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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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U.S. Renal Care

C.R. Bard Inc.

Ranbaxy USA Inc.

Adventist Health System/West and White Memorial Medical Center

St. Vincent Healthcare and Holy Rosary Healthcare

Amgen Inc.

Intermountain Health Care Inc.

Fluor Hanford LLC

CDW-Government LLC

California Board of Regents

Caddell Construction

Hospice of Arizona L.C., American Hospice Management LLC, and American Hospice Management Holdings LLC

Techota, LLC

American Systems Corporation, Anixter International Inc. and Corning Cable Systems LLC

Mohanbhai Ramchandani and Mohan's Custom Tailors

Par Pharmaceutical Companies, Inc.

CH2M Hill Hanford Group Inc.

Fairfax Nursing Center

Steven J. Wasserman

St. Luke's-Roosevelt Hospital Center, Continuum Health Partners, Inc., and SLR Psychiatric Associates

Catholic Health Initiatives

Cooper Health System

Pfizer, Inc. and Endo Pharmaceuticals

Victory Pharma

Education Holdings 1

Crown Roofing Services

Sanofi-Aventis U.S. Inc. and Sanofi-Aventis U.S. LLC

Toyo Ink SC Holdings Co. Ltd.

Structured Employment Economic Development Corporation

Amgen

Pfizer, Inc.

APTx Vehicle Systems

Healthpoint, Ltd.

Metro North Newspapers, Inc. and Mile High Newspapers

Baylor University Medical Center, Baylor Health Care System, and HealthTexas Provider Network

Harmony Hospice Care, Inc.

Technological Research and Development Authority of Florida and the Melbourne Airport Authority

Five Banks: Countrywide Home Loans, Inc.; PNC Bank; First Tennessee Bank; SunTrust Mortgage; and CitiMortgage

Donald Hallmark Sr., Donald Hallmark Jr., and Hallmark Meat Packing Co.

Freeman Health System

Orthofix International NV and Blackstone Medical, Inc.

Novartis

Boehringer Ingelheim Pharmaceuticals

Westchester County Health Corporation

Weill Cornell Medical College

RxAmerica, LLC

Lucent Technologies World Services, Inc.

Georgia Cancer Specialists, I, PC

HCA Inc. and Parkridge Medical Center

Compass Group USA

Pinnacle Medical Solutions

New York Downtown Hospital

Johnson & Johnson

AstraZeneca PLC

Bechtel Jacobs Company LLC

Los Angeles Doctors Hospital Inc.

SCAN Health Plan, Senior Care Action Network, and Scan Group

CareAll Management LLC

The Mayo Clinic

McKesson Corp.

District Council 1707, Local 95 Head Start Employees Welfare Fund

Dartmouth-Hitchcock Clinic

Louis Dreyfus Energy Services

Davita, Inc.

NextCare Inc.

GlaxoSmithKline Inc.

FROM THE EDITOR

HAPPY BIRTHDAY!!!!!

The False Claims Act turned 150 this year. So while this "Year in Review" issue looks back at the prior twelve months of FCA developments, it is inspired by the past century and a half of progress. Signed in 1863 by President Abraham Lincoln, the FCA has endured as our most effective weapon in the fight against fraud on our government, as its strong whistleblower (*qui tam*) provisions give all of us a stake in our government, allows each of us to expose those who cheat the government and steal our tax dollars, and enables us to level the playing field for the companies and individuals who still play by the rules—even in the face of rampant fraud.

Taxpayers Against Fraud Education Fund works tirelessly to promote, protect, and defend the False Claims Act and its *qui tam* provisions. We salute and support the courageous whistleblowers, as well as the private and government attorneys, who have guarded the federal fisc for the 150 years, and we vow to continue to lead the fight against fraud. For more information about TAFEF, please our website: www.taf.org.

Onward and upward,
Cleveland Lawrence III

Recent False Claims Act & *Qui Tam* Decisions

JULY 1, 2012–JUNE 30, 2013

FALSE CLAIMS ACT LIABILITY

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

U.S. ex rel. Schubert v. All Children's Health Syst., Inc., 2013 WL 1651811 (M.D. Fla. Apr. 16, 2013)

A *qui tam* relator filed suit alleging that a group of affiliated children's healthcare companies—consisting of a children's hospital, a physician services company, and the two companies' parent corporation—violated the federal False Claims Act and the Florida False Claims Act. Specifically, the relator alleged that the physician services company was responsible for physician staffing at the hospital, and that the company hired her to restructure the compensation plan for the hospital's doctors. She claimed that, in spite of the compensation plan she developed, which ensured that compensation did not exceed the 75th percentile of applicable national average salaries, the defendant parent company overcompensated pediatric practices in an effort to guarantee loyalty. The relator claimed that the overcompensation amounted to illegal kickbacks, in violation of the Anti-Kickback Statute and the Stark Law. She alleged that all of the hospital's Medicaid reimbursement claims were tainted by these violations, and thus, were false. The defendants moved to dismiss the relator's claims, arguing that the alleged fraud was not plead with particularity.

Holding: The U.S. District Court for the Middle District of Florida granted the defendants' motion. All of the relator's claims were dismissed, but without prejudice.

The court began by considering the relator's claims under the federal False Claims Act, which consisted of two counts: (1) an allegation that the defendants presented false claims to the government; and (2) an allegation that the defendants made false statements to the government that were material to those claims. First, the court disposed of the relator's presentment claim, noting that even though she alleged that <u>all</u> of the hospital's Medicaid claims were false, under an "implied false certification" theory of liability, she was still required to allege the fraud scheme, with specificity. The court observed that not only did the relator fail to identify any allegedly false claim that was presented to the government, but she also failed adequately to describe the alleged kickbacks or the defendants' alleged false certifications with particularity. The court further noted that relator was employed by the physician services company, not the hospital, which prepared and submitted the Medicaid claims at issue. Ultimately, the court held that the relator failed to plead sufficient facts from which the court could infer an "indicia of reliability" that false claims were presented to the government. The court dismissed the relator's allegations regarding presentment. Similarly, the court dismissed the relator's allegations that false statements were made to the government to support false claims. The court held that liability under this FCA provision requires a showing that

"false statements ultimately led the government to pay amounts it did not owe." The court held that the relator did not plead the elements of this cause of action with particularity, since she could not allege any amount the government paid to the hospital that it did not owe.

