on goods and products which it has allegedly and intentionally failed to do. Lastly, there were allegations that Grainger entered into sales contracts with a number of Asian countries which do not have reciprocal trade agreements with the United States. These actions would thereby violate the Trade Agreement Act. To settle these allegations Grainger has paid the U.S. $6 million, $70,400 of which has been allocated for the relators' share. The investigation was undertaken by the U.S. Attorney's Office for the Eastern District of Wisconsin, the GSA's Office of the Inspector General, and the Justice Department's Civil Division.

Lester E. Cox Medical Centers (W.D. Mo. July 22, 2008)

Lester E. Cox Medical Centers and the United States recently reached a $60 million settlement to resolve allegations of Medicare fraud which violated the Stark Law, Anti-Kickback Statute, and False Claims Act. In addition to a financial settlement, Cox agreed to a Corporate Integrity Agreement in conjunction with the Office of Inspector General of the U.S. Department of Health and Human Services. Specific allegations include entering into a barred financial arrangement with the Ferrell-Duncan Clinic, Inc. physicians group. This financial arrangement presented a situation in which the physicians had financial incentive to refer patients to Cox for treatment. Additionally, there were allegations that Cox defrauded the United States by submitting Medicare cost reports which resulted in Cox's reimbursement for clinic costs that were non-reimbursable. Lastly, it was alleged that Cox fraudulently billed for renal disease treatments through smaller entities controlled by Cox which violated the False Claims Act. The settlement agreement was entered into with attention paid toward the amount of payment that could be made by Cox without compromising their current patient care abilities. That being said, the total settlement agreement was ultimately a cost considerably lower than the alleged monetary amount of fraud. The settlement agreement and allegations were borne out of an investigation which began in 2003 by the Health and Human Services Office of the Inspector General, the Office of Audit Services, and the Federal Bureau of Investigations.

Armor Holdings Products LLC (D.D.C. October 7, 2008)

To resolve allegations that they intentionally and deceptively defrauded the United States, Armor Holdings Products LLC has agreed to pay the United States $30 million. The United States alleged that Armor Holdings manufactured and sold substandard Zylon bullet-proof vests despite its knowledge that Zylon material had rapid degradation qualities. Additionally, the United States alleged that these bullet-proof vests were unsuitable for ballistic use. The two types of Zylon vests sold by Armor Holdings to the United States had been produced by Tyobo Co. Ltd., who had previously been sued by the United States for similar allegations. Thus, the $30 million settlement is part of a larger, more pervasive investigation into the practice of the body armor manufacturing industry. Three previous settlements total roughly $16 million for similar allegations against Zylon body armor manufacturers. The allegations and ultimate settlement were brought about by an ongoing investigation by the Justice Department's Civil Division, the General Services Administration Office of the Inspector General, the Department of Homeland Security Office of Inspector General, the Defense Criminal Investigative Service, the Air Force Office of Special Investigations, the Department of Energy Office of the Inspector General, the U.S. Agency for International Development Office of the Inspector General, among other agencies.

U.S. ex rel. Klemm v. West Jefferson Medical Center (E.D. La. October 17, 2008)

West Jefferson Medical Center has agreed to pay the United States and the State of Louisiana $3.3 million to settle allegations that the hospital fraudulently billed Medicaid programs. The allegations put forth by the United States suggested that Western Jefferson Medical Center had deceived the Medicaid program into believing that its Pediatric Intensive Care Unit (PICU) could treat patients with specific critical care services, when it realistically could not. This alleged behavior took place between March of 1998 and October of 2003 and resulted in the collection of illegitimate reimbursements by the Medicaid program on the part of Western Jefferson Medical Center. The allegations were initially filed by Leslie Klemm, the relator, who served as a nurse in Western Jefferson. Klemm will receive a total of $627,000 as her share of the settlement between the United States, Louisiana, and West Jefferson. The investigation was led in a cooperative fashion by the Justice Department's Civil Division, HHS-OIG, the Office of the U.S. Attorney in New Orleans and the Louisiana Attorney General's Medicaid Fraud Control Unit.

U.S. ex rel. Bernstein v. Carlson Therapy Network (D. Conn. September 22, 2008)

Carlson Therapy Network has agreed to pay the United States $1.88 million to resolve allegations that it defrauded a number of Government health care programs by intentionally, improperly billing. Government health care programs, such as Medicare and Tricare, require that specific types of physical therapy treatments and services are done in a one-on-one fashion in order to be reimbursed. Rather than properly stating when one-on-one treatment took place, the allegations state that Carlson Therapy Network billed for one-on-one treatments when no such care took place. Instead, Carlson Therapy Network physical therapists overlapped billing time and treated multiple patients at once. The alleged result was United States' losses totaling $943,417 due to pervasive improper billing throughout Carlson's 20 physical therapy facilities. In addition to the financial terms established in the settlement, Carlson Therapy Network has agreed to sign a Corporate Integrity Agreement with the U.S. Department of Health and Human Services in hopes of preventing future Medicare fraud. Leslie Bernstein, the relator and former Carlson Therapy Network employee, will receive $320,762 as her share of the settlement agreement. The settlement was reached as a result of an investigation by the HHS-OIG, Federal Bureau of Investigation, and the U.S. Defense Criminal Investigative Service.

Legal Analysis

Fraud Enforcement & Recovery Act of 2009: A Giant First Leap Forward for False Claims Act Enforcement

FRAUD ENFORCEMENT & RECOVERY ACT OF 2009:
A Giant First Leap Forward for False Claims Act Enforcement

Joseph E. B. White, Esq.
Taxpayers Against Fraud

INTRODUCTION

By passing the Fraud Enforcement and Recovery Act of 2009 (FERA), Congress finally sought to remove the liability loopholes and statutory confusion that has undermined the False Claims Act ("FCA"), the Government's primary fraud-fighting weapon. Indeed, at a time when we most need to protect every single tax dollar from fraudulent schemes, our country could ill afford to allow these problems to continue. Among other things, these landmark amendments restore this important law enforcement mechanism, remove the statutory ambiguity that is breeding confusion for all parties, and deter dishonest entities who might seek to drain funds from the U.S. Treasury. However, while this is a giant leap forward for our country's fraud-fighting efforts, major problems still plague FCA enforcement. This article highlights some of the FCA concerns addressed by FERA and explains why additional work is still needed to fully restore the Act.

I. FERA FULLY PROTECTS GOVERNMENT FUNDS FROM FRAUD

FERA sensibly closes and "corrects" a number of loopholes that fraudfeasors have used and abused to drain billions of dollars from the U.S. Treasury. This important legislation clarifies, once and for all, the reach of the *existing* FCA liability provisions and rejects extraneous limits that judges have legislated from the bench. Restoring the full reach of the FCA, FERA empowers our law enforcement efforts to finally reach those who are currently stealing taxpayer dollars with impunity. The key improvements to the Section 3729(a) liability provisions are those designed to do the following: a) fully protect U.S. Government dollars even when the Government relies on others to make payment decisions for the federal Government; b) impose liability on those who steal funds administered by the U.S. Government; and c) recover funds from those who convert taxpayer funds to unauthorized uses or knowingly retain overpayments.

A. Liability for Those Who Seek to Steal Government Funds from Government Contractors or Grantees

The U.S. Government has drastically changed since the FCA was last amended nearly a quarter century ago. Today, the U.S. Government largely relies on federal contractors for many traditionally government functions, including procurement and contract management. Unfortunately, with the FCA statutory language cemented to reflect the realities of the 1986 government contracting environment, a number of recent court decisions have read the Act in a way to expose the modern expenditure of Government funds to fraud and abuse. FERA restores the Act to clearly reflect the Congressional intent behind the 1986 FCA amendments. Specifically, when Congress amended the FCA in 1986, it intended that, under the FCA, ". . . a claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States . . . a false claim to a recipient of a grant from the United States or to a State under a program financed in part by the United States is a false claim to the United States."[1]

The need for this clarifying legislation was underscored by a recent U.S. Supreme Court decision that narrowed the Act to *only* apply to false claims that are potentially reviewable by the "Government itself."[2] This limiting Court decision was reached notwithstanding the crystal clear legislative history and a definition of "claim" in the FCA that includes claims "made to a contractor, grantee, or other recipient if the United States provides any portion of the money or property which is requested or demanded."[3]

The real-world impact of this decision was evident the very next day, when a district court dismissed, on the eve of trial, the Government's prosecution of a substantial crop subsidy fraud scheme.[4] According to this decision, a false statement can *never* be "material to the Government's decision to pay" when a private entity pays the claim and then seeks reimbursement from the Government. Since then, similar arguments have been parroted in courts throughout the country, seeking to squelch government investigations involving Medicare and Medicaid fraud,[5] defense subcontractor fraud,[6] and fraud on local and state programs, including those "funded in part by the United States where there is significant Federal regulation and involvement."[7]

Most importantly, given the modern-day government contracting environment, these troubling court decisions were likely the tip of the iceberg of future court dismissals. The simple truth is that the federal Government has outsourced an unprecedented

1. S. Rep. No. 99-345, 99th Cong., 2d Sess. 19-20 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5288-89.

2. *Allison Engine Co. v. United States ex rel. Sanders*, 128 S.Ct. 2123 (2008).

3. 31 U.S.C. § 3729(c).

4. *United States v. Hawley*, 566 F.Supp.2d 918 (N.D. Iowa 2008).

5. *See United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302, 1305-06 (N.D. Ala. 2004), *aff'd*, 470 F.3d 1350 (11th Cir. 2006) (dismissing case involving nursing home claims on state Medicaid agency); *United States ex rel. Brunson v. Narrows Health & Wellness*, LLC, 469 F. Supp. 2d 1048, 1053 (N.D. Ala. 2006) (dismissing Medicare claims submitted to an insurance company hired by the federal government to administer the Medicare program).

6. *See United States ex rel. Sanders v. Allison Engine Co.*, 364 F. Supp. 2d 710 (S.D. Ohio 2003), *rev'd by*, 471 F.3d 610 (6th Cir. 2006), *vacated and remanded by Allison Engine Co. v. United States ex rel. Sanders*, 128 S.Ct. 2123 (2008).

7. S. Rep. No. 99-345 at 19-20 (citing an area in which Congress intended the FCA to be applicable). *See, e.g., United States ex rel. Rutz v. Village of River Forest*, 2007 WL 3231439 (N.D. Ill. Oct. 25, 2007) (federal Bureau of Justice Assistance block grant to county); *U.S. DOT ex rel. Arnold v. CMS Eng'g*, 2007 U.S. Dist. LEXIS 9118 (W.D. Pa. Feb. 6, 2007) (U.S. Department of Transportation grant to Pennsylvania Department of Transportation); *U.S. v. City of Houston*, 2006 U.S. Dist. LEXIS 57741 (S.D. Tex. Aug. 16, 2006) *affirmed on other grounds by*, 523 F.3d 333 (5th Cir. 2008) (U.S. Department of Housing funding of City of Houston housing authority); *United States ex rel. Rafizadeh v. Cont'l Common, Inc.*, 2006 U.S. Dist. LEXIS 18164 (E.D. La. April 10, 2006) *affirmed on other grounds by*, 553 F.3d 869 (5th Cir. 2008) (U.S. grants to state Department of Social Services and state Department of Health & Hospitals).

number of governmental functions to private entities, including the contracting process itself.[8] Indeed, this trend has accelerated to a record level, with the Government now spending nearly *40 cents* of every discretionary dollar on contracts with private companies.[9] In fact, "Presidents and Congress have moved millions of jobs to an estimated contract workforce of more than 7.6 million employees, or three contractors for every federal employee. The number of contractors has grown by 70 percent since 2002, mostly through contracts that have been awarded without competition."[10]

The pervasiveness of this government outsourcing was recently highlighted by the U.S. Comptroller General:

> The government is relying on contractors to fill roles previously held by government employees and to perform many functions that closely support inherently governmental functions, such as contracting support, intelligence analysis, program management, and engineering and technical support for program offices.[11]

This trend was also recently identified in a Government Accounting Office report, noting that spending by the Department of Defense (DOD) on contractor services has more than *doubled* over the past decade.[12]

Additionally, at a time when we are increasingly relying on this so-called "shadow government"[13] to award and oversee contracts, disburse federal funds, and attempt to detect fraud in government contracting, procurement spending has reached all-time highs. Between 2000 and 2005, procurement spending rose by 86% to $377.5 billion annually, and spending on federal contracts grew over twice as fast as other discretionary federal spending.[14]

Given the recent federal stimulus package paying out nearly a trillion additional

8. Between 1993 and 2000, the size of the civilian workforce was reduced by 426,000 positions, reaching a level equal to that under President Eisenhower. Between 2000 and 2005, annual government procurement spending increased by 86%, or $175 billion dollars. *Dollars, Not Sense: Government Contracting Under the Bush Administration* at i, 3 (Comm. Print 2006), H.R. Comm. Gov't Reform—Minority Staff Special Investigations Division, 109th Cong., 2d Sess.

9. *Id*. The Department of Energy spends approximately 98% of its budget on contractors, the Pentagon spends nearly half of its budget on contractors, and the National Air & Space Administration spends about 78% of its budget on contractors. Shane, Scott. "Uncle Sam keeps SAIC on Call for Top Tasks/Government Turns to California Company for Variety of Sensitive Jobs." The Baltimore Sun, 26 Oct. 2003.

10. Light, Paul C. "Open Letter to Presidential Candidates," *available at* http://www.nyu.edu/public.affairs/releases/detail/2182 (last visited March 29, 2009).

11. *DOD's Increased Reliance on Service Contractors Exacerbates Long-standing Challenges, 2008: Hearings on Defense Acquisitions before the Subcom. On Defense of the House of Representatives Comm. on Appropriations*, 110th Cong., 2d Sess. 10-12 (2008) (statement of David M. Walker, Comptroller General of the United States).

12. *DOD Needs to Reexamine Its Extensive Reliance on Contractors and Continue to Improve Management and Oversight, 2008: Hearings on Defense Management Before the Subcomm. On Readiness of the House of Representatives Comm. On Armed Services*, 110th Cong., 2d Sess. 3 (2008) (statement of David M. Walker, Comptroller General of the United States).

13. GAO Report, *2008: Hearings on Defense Management Before the Subcomm. On Readiness of the House of Representatives Comm. On Armed Services*, 110th Cong., 2d Sess. 3 (2008), *available at* http://oversight.house.gov/story.asp?ID=1071 (last visited March 29, 2009).

14. *Id.*

dollars in government funds, the concerns over the protective reaches of the FCA became even more pressing. Instead of having the "Government itself" pay out these funds, the federal Government will continue to rely on the usual third parties, including State agencies, government contractors, and government grantees, to distribute these funds.

In turn, when a person submits a claim for a government benefit, or for payment for services or goods provided as part of a government program, chances consequently are extremely high that the a government employee will not be involved in the payment decision. For example, when seeking reimbursement from the Medicare or Medicaid program, hospitals submit their claims to private insurance companies on contract with the federal or a state government, and the "Government itself " is *never* consulted on whether or not to pay the claims. Similarly, defense contractors typically find themselves billing another defense contractor who, in turn, bills another defense contractor, who may or may not be the one with the prime contract with the Department of Defense. In each of these examples, however, the person submitting the bill knows full well that he is being paid by the taxpayers to perform work in furtherance of governmental purposes.

In short, without the FCA Amendments offered by FERA, a "free fraud zone" would have continued for the *numerous* situations in which companies bill entities that have been paid in advance by the federal Government. FERA shuts down this gaping enforcement loophole. Consistent with the Congressional intent behind the 1986 FCA amendments, FERA corrects the FCA to make clear that liability attaches whenever a person knowingly makes a false claim to obtain money or property, any part of which is provided by the Government without regard to whether the wrongdoer deals directly with the federal Government; with an agent acting on the Government's behalf; or with a third party contractor, grantee, or other recipient of such money or property. To ensure that the Act is not interpreted to federalize fraud that threatens no harm to Government purposes or federal program objectives, the Amendment explicitly excludes from liability requests or demands for money or property that the Government has paid to an individual as compensation for federal employment or as an income subsidy, such as Social Security retirement benefits, with no restrictions on that individual's use or the money or property at issue.

These timely Amendments, in turn, clarify that the FCA may be used to redress Medicare Part D fraud and fraud on Medicare managed care, for both of these programs are administered by Government contractors. Moreover, FERA eliminates the argument, once and for all, that the FCA does not reach false claims submitted to State-administered Medicaid programs, as some have argued under *Totten* and *Allison Engine*. Additionally, FERA correctly clarifies that the Act can be used to reach federal funds stolen from recipients of federal block grants. The simple fact is that such claims undermine the purpose of those grants by diverting funding away from the objectives that the federal program sought to achieve.

Notably, these clarifications are consistent with what Congress intended to achieve in 1986. By removing from Section 3729(a)(1) language that could be narrowly read to limit liability to persons who present false claims directly "to an officer or employee of the Government, or to a member of the Armed Forces," FERA finished the job Congress intended to complete in 1986, when it defined actionable "claims" in the current Act to include "any request or demand . . . for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded."[15]

In arguing against this much-needed clarification, FCA defendants posited a red herring in arguing that the appropriate remedy when a government subcontractor submits false claims to a government prime contractor is a lawsuit by the prime contractor against the subcontractor under the law of contract or the law of fraud. As they certainly recognized, this remedy would be nowhere near as effective as the FCA at uncovering, deterring or remedying fraud in government programs. First, state contract and tort laws do not provide any means comparable to the *qui tam* provisions for a recipient of federal funds to learn about the fraud from an insider with financial incentives to come forward. Second, state contract and tort laws do not contain treble damage remedies that serve as both a powerful deterrent to fraud and a means of obtaining full compensation not only for the overcharge, but also the time value of money, and the costs inherent in detecting, investigating and pursuing fraud. Thankfully for the federal fisc, Congress was not fooled by this diversion.

B. Liability for Those Who Steal Funds Administered by the United States

In 1986, Congress surely could not foresee that the U.S. Government would enter into the role of administering the funds of another country, such as the Iraqi funds administered by U.S. officials at the Coalition Provisional Authority. However, as U.S. Department of Justice unsuccessfully argued to a recent court, when the United States elects to invest its limited resources in administering the funds of another entity, the FCA should protect these funds from fraud.[16] Unfortunately, because the pre-FERA FCA did not expressly impose liability for false claims for money administered, but not owned by the United States, fraudsters were able to drain these critical funds with impunity.

However, as the U.S. Department of Justice has argued on numerous occasions, there are a myriad of reasons why the Act should be used to cover such situations. Perhaps most importantly, when the United States elects to invest its resources in administering the funds of another, it does so only because the achievement of important foreign or domestic policy goals turns on proper management of the funds. Indeed, while the Act did not explicitly cover these funds prior to FERA, the U.S. Government pursued cases of this nature, recovering millions of dollars from oil, gas and

15. 31 U.S.C. § 3729(c). *See also* S. Rep. No. 345, 99th Cong., 2d Sess. 1986 (section-by-section analysis explaining that a false claim includes claims submitted to grantees and contractors if the payment ultimately results in a loss to the Government).

16. *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617, 636-641 (E.D. Va. 2006).

mining companies that had underreported the royalties owed under leases on Native American land.[17]

FERA codified, once and for all, the Government's ability to protect these funds under the FCA. FERA prudently amends the FCA so that it covers fraud on U.S.-administered funds by defining "claim" to include, among other things, requests or demands for money or property that are presented to an officer, employee, or agent of the United States "whether or not the United States has title to the money or property."[18] This amendment to the existing statutory language clarifies that FCA liability attaches to knowingly false requests or demands upon the United States for money or property administered by the United States on behalf of another person. This amendment takes on added importance given the concern about fraud on Iraqi funds paid out by the U.S. Government. As noted on the editorial pages of the *New York Times*: "Investigators say that current war fraud runs into the untold billions, including faulty ammunition and vehicles and not-so-bullet-proof vests."[19]

C. Liability for Those Who Convert Taxpayer Funds to Unauthorized Uses or Knowingly Retain Overpayments

Since the FCA was last amended in 1986, a gaping liability loophole has been recognized by fraudsters, allowing a "finders' keepers" regime to flourish when it comes to the overpayment of federal funds. Specifically, the knowing retention of overpayments is a tremendous problem in government health programs and government procurements. Moreover, as then-CBO Director Peter Orszag stressed last year, "[f]uture health care spending is the single most important factor determining the nation's long-term fiscal condition."[20]

An example is a health care provider that mistakenly overbills the federal Government for services, identifies its mistake, and then decides not to disclose the mistaken billing to the Government in order to fraudulently hold on to the overpayment. Understandably, the provider's mistake might have stemmed from a misunderstanding of the billing rules or some other error, but, in each case, FCA liability would not attach, for the original claims would not be "knowingly" false.[21] However, after the provider discovers the mistaken payment and retains it, the provider has committed a criminal offense.[22] The Compliance Guidelines of the Office of Inspector General of the U.S.

17. *See, e.g., Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039 (10th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005); *U.S. v. Chevron*, 186 F.3d 644 (5th Cir. 1999); *United States ex rel. Wright v. Agip Petroleum Co.*, 2006 U.S. Dist. LEXIS 93415 (E.D. Tex. Dec. 27, 2006); *United States ex rel. Koch v. Koch Indus.*, 57 F. Supp. 2d 1122 (N.D. Okla. 1999).

18. *See* new 31 U.S.C. § 3729(b)(2)(A).

19. "The Imprecise Meaning of War." Editorial. *The New York Times*. July 3, 2008.

20. "Opportunities to Increase Efficiency in Health Care," Statement of Peter R. Orszag, Director, Congressional Budget Office, at the Health Reform Summit of the Committee on Finance, United States Senate, June 16, 2008, at 8.

21. In many situations of this nature, there also would no false statement to trigger liability. With the exception of long term health care providers that must submit quarterly statements to the Medicare program disclosing any known overpayment ("Credit Balance Reports" submitted by Medicare Part A providers), health care providers generally are not asked to submit statements disclosing known overpayments.

22. 42 U.S.C. § 1320a-7b(a)(3).

Department of Health & Human Services ("OIG") warn that failure to return overpayments within a "reasonable period of time" following discovery may be interpreted as an intentional attempt to conceal the overpayment from the Government.[23] Paradoxically, however, because of a drafting problem with the 1986 FCA Amendments, the Government was not able to use the pre-FERA FCA to protect these funds. In short, without the amendments offered by FERA, this common fraud scheme of dishonest providers would have remained largely concealed, for *qui tam* whistleblowers would not be able to expose the scheme under the FCA.

Equally disturbing, unless a contractor submitted something to the Government concealing its dishonesty, the pre-FERA FCA would not apply when someone wrongfully converted Government funds to an unauthorized use. An example of this scenario would be a government contractor's decision to spend an advance payment intended for hurricane relief efforts on his personal enrichment instead. When our country is in the midst of a war or rebuilding roads in the wake of a major hurricane, government funds are often disbursed quickly in advance of the work being performed, and without the usual required certifications of performance under the contract. Moreover, when a contractor uses an advance payment for an improper purpose in these circumstances, there will rarely be a false claim or false statement submitted to the Government that would have triggered FCA liability. In short, these dishonest contractors were able to evade FCA liability.

FERA seeks to address both of these common fraud schemes by expressly imposing liability on anyone who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the United States." This language makes clear that a person who retains an overpayment, while avoiding a duty to disclose or return the overpayment that arises from a statute, regulation or contract, violates the False Claims Act. Indeed, to address any potential confusion among the courts as to what is intended to be encompassed within the term "obligation" as used in Section 3729(a)(7),[24] the amendments define that term in new Section 3729(b)(3) as encompassing legal duties that arise from the retention of any overpayment.

As outlined above, this amendment was needed to plug a gaping loophole that was draining our public fisc and undermining the long-term viability of our government health care programs. This provision alone should recover millions of additional stolen tax dollars.[25]

23. *See, e.g.*, Hospital Compliance Guidelines, 63 Fed. Reg. 8987 (February 23, 1998); Supplemental Compliance Program Guidance for Hospitals, 70 Fed. Reg. 4858 (January 31, 2005); Compliance Program for Individual and Small Group Physician Practices, 65 Fed. Reg. 59,434 (October 5, 2000).

24. *See, e.g.*, United States *ex rel.* Prawer & Co. V. Verrill & Dana, 946 F. Supp. 87 (D. Me. 1996); American Textile Manufacturers Institute, Inc. v. The Limited, Inc., 190 F.3d 729 (6th Cir. 1999).

25. Nearly a decade ago, before the baby boomer generation even qualified for Medicare, HHS-OIG researched the instances of overpayment in the Medicare system and concluded that $23.2 billion, or 14% of total program costs, were lost each year due to fraud, waste and abuse. *HCFA's FY 1996 Medicare Audit, 997: Hearing before the Subcomm. On Health of the House Comm. On Ways and Means*, 105th Cong., 1st Sess. (1997) (statement by June Gibbs Brown, Inspector General, Dep't of Health & Human Services).

II. FERA REMOVES EXTRANEOUS HURDLES UNDERMINING THE FCA'S LAW ENFORCEMENT CAPABILITIES

A. Empowering the Government With A Practical Subpoena Tool That Clearly Defines Appropriate Use of Subpoenaed Material

Perhaps most importantly for the day-to-day capabilities of the Justice Department, FERA amends the FCA to permit the Attorney General to delegate the issuance of Civil Investigative Demands (CIDs), a form of administrative subpoena that may be used to obtain documents, testimony and interrogatory responses. In 1986, when Congress added the CID to the Act, the Senate Judiciary Committee viewed this as an authority "supplementing the investigative powers of the IGs [Inspectors General]."[26] Unfortunately, the statutory language did not make the CID power delegable. Thus, when an Attorney General was occupied with matters that he or she considers more important than FCA investigations, the line attorneys at the Department of Justice and in the Offices of U.S. Attorney were unable to utilize CIDs to investigate their cases.

To compound matters, the pre-FERA CID provision did not spell out permissible "official uses" of materials obtained under the CID. This uncertainly over appropriate use of materials caused most Department of Justice trial attorneys and Assistant U.S. Attorneys to shy away from utilizing the CID authority in the first place.

FERA addresses these debilitating concerns by permitting the Attorney General to delegate the authority to issue CIDs, and by clearly defining the term "official use" to include "any use that is consistent with the law, and the regulations and policies of the Department of Justice." This new definition of "official use" also includes specific examples of the types of uses that fall within the term "official use." Notably, these examples are not meant to be an exhaustive list, but rather illustrative of the ordinary, lawful uses of subpoenaed material in a Department of Justice investigation or litigation that we intend the Department of Justice to employ in FCA cases. FERA also removes confusing language that could have been misinterpreted by the courts to prevent the custodian of CID material from sharing the material with other Department of Justice or program agency personnel for these official uses in the absence of authority from regulations or a court.

Finally arming the Justice Department with usable CID powers will permit it to effectively investigate FCA cases on its own means, thereby allowing it to investigate many more cases and recover millions of additional dollars each year.

B. Updating Service Requirements to Reflect Realities of Multi-Jurisdictional *Qui Tam* Suits

FERA also recognizes that *qui tam* plaintiffs are increasingly filing FCA actions on behalf of not only the federal Government, but also one or more States joined as co-plaintiffs pursuant to state False Claims Act statutes. Such cases ordinarily allege false

26. S. Rep. No. 99-345, 99th Cong., 2d Sess. 33, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5298 (1986).

claims submitted to Medicaid, which is a program funded jointly by the United States and the states. These cases are increasing in number as many States recently have enacted *qui tam* statutes, and many more are expected to do so in light of the provisions in the Deficit Reduction Act of 2005. The pre-FERA FCA already provided that state law claims could be asserted in a case filed under the federal FCA if the claims arise from the same transaction or occurrence. However, the FCA was unclear, however, as to whether the federal FCA seal precluded the *qui tam* plaintiff from complying with state requirements to serve the complaint, or restricted the *qui tam* plaintiff and the federal Government in their ability to serve other pleadings on the States.

FERA explicitly clarifies that the seal does *not* preclude service or disclosure of such materials to the State officials authorized to investigate and prosecute the allegations that the *qui tam* plaintiff raises on behalf of the State. It also clarifies that State officials and employees must respect the seal imposed on the case to the same extent as other parties to the proceeding must respect the seal.