Finally, the court dismissed the relator's state FCA claims on the same basis. The court noted that the Florida statute mirrored the federal statute's liability provisions, and therefore held that the same reasoning applied with respect to the relator's state law claims.

The relator was granted leave to amend her compliant, but was cautioned that she might not receive further leave to amend, should she fail to cure the deficiencies identified by the court.

U.S. ex rel. Meyer v. Kempf Surgical Appliance, Inc., 2013 WL 1438025 (S.D. Ohio Apr. 9, 2013)

A *qui tam* relator filed suit against a medical supplies company and its president, alleging that the defendants violated the False Claims Act by submitting false claims to the federal government healthcare programs. More specifically, the relator alleged that the defendants improperly billed the government: for customized surgical devices, even though they actually used "off-the-shelf" devices; for add-on components to devices that were never actually provided; for components that were provided but which had already been included as part of the base price of the device; and for orthotic services provided by unqualified, unsupervised personnel. In addition, the relator alleged that the defendant company received impermissible kickbacks from a medical device manufacturing company in exchange for purchasing the manufacturer's equipment, and thus, the defendants' healthcare claims to the government were false because they were tainted by that illegal relationship. The relator—a licensed orthotist who had been employed by the defendants for about nine months—also alleged a claim under the FCA's anti-retaliation provision, alleging that he was constructively discharged from his job after fruitlessly attempting to stop the defendants' fraud. The defendants moved to dismiss the relator's complaint, arguing that the complaint failed to state a claim and failed to allege the fraud scheme with particularity, as required by Federal Rules of Civil Procedure 12(b)(6) and 9(b), respectively.

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

The court held that the relator adequately put the defendants on notice of the fraud allegations against them, even though he had not been employed by the defendant company for very long. With respect to the relator's claims that the defendants improperly billed the government for various devices and components, the

court held that the relator's complaint was sufficient to overcome the defendants' motion, given the short duration of his employment. While the court held that "the full panoply of claims submitted to the government by Defendants for payment is only available through discovery," it still noted that the relator provided some detailed allegations and he "did allege representative instances of what he claims are the impermissible billing practice." He further alleged that when he questioned the defendants' billing practices, he was told: "This is how we make our money."

Similarly, with regard to the relator's allegations of false claims based on illegal kickbacks, the court noted that he offered a specific example of the defendants' allegedly illegal kickback arrangement and asserted that the company president routinely accepted improper gifts from the manufacturing company. The court ultimately stated that "[t]aking the allegations as a whole and accepting them as true, the Court draws a strong inference that false claims were submitted to the government as a result of the schemes described in the complaint."

Finally, the court turned to the relator's allegation that the defendants improperly billed the government for services that were performed by unqualified and unsupervised personnel. The defendants argued that this cause of action could not be maintained because the relator failed to show that no supervising orthotist was physically present when the alleged unlicensed individual provided services. The defendant noted that the relator agreed that the individual defendant was typically present in the office building during business hours, and therefore argued that a supervisor was indeed physically present when the services at issue were provided. The court, though, determined that the relator's claim was not solely based on whether or not a supervisor was physically present in the building, but instead on whether or not the person actually provided supervision to unlicensed personnel. The court held that the relator's allegation that neither the individual defendant nor anyone actually supervised the procedures at issue was sufficient to withstand the defendants' motion to dismiss, but noted that more details "must be flushed out in discovery."

As a result of these findings, the court denied the defendants' motion to dismiss the fraud claims.

The court also denied the defendants' motion to dismiss the relator's retaliation claim. The relator argued that he was constructively discharged when he refused to participate in the alleged fraud and instead attempted to stop it. The defendant countered that the relator expressed "mere dissatisfaction" with his treatment on the job and quit. The court held that the relator's allegations were sufficient to infer a cause of action for retaliation.

U.S. ex rel. Daugherty v. Bostwick Labs., 2012 6593804 (S.D. Ohio Dec. 18, 2012)

A *qui tam* relator filed a suit under the False Claims Act, alleging that a laboratory company and its founder and CEO defrauded federal healthcare programs and the healthcare programs of seven U.S. States and the District of Columbia by submitting false claims for reimbursement. More specifically, the relator alleged that the defendants submitted claims for services that were not ordered by a physician and provided illegal kickbacks to physicians to incentivize them to refer business to the defendants, in violation of the Stark Law and the Anti-Kickback Statute. The relator, who was president of a competing laboratory company, alleged that his company shared some customers with the defendants, and that some of those customers informed the relator of the defendants' alleged practices. None of the government entities intervened in the relator's suit. The corporate defendant moved to dismiss the relator's claims for lack of subject matter jurisdiction, pursuant to the False Claims Act laws' public disclosure bar provisions, and also moved to dismiss for failure to state a claim and for failure to plead the alleged fraud with particularity. The individual defendant also moved to dismiss the relator's complaint, arguing that the complaint failed to set forth facts from which the court could pierce the corporate veil and hold him personally liable for any acts of the company. The individual defendant also adopted and incorporated the corporate defendant's motion to dismiss.

Holding: The U.S. District Court for the Southern District of Ohio denied both defendants' motions.