C. Clarifying That the Government's Complaint-In-Intervention Relates Back to *Qui Tam* Complaint's Original Filing Date

Prior to the enactment of FERA, the FCA did not expressly provide that the Government could amend the *qui tam* plaintiff's complaint or that it could file its own complaint upon intervention in a *qui tam* case. This lack of clarity raised a question of whether the Government could avail itself of the Federal Rules of Civil Procedure "relation back doctrine." The Second Circuit recently ruled that the United States can not avail itself of this rule when amending a *qui tam* plaintiff's complaint.[27] The implication of this ruling was that the United States would be regularly forced to forego a thorough investigation of the merits of *qui tam* allegations in order to ensure that it did not lose claims due to the running of the statute of limitations.

FERA solved this conundrum by clarifying that the Government's complaint-in-intervention or amended complaint relates back to the date of the original *qui tam* complaint so long as the conditions of Federal Rule of Civil Procedure are otherwise met. Thus, FERA adds a new paragraph (c) to Section 3731 that expressly provides that the United States' complaint-in-intervention or amended complaint relates back to the date of the complaint filed by the *qui tam* plaintiff "to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person."

III. MAJOR FCA PROBLEMS STILL UNDERMINING FRAUD-FIGHTING EFFORTS

Many of the FCA Amendments etched into the law by FERA appear in a more comprehensive legislation, the False Claims Act Corrections Act. To understand the need for the remaining clarifications offered under the False Claims Act Corrections Act

27. *United States v. Baylor Univ. Medical Center*, 469 F.3d 263 (2d Cir. 2006).

of 2009, one must first understand the important and necessary role *qui tam* whistleblowers and their counsel play in uncovering fraud against the U.S. Government. During my tenure with Taxpayers Against Fraud, I have come to truly appreciate the unique public-private fraud-fighting partnership encouraged under the FCA *qui tam* provisions. I have been equally impressed by the evolving ingenuity of those who seek to steal the U.S. tax dollar. Over the years, as the complexity of fraud has become increasingly buried behind innocuous transactions, there is a heightened need for the inside fraud evidence *qui tam* whistleblowers bring to fraud investigations.

Equally important, as the limited resources of the federal Government have been stretched thin, especially in the wake of the September 11th attacks, the Government has relied, more and more, on the supplementary resources and capabilities of *qui tam* counsel. Indeed, *qui tam* whistleblowers and their counsel have been the driving force behind nearly 70% of the FCA dollars recovered in recent years and were the ones to originally file nearly all of the top FCA settlements of all time. In fact, several FCA settlements during my tenure were achieved after *qui tam* whistleblowers and their counsel devoted years either trying to persuade the Government of the merits of the case before achieving an intervention decision, or litigating the case following a Government declination.

Perhaps the best example of the benefits *qui tam* assistance brings to FCA enforcement was seen in a 2006 settlement involving Northrop Grumman. Here, the United States negotiated a $134 million FCA settlement that simply never would have been achieved without the dedication, hard work and perseverance of two *qui tam* whistleblowers and their counsel.[28] This settlement resolved allegations that were originally brought to light in 1989, that the defense contractor was overcharging the Government for radar jamming devices installed on Air Force airplanes. When the Government declined to intervene, the *qui tam* whistleblowers and their counsel continued working the case for the next *nine years* on their own, undertaking extensive document and deposition discovery, and risking their personal resources on the case. Finally, in 2002, they were able to convince the Government to take a second look and to intervene in the suit.

The good news for the public fisc is that this settlement is not an outlier. Time and time again, *qui tam* whistleblowers and their counsel have recovered the country's stolen tax dollars.[29] FCA defendants, however, argue that *qui tam* suits recover few dollars for the public fisc, especially after the Government declines to intervene. To support

28. *United States ex rel. Holzrichter v. Northrop Grumman*, Civil Action No. 89C 6111 (N.D. Ill. 2006).

29. Another good example is the settlements of *United States ex rel. Alderson v. HCA-The Healthcare Company* and *United States ex rel. Schilling v. HCA-The Healthcare Company*. Although the Justice Department originally intervened in all aspects of both cases in 1998, when it came time to litigate the consolidated cases following a lengthy stay of the proceedings, the Government declined to pursue a number of the allegations, instead restricting its efforts to the strongest claims. The *qui tam* whistleblowers and their counsel pursued the rest of the claims on their own, recovering about $100 million for the Government through their independent efforts. In addition, at the request of the Justice Department, they assumed almost all of the affirmative discovery work on the intervened parts of the case, with the Government's lawyers focusing on defending depositions of government witnesses and producing government documents. In 2003, the two cases settled for more than $600 million in cash and credits.

their argument, they point to Justice Department statistics that show a relatively low number of settlement dollars under the "non-intervened *qui tam* suits" category. However, while settlements like the above *Northrop Grumman* case are tallied in the "intervened *qui tam* suits" category, it is dishonest to argue that *qui tam* whistleblowers and their counsel brought little to the table in the nine years that the solely carried the case during the post-declination period.

However, for every successful FCA settlement, there are perhaps a dozen meritorious *qui tam* suits that have been derailed by atextual procedural hurdles found nowhere in the FCA or underlying legislative history. FCA defendants counter that the current FCA is working "well enough" and that the $22 billion recovered under the Act since the 1986 FCA Amendments is somehow sufficient. They paint our country's courageous whistleblowers as "parasites" whose cases should be silenced, not because of the merits of their suits, but because existing judicial rewrites to the Act. Their similar tactics in courts have silenced countless *meritorious* whistleblower suits, undermining FCA enforcement to the determent of the U.S. Department of Justice and the public fisc. The truth is that over the last twenty plus years of FCA enforcement, FCA defendants have been successful in highlighting some of the statutory deficiencies and procedural inefficiencies in the current law. The FCA Corrections Act rectifies these deficiencies, for when it comes to fighting fraud, particularly in the current economic crisis, it is not a matter of settling for "well enough."

In turn, the FCA Corrections Act has received broad bipartisan support because it rejects judge-created, extraneous procedural hurdles that have wrongfully derailed meritorious suits. Accordingly, the remaining provisions of the FCA Corrections Act fully restore the law enforcement capabilities of the FCA, allowing the Government to uncover and prosecute complex fraud schemes. The remaining amendments include several important provisions that honor the Congressional intent of the 1986 FCA amendments of fostering a public-private partnership that ushers meritorious *qui tam* actions forward to the benefit of the U.S. Treasury. The remainder of the bill clarifies that *qui tam* whistleblowers with *detailed* knowledge of fraudulent schemes may bring cases even when they lack access to the FCA defendants' underlying billing documentation. It also takes out of the defendants' hands the ability to delay or even preclude adjudication of the merits by challenging the whistleblowers' right to bring a case under the "public disclosure" bar, a provision originally crafted to protect the interests of the Government alone, not the defendant.

A. Encouraging *Qui Tam* Suits That Specifically Detail Fraudulent Schemes, Regardless of Whether the Allegations Include Innocuous Billing Documentation

The FCA Corrections Act injects predictability into the FCA practice by explicitly clarifying *how* Federal Rule of Civil Procedure 9(b) applies to FCA *qui tam* suits. Currently, courts are in disarray on the proper application of Rule 9(b). Different standards apply in different federal circuits—and *even in the same courthouse and same* *type of case*—with some requiring claims evidence at the pleading stage[30] and others not requiring such evidence.[31] This confusion is compounded by the fact that no other category of cases has demanded pleading of specific pieces of evidence at the *pleading* stage of litigation. The FCA Corrections Act rejects this excessively rigid evidentiary standard by making Rule 9(b) apply to *qui tam* whistleblowers the *same* as it applies to any other litigant in a case where the Rule applies.

The simple fact is that the Government needs whistleblowers to provide inside information about fraudulent schemes; the Government already has easy access to the underlying invoice documentation. This is precisely why the Justice Department has consistently argued that requiring *qui tam* whistleblowers to plead specific false claims is a "formalistic and rigid interpretation of Rule 9(b) which distorts the purpose of the Rule."[32] The Government contends that it "hamstring[s] the parties in counter-productive pleading and motion practice that [ ] unduly delay[s] examination of False Claims Act cases on the merits."[33]

Even with the Justice Department raising this argument in courts across the country, including to the U.S. Supreme Court,[34] courts continue to squelch meritorious FCA cases under this erroneous standard.[35] In addition to misapplying Rule 9(b), these courts have failed to grasp the real-world limitations that prevent *qui tam* whistleblowers from meeting an overly harsh evidentiary standard prior to discovery. Whistleblowers typically know the details of the fraudulent scheme, not the innocuous information on an invoice. However, by requiring a *qui tam* whistleblower to produce an invoice, or some other sheet of paper, at the pleading stage, courts have prevented fraudulent schemes from seeing the light of day. Moreover, some laws prevent or discourage compiling claims data. For example, national and state patient privacy laws may discourage a physician-insider from disclosing this information, even if he knows everything about the underlying fraud scheme.

30. *See, e.g., United States ex rel. Duxbury v. Ortho Products*, 551 F.Supp.2d 100 (D. Mass. 2008).

31. *See, e.g., United States ex rel. West v. Ortho-McNeil Pharmaceuticals*, 538 F. Supp. 367 (D. Mass. 2008).

32. *Statement of Interest of the United States, United States ex rel Hopper v. Solvay Pharmaceuticals*, Civil No. 8:04-CV-2356 (M.D. Fla. 2007).

33. *Id.*

34. *See, e.g.*, Solicitor General's Brief, *Rockwell International v. United States ex rel. Stone*, 2006 WL 3381295 (U.S. 2007) (arguing that "In the view of the United States, it is possible for a relator (or the government) in an FCA action to describe the alleged fraudulent scheme with sufficient specificity to satisfy Rule 9(b)'s 'particularity' requirement even without identifying specific false claims"); *United States ex rel. Rost v. Pfizer, Inc.*, Civil No. 03-CV-11084 (D. Mass 2008) (stressing that "Such an analysis is consistent with FCA cases in which courts have found that when a complaint sets forth with particularity allegations of a fraudulent scheme or course of conduct, it is not also necessary to identify specific claims because doing do adds little to the sufficiency of the complaint as a whole.").

35. *See, e.g., United States ex rel. Bledsoe v. Community Health Systems, et al.*, 501 F.3d 493, 504-05 (6th Cir. 2007); *United States ex rel. Joshi v. St. Luke's Hospital, Inc.*, 441 F.3d 552, 559 (8th Cir.), *cert. denied*, 127 S. Ct. 189 (2006); *United States ex rel. Sikkenga v. Regence Bluecross BlueShield*, 472 F.3d 702, 727 (10th Cir. 2006); *Sanderson v. HCA-the Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 303 (2006); *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013-14 (11th Cir. 2005), *cert. denied*, 127 S. Ct. 42 (2006); *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220 (1st Cir.), *cert. denied*, 543 U.S. 820 (2004); *In re Genesis Health Ventures, Inc.*, 112 Fed. Appx. 140, 144 (3rd Cir. 2004); *United States ex rel. Clausen v. Lab Corp. of Am.*, 290 F.3d 1301, 1308-09 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).

Time and time again, *qui tam* whistleblowers have alleged significant details of the fraudulent schemes, only to have courts dismiss the suits on the basis that the whistleblowers lacked access to the billing documentation, and consequently could not allege details of the invoices sent to the Government, such as which billing department employee submitted the false claims, on which date, and with regard to the care of which patient. In fact, the Eighth and Eleventh Circuits both recently dismissed cases under Rule 9(b) simply because the whistleblowers "did not work in the billing department."[36]

The Eighth Circuit *Joshi* decision is a perfect example of the real-world absurdity of this Rule 9(b) misapplication. Here, the court acknowledged that it "fully recognize[d] Dr. Joshi alleges a systemic practice of St. Luke's and Dr. Bashiti submitting and conspiring to submit false claims over a sixteen year period."[37] In particular, in the court's own words:

> Dr. Joshi, an anesthesiologist who practiced from 1989 to 1996 at St. Luke's, brought a *qui tam* action under the FCA against St. Luke's and Dr. Bashiti, alleging violations [of the FCA] . . . In Count I, Dr. Joshi alleges St. Luke's requested and received Medicare reimbursement from the government for anesthesia services performed by Dr. Bashiti at the reimbursement rate for medical direction of anesthesia services, when St. Luke's was entitled only to the lower reimbursement rate for medical supervision or no reimbursement at all. Dr. Joshi alleged Dr. Bashiti failed both to perform pre-anesthetic evaluations and prescribe anesthesia plans, and Dr. Bashiti falsely certified he supervised or directed the work of several certified registered nurse anesthetists (CRNAs).[38]

In short, Dr. Joshi provided more than enough details of the scheme for the defendants to know exactly the nature of the fraud at issue. As an anesthesiologist, Dr. Joshi witnessed Dr. Bashiti's failure to perform the work and the supervision required to bill Medicare for specified services, and he alleged the specifics of what he had observed. Then, Dr. Joshi detailed how the services were being billed, and the fact that Medicare was being billed. Nonetheless, the Eighth Circuit affirmed the lower court's ruling that Dr. Joshi's failure to identify specific billing documentation was fatal to his complaint, noting: "Dr. Joshi was an anesthesiologist at St. Luke's, not a member of the billing department."[39]

Regrettably, court decisions such as *Joshi* drastically undermine the Government's ability to uncover false claims targeting the U.S. tax dollar. This is especially true when

36. *See, e.g., United States ex rel. Joshi v. St. Luke's Hospital*, 441 F.3d at 557; *Corsello*, 428 F.3d at 1013-14.

37. *Joshi* at 557.

38. *Joshi* at 554.

39. *Joshi* at 557.

the fraud takes places behind corporate walls, where organizational knowledge is regularly compartmentalized: the billing department employees rarely know the details of what is happening on the operational side, and the reverse is true as well. For example, in a hospital overbilling case, it would be highly unusual for billing department employees to be in a position to discern that a given doctor was misrepresenting the nature of the services delivered to any particular patient. On the flip side, the doctors practicing alongside another doctor will see what medical work he is performing, and may overhear how the work is being billed, but will not have access to the actual billing documentation itself.

While these court decisions may not pose a problem for the rare whistleblower-billing department employee, they pose a serious threat to the vast majority of potential whistleblowers who witness the fraud but do not work in the billing department. The reality is that the employees with the necessary inside information and knowledge of the underlying fraudulent schemes do not have ready access to the actual claims or invoices submitted to the Government. However, the information that would be supplied by these employees is *precisely* the evidence needed to unravel complex fraud schemes.