Public Disclosure Bar

The corporate defendant argued that the relator's fraud claims were jurisdictionally barred, because the claims were based on information that had already been publicly disclosed. In support of its argument, the defendant alleged that the relator's complaint relied on a letter the defendant's general counsel sent to various providers, informing them of a "loophole" they could exploit by billing government entities for a particular test even if it was not ordered by the treating physician—supposedly the same "loophole" that the relator alleged constituted an FCA violation. Moreover, the defendant argued that several large laboratories and multiple laboratory associations met with federal government officials from the Centers for Medicare and Medicaid Services (CMS) to discuss the loophole, and that that meeting constituted a public disclosure for FCA purposes. In addition, the defendant pointed to several articles discussing the loophole, and noted that another healthcare association submitted a comment letter to the CMS on the issue, and that the letter was a public disclosure since it was available on the CMS website. The court held that none of these purported public disclosures precluded the relator's claims. The court found that the general counsel

letter did not meet the FCA's definition of a public disclosure, since it was not part of a criminal, civil, or administrative proceeding; was not included in a congressional, administrative, or GAO report, hearing, audit, or investigation; and was not from the news media. While the court held that the news articles were public disclosures and that the CMS meeting and letter to CMS were arguably public disclosures, they did not bar the relator's suit, since "substantial identity between the disclosures and the complaint does not exist," and thus, the relator's allegations could not have been "based upon" those public disclosures. The court determined that the disclosures relied on by the defendants did not "detail[] the elements of the allegedly fraudulent transactions or the fraud itself," and did not describe "the particulars of the fraud alleged here or, importantly, the Defendants served here." In denying the defendant's motion to dismiss for lack of subject matter jurisdiction, the court summarized its holding by re-stating the relator's analogy: "A handbook describing how to crack a safe does not mean that the fact that a particular safecracker robs banks is publicly disclosed."

Failure to State a Claim

The corporate defendant argued that the relator's complaint failed to state an FCA claim, arguing that the defendant's claims for the testing at issue were not false—the defendant argued that even if the testing was not ordered by a treating physician, the relator could not show that any of the tests at issue were not medically necessary. Since the tests were medically necessary, the defendant's argument continued, its claims for reimbursement were not false. In support of this argument, the defendant pointed to a specific exception to the rule requiring a treating physician's signature, and asserted that the lack of a physician's signature did not, in and of itself, necessarily make its reimbursement claims false. The court rejected the defendant's argument, agreeing with the relator that the defendant's argument challenged the relator's factual allegations—which must be accepted as true at the motion to dismiss stage—not the viability of the relator's cause of action itself. The court held that "[t]ests billed without a physician's order under the circumstances alleged in the complaint could be found to be medically unnecessary and thus fraudulent under the FCA, and that is the only question before the Court at this stage." The court noted that the extent to which any exceptions to the general rule might apply would become clearer through the discovery process, but held that the relator's factual allegations regarding the defendant's testing and billing practices were sufficient to overcome the defendant's motion to dismiss for failure to state a claim.

Similarly, the court held that the relator's allegations regarding the defendant's illegal kickbacks to physicians stated a claim under the FCA laws. The defendant argued that the relator failed to establish that the defendant falsely certified that it had complied with the Stark and Anti-Kickback laws in connection with actual claims that were submitted to federal and/or state healthcare programs. Additionally, the defendant alleged that the relator failed to provide factual support for his contention that the defendant provided improper remuneration to physicians in exchange for referrals.

The court rejected these arguments. First, the court held that when the defendant submitted its application to participate in the federal healthcare programs, it signed an agreement that included a certification stating that the defendant understood that payment under those programs was conditioned on compliance with applicable laws and regulations—including the Stark and Anti-Kickback laws. The court also noted that compliance with these laws is material to the government's payment decision as a matter of law, stating that "[i]t is not a large leap at all to conclude that compliance with the AKS and the Stark Laws would have a natural tendency to influence the federal government's decision to pay a claim. Second, the court held that the relator adequately pled the defendant's illegal remuneration to doctors, as the relator detailed the arrangement whereby the defendant would provide value—in the form of completing various administrative tasks on behalf of physicians, offering physicians opportunities to bill the government for certain components of tests at a marked-up price, and offering physicians discounts on private insurance business—in exchange for referrals to its laboratory. Again, the court observed that, after discovery, the defendant's arguments might give rise to a motion for summary judgment, but held that the relator's allegations were sufficient at the motion to dismiss stage. Consequently, the court denied the defendant's motion to dismiss for failure to state a claim.

Failure to Plead Fraud with Particularity

Next, the court turned to the corporate defendant's motion to dismiss the relator's complaint for failure to plead the alleged fraud with particularity, as required by Federal Rule of Civil Procedure 9(b). The defendant argued that the relator's complaint was deficient because the relator failed to identify any specific fraudulent claim that the defendant actually submitted to the government. The court quickly resolved this issue, determining that the relator's fraud allegations were adequately pled, as the relator's complaint was sufficient to put the defendant on notice of the relator's claims. The court noted that the relator was an outsider to the defendant's company, and that "the full panoply of claims submitted to the government by [the defendant] for payment [would only be] available through discovery," but concluded that the relator still provided some details regarding the alleged fraud, including an example of testing for a specific patient on a specific date that was not ordered or consented to by the appropriate provider, as well as an admission from one of the defendant's representatives that the defendant's policy was to conduct the testing without a physician's order. The court held that the relator's failure to describe actual false claims was not fatal to his case, as the court determined that the relator's allegations, taken as a whole and accepted as true would lead to a strong inference that false claims were submitted to the government entities involved as a result of the defendant's alleged misconduct. Moreover, the relator's kickback allegations not only included information gleaned from the defendant's own marketing materials, but the relator also identified—by date and location—specific examples of improper inducements the defendant allegedly made to physicians. As a result of these findings, the court held that the relator's claims were pled with particularity and denied the defendant's motion to dismiss on that basis.