Moreover, as some courts have correctly recognized, the chief objective of Rule 9(b)—putting the defendant sufficiently on notice of the allegations so that it can mount a defense—is easily met by a complaint that details other aspects of the fraudulent scheme, such as the category of claims alleged to be false, the perpetrators, time and location of the scheme, and the factual predicate for the whistleblower's belief that the claims are false.

The FCA Corrections Act adopts the rulings of courts that have applied Rule 9(b) in a manner designed to take into account the aforementioned realities of whistleblower cases. Explicitly embracing the language championed by these courts and the Justice Department, the Bill adds a new subsection 3731(e) to the FCA that would provide that "[i]n pleading an action brought under section 3730(b), a person shall not be required to identify specific false claims that result from an alleged course of misconduct if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section 3729 are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made."

This amendment correctly highlights the inside information the Government actually needs for a successful fraud prosecution. Notably, the amendment expressly requires *qui tam* whistleblowers to either "identify *specific* claims that result from an alleged course of misconduct" or "provide adequate notice of the *specific* nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made." In turn, the Government would be greatly assisted by detailed *qui tam* suits without concerns that meritorious fraud allegations will be silenced under an erroneous pleading standard, and the defendants would have more than enough information to mount a defense.

B. Vesting the Government with the Power to Dismiss Whistleblowers Who File FCA Lawsuits Based Solely on Public Allegations

In an attempt to decipher the application of the FCA public disclosure bar, 31 U.S.C. 3730(e)(4), a court recently summarized the current sentiment: "The Court sympathizes with anyone litigating under the False Claims Act. Perhaps Congress will elect at some point to give legislative attention to the FCA to resolve some of the still unresolved questions about the Act's application."[40] This confusion is reflected in the 200+ published and unpublished rulings in well over 100 separate cases concerning the meaning of the "public disclosure" bar. The seemingly simple act of flow charting the steps in the public disclosure bar provision quickly produces a maze of diverging roads leading to confusion. The myriad of conflicting court decisions has facilitated the ability of defendants to evade liability, greatly undermining the Government's fraud-fighting efforts.

Ironically, Congress added this so-called "public disclosure" bar in 1986 with the sole goal of protecting the Government's interests in allowing non-parasitic *qui tam* suits to survive dismissal. This provision replaced an earlier provision known as the "government knowledge bar" that deprived courts of jurisdiction over *qui tam* actions "based on evidence or information the Government had when the action was brought." Courts interpreted this provision so broadly that few *qui tam* actions survived, and the FCA well into virtual disuse. By 1986, Congress had determined to eliminate this so-called "government knowledge bar" in light of its stated concern about cases in which "the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action."[41] Congress wished to "encourage more private enforcement suits" and consequently amended the statute to eliminate the government knowledge bar in 1986.[42] Congress remained concerned, however, about "parasitic" *qui tam* whistleblowers such as those who filed complaints simply by copying information from a government indictment.

The resulting public disclosure bar provision was an attempt to strike a balance between "encouraging people to come forward with information and . . . preventing parasitic lawsuits."[43] Unfortunately, however, by depriving courts of jurisdiction over cases barred under the provision, Congress unwittingly handed defendants a tool that has been used and abused to derail meritorious suits and prevent judgments on liability.

Now, virtually every *qui tam* suit is faced with a motion to dismiss pursuant to the public disclosure bar. Even over the frequent objections of the G*overnment*, courts have allowed defendants to use the public disclosure bar as a weapon to kill meritorious *qui tam* actions. The rampant use of this provision has deterred countless insiders

40. *United States ex rel. Montgomery v. St. Edward Mercy Medical Center*, 2008 WL 110858 (E.D. Ark. 2008).

41. H. R. Rep. No. 660, 99th Cong., 2d Sess. 22-23 (1986).

42. S. Rep. No. 99-345, 99th Cong., 2d Sess. 23-24 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5288-89.

43. *FCA Implementation, Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 3 (1990) (Statement of Sen. Grassley).

from risking their livelihoods in filing *qui tam* suits. For those who have braved the *qui tam* waters, the courts' unreasonably broad interpretations of what constitutes a "public disclosure" has forced many *qui tam* counsel from thoroughly investigating fraud allegations, fearful that their due diligence will trigger the public disclosure bar. For example, counsel are quite reluctant to use the Freedom of Information Act (FOIA) to corroborate their client's understanding of transactions, for some courts have barred *qui tams* based even in part on responses to a private party's FOIA request.[44]

Recently, the public disclosure bar confusion boiled up to the U.S. Supreme Court in a case where the Government wished to pay a whistleblower for being the original source in a successful fraud prosecution.[45] The Court, rejecting the Government's own assessment of the whistleblower's contributions, ruled that the statutory language of the public disclosure bar *prevented* the Government from awarding this particular whistleblower.

The FCA Corrections Act would appropriately place the public disclosure bar solely in the hands of the Government. Moreover, the Bill would remove the uncertainty plaguing the Act by explicitly defining key statutory terms, including the term "public disclosure" to make clear that it includes only disclosures on the public record and those that have been "disseminated broadly to the general public," with responses to FOIA requests and exchanges with law enforcement expressly excluded from the definition. Finally, to eliminate the circular analysis engaged in by many courts, an action would be deemed to be "based upon" a public disclosure only when all elements of liability are "derived exclusively from" the public disclosure. The much-litigated "original source" language would drop out of the provision, as the new definition of "based upon" would have the effect of carving out complaints by original sources. Notably, the Bill would still protect the Government from situations where a whistleblower derived most, but not all, of the information underlying the case from prior Government disclosures. The court could take these circumstances into account and, where appropriate, reduce the *qui tam* whistleblower's share of the proceeds below the minimum threshold.

FCA defendants lament that they would no longer be able to dismiss suits under the public disclosure bar, but the simple truth is that the Government is in the best position to determine whether a whistleblower was a "parasite" of public information. Moreover, because the Government takes on the primary role of prosecuting these suits and must pay a share to a successful whistleblower, they have a sizeable incentive to ensure that *only* non-meritorious suits are dismissed. The FCA defendants, on the other hand, have *every* incentive to get rid of meritorious whistleblower suits.

FCA defendants also argue that they will no longer be able to use the public disclosure bar to dismiss frivolous *qui tam* suits. However, this is a red herring, for the FCA public disclosure bar has *nothing* to do with the merits of a case. If cases are truly frivolous, defendants may and should rely upon the following:

44. *See, e.g., United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051 (10th Cir. 2004), *cert. denied*, 545 U.S. 1129 (2005); *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 175-176 (5th Cir. 2004); *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 383 (3rd Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000).

45. *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397 (2007).

- F.R.C.P. 11 (providing sanctions for unwarranted factual contentions and legal theories)
- F.R.C.P. 12(b)(6) (dismisses a complaint that "fails to state a claim upon which relief may be granted")
- F.R.C.P. 56(b) (permits defendant to move "at any time" for judgment on the facts set forth in the pleadings)
- F.R.C.P. 54(d) (awards costs to prevailing defendants)
- 31 U.S.C. 3730(d)(4) (awards attorneys' fees and expenses to defendants that prevail in *qui tam* actions that are "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment")

In short, the FCA Corrections Act would correctly vest the public disclosure bar solely with the Government, while still preserving the defendant's current options for dismissing truly frivolous *qui tam* suits.

C. Setting Uniform Statute of Limitations Period

The FCA Corrections Act removes the confusion over the statute of limitations period by adopting a straightforward ten year period. Under the current law, the statute of limitations period is *currently* up to ten years for cases where the defendants have concealed the fraud. The truth is that because of the subversive nature of fraudulent schemes, the vast majority of *current* FCA cases qualify for the 10-year period. However, because some courts have adopted differing standards, it behooves Congress to adopt one uniform 10-year standard for all cases.

The FCA defendants complain that the Bill will greatly expand the limitations period from six years to ten years. However, the statute of limitations on FCA claims currently runs *on the later* of six years from the date of violation, or three years from the date that the United States learned of the violation, *not to exceed ten years*. The proposed amendment is necessary only because this language has proven confusing for the courts and the parties. Courts across the country now read the confusingly worded limitations period in a myriad of ways, only adding to the confusion of all parties.[46]

46. The FCA currently requires an FCA complaint to be filed by *the later of*: (i) six years from the date of the violation, or (ii) three years from the date "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances," not to exceed ten years from the date of the violation. 31 U.S.C. § 3731(b). The chief source of confusion has been the three year tolling provision in 31 U.S.C. § 3731(b)(2). The courts have been unclear how to apply this provision when a relator files a case, or proceeds with a case declined by the United States. Some courts have held that the relator does not get the benefit of the tolling provision at all. *See, e.g., United States ex rel. Sikkenga v. Regence Blue Cross Blue Shield of Utah*, 472 F.3d 702, 724-25 (10th Cir. 2006); *Neal v. Honeywell*, 33 F.3d 860, 865-66 (7th Cir. 1994); *United States ex rel. Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 171 (D.D.C. 1998). Other courts have held that the relator may file within three years of when he or she first knew or reasonably should have known the facts material to the rights of action. *See, e.g., United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1218 (9th Cir. 1996); *United States ex rel. Lowman v. Hilton Head Health Sys.*, L.P., 487 F. Supp. 2d 682, 697 (D.S.C. 2007). Yet other courts have ruled that the relator may file within three years of when the Government knew or reasonably should have known about the violation. *See, e.g., United States ex rel. Pogue v. Diabetes Treatment Ctrs. of America, Inc.*, 474 F. Supp. 2d 75, 88-89 (D.D.C. 2007).

The proposed amendment is especially needed to permit the U.S. Government to pursue fraud by contractors providing goods and services in Iraq. Some courts have effectively required the FCA plaintiff—whether the Government or a *qui tam* whistleblower—to file suit within six years of the date when the defendant violated the FCA. Six years is far too short a time to uncover many of the fraudulent schemes aimed at Government programs. In fact, Congress has provided the Government with a ten year statute of limitations for recovery of debts owed to the United States.[47] Surely when fraud is involved, the Government needs at least as long a period of time to uncover the matter as it would need to look into an ordinary debt.

Moreover, a ten year statute of limitations is even more important when the Government must surmount the special challenges of locating and acquiring evidence in a war-torn country. These special challenges include working with foreign law enforcement personnel, arranging for special security in high threat zones, and finding witnesses willing to risk their lives to cooperate with the Government's investigation. The United States is entering its seventh year in Iraq. Under some of the incorrect readings of the FCA statute of limitations, the United States will soon lose the ability to pursue many claims for Iraq war fraud that took place in the initial year of the Iraq war and reconstruction effort. This amendment is critical to preserve the ability of the Justice Department to effectively pursue and obtain recoveries for such fraudulent activities. In short, the Bill not only removes the confusion plaguing the FCA practice, but it ensures that the Government will be able to fully prosecuting fraud targeting our war efforts in Iraq and Afghanistan.

47. *See* 31 U.S.C. § 3716(e).

Legal Analysis

Changes to the False Claims Act in Senate Bill 386:
A Review of Impacts on Mortgage Banking and TARP Spending

Changes to the False Claims Act in Senate Bill 386:
A Review of Impacts on Mortgage Banking and TARP Spending

*By Reuben Guttman and Bradley Hillis**
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INTRODUCTION

Under new legislation, the federal False Claims Act ("FCA"),[1] will take an even more prominent role in protecting from fraud the increase of federal spending to meet the nation's financial crisis. With federal funds going to a range of projects—from state infrastructure "shovel ready" road building to Internet connectivity, green energy innovation and high-tech transportation solutions—there are simply more federal expenditures in the pipeline for the FCA to cover.

On May 20, 2009, President Obama signed into law Senate Bill 386, the Fraud Enforcement and Recovery Act ("FERA"),[2] which makes important amendments to the FCA. Under the new law, bailout-fund recipients' potential liability under the FCA is increased. The President stressed the importance of protecting taxpayer dollars needed for economic recovery under the Troubled Asset Relief Plan ("TARP"), run by the U.S. Treasury to shore up financial institutions, and other stimulus programs.

A key amendment in S. 386 is to delete the requirement for a "claim" in 31 U.S.C. § 3729(c), and expand the definition of claim in a new section.[3] The problem the drafters of S. 386 had to overcome was that a claim, as included in § 3729(c), was deemed by some courts as bound by "the rule that a claim requires a request or demand for payment from government funds."[4] In response, S. 386 excises § 3729(c) and instead defines "claim" to include "any request or demand for money, whether or not the government has title to that money or property, and including situations where the defendant submits the request or demand either directly to the government or to a contractor, grantee, or any other recipient of government funds used to advance a government program."[5]

As enacted, S. 386 broadens the coverage of current laws against financial crimes, including fraud affecting mortgages, securities, and federal assistance and relief pro-

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1. 31 U.S.C. § 3729 *et seq.*

2. Public Law No. 111-021.

3. S. 386, § 4(a)(2), deleting 31 USC § 3729(c), and substituting § 3729(b)(2)(A).

4. FCA Liability Only Attaches to U.S. Government Funds, discussing *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. July 8, 2005), TAF Quarterly Review, v. 39 (Oct. 2005), at 11 ("While the court recognized that the definition in § 3729(c) is not exclusive, the court warned that the expanded definition outlined in Section 3729(c) 'does not explicitly overturn the rule that a claim requires a request or demand for payment from government funds.' Thus, the district court held that a 'claim' requires a request or payment for government property plainly survives the 1986 FCA amendment.") (*available at* http://www.taf.org/publications/ PDF/TAF_QR_v39.pdf).

5. Ronald A. Sarachan, Dee Spagnuolo & Tejal K. Mehta, Expansion of False Claims Act liability signed into law by the President, May 22, 2009, Ballard Spahr Andrews & Ingersoll, LLP (*available at* http://www.ballardspahr.com/press/article.asp?ID=2529).

grams.[6] Mortgage lending now unquestionably falls within the purview of the FCA, on the basis of the large federal role in propping up the sub-prime lenders during the current financial crisis.

The bill also addresses recent court decisions, including the 2008 U.S. Supreme Court decision in *Allison Engine Co. v. U.S.*,[7] which narrowly interpreted the scope of the FCA to potentially exclude subcontractors and non-governmental entities from coverage. Importantly, S. 386 revises the liability provisions of the FCA to clarify and reaffirm that whistleblowers' suits for anti-fraud civil liability reach federal funds spent by non-governmental entities. The common theme in these legislative changes is that the jurisdiction of the FCA is co-extensive with the federal dollars spent to support industries, as through TARP, or by private contractors paid by the Government to run facilities or programs.