Piercing the Corporate Veil

Finally, the court considered the individual defendant's motion to dismiss. The court held that to the extent that the individual defendant adopted the corporate defendant's motion to dismiss, the court's denials of that motion applied with equal force to the individual defendant. Therefore, the court was only left with the individual defendant's corporate veil argument. The relator countered that argument, claiming that the corporate veil should be pierced and FCA liability should attach to the individual defendant personally, since the individual defendant also committed fraud on the government in his individual capacity and since his identity was inseparable" from the corporate defendant's with respect to the alleged fraud. The court agreed with the relator, finding that the relator pled adequate fact from which the court could infer that the individual defendant personally participated in the alleged fraud, and that the corporate defendant's allegedly fraudulent actions could be imputed to the individual defendant, as the relator alleged that the individual defendant controlled and directed the fraud scheme, and personally benefitted from it. The court held that these allegations were sufficient to withstand the individual defendant's motion to dismiss. The court noted, however, that this question could be revisited after discovery. Consequently, the court denied the individual defendant's motion to dismiss.

See *U.S. ex rel. Bahnsen v. Boston Scientific Neuromodulation Corp.*, 2013 WL 2404816 (D.N.J. May 31, 2013), at page 210.

See *U.S. ex rel. Yarberry v. Sears Holdings Corp.*, 2013 WL 1287058 (S.D. Ill. Mar. 28, 2013), at page 216.

See *U.S. ex rel. Osheroff v. Tenet Healthcare Corp.*, 2013 WL 1289260 (S.D. Fla. Mar. 27, 2013), at page 274.

See *U.S. ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 2013 WL 1149255 (M.D. Fla. Mar. 19, 2013), at page 158.

See *U.S. ex rel. Health Dimensions Rehab., Inc. v. RehabCare Group, Inc.*, 2013 WL 992642 (E.D. Mo. Mar. 13, 2013), at page 160.

See *U.S. ex rel. Palmieri v. Alpharma, Inc.*, 2013 WL 821965 (D. Md. Mar. 5, 2013), at page 25.

See *U.S. ex rel. Dennis v. Health Mgmt. Assocs., Inc.*, 2013 WL 146048 (M.D. Tenn. Jan. 14, 2013), at page 176.

See *U.S. ex rel. Freedman v. Suarez-Hoyos, MD*, 2012 WL 4344199 (M.D. Fla. Sept. 21, 2012), at page 257.

See *Gonzalez v. Fresenius Med. Care North America*, 2012 WL 3065314 (5th Cir. July 30, 2012), at page 243.

See *U.S. ex rel. Osheroff v. Tenet Healthcare Corp.*, 2012 WL 2871264 (S.D. Fla. July 12, 2012), at page 249.

B. What Constitutes a False Claim

U.S. ex rel. Humphrey v. Hocking, Athens, Perry Cmty. Action Agency, 2013 WL 494035 (S.D. Ohio Feb. 7, 2013)

A relator filed a *qui tam* complaint alleging that an organization misused federal Head Start Program funds. He alleged a claim under the False Claims Act's "reverse" false claims provision. The United States declined to intervene in the lawsuit. The relator moved to file a third amended complaint, seeking to add the organization's attorney and former executive director as defendants. The defendants opposed the motion, arguing that such an amendment would be futile.

The U.S. District Court for the Southern District of Ohio denied the relator's motion. The court held that the relator failed to plead a reverse false claim, since he did not identify an obligation imposed on the defendants to pay or transmit money or property to the government, and since he did not allege a judgment, retention of an overpayment, or an implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, fee-based, or similar relationship, as required by the False Claims Act. As a result, the court denied the relator's motion to amend his complaint as futile.

U.S. ex rel. Spay v. CVS Caremark Corp., 2012 WL 6645537 (E.D. Pa. Dec. 20, 2012)

A physician and pharmacist brought a *qui tam* action against three related companies that provide prescription and pharmaceutical services, alleging that the defendants committed Medicare fraud. The relator alleged that his company was retained to audit the defendants' Medicare claims, and that the audit revealed that the defendants had submitted fraudulent Medicare claims—including claims for prescriptions that had not undergone the required drug utilization review, among other things. Based on this information, he filed a *qui tam* action, alleging that the defendants violated multiple provisions of the False Claims Act. The defendants moved to dismiss the relator's complaint for failure to state a claim and for failure to plead fraud with particularity. They also moved to dismiss the relator's action for lack of subject matter jurisdiction, pursuant to the False Claims Act's public disclosure bar provision.

Holding: The U.S. District Court for the Eastern District of Pennsylvania denied the defendants' motion on all grounds.

Failure to State a Claim

The defendants argued that the relator's complaint failed to state a claim, contending that the relator did not: (1) plead "falsity" as a matter of law; (2) allege that the de-

fendants submitted, or caused to be submitted, any claims to the government for payment; or (3) plead a violation of the FCA's "reverse" false claims provision. The court considered each of the defendants' arguments in turn.

1. Were the claims false?

First, the court evaluated the defendants' contention that the relator could not establish the falsity of any Medicare claims at issue. The court noted that in the context of Medicare claims, "falsity" under the FCA can be established in two ways: a claim can be "legally" false under a false certification theory, or a claim may be false under a worthless services theory. Ultimately, the court concluded that the relator's alleged FCA violations under both theories.