LEGISLATIVE HISTORY OF S. 386

The legislation moved through Congress on a fast-track, reflecting the importance of the FCA to the Obama administration. Although various iterations of the bill were introduced during the Bush administration, the most recent version of the bill was introduced February 5, 2009, by Senator Patrick Leahy (D-Vermont), Senator Charles Grassley (R-Iowa), and Senator Ted Kaufman (D-Delaware), and referred to the Senate Judiciary Committee.[8] The bill was reported, as amended, by that committee on March 5, 2009, by a voice vote, and subsequently placed on the Senate calendar. On April 28, 2009, the Senate passed the bill by a vote of 92 to 4, showing bi-partisan support. On May 18, 2009, the House amended and passed S. 386 by a count of 338 to 52. The Senate then agreed to the House amendments with one change, to which the House concurred.[9] On May 19, 2009, the bill was presented to the President, and he signed it the following day.[10]

6. Marcia Coyle, "Fears rise over new fraud law, Changes to False Claims Act adds muscle to whistleblower suits," *Nat'l Law Journal*, May 25, 2009 ("The law expands the potential liability of companies and institutions receiving federal funds, extending the act's reach to subcontractors and subgrantees and enhancing the Justice Department's investigative tools, among other provisions.")(*available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id= 1202430941952&Fears_rise_over_new_fraud_law_&slreturn=1).

7. 123 S. Ct. 2128 (2008).

8. Many of the ideas in S. 386 had appeared in a bill in the previous Congress that had not reached a vote. *See* S. 386 report, U.S. Senate Republican Policy Committee Legislative Notice, no. 9, Apr. 20, 2009, at 3 ("Section 4 of S. 386 incorporates a number of very similar provisions to S. 2041 from the 110th Congress. That bill was introduced on September 12, 2007, referred to the Committee on the Judiciary, and subsequently reported, as amended, by the committee to the full Senate. No further action was taken on the bill.") (*available at* http://rpc.senate.gov/public/_files/L9S386FraudEnforcementandRecovery042009.pdf).

9. Roll Call #268 (Suspend Rules and Agree to S Adt to House Adts - Fraud Enforcement and Recovery Act). 111th United States Congress, 1st Session. Clerk of the U.S. House of Representatives (*available at* http://clerk.house.gov/evs/2009/roll268.xml); *also see*, History of S. 386, GPO Access (*available at* http://frwebgate6.access.gpo.gov/cgi-in/TEXTgate.cgi?WAISdocID=472376472841 +0+1+0&WAISaction=retrieve); *and see*, Sen. Res. S. 386 EAS, May 14, 2009 (*available at* http://thomas.loc.gov/cgi-bin/query/D?c111:5:./temp/~c111VytoFn::).

10. John T. Boese, "The False Claims Act is amended for the first time in more than twenty years as the President signs the Fraud Enforcement and Recovery Act of 2009," *FraudMail Alert*, No. 09-05-21, May 21, 2009, Fried, Frank, Harris, Shriver & Jacobson LLP (*available at* http://www.ffhsj.com/siteFiles/Publications/ 96C624E1C1C818605ABF4C050E2677B9.pdf).

EFFECT OF S. 386 ON MORTGAGE LENDING INDUSTRY

The nation's editorial pages have reflected a palpable sense of frustration that such a large financial collapse as occasioned by sub-prime lending would result in few criminal indictments, while bad actors seemingly went untouched by law enforcement and industry regulators.[11] In strengthening the ability of private attorneys general to enforce anti-fraud laws, in S. 386 the FCA was squarely extended to interstate mortgage lenders and other recipients of TARP and economic stimulus funds.

The problem of the doctoring of loan documents was widely noted in the press. Unwitting consumers declared that if they did not qualify for a home loan based on the legitimate credit analysis, the mortgage broker would help fill out the paperwork to make it pass.[12] As stated in a recent U.S. Senate report, shadowy financiers adopted practices that resulted in pushing mortgages on to consumers who could not afford them, so that short term speculators could generate profits by packaging the mortgages into securities sold on Wall Street. As residential home prices dipped, collateralized securities lost value, leading to a spiral of fraud and injury to investors.[13] Accordingly, S. 386 now defines a "false statement" to include mortgage application statements by mortgage brokers, as defined in 18 USC § 1014.

A White House press release explained that S. 386 corrects the problem that many mortgage lenders fell outside existing protections, as follows: "Over 50% of subprime mortgages issued as recently as 2005 involved private mortgage institutions and similar entities not currently covered under federal bank fraud criminal statutes. FERA amends the definition of a 'financial institution' in the criminal code (18 U.S.C. § 20). This will extend Federal laws to private mortgage brokers and companies that are not directly regulated or insured by the Federal Government."[14]

In S. 386, the definition of "financial institution" in 18 USC § 20, para. 10, was amended to include banks and mortgage lenders making "a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974."[15]

Finally, Section 5 of S. 386 creates a Financial Crisis Inquiry Commission, whose mandate is to investigate the causes of the financial crisis, including the worst practices of the mortgage industry. The Commission will examine the "lending practices and securitization, including the originate-to-distribute model for extending credit and

11. Editorial, "Wall Street follies," *L.A. Times*, Jan. 4, 2009 ("Lenders should be deterred from giving money to people with no reasonable ability to repay it, even if they plan to sell the loans to Wall Street as soon as the borrowers' signatures are dry.") (*available at* editorials/la-ed-wallstreet4-2009jan04%2C0%2C7346014.story).

12. *See, e.g.*, Lisa Scherzer, "Subprime blame game," *SmartMoney*, Nov. 1, 2007 (*available* at http://www.smartmoney.com/investing/economy/subprime-blame-game-22074/).

13. *See* Senate Report 111-001, Joint Economic Report, Jan. 9, 2009, at 180-181 (*available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:sr001.111.pdf).

14. Press release, President Obama Signs the Helping Families Save Their Homes Act and the Fraud Enforcement and Recovery Act, May 20, 2009, White House archives (*available at* http://www.whitehouse.gov/the_press_office/ Reforms-for-American-Homeowners-and-Consumers-President-Obama-Signs-the-Helping-Families-Save-their-Homes-Act-and-the-Fraud-Enforcement-and-Recovery-Act/).

15. S. 386, § 2(a)(3).

transferring risk," and will submit a report on its findings by December 15, 2010.[16]

The bill appropriates to the Attorney General the sum of $265 million, "which would go to hire about 160 more FBI agents and 200 more Justice Department prosecutors to work on mortgage fraud cases."[17]

EFFECT OF S. 386 ON TARP SPENDING

In remarks made May 20, 2009, at the signing of S. 386, President Obama said that the law: "allows DOJ to prosecute anyone who fraudulently obtains Recovery Act or TARP funds—precious taxpayer dollars we've carefully invested in order to turn this crisis around."[18]

TARP was created to purchase and insure up to $700 billion of troubled assets held by banks and other financial institutions in an effort to stabilize and otherwise bail out the financial markets. On June 22, 2009, The Office of Management and Budget ("OMB") released a memorandum giving guidance on reporting requirements included in Section 1512 of the Recovery Act.[19] Stimulus recipients and subrecipients must report a series of data, including, "names and compensation of the five highest paid employees." According to the OMB memorandum: "Section 1512 of the Recovery Act requires that prime recipients and delegated sub-recipients submit quarterly reports on their use of the funds not later than the 10th day following the end of each quarter beginning on October 10, 2009, and will be cumulative since enactment, or February 17, 2009."[20] Reports are entered at the www.FederalReporting.gov website and published at www.Recovery.gov within 30 days of filing.

The Emergency Economic Stabilization Act of 2008, which authorized TARP, established under Section 121 the Office of the Special Inspector General for TARP, which is commonly referred to as SIGTARP. On December 15, 2008, Neil Barofsky was appointed the inspector general, with the authority to "conduct, supervise, and coordinate audits and investigations of the purchase, management and sale of assets" under TARP.[21]

In the initial report to Congress of February 9, 2009, and a letter of January 7, 2008, Barofsky urged the Treasury to include language in all TARP contracts entered

16. S. 386, § 5(c)(1)(I).

17. Foon Rhee, "Obama signs mortgage bills," *Boston Globe*, May 20, 2009 (*available at* http://www.boston.com/news/politics/politicalintelligence/2009/05/ obama_back_on_e.html); *and see* Ronald D. Orol, "Obama to sign $490 million mortgage fraud bill into law," *MarketWatch.com*, May 20, 2009 ("The House voted Monday night, 338-52, to approve bipartisan legislation that would authorize $490 million over two years to hire fraud prosecutors, increase enforcement actions and add funds to the Secret Service and Housing and Urban Development Inspector General.") (*available at* http://www.marketwatch.com/story/obama-to-sign-490-million-mortgage-fraud-bill).

18. Remarks of Pres. Obama, May 20, 2009, White House archives (*available at* http://www.whitehouse.gov/ the_press_office/Remarks-by-the-President-at-Signing-of-the-Helping-Families-Save-Their-Homes-Act-and-the-Fraud-Enforcement-and-Recovery-Act/).

19. M-09-21, Implementing Guidance for the Reports on Use of Funds Pursuant to the American Recovery and Reinvestment Act of 2009, OMB website, June 22, 2009 (*available at* http://www.whitehouse.gov/omb/ memoranda_default/).

20. *Id*., para. 3.2, at 16.

21. Emergency Economic Stabilization Act of 2008, Pub.L. 110-185, 122 Stat. 613, enacted Feb. 13, 2008, at 63.

into after that date that requires the bank to, at the minimum, account for the use of TARP funds, provide internal controls to ensure compliance with the remainder of the TARP contract, and have a senior officer certify the accuracy of the information provided.[22]

One element of the government's response to the financial crisis is the Term Asset-backed Securities Loan Facility ("TALF") program, in which the Federal Reserve will give non-recourse loans totaling up to $20 billion upon the posting of collateral in the form of newly issued asset-backed securities. Barofsky has stated the need to extend the FCA to the program.[23]

In addition to recipients of government funds facing potential increased FCA liability, private sector contractors and agents providing services to the Treasury in connection with TARP may face increased potential liability under the FCA in connection with new conflict of interest and mandatory disclosure requirements under an interim rule issued by the Treasury.[24] False responses to these inquiries could subject TARP recipients to potential liability under the FCA.

Since the inception of TARP in October 2008, there has been a push for oversight over the use of the funds by recipients. On November 17, 2008, Sen. Grassley suggested that those found to be using TARP funds under false pretenses should be subject to liability under the FCA.[25] The applicability of the FCA to pre-SIGTARP recipients is less certain than to those recipients certifying under SIGTARP requirements to the funds use prior to receiving the funds.[26]

One may assert that false certifications in response to the SIGTARP's request should not be considered "claims"[27] under the FCA because the TARP funds that are the subject of the certifications were distributed before requirements as to their use were imposed. But one could argue in reply that funds already distributed are subject to the FCA if there was: (1) an express or implied condition on the recipient to use the funds for a specific purpose; and (2) an express or implied obligation to return the funds if the condition of use was violated.

The case for FCA liability with respect to new TARP distributions is considerably stronger as the funds are typically not distributed by the government until after

22. *See* Jan. 7, 2009, letter of Neal Barofsky's to the U.S. Senate Committee on Finance (*available at* http://finance.senate.gov/press/Bpress/2009press/prb010709.pdf). Barofsky has written to the previous stimulus recipients to ask for a certification of information provided to the government. *See* Jan. 22, 2009, letter from Neal Barofsky to the U.S. Senate Committee on Finance (*available at* http://finance.senate.gov/press/Gpress/2009/ prg012209.pdf).

23. SIGTARP, Initial Report to Congress, Feb. 6, 2009, at 100-101 ("Fraud vulnerabilities in the Term Asset-backed Securities Loan Facility ('TALF') should be addressed before the program is initiated.") (*available at* http://www.sigtarp.gov/reports/congress/2009/SIGTARP_Initial_Report_to_the_Congress.pdf).

24. *See* Dep't of the Treasury, TARP Conflicts of Interest Interim Rule, 74 Fed. Reg. 3431 (Jan. 21, 2009) (to be codified at 31 C.F.R. pt. 31) (*available at* http://edocket.access.gpo.gov/2009/pdf/E9-1179.pdf).

25. *See* Nov. 17, 2008, letter from Sen. Grassley to Treasury Secretary Paulson and Attorney General Mukasey (*available at* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=18128).

26. Newsletter, "SIGTARP: The most important acronym to come along in years," Feb. 12, 2009, McDermott Will & Emery (*available at* http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/aabeddb9-ab15-4ff1-b46d-0c5b759bcdb4.cfm).

27. 31 U.S.C. § 3729(c).

the letter of intent is submitted. Recipients should expect that the U.S. Department of Justice and/or private whistleblowers will argue that the false certification was material to the payment decision to release the funds, subjecting the entire amount to trebling of the government's loss, plus penalties.

S. 386 MORE CLEARLY EXTENDS FCA TO GOVERNMENT CONTRACTORS AND SUBS

The effect of S. 386 on the mortgage industry and TARP spending are weighty enough. But S. 386 also resolves problems in three of four recent cases under debate.

The key change in Section 4 of S. 386 is to the definition of "claim." The Senate Report explains the significance of the change, as follows:

> By removing the offending language from section 3729(a)(1), which requires a false claim be presented to 'an officer or employee of the Government, or to a member of the Armed Forces,' **the bill clarifies that direct presentment is not required for liability to attach**. This is consistent with the intent of Congress in amending the definition of 'claim' in the 1986 amendments to include 'any request or demand * * * for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.' 31 U.S.C. Sec. 3729(c) (2000).[28]

Further, the change to the definition of claim makes clear the FCA extends to funds administered by the United States, as follows:

> False claims made against Government-administered funds harm the ultimate goals and U.S. interests and reflect negatively on the United States. The FCA should extend to these administered funds to ensure that the bad acts of contractors do not harm the foreign policy goals or other objectives of the Government. Accordingly, this bill includes a clarification to the definition of the term 'claim' in new Section 3729(b)(2)(A) and attaches FCA liability to knowingly false requests or demands for money and property from the U.S. Government, without regard to whether the United States holds title to the funds under its administration.[29]

28. Senate Report No. 111-010, Fraud Enforcement and Recovery Act of 2009, n. 4, *citing* S. Rpt. No. 99-345, at 5282-5301 (providing section-by-section analysis explaining that a false claim includes claims submitted to grantees and contractors if the payment ultimately results in a loss to the Government) (*available at* http://thomas.loc.gov/cgi-bin/cpquery/R?cp111:FLD010:@1(sr010):).