a. False Certification Theory

With respect to the false certification theory of FCA liability, the relator alleged that the defendants submitted, or caused to be submitted, Medicaid claims that included, as a condition of payment, a certification that the prescription for which the claims were made were "true, accurate, and complete." The relator alleged that the defendants knew that their Medicare prescriptions were not "true, accurate, and complete," since the claims were for prescriptions that had not been properly reviewed, and thus, the claims were false. The defendants countered, arguing that the "true, accurate, and complete" certification does not create a condition of payment that can form the basis of FCA liability; that the regulation was not applicable to pharmacy benefit managers (PBMs) like the defendants, but only applied to Medicare Part D Plan Sponsors; and that the relator failed to plead that they submitted any false, inaccurate, or incomplete information. The court distinguished violations of Medicare conditions of participation—which may deprive entities of the ability to participate in the Medicare program, but which do not create FCA liability—with violations of Medicare conditions of payment—which will only result in FCA liability if the violation might cause the government actually to refuse payment. The court held that the plain language of the "true, accurate, and complete" regulation made clear that the required certification created a condition of payment. In addition, the court held that the regulation applied to the defendants. The defendants had argued that, as PBMs, they were not bound by the regulation relied on by the relators. Instead, they argued that a separate regulatory provision—which stated that PBMs must "similarly certify" the truthfulness, accuracy, and completeness of their claims data—applied to them, and that this regulation does not create a condition of payment. The court rejected that argument, as it determined that both regulatory provisions appeared in a section entitled "Certification of data that determine payments," and reasoned that all subparts of that section must relate to certifications that determine—or are conditions of—Medicare Part D payments. Based on this finding; the Centers for Medicare and Medicaid Services' (CMS) interpretation of the regulation, as published in a CMS manual; and caselaw, the court

concluded that the regulations at issue established that, as a condition of receiving payment, Medicare Part D Plan Sponsors must certify the truthfulness, accuracy, and completeness of their prescription claims data, and when such data is supplied by a PBM (such as the defendants), then the PBM must similarly certify, as a condition of payment, the truthfulness, accuracy, and completeness of the data. The court then held that the type of data submitted by the defendants with respect to the allegedly false claims act issue was data "related to payment," and therefore, the "true, accurate, and complete" condition of payment applied to the defendants' conduct. Consequently, the court held that the relator properly alleged an FCA violation based on a false certification theory of liability and denied the defendants' motion to dismiss those claims.

b. Worthless Services Theory

With respect to the relator's "worthless services" theory of FCA liability, the relator alleged that the defendants submitted claims, or caused claims to be submitted, for Medicare reimbursement even though the government did not receive the full services it was being asked to pay for, since the defendants failed to provide the proper drug utilization review for the prescriptions underlying those claims and committed other regulatory violations. The court held that the relator properly pled a claim under this theory, rejecting the defendants' arguments that the relator failed to allege that the defendants billed, or caused others to bill, the government for services that were not provided; that the relator only alleged that the defendants failed to perform their duties perfectly, not that they failed to provide the services at all; and that the relator could not demonstrate that the defendants were required to conduct the drug utilization review for the prescriptions at issue. Instead, the court found that the *qui tam* complaint specifically alleged that due to the defendants' conduct, claims were submitted to the government for services that were not provided; that discovery would determine whether or not the defendants completely failed to provide services to the government; and that the relator's allegations, accepted as true for motion to dismiss purposes, established that, by contract and regulation, the defendants were required to perform drug utilization review services. As a result, the court denied the defendants' motion to dismiss the relator's worthless services claims.

2. Did defendants actually submit claims or cause claims to be submitted?

The court then turned to the defendants' second argument in support of their motion to dismiss—that the relator failed to allege that the defendants themselves submitted claims or caused claims to be submitted for payment. Rather, the defendants argued that the prescription information they provided was merely used for accounting and reconciliation purposes, and thus does not meet the FCA's definition of "claim"—a request or demand for government money. Moreover, the defendants argued that the relator could not allege that they violated the FCA by making a false record or false statement "to get" a claim paid.

a. Was a "claim" alleged?

The court rejected the defendants' argument that the data they provided did not satisfy the FCA's definition of "claim," noting that, according to CMS's instructions, the type of prescription data provided by the defendants "will enable CMS to make payment," and "allow[s] calculation of payment." Moreover, CMS made clear that subcontractors like the defendants must certify that their data is true and accurate, and specifically tied the submission of knowingly false information to liability under the False Claims Act. As a result, the court held the defendants' data did indeed fall within the FCA's definition of "claim," as such information "is the only record submitted from PBMs or Part D sponsors that triggers CMS's payment obligation to the Part D sponsor."

b. Did the defendants make records or statements "to get" claims paid?

Next, the court considered the defendants' argument that the relator failed to state a claim because he could not show that the defendants made any misrepresentations for the specific purpose—and with the specific intent—"to get" the government to pay false claims. Although the FCA no longer includes this "to get" language, the court held that the amendment which removed the language did not retroactively apply to the relator's claims, since there were no still-pending Medicare reimbursement claims to the government based on the defendants' alleged misconduct; the court's view in this regard underlies a split of authority regarding whether or not the amendment's use of the term "claims" in its retroactivity provision refers to "claims" as defined by the FCA, or simply refers to causes of action filed under the FCA. The court, though, ultimately held that the relator's allegations still survived the defendants' motion to dismiss, as the relator pled sufficient facts that, taken as true for motion to dismiss purposes, created an inference that the defendants knew and intended that the government would make payments on claims that included false information supplied by the defendants.

As a result of the above findings, the court rejected the defendants' argument that the *qui tam* complaint did not adequately allege that the defendants submitted false claims or false records to the government, or caused others to do so. The defendants' motion to dismiss on that basis was denied.

3. Was a "reverse" false claim pled?

In addition to the causes of action discussed above, the relator brought a claim under the FCA's "reverse" false claims provision, which prohibits knowingly making or using (or causing to be made or used) a false statement or record to conceal, avoid, or decrease an obligation to repay money to the government. The relator alleged that the defendants violated this provision by knowingly withholding government funds that they were not entitled to receive. The defendants argued that the relator's reverse false claim allegation failed as a matter of law—once again they argued that the relator could not demonstrate that they made any false statements or records; they argued

that the relator failed to plead any "clear" obligation on the part of the defendants to return money to the government; and they argued that the relator's allegation did not satisfy Federal Rule of Civil Procedure 9(b)'s heightened pleading requirement.

a. Falsity

The court quickly disposed of the defendants' first argument, based on its findings discussed above that the relator adequately pled that the defendants knowingly submitted materially inaccurate and incomplete prescription information that was included in Medicare claims to the government.

b. Obligation

The court then considered the defendants' second line of attack—that the defendants were under no obligation to return funds to the government, since the funds it received for its services were paid by its Medicare Part D sponsor, and not directly by the government. They contended that after their Part D sponsor completed a reconciliation process with the government, any overpayments by the government were to be returned by the sponsor, but not by the defendants. The court, though, relying on Fifth Circuit precedent involving at least one of the same defendants, held that the relator's allegations were sufficient to survive a motion to dismiss. The court held that even if the defendants did not owe an obligation to the government to return overpayments, they could still be held liable under the FCA's reverse false claims provision if they made false statements or records that caused others in turn to submit false information that impaired an obligation to repay government funds. Notably, the court determined that the FCA does not specify that the false statement or record at issue must impair the defendant's own obligation to repay funds to the government—instead, the statute simply references "an obligation," which can include obligations of non-defendants.

c. Rule 9(b)

Lastly, the court analyzed the defendants' Rule 9(b) argument, wherein the defendants contended that the relator's reverse false claim allegation was deficient because the relator did not plead with particularity the amounts for which the government was asked to repay. The court disagreed, noting that the relator's theory of liability was that the defendants should not have submitted claims to CMS for amounts associated with such claims at all, and held that the relator made "repeated, detailed allegations," that "expressly allege[d] that Defendants dispensed medications and submitted claims that should have never been submitted. Overall, the court observed that the relator's complaint included allegations that the defendants had adjudicated and submitted nearly 50,000 false claims, with a total cost of more than $4 million to the government. The court held that these allegations satisfied Rule 9(b)'s pleading requirements.

Consequently, the court denied the defendants' motion to dismiss the reverse false claims allegations.

Failure to Plead Fraud with Particularity

The defendants also moved to dismiss all the relator's claims under Rule 9(b), arguing that the relator could not plead a nationwide scheme of fraud with the requisite particularity. The defendants noted that the relator's company did not conduct an audit of the defendants' nationwide practices, and that the relator's allegations of nationwide fraud were speculative and not pled with specificity. The court held that "allegations of specific claims in one state or region satisfy Rule 9(b) requirements by establishing a nationwide inference of fraud," and concluded that the relator's allegations, which identified almost 50,000 problematic claims in multiple states and included detailed information including the drugs prescribed, the pharmacies involved, the date the prescription were filled, drugs expiration dates, patient co-pays, and prescriber names, created a strong inference that the defendants submitted false claims on a nationwide scale. The court held that, without any discovery, the relator could not be expected to "plead with particularity each and every false claim nationwide . . . as such information rests solely within Defendants' control." Thus, the court denied the defendants' motion to dismiss the relator's nationwide claims for failure to plead the alleged fraud with particularity.

Public Disclosure Bar

As their final attempt to dismiss the relator's *qui tam* complaint, the defendants argued that the court did not have subject matter jurisdiction over the relator's claims due to the FCA's public disclosure bar provision, which generally precludes *qui tam* actions that are based upon information that had been previously publicly disclosed in civil hearings and government reports. The defendants argued that the relator's complaint was based on information that had been publicly disclosed as part of discovery in a prior lawsuit between the parties, as well as information that the defendants reported to CMS (which the defendants asserted were "reports" for FCA public disclosure purposes).

The court observed that the defendants did not make any showing that the information produced during discovery in the prior lawsuit was ever used in court proceedings, which raised the question of whether or not the information was ever made "public." And even if the information had been proposed to be used during the court proceedings, the court found that it was unclear whether either of the parties would have sought a protective order to shield the information from the public. Therefore, the court refused to hold that the exchange of information between the parties through discovery as part of a prior lawsuit constituted a public disclosure for FCA purposes. The court similarly held that the defendants' self-reports to the government of the information uncovered in the relator's audit were not public disclosures. The defendants claimed that their disclosures to the government were "reports" for FCA purposes, particularly since the information was available to the public through FOIA

requests—and the U.S. Supreme Court has held that information obtained from the government through FOIA requests would constitute government "reports" for FCA purposes. The court, though, distinguished the Supreme Court's ruling—which focused on "reports" obtained from the government—and self-disclosures made to the government. The court stated that adopting the defendants' rationale would mean that the content of all government files would be deemed public disclosures for FCA purposes. Under this view, the court observed, even defendants' actual false claims to the government would be considered public disclosures and would serve to shield them from *qui tam* suits—a result the court held did not serve the purposes of the FCA. The court further noted that the type of information included in the defendants' self-reports was not generally made available to the public, and when it was made available, it was only to be disclosed to specific entities for specific purposes, subject to regulations to prevent improper disclosures. The court held that the defendants' reports to the government were not public disclosures.

Since the court held that neither disclosure relied on by the defendants constituted a public disclosure for FCA purposes, it declined to reach the questions of whether or not the relator's allegations were "based upon" the disclosures and whether or not the relator qualified for the "original source" exception to the public disclosure rule. Based on its findings, the court denied the defendants' motion to dismiss for lack of subject matter jurisdiction.

U.S. ex rel. Feldman v. Van Gorp, 2012 WL 3832087 (2d Cir. Sept. 5, 2012)

A relator brought a *qui tam* suit under the False Claims Act, alleging that a medical college and one of its professors defrauded the National Institutes of Health (NIH) by providing false information in an application for research grant funds. The relator had been selected to participate in the research program as a fellow, but left the program before his two-year fellowship ended. He alleged that the defendants deviated from what they described in their grant application and failed to inform NIH of those deviations. After a jury trial, a verdict was returned partially in favor of the plaintiff and the U.S. District Court for the Southern District of New York awarded the government over $850 million in treble damages—representing the full value of government grant for the years in which the violations alleged by the relator were found to have occurred. The defendants moved for judgment as a matter of law and for a new trial, but the district court denied both motions. The defendants appealed to the U.S. Court of Appeals for the Second Circuit, arguing that the district court did not apply the proper methodology for determining the government's damages; that the jury did not have sufficient evidence from which to conclude that the false statements at issue were material to the government's funding decision; and that the district court erred when it excluded evidence of NIH's "inaction" in response to the relator's complaint to the agency.