29. *Id.*, n.7.

The statute removed the FCA's "by the Government" limitation and the "to get" verbiage in section 3729(a)(2). The same amendments are made to parallel language in sections 3729(a)(3) and (a)(7). The excised, narrow terms are replaced in the statute with "material," in a new Section 3729(a)(1)(B), which now imposes liability for knowingly making or using a false record or statement *material* to a false or fraudulent claim. The definition of "material" is amended to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[30]

These changes solve the narrow interpretations of the FCA presented in the three cases discussed next.[31] The fourth case at issue addressed the public disclosure bar. A companion bill, H.B. 1788, limited to the Department of Justice the ability to invoke the public disclosure bar, an idea to remove a perceived disincentive for relators to report fraud and abuse.[32] That provision was not included in S. 386.

In a floor statement, Senator Grassley noted that the legislation would close a loophole in the law as a result of the decision in *Allison Engine Co. v. U.S. ex rel. Sanders,* 123 S. Ct. 2128 (2008).[33] In *Allison Engine*, the Supreme Court limited liability to fraudulent statements that were specifically connected to government funds and designed "to get" false claims paid or approved by the government. For example, as opined by Justice Alito, the sub-contractor's false invoice was passed up the chain by the prime contractor to justify a payment by the government, the FCA applied. If, instead, the prime contractor, or sub-contractor above a lower sub-contractor, had

30. S. 386, § 4(a), amending 31 U.S.C. § 3729(b)(4).

31. Democratic and Republican policy analysis reports describe the changes in Section 4 of S. 386, as follows:

> S. 386 would restore the original intent of the *False Claims Act* (FCA) to expand beyond just those instances in which the defendant intends to directly defraud the federal government. Recent court decisions limited FCA's effectiveness by requiring the government to prove that a defendant intended to defraud the federal government, as opposed to another non-governmental entity. For example, a subcontractor in a large government contract could offer as a defense to their prosecution under FCA that they only meant to defraud their general contractor and not the federal government. The bill would also make clear that the government can recover for frauds committed by a defendant when the funds are expended by a government grantee, such as Amtrak.

Democratic Policy Committee, "S. 386, the Fraud Enforcement and Recovery Act of 2009," Apr. 21, 2009 (*available at* http://dpc.senate.gov/dpcdoc.cfm?doc_name=lb-111-1-58).

The Republican analysis is substantially similar, and states in pertinent part:

> Amends the False Claims Act (FCA) to overturn a number of recent court decisions that have narrowed its reach. In particular, section 4 amends the FCA in order to clarify that (1) liability attaches for fraud perpetrated against contractors and grantees of the U.S. government—not just for fraud directly committed against the U.S. government; (2) intent is not necessary for FCA liability to attach; (3) the scope of FCA applies to funds administered by the U.S. government; (4) conspiring liability can arise from any violation of the FCA; (5) a valid receipt from the U.S. government is not necessary to attach liability; and (6) liability exists for conduct to conceal, avoid or decrease an obligation owed to U.S. government. The section makes clear that liability does not apply to federal employment compensation or income subsidies, such as Social Security benefits.

U.S. Senate Republican Policy Committee Legislative Notice, "S. 386 report," no. 9, Apr. 20, 2009, at 4 (*available at* http://rpc.senate.gov/public/_files/L9S386FraudEnforcementandRecovery 042009.pdf).

32. H.R. 1788, § 3(d), at 7, as reported by House Judiciary Comt. (*available at* http://thomas.loc.gov/cgi-bin/query/F?c111:2:./temp/~c111KaDCsE:e8076:).

33. Prepared Statement of Senator Chuck Grassley of Iowa, Senate Floor Debate on Fraud Enforcement and Recovery Act, Apr. 20, 2009 (*available at* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=20209).

a fixed amount of money, and paid the false claim from that pool of funds, the FCA would not apply.

The amendment to the provision in the bill that corresponds to section 3729(a)(2) would specifically apply retroactively to all claims pending as of June 7, 2008,[34] which is the date of decision of *Allison Engine*.

The question may arise: is there a sufficient nexus between federal funds and private industry to apply the FCA? For example, the federal government has ploughed billions into General Motors, and so litigation may assert that the FCA applies to that company. Section 4 of S. 386 limits liability to the funds provided by the government "to be spent or used on the Government's behalf or to advance a Government program or interest."[35]

In a letter of April 21, 2009, from the U.S. Chamber of Commerce and allied business groups, to the U.S. Senate, the argument was advanced that S. 386 was unnecessary due to recent appellate reversals of two of the cases of concern. The business groups wrote: "More fundamentally, we believe that recent court decisions have also eliminated the need for any changes to the Act. The two key precedents that Section 4 of the legislation was designed to overturn—*Custer Battles* and *Totten*—have been reversed. Specifically, the 4th Circuit recently reversed the *Custer Battles* decision, and the Supreme Court's *Allison Engine* decision overturned the 'presentment' requirement identified in the [*U.S. ex rel. Totten v. Bombardier Corp.*] case."[36]

On April 10, 2009, in *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*,[37] the Fourth Circuit reversed the district court's interpretation of "claim." In that case, a relator alleged that a contractor submitted false claims to the Coalition Provisional Authority ("CPA") in Iraq. The District Court for the Eastern District of Virginia, in *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*,[38] dismissed the claims, reasoning that the CPA was a private contractor and the nexus to the federal government too tenuous.

Reversing on this point of law, on appeal the Fourth Circuit held that the contractor's fraudulent demand for payment from CPA was a claim within the meaning of the FCA. The court wrote: "Section 3729(c) does not define a 'claim' in relation to the obligation of the United States government but rather to the provision of United States funds."[39]

In the earlier case, *U.S. ex rel. Totten v. Bombardier Corp.*,[40] a relator brought a *qui tam* action against contractor under the FCA for allegedly submitting false claims to the National Railroad Passenger Corporation (Amtrak) to obtain payment for allegedly defective railroad cars. The trial court dismissed the case. In an opinion by circuit

34. S. 386, § 4(f)(1).

35. S. 386, § 4(b)(2)(A)(ii).

36. Letter of Apr. 21, 2009, from the U.S. Chamber of Commerce and allied business groups, to the U.S. Senate, at 1 (*available at* http://www.aamc.org/advocacy/library/research/corres/2009/042109senate.pdf), *citing U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), *cert. den.*, 544 U.S. 1032 (2005).

37. 562 F.3d 295 (4th Cir. 2009).

38. 376 F.Supp.2d 617 (E.D.Va. Jul. 8, 2005), *rev'd*, 562 F.3d 295 (4th Cir. 2009).

39. *Custer Battles, LLC*, 562 F.3d at 304, referring to 31 U.S.C. § 3729(c) and used in § 3729(a).

40. 380 F.3d 488 (D.C. Cir. 2004), *cert. den.*, 544 U.S. 1032 (2005).

Judge John Roberts, now Chief Justice of the U.S. Supreme Court, the U.S. Court of Appeals for the District of Columbia affirmed the lower court's dismissal. Under the FCA, Amtrak is not a governmental entity, so the presentation of false claim to Amtrak was not a presentation to the federal government, the appeals court ruled. The U.S. Supreme Court in *Allison Engine* rejected the direct presentment requirement, and so *Totten* is not considered good law. Nevertheless, Congress felt it sufficiently important to clarify in S. 386 the language of the statute that the provenance of government funds, not the status of private contractor, is the key to the scope of the FCA.

Regarding the public disclosure bar, H.B. 1788, a parallel bill to S. 386, had sought to undo the ruling in *U.S. ex rel. Stone v. Rockwell Int'l Corp.*.[41] In *Rockwell Int'l*, the Supreme Court held that the *qui tam* whistleblower was barred from receiving a share of any money recovered because under the "public disclosure bar" the whistleblower was not an original source with "independent knowledge of the information on which the allegations are based."[42] Senator Grassley noted that *Rockwell* provides a disincentive for a whistleblower to bring a case, even if the Justice Department is overloaded or does not chose to bring the case.[43] The proposed language in H.B. 1788, which was not included in S. 386, would have eliminated the procedural uncertainties by requiring the Justice Department to file a timely motion to dismiss claims that violate the "public disclosure bar."[44]

Finally, S. 386 also carves out an exception to the seal provision to allow sharing of evidence with state and local government law enforcement authorities. Section 4(e) of S. 386 amends 31 USC § 3730(h), to permit the sharing of sealed case files to enable state or local government officials to evaluate taking co-plaintiff status as intervenors. Obviously, the change is important for projects in which federal funding is intermingled with state and local funds, as is the case in many of the new stimulus spending activities.

CONCLUSION

The provisions of S. 386 make important changes to the FCA that expand its powers to new arenas of interstate mortgage lending and TARP spending, and clarify jurisdictional questions raised by *Allison Engine* and related cases. The rapid adoption of the bill shows the appetite in Congress for protecting the large federal stimulus expenditures from fraud and abuse. With adoption of S. 386, the role of relators, as private attorney generals, is more important than ever. From false statements on mortgage

41. 549 U.S. 457 (2007).

42. *Rockwell Int'l Corp.*, 549 U.S. at 477.

43. On June 23, 2009, the U.S. Supreme Court granted *certiorari* to hear a case on the public disclosure bar, specifically whether whistleblower lawsuits are restricted if the information behind the lawsuits came out in state or local agency reports or audits, rather than in a federal proceeding. *Graham County Soil & Water Conservation District v. U.S. ex rel. Wilson*, 528 F.3d 292 (4th Cir. Jun. 9, 2008), *petition for cert. granted*, 2009 WL 1738653 (mem.)(U.S. Jun. 22, 2009)(No. 08-304).

44. F. Joseph Warin, *et al.*, eds., "Proposed Legislation Amending False Claims Act," Feb. 26, 2009, Gibson Dunn & Crutcher LLP (*available at* http://www.gibsondunn.com/Publications/Pages/ ProposedLegislationAmendingFalseClaimsAct.aspx).

applications, to fraud in TARP-funded programs, the FCA is front and center in providing effective incentives for whistleblowers to come forward and explore the merits of potential litigation.

Spotlight

The Miami-Dade County False Claims Ordinance: Smoke & Mirrors

The Miami-Dade County False Claims Ordinance: Smoke & Mirrors

*Jonathan Kroner**

INTRODUCTION

Miami-Dade County's self-defeating ordinance should be discarded and replaced, or preempted by an effective Florida False Claims Act.

The Problem: Rampant Fraud in South Florida

South Florida is a contender for the fraud capital of the nation. Medicare, Medicaid[1], mortgage[2], money laundering[3], and insurance fraud[4] all flourish in Miami-Dade County. Included among these wrongdoers are corrupt county contractors who defraud our County of much-needed funds, unquestionably harming our residents and taxpayers. A recently approved $2.4 billion stadium provides additional opportunities for such contractors who already take advantage of the lack of oversight in our county's $7.5 billion dollar budget.

Is there a remedy for this theft? Yes. Our municipal leaders are far from the first elected officials to be faced with such a challenge.

Lincoln's Answer to Fraud

During the Civil War, President Abraham Lincoln fought contractors' fraud by insisting that Congress provide better tools for policing rampant government contracting fraud. In response, a newly enacted whistleblower law, commonly dubbed the "Lincoln Law", allowed whistleblowers to recover a "bounty." Civil War whistleblowers, often insiders to the fraud scheme, were awarded up to 50% where their cases, brought on the government's behalf, resulted in a recovery from fraudulent government contractors.

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* Jonathan Kroner represents courageous relators (whistleblowers) in Miami, Florida. He most gratefully expresses his appreciation for comments and suggestions to Lesley Ann Skillen, Getnick & Getnick, New York; and Ann Lugbill, Murphy Anderson PLLC, Cincinnati.

1. Medicare and Medicaid lose to fraud an estimated $2.5 billion annually in South Florida. (Miami Herald, August 11, 2008). In 2007, Miami's U.S. attorney, Alexander Acosta, said that inspectors found that nearly one-third of the businesses that bill Medicare for services allegedly delivered to beneficiaries—481 of 1,600—didn't exist. http://www.npr.org/templates/story/story.php?storyId=16045685 (last visited March 19, 2009).

2. S. Florida as the nation's mortgage fraud capital for second year running. Tenth Periodic Mortgage Fraud Case Report to Mortgage Bankers Association, http://www.thetitlereport.com/Media/MediaManager/fraudreport2007.pdf

3. Southern District of Florida in Miami takes first place among the federal judicial districts with the most money laundering referrals (106 cases), followed by the Southern District of New York (83 cases). U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (2003 report, last year reported) http://www.ojp.usdoj.gov/bjs/pub/press/mlo01pr.htm (last visited April 2, 2009). See generally, Financial Crimes Enforcement Network http://www.fincen.gov/ (last visited March 24, 2009).

4. "Florida ranks in the top four (4) among all states' fraud divisions . . . 2nd in the number of arrests, 3rd in the number of cases presented for prosecution. . . ." Florida Department of Financial Services. http://www.fldfs.com/FRAUD/ (last visited April 2, 2009).

The Lincoln Law, now called the False Claims Act, imposes double and treble civil damages and civil penalties of $5,500 to $11,000 for each false bill or payment submitted. And it rewards brave whistleblowers with 15% to 30% of recoveries obtained from those caught cheating the government.

Fighting fraud is an all-American, bipartisan effort. Presidents Reagan and Obama supported and signed amendments that strengthened this Civil War-era anti-fraud statute. Republicans and Democrats agreed with President Lincoln that whistleblower laws deter fraud against the government and help to recover funds wrongfully diverted by corrupt contractors.