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

Damages

The defendants argued that the district court failed to apply the "benefit-of-the-bargain" method for calculating the government's damages, and erred by deciding the amount of damages as a matter of law, rather than allowing the jury to assess damages. According to the defendants, the proper measure of damages was the difference between the amount the government paid minus the value of the goods or services the government received. The relator—supported by the United States as *amicus curiae*—countered that a different method of calculating damages was appropriate and that the benefit-of-the-bargain approach was improper, since the defendant was held liable for fraudulently seeking payments for participating in a program designed to benefit third parties, and the government received nothing of tangible benefit from the defendant. In accordance with this argument, the relator alleged that the correct measure of the government's damages was the full value of the grant funds, since the government lost the opportunity to award the grant funds to a recipient who would have used the money as the government intended. The circuit court noted that the "question of how damages should be measured in an FCA case where 'contracts entered into between the government and the Defendants did not produce a tangible benefit to the government,' is one of first impression" (internal citation omitted). However, relying on authority from sister circuits, the Second Circuit held that "the measure of damages advocated by the plaintiff and the United States is correct. The court noted that when, as here, "the government bargain[s] for something qualitatively, but not quantifiably," it is entitled to receive as damages the full amount it paid based on materially false statements.

The circuit court rejected the defendants' argument that the district court's view of the government's damages was erroneously based on a fraudulent inducement theory of FCA liability. The appellate court, though, stated that it saw

> no principled distinction, however, between fraudulently inducing payment initially, thereby requiring all payments produced from that initial fraud to be returned to the government (trebled and with certain fees and costs added as provided by statute), and requiring payments based on false statements to be returned to the government when those false statements were made after an initial contractual relationship based on truthful statements had been established. . . . If the government made payment based on a false statement, then that is enough for liability in an FCA case, regardless of whether that false statement comes at the beginning of a contractual relationship or later. The only difference would be that liability begins when the false statement is made and relied upon, rather than at the beginning of the contractual relationship, as it would be in a fraudulent inducement case.

Moreover, since this was not a benefit-of-the-bargain situation and since the amount of each payment of government funds for which liability was assessed was not in dispute, the circuit court held that there were no further findings of fact necessary with respect to damages, and the district court properly determined damages as a matter of law. Thus, the district court's rulings on damages were affirmed.

Materiality

The defendants also challenged the district court's denial of their motion for judgment as a matter of law and for a new trial, arguing that the alleged false statements to the government at issue were not material to the government's payment of grant funds. The circuit court again affirmed the district court's ruling, finding that the parties stipulated that, in order to receive funding after the initial grant year, the defendants were required to submit renewal applications containing various progress report information. The defendants contended that the statements contained in these reports did not establish what information was material to the government's decision on renewal applications. The circuit court, though, held that the FCA's materiality requirement is an objective standard that applies when a statement has a "natural tendency" to influence the government's payment decision. The circuit court agreed with the district court that a reasonable jury could have found that the defendants' false statements to the government with respect to renewal applications were material, since the defendants knew—based on the instructions for submitting renewal applications—that NIH considered the information included in the progress reports when making funding decisions. As a result, the Second Circuit affirmed that the district court did not abuse its discretion when denying the defendants' motion for a new trial.

Government Inaction

The circuit court also affirmed the district court's ruling to exclude evidence of NIH's alleged failure to take remedial action in response to the plaintiff's complaints to the agency. The defendants argued that the agency saw no validity in the relator's complaints and that the district court erred when it denied them an opportunity to present such evidence to the jury, which would have established that the defendants' false statements were immaterial to the government. The appellate court, though, held that the district court did not abuse its discretion when it determined that the excluded evidence was irrelevant, since "the NIH's failure to act in response to [the relator]'s complaints did not speak to the seriousness of those complaints or the likelihood that false claims had been made," particularly since the jury was not presented with any evidence regarding the standards used by NIH to determine the existence of misconduct and whether or not those standards are in line with the elements of fraud claims under the FCA.

Hooper v. Lockheed Martin Corp., 2012 WL 3124970 (9th Cir. Aug. 2, 2012)

A relator filed a *qui tam* suit, alleging that a defense contractor defrauded the U.S. Air Force by filing false claims under a hardware/software contract project he was working on. He claimed that the defendant knowingly underbid the contract; failed to properly convey to the government all intellectual property rights in the software; and failed to follow required testing procedures. He further claimed that he was terminated from his job after investigating and threatening to report the alleged fraud to the government. His lawsuit alleged claims under the False Claims Act for fraud and retaliation. The suit was originally filed in the U.S. District Court for the District of Maryland, but was transferred to the U.S. District Court for the Central District of California on *forum non conveniens* grounds. The California district court dismissed the retaliation claim, finding that it was time-barred, pursuant to California's two-year statute of limitations. The court later granted summary judgment in favor of the defendant on the fraud claims, finding that the relator's evidence was insufficient to establish fraudulent underbidding; that his intellectual property claims were "completely unsupported;" and that he failed to produce evidence of fraud in the required testing procedures. The relator appealed the district court's rulings to the U.S. Court of Appeals for the Ninth Circuit, arguing that the court erred when it dismissed his retaliation claim, because Maryland's three-year statute of limitations—not California's two-year limitations period—should have applied to that claim. He further argued that the district court erred when it dismissed his fraud claims.