The Federal False Claims Act has recovered over $22 billion since the Reagan-era 1986 amendments.[5] Hundreds of billions more have been saved due to the False Claims Act's deterrence effect on would-be fraudsters.[6] For every dollar invested in investigation and prosecution of health care fraud under the Federal False Claims Act, the U.S. Treasury recovered fifteen dollars.[7]

Congress wisely recognized the preventative benefits of an effective and well-designed whistleblower law like the False Claims Act by requiring that federal contractors and Medicare and Medicaid providers provide training and notice to their employees about the federal False Claims Act's prohibitions against cheating the government.[8] The federal Deficit Reduction Act incentivizes states to enact effective state False Claims Act statutes that provide for whistleblower-instigated suits.[9]

At the municipal level, taxpayers and residents of New York City, Chicago, San Francisco, and other cities benefit from *bona fide* False Claims Act ordinances, modeled on the successes of the federal Lincoln Law. Both the federal False Claims Act and the various state laws provide for a system of "checks and balances," much like our federal and state Constitutions, whereby the executive branch cannot dismiss a False Claims Act action without the federal judiciary first reviewing and permitting the dismissal.

Then there is Miami-Dade County's so-called False Claims Ordinance.

Miami-Dade County's Answer to Fraud

Ten years ago, in response to a *Miami Herald* series on airport construction fraud, Miami-Dade County adopted a False Claims Ordinance.[10] The Miami-Dade False Claims Ordinance, however, does not live up to its name or the venerable history of

5. http://www.taf.org/statistics.htm (last visited March 19, 2009).

6. Sen. Charles Grassley (R-IA) and Rep. Howard Berman (D-CA). http://www.taf.org/whyfca.htm (last visited March 23, 2009).

7. Jack A. Meyer, *Taxpayers Against Fraud Education Fund, Fighting Medicare Fraud: More Bang for the Federal Buck* (July 2006), available at http://www.taf.org/publications.htm (last visited March 19, 2009).

8. The DRA requires entities that receive or pay $5 million or more annually in Medicaid to establish written policies for all their employees, and for their contractors' employees and agents.These policies must provide: detailed information about the federal FCA; administrative remedies for false claims and statements; state laws with penalties for false claims or statements; and whistleblower protections. 42 U.S.C. §1396a(a)(68).

9. "State false claims act requirements for increased State share of recoveries." 42 U.S.C. §1396(h).

10. Miami-Dade County, Fla. Code, Chapter 21, Article XV. False Claims Ordinance 21-255 through 21-266. Ord. No. 99-152, §1, 11-2-99.

anti-fraud whistleblower laws. Instead, the Miami False Claims Ordinance combines both whistleblower *dis*incentives and protections for corrupt contractors—ensuring that local residents and taxpayers will never benefit from the law. In fact, the Ordinance is so defective that lawyers who specialize in False Claims Act litigation do not view it as a false claims ordinance.[11]

Other municipalities, whether in Miami-Dade County (where there are approximately 35 separate municipalities[12]), or elsewhere, might mistake the County's Ordinance as an appropriate model to deter fraud. To illustrate the problem, at least one other municipality, the City of Miami Beach, used the Miami False Claims Ordinance as a model for its similar law.[13] If other municipalities were also to model their ordinances on the Miami-Dade Ordinance, it will derail other municipalities' efforts to prevent and prosecute fraud.

The Miami-Dade Ordinance is based in part on Florida's False Claims Act.[14] Even where Florida and Miami-Dade have identical provisions, the Miami-Dade False Claims Ordinance is ineffective for two reasons. First, since county fraudulent contractor cases often involve smaller dollar amounts than statewide fraud schemes, whistleblowers' incentives are often just not sufficient. Incentives for successfully bringing suit against a local fraudulent contractor need to take into account financial realities of exposing and litigating complex financial fraud schemes. Second, because local politicians are particularly vulnerable to being swayed by contractors' contributions and personal ties, the need for strong oversight and other effective anti-retaliation whistleblower protections are essential if the Ordinance is to be effective.

THE ORDINANCE POSES UNNECESSARY BARRIERS

Power to Dismiss without Oversight

The Miami-Dade False Claims Ordinance is fatally flawed because it gives the County Manager the unchecked power to dismiss all fraud suits brought by a whistleblower—even completely valid, big-dollar schemes that unquestionably violate conflict of interest or fraudulent billing laws. The County's Ordinance gives the County Manager sole dis-

11. *The New York City False Claims Act: A Tale of One City*, by Lesley Ann Skillen, The False Claims and *Qui Tam* Quarterly Review, Vol.39, page 93, October 2005 identifies bona fide municipal ordinances: San Francisco Admin. Code §§6.80 et seq., §21.35 (1999); Chicago, Ill., Mun. Code §§1-21-010 through 1-22-060 (2005); and New York City Admin. Code, Title 7, §7-808 (2005).

12. http://www.miamidade.gov/Portal_Content/government/other_local_government.asp (last visited March 22, 2009).

13. City of Miami Beach, Fla. Ord. No. 2003-3398, §1, 2-26-03. §70-300 to §70-312. That ordinance limits whistleblowers to Miami Beach residents (few of whom work on city contracts) and "person in privity of contract." City of Miami Beach, Fla. Code §70-304(b). So who is in privity of contract—a corrupt contractor's administrative assistant, a supply subcontractor, an outside auditor? How can limiting the population of potential whistleblowers do anything but limit the effectiveness of the ordinance?

14. The table at the end compares the Ordinance with the federal and Florida false claim statutes.

cretion to dismiss a case, *notwithstanding the objections of the person bringing the case*.[15]

To make matters worse, the public may never know of Miami-Dade fraud allegations, nor of the County's failure to prosecute wrongdoers. This is because these cases are confidentially sealed.

The County Manager can get rid of a case secretly, with no judicial or other independent oversight.[16] This directly conflicts with the "balance of powers" system of government, exemplified in the federal False Claims Act, where an independent federal judge, with lifetime tenure unaffected by partisan politics, decides whether to dismiss the action. Moreover the Lincoln Law gives whistleblowers a right to be heard and object to "sweetheart deal" settlements.[17] This is consistent with the principles behind the rest of Florida's open government and sunshine laws.

As a result, while potential Miami-Dade whistleblowers and their lawyers have ample fraud schemes upon which to base suits, the County Manager's discretionary ability to dismiss their False Claims suits, means that few valid local fraud cases will ever be filed or pursued. Under the shroud of secrecy, a county manager can dismiss a case, thereby protecting long-standing business, political, or personal relationships without fear of public scrutiny.

As a further daunting disincentive, the County's dismissal triggers a *mandatory* fee assessment against the whistleblower by the "prevailing" defendant.[18]

Consider what might happen under the Miami-Dade False Claims Ordinance. A private attorney spends weeks of unpaid time investigating and developing the facts of the violations revealed to him by the whistleblowing client. After weeks or months of hard and careful work, a suit is filed on behalf of the courageous whistleblower. The county's investigation eventually results in the corrupt contractor and its lawyers being notified of the existence of the fraud claims. Defense counsel could easily charge \$50,000 to \$1 million or more in legal fees for evaluating a case's. Then the corrupt contractor or its attorney calls a county commissioner, county manager or county Attorney and says essentially "Oops!, Thanks for bringing this to our attention. My client (who is personally known to commissioner as a major contributor) might have made a mistake, but this will be taken care of." A commissioner then instructs or pressures the County Manager to dismiss the case.

This is not fiction. Municipal contractors are the largest contributors to county commissioners campaigns. Likewise, defense law firms and their attorneys are Flori-

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15. Rights of the parties in civil actions.

> (1) If the County Manager, on behalf of the County, elects to proceed with the action, he or she has the primary responsibility for prosecuting the action, and is not bound by any prior or subsequent act(s) of the person bringing the action. *The County may also voluntarily dismiss the action notwithstanding the objections of the person bringing the action.* [Emphasis supplied].

Miami-Dade County, Fla. Code §21-260.

16. Miami-Dade County has a "strong mayor" form of government, this concentrates political influence.

17. (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action *if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.* [emphasis supplied] 31 U.S.C. 3730(c)(2)(a).

18. Miami-Dade County, Fla. Code §21-262(3).

da's largest group of federal campaign contributors.[19]

Following dismissal, the *de facto* corrupt contractor seeks the *mandatory* reimbursement of its legal fees and costs which are assessed against the good-faith whistleblower.[20] Could a lawyer bring a case under a municipal ordinance with a provision like this without risking malpractice?

These shortcomings in Miami-Dade's Ordinance result in a False Claims Ordinance with little or no real deterrent effect upon corrupt contractors or any likelihood that meaningful cases will be filed and pursued.

Dismissal Against Those Who "Furthered" the Fraud

The Miami-Dade Ordinance requires that a judge must dismiss a whistleblower (but not the case) who has "furthered" a violation.[21] The undefined "furthered" can be broadly construed. Does a truck driver "further" a violation if he unknowingly delivers goods but does not otherwise participate in the fraud? What about a clerical employee whose job required that she copy and file documents essential to the fraud scheme, perhaps even knew of the fraud, and later had second thoughts and risked her family's financial security to blow the whistle?

This County Ordinance's "furthered" language is far more restrictive than similar provisions of the federal False Claims Act, upon which this part of the Ordinance is based. The federal law wisely recognizes that sometimes "it takes a thief to catch a thief." It does not eliminate a whistleblower's recovery under the False Claims Act unless the plaintiff help plan the fraud or is convicted as a result of the government's investigation.

Under the Federal FCA courts may reduce rewards to a wrongdoing relator "to the extent the court considers appropriate."[22] But even those who participate in a fraud may blow the whistle and receive compensation for their efforts.

For example, a whistleblower who worked for a defense contractor, who *failed to test the guidance system for nuclear tipped missiles*, and who testified they were "just as likely to hit Chicago as Kiev" was nonetheless awarded 10.8% (instead of up to 25%) of the recovery.[23] In that case, the judge reviewed and considered the whistleblower's "horrifying" behavior and then awarded him $864,000, emphasizing that *the consequences of the fraud make it all that much more important to provide incentives to encourage whistleblowers.*

19. Five law firms included among top 20 contributors in Florida. http://www.opensecrets.org/states/donors.php?cycle=2008&state=FL. When grouped by profession, lawyers contributed $17.5 million, exceeding real estate $14.8, health professions $7.0, and miscellaneous business $5.3, http://www.opensecrets.org/states/indus.php?cycle=2008&state=FL based on Federal Election Commission data available electronically on February 09, 2009.

20. Miami-Dade County, Fla. Code §21-262(3).

21. "Whether or not the County proceeds with the action, if the court finds that the action was brought by a person who planned, initiated, *or furthered* the violation of Section 21-258 upon which the action was brought, the person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the County to continue the action." [*emphasis supplied*]. Miami-Dade County, Fla. Code §21-261(5)

22. 31 U.S.C. §3730(d)(3).

23. *United States ex rel. Barajas v. Northrop Corp.*, 1992 U.S. Dist. LEXIS 22817, 38-39 (C.D. Cal. May 14, 1992) ($864,000 awarded to whistleblower).

Dismissal for having "furthered" a false claim converts a corrupt contractor—after all, there was in fact a false claim—into a prevailing (winning) defendant and triggers mandatory fees against the whistleblower. Would a secretary or truck driver or other potential whistleblower who may have "furthered" a fraud risk defense fees of tens or hundreds of thousands of dollars?

Bars to Current or Former County Employee

The Ordinance places a jurisdictional bar against current and former county employees, and against actions based "in whole or in part" on information obtained in the course of county employment.[24] Worse, the Ordinance places a jurisdictional bar against anyone bringing an action where information was obtained from a current or former employee of the county, without regard to whether or not the information had anything to do with that county employees' job with the county.[25]

The very people most likely to witness wrongdoing and who might have tried unsuccessfully to fix it internally risk dismissal if they expose it.

Nothing in the Federal FCA prohibits a government employee from filing action based on information acquired while working for the government, not even requiring a wait until the United States declines to initiate suit.[26]

But in Miami-Dade County, if a clerical or park service employee learns of fraud, brings it to the attention of persons responsible for stopping fraud and sees no remedial action, they can *not* use this Ordinance to stop the fraud. Worse, if they attempt to use the Ordinance and file suit, the confidential "seal" will gag them from disclosing the fraud to any other person (such as a newspaper). On top of that, once the suit is dismissed the Ordinance mandates that such whistleblowers pay the corrupt contractor's legal fees and costs.

The "Innocent Claimant" Defense

The so-called "Innocent Claimant" defense allows a contractor, who actually defrauded the county, the opportunity to avoid all responsibility by persuading a judge or jury, in essence, that it didn't mean to cheat the county.[27] This results in an innocent whistle-

24. "(3) No court shall have jurisdiction over an action where the person bringing the action under Section 21-258 is:

> (b) An employee or former employee of the County, and the action is based, in whole or in part, upon information obtained in the course or scope of County employment."

Miami-Dade County, Fla. Code §21-263(3)(b)

25. "(4) No court shall have jurisdiction over an action where the person bringing the action under Section 21-258 obtained the information from an employee or former employee of the County." Miami-Dade County, Fla. Code §21-263(4).

26. *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991) (criticized in *United States ex rel. Holmes v. Consumer Ins. Group*, 279 F.3d 1245 (10th Cir. 2002).

27. Innocent claimant affirmative defense.

> The provisions of this article shall not apply if the claimant can demonstrate by a preponderance of the evidence each of the following facts:
>
> (1) The claimant submitted or caused to have submitted the claim to or against the County reason-

blower then being held responsible for tens or hundreds of thousands of dollars in legal fees and costs of a contractor who, in fact, filed false claims against the county.

The Ordinance should encourage scrupulous compliance with the terms of County contracts—not just an ability to prove good intentions after the fact. The similar Federal FCA provision reduces the contractor's penalties from triple to double.[28]

The Innocent Claimant's Window of Corrections

The "Innocent Claimant" defense also allows a contractor who defrauded the County a chance to avoid responsibility and shift its fees and costs to the whistleblower by taking "immediate steps to modify, correct, or withdraw" its false claim within five days of *discovering the falsity* of the claim.[29] The moment of "discovering the falsity" should be limited to *before* the filing date of a case under this Ordinance. This is how a similar defense is handled under the Federal FCA.[30] Otherwise, the claimant (a contractor who did in fact submit false claims and cheat the county) can lose at trial, maybe even lose on appeal, and then "discover the falsity" and make the correction.[31]

A post-judgment correction defense can convert a corrupt contractor into a "prevailing party" and trigger the contractor's right to impose legal fees upon an innocent whistleblower. To bring any case under a municipal ordinance with a provision like this risks legal malpractice.

> ably believing that such claim was free of any material misstatements, or any exaggerated, inflated, or unsubstantiated assertions or damages;
>
> (2) The claimant had no reasonable basis to doubt the truth, veracity, or accuracy of such claim at the time it was submitted;
>
> (3) Prior to submitting the claim, the claimant diligently investigated the facts underlying such claim and prepared the claim in a reasonable manner given all the relevant information available; and
>
> (4) When information indicating that any element, statement, or allegation in the claim was false or misleading first became available, such claimant, within five (5) business days of discovering the falsity of the claim, took immediate steps to modify, correct, or withdraw such claim and provided the County with immediate notice thereof.

Miami-Dade County, Fla. Code §21-266

Note that subparagraph (3) requires investigation of just facts but not the contract's requirements.

28. 31 U.S.C. §3729(a).

29. *Id*, §21-266(4), above.

30. 31 U.S.C. §3729(a) . . . "(C) at the time such person furnished the United States with the information about the violation, *no criminal prosecution, civil action, or administrative action had commenced under this title* with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation; . . ." [emphasis supplied]

31. Sound crazy? *Cf.* litigation history through U.S. Sup. Ct. of 29 CFR 541.118(a)(6). *Auer v. Robbins*, 519 U.S. 452, 463–464 (1997) (unlimited window of corrections).

THE ORDINANCE REDUCES AND OR ELIMINATES WHISTLEBLOWER INCENTIVES

Prevailing Whistleblower's Fees and Costs Subtracted from Proceeds Reduces or Eliminates the Award

The Ordinance purports to award attorney's fees and costs (but no expenses) to a prevailing plaintiff's attorney, but takes those fees from the "recovered proceeds" rather than from the defendant.[32]

In contrast, the Federal FCA, and DRA guidelines, charge the defendant for a prevailing whistleblower's attorney's fees and costs, and the whistleblower's expenses.[33]

The Ordinance's fee provision eliminates whistleblower incentives to report any but the largest of frauds, since attorney's fees and costs will wipe out whistleblower awards in all but big-dollar cases. For example, a modest case could cost over $50,000 in fees and costs to get through trial (for a simple fraud involving few witnesses, few depositions, no experts and no appeal). A whistleblower could expect to receive, at best, only 10% to 25% of the amount by which the recovery exceeds those fees.[34] In essence, the Ordinance provides a $100,000 to $200,000 safe harbor for corrupt contractors' protection from whistleblowers.

The Federal FCA, in contrast, by providing fees and costs in addition to the underlying award, allows attorneys to pursue smaller cases than could be pursued under the Miami-Dade ordinance.[35]

Treatment of whistleblowers seems shabby compared to what the county does for itself. The Ordinance provides for payment to the county of fees, costs, and expenses, if it prevails.[36] A whistleblower and the whistleblower's attorney stand in the shoes of

32. "Expenses; attorney's fees and costs.

> (2) If the court awards the person bringing the action proceeds under this article, the person shall also be awarded an amount for reasonable attorney's fees and costs. *Payment for reasonable attorney's fees and costs shall be made from the recovered proceeds before the distribution of any award.*" [emphasis supplied]. Miami-Dade County, Fla. Code §21-262.

This article assumes the Ordinance's use of "shall" is mandatory and not permissive. However, a Florida "shall" can mean other than "shall" when the result is "unreasonable." *See* Wisotsky, Steven, *How to Interpret Statutes—or Not: the Phantom of Plain Meaning*, 83 Fla. B. J. 1 (Jan. 2009), page 43. http://www.floridabar.org/ (last visited March 19, 2009). But a whistleblower shouldn't have to risk his or own savings that "shall" might mean "may."

33. "Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant." [emphasis supplied] 31 U.S.C. §3730(d)(2), incorporated by reference at DRA's 42 U.S.C. §1396h(b)(2).

34. In contrast to the whistleblower's fees and costs, the Ordinance does not state that the county attorneys' legal fees, costs and expenses shall be paid from the recovered proceeds. Miami-Dade County, Fla. Code §21-262(1). However, defendants will likely argue that the Ordinance does not state that they would be in addition to those proceeds.

35. *Coleman v. Hernandez*, 490 F. Supp. 2d 278, 284 (DC Conn 2007) ($10,224 for FCA violation of Section 8 housing agreement as 30% of recovery where government did not intervene, attorney's fees and costs not reported).

36. "(1) If the County initiates an action under this article or assumes control of an action brought by a person under this article, and the County prevails in such action, the County shall be awarded its reasonable attorney's fees, expenses, and costs." Miami-Dade County, Fla. Code §21-262 (1).

the county to enforce the county's rights and to recover funds for the county. There is no rational basis for the disparate treatment of fees, costs and expenses.

Additionally, since the Ordinance subtracts whistleblowers' fees and costs from the proceeds, the county—rather than an adjudicated corrupt contractor—pays 70% or more of those fees from *its* share of the proceeds. What is the logic of taking a prevailing plaintiff's fees from the county's recovery rather than from the wrongdoing defendant?

Fees Charged Against Whistleblower

If the whistleblower fails to prove the county's case, the Ordinance burdens him or her with *mandatory* defendant fees and costs.[37] As discussed above, the ordinance poses many barriers to whistleblowers. Charging whistleblowers with defendants' fees and costs chills the likelihood of any prudent whistleblower taking any action under this ordinance. Whistleblowers have enough stress without risking tens or hundreds of thousands of dollars in legal fees—financial ruin for most potential whistleblowers.

Although Miami-Dade County burdens a whistleblower with a defendant's fees and costs, it exempts itself from defendants' expenses, fees or other costs.38

The County's approach is the precise opposite of the Federal FCA which requires a court to make a finding that the case was "clearly frivolous, clearly vexatious or brought primarily for purposes of harassment."[39] Similarly, the imposition of defense fees would fail DRA guidelines since it requires provisions "at least as effective in rewarding and facilitating" these cases as the Federal FCA.[40]

If Intervened: 10% reward, instead of 15%–25%

If the County proceeds with and prevails in an action, the whistleblower will receive ten percent (10%) of the proceeds.[41] These awards are less than the fifteen to twenty-five percent (15%–25%) awarded to a whistleblower under the Federal FCA and DRA guidelines (25% minimum).[42]

37. "If the County does not proceed with an action under this article and the defendant is the prevailing party, the court shall award the defendant reasonable attorney's fees and costs against the person bringing the action." Miami-Dade County, Fla. Code §21-262(3).

38. Miami-Dade County, Fla. Code §21-262(4).

39. "If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 31 U.S.C. §3730(d)(4)

40. 42 U.S.C. §1396h(b)(2). Other minor provisions also erode successful FCA actions. For example, §21-259(2)(a) triples the 60 days seal allowed under the FCA. 31 U.S.C. §730(b)(2). This makes it more likely that evidence will stale and witnesses forget. *Cf.* Frederick M. Morgan, Jr. (Morgan Verkamp, LLC, Cincinnati, Ohio), *Of Third Rails and Rabbit Trails: the "No-Contact Rule" and the McDade Amendment in Qui Tam Lawsuits*. Legal Ethics, 37 TAF Q.R. 85, 87 (2005) ("[I]t is irresponsible for relator's counsel to allow potential sources of highly valuable evidence to wither on the vine, or for that matter move, forget, or expired.").

41. Miami-Dade County, Fla. Code §21-261(1).

42. 31 U.S.C. §3730(d)(1).

If Declined: 25% reward, instead of 25%–30%

If the county declines to prosecute the case, and that whistleblower proceeds and wins, it awards the whistleblower twenty-five percent (25%).[43] In contrast, the Federal FCA provides for up to thirty percent (30%)[44], and the DRA sets thirty percent (30%) as a *minimum*. California's FCA, for example, provides for up to fifty percent (50%),[45] the same that the FCA awarded originally.[46]

The county's annual budget is approximately $5 billion.[47] Its contracts are generally smaller than the federal government's contracts. If anything, to create financial incentives as strong as those under the Federal FCA incentives, the percentage should be higher than the percentages awarded by the federal government. Why would a county decrease incentives to deter fraud?

Elimination of Civil Penalties ($5,000–$10,000 per claim under FCA)

Miami-Dade's Ordinance has no civil penalties. The omission of civil penalties presents corrupt contractors a free pass for high-volume, low-dollar fraud and for false claims for which there are no damages. Thus, for approximately half of the false claims defined in the Ordinance at §21-251(1)(a) through (g) the county could decline, a whistleblower could prevail, the whistleblower's award would be zero dollars ($0.00), from which the whistleblower's attorney would, of course, receive nothing.

In contrast, there is no requirement under the Federal FCA that the United States suffer damages as result of fraud.[48] The time-tested and proven Federal FCA imposes triple damages *and* up to $10,000 per transaction.[49] Likewise, the DRA mandates a civil penalty "that is not less than the amount of the civil penalty" under the Federal FCA.[50]

43. Miami-Dade County, Fla. Code §21-261(3).

44. "The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds." 31 U.S.C. 3730(d)(2).

45. Cal. Govt. Code. §12652(f)(3).

46. ". . . shall be entitled to receive a one half the amount. . . ." Ch 67 §6, 12 Stat 696 (1863).

47. http://www.miamidade.gov/budget/FY2008-09/Adopted/Final_Budget_Vol1.asp.

48. *Harrison v Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999). U.S. v. United Technologies Corp., 2008 WL 3007997 (S.D. Ohio. August 1, 2008) (Although government suffered no actual damages, each invoice the defendant submitted to the government constituted a violation of the FCA and court awarded FCA civil penalties of $10,000 per invoice submitted, totaling $7,090,000.)

49. ". . . person who makes a false claim . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person" 31 U.S.C. §3729(a).

50. 42 U.S.C. §1396h(b)(4).

CONCLUSION AND RECOMMENDATIONS

To bring any case under this Ordinance risks legal malpractice. The ordinance has few redeeming virtues. [51] How to fix it? Two recommendations:

1. Model an amended Ordinance on the proven and time-tested Federal FCA, or rewrite it to conform to DRA guidelines.[52]

2. Amend the Florida FCA to bring it up to DRA compliance, extend it to all (not just Medicaid) false claims; and include false claims made against cities and counties.[53]

	Federal	Florida	Miami-Dade
Award: intervention	15%–25%[54]	15%–25%[55], except when it's 10%[56]	10%, except when it's 5%[57]
Award: no intervention	25%–30%[58]	25%–30%[59]	25%[60]
Civil penalty	$5,000–$11,000	$5,000–$11,000[61]	$0.00
Must prove damages	No, just false claims.	Yes.[62]	As a practical matter, yes, because no civil penalty.
Prevailing plaintiff fees	Yes, on top of recovery.	"from the recovered proceeds"[63]	"from the recovered proceeds"[64]
Prevailing defendant fees	No, except if frivolous.[65]	Yes. Mandatory.[66]	Yes. Mandatory.[67]

51. Unlike the federal statute, the Ordinance includes tax fraud. Miami-Dade County, Fla. Code §21-258 (1)(g). 31 U.S.C. §3729(e) but cf., 26 U.S.C. §7623 (tax whistleblower). If the Ordinance were appropriately amended, the tax provision could generate significant revenue for the county.

52. TAF Model Ordinance http://www.taf.org/modelstatefca.pdf (last visited March 23, 2009).

53. Suggested by Lesley Ann Skillen, Getnick & Getnick, New York, who points out that the most effective State FCAs are those (like NY and CA) that also apply to cities and municipalities. A Florida FCA extended to cover claims against cities and counties would render the Miami-Dade ordinance redundant (or unconstitutional).

54. 31 U.S.C. §3730(d)(1).

55. Fla. Stat. §68.085(2).

56. "(2) If the department proceeds with an action which the court finds to be based primarily on disclosures of specific information, other than that provided by the person bringing the action, . . . the court may award such sums as it considers appropriate, but in no case more than 10 percent. . . ."

57. Miami-Dade County, Fla. Code §21-261(1). But five percent (5%) here: ". . . the court finds to be based primarily on disclosures of specific information, other than that provided by the person bringing the action, . . . 5 percent." Miami-Dade County, Fla. Code §21-261(2).

58. 31 U.S.C. §§3730(d)(2).

59. Fla. Stat. §68.085(3).

60. Miami-Dade County, Fla. Code §21-261(3).

61. Fla. Stat. §68.082(2)(g).

62. Fla. Stat. §68.09.

63. Fla. Stat. §68.086(2).

64. Miami-Dade County, Fla. Code §21-262(2).

65. 31 U.S.C. §3730(d)(4).

66. Fla. Stat. §68.086(3).

67. Miami-Dade County, Fla. Code §21-262(3).

	Federal	Florida	Miami-Dade
Defenses: innocent mistake	No, but reduces damages from 300% to 200%.[68]	Yes.[69] Not clear whether "innocent" false claims must be repaid, or whether defendants can keep their unearned money.	Yes.[70]
Corrections	Before knowledge of investigation or action.[71]	30 days before any action and damages reduced from 300% to 200%.	Yes, no limit as to when.[72]
Dismissal by government	No, judge decides.	Yes.[73]	Yes.[74]
Parties: persons who planned or initiated false claim	Yes, except 0% if criminally convicted.[75]	Yes, can be reduced by court except 0% if criminally convicted receive.[76]	No jurisdiction for anyone who "furthered" violation.[77]
Parties: gov't employees	Yes.[78]	No.[79]	No.[80]
Reports on Effectiveness	Yes.[81]	No.	No.
Results	Billions. Over a billion in first three months of 2009.[82]		Unknown. Probably $0 over 10 years.

68. 31 U.S.C. §3729(a).

69. Fla. Stat. §68.082(1)(c).

70. Miami-Dade County, Fla. Code §21-266.

71. 31 U.S.C. §3729(a)(C).

72. Miami-Dade County, Fla. Code §21-266(4).

73. Fla. Stat. §68.084(2)(a).

74. Miami-Dade County, Fla. Code §21-260.

75. 31 U.S.C. §3729(a).

76. Fla. Stat. §68.085(6).

77. Miami-Dade County, Fla. Code §21-261(5).

78. Except certain actions brought by current or former members of the armed forces. 31 U.S.C. §3730(e)(1).

79. Fla. Stat. §68.087(4)(b).

80. Miami-Dade County, Fla. Code §21-263(4).

81. Dept. of Justice False Claims Statistics for FY 1987-2008: http://www.taf.org/statistics.htm (last visited March 19, 2009). This excludes state Medicaid recoveries and criminal fines assessed in FCA cases.

82. http://www.taf.org (last visited March 19, 2009).