Statute of Limitations for FCA Retaliation Claims

The Ninth Circuit noted that, at the time of the relator's alleged retaliation, the False Claims Act did not include a statute of limitations for retaliation claims, and that the U.S. Supreme Court held that the most closely analogous state statute of limitations would apply to each respective claim. The circuit court also determined that the relator properly filed his *qui tam* action in Maryland, where the defendant's corporate headquarters were based, and that the Maryland court was authorized to transfer the case to California on forum non conveniens grounds. The relator argued that the California court, as the transferee court, should have applied the law that the Maryland court would have applied—including Maryland's statute of limitations. The appeals court agreed. Although the court recognized some disagreement among the circuits, it held that, with respect to state law, changes of venue should be nothing more than changes of courtrooms—even for cases that arise under federal question jurisdiction but have embedded state law issues. The court remanded the relator's retaliation claim to the California district court, with instructions to apply Maryland's three-year statute of limitations and to allow the claim to proceed on its merits.

What Constitutes a False Claim?

The defendant argued that the relator's claim of fraudulent underbidding failed because false estimates of future costs cannot ever be the basis for FCA liability—the defendant argued that such estimates are opinions or predictions and cannot be "false" within the meaning of the FCA. The Ninth Circuit noted that this was a question of first impression, and turned to sister circuits, finding that the First and Fourth Circuits have held that FCA liability may attach to knowingly false estimates, under a fraudulent inducement theory. The Ninth Circuit held that "false estimates, defined to include fraudulent underbidding in which the bid is not what the defendant actually intends to charge, can be a source of liability under the FCA, assuming that the other elements of an FCA claim are met." The circuit court then addressed the question of whether or not the district court erred in granting summary judgment in favor of the defendant on the relator's underbidding claim, noting that the district court concluded that the relator failed to provide sufficient evidence to show that the defendant *knowingly* submitted a false bid to the government. The relator argued that his evidence met the FCA's definition of "knowledge" and that the district court applied the wrong legal standard by improperly requiring him to demonstrate that the defendant had the intent to deceive the government—an element that is specifically excluded from the FCA's definition of "knowledge." The circuit court agreed. The court found that the relator provided evidence that the defendant instructed employees to reduce its bids on the contract without regard to actual costs, after its initial bid was rejected. This evidence, the court held, raised a genuine issue of material fact regarding the question of whether or not the defendant acted knowingly, either by having actual knowledge, deliberately ignoring the truth, or acting in reckless disregard of the truth when it submitted its bid to the government. The court reversed the district court's grant of summary judgment on the underbidding claim.

The circuit court, though, affirmed the district court's dismissal of the relator's other fraud claims, in which the relator argued that the defendant fraudulently used freeware in violation of the government's intellectual property rights, and employed defective testing procedures. The district court found that the relator provided no evidence to show that the defendant improperly used the freeware, as it concluded that it was "undisputed" that the defendant was allowed to use it. The district court similarly found that the relator could not support his fraudulent testing claim, noting that the defendant made the Air Force aware of its testing procedures and thus, could not have knowingly submitted a false claim based on testing. The relator argued that the district court erred by excluding various pieces of evidence obtained in discovery, but the circuit court rejected that argument, as it determined that the relator failed to properly admit the materials into evidence, and therefore, the district court was within its discretion to exclude them.

See *U.S. ex rel. Liotine v. CDW Gov't, Inc.*, 2012 WL 2807040 (S.D. Ill. July 10, 2012), at page 123.

JURISDICTIONAL ISSUES

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

U.S. ex rel. Heineman-Guta v. Guidant Corp., 2013 WL 2364172 (1st Cir. May 31, 2013)

A relator brought a *qui tam* action against a healthcare company and its successor company, alleging Medicare fraud arising from an illegal kickback scheme. The U.S. District Court for the District of Massachusetts dismissed the relator's suit, finding that the suit was prohibited by the False Claims Act's first-to-file provision. Specifically, the district court held that a prior *qui tam* complaint, filed by a different relator against the same defendants and alleging the same fraud, was still pending when the current relator's complaint was filed, and thus, the prior suit precluded the present suit. The present relator appealed the district court's ruling to the U.S. Court of Appeals for the First Circuit, arguing that the earlier-filed *qui tam* complaint—which was voluntarily dismissed—could not preclude her later-filed action because the prior complaint did not satisfy Federal Rule of Civil Procedure 9(b)'s heightened pleading requirements.

Holding: The First Circuit held that the FCA's first-to-file provision applies even when the prior, pending complaint does not meet Rule 9(b)'s pleading standards. As a result, the circuit court affirmed the district court's decision.

First-to-File Bar

The circuit court rejected the current relator's argument that the prior *qui tam* complaint's allegations were "barebones" and speculative. Instead, the appellate court stated that "there is no question" the two *qui tam* complaints alleged the same "essential facts" of the defendants' illegal kickback scheme, resulting in false Medicare claims from physicians who received improper kickbacks from the defendants. The court observed that the FCA "does not require the facts alleged in both complaints be identical; they need only overlap in their material facts," and concluded that the present complaint "merely echoes the alarm sounded by" the first complaint.

Having determined that the two complaints alleged the same essential facts, the circuit court turned to the present relator's argument that her complaint should go forward since the prior complaint was deficient. The appeals court rejected that argument. The court noted that the FCA references the Federal Rules of Civil Procedure—specifically, the rules regarding service requirements—in some of its provisions, and determined that, had Congress wanted to, it could have referenced Rule 9(b)'s requirements in the FCA's first-to-file provision. The fact that Congress did not, the court opined, "tells us that Congress did not intend the first-to-file rule to incorporate Rule 9(b)'s heightened pleading standard." The court went on to note that Rule 9(b)'s

pleading requirements serve a different function than the FCA's first-to-file provision—while Rule 9(b) is designed "to protect defendants in fraud cases from frivolous accusations and allow them to prepare an appropriate defense," the first-to-file rule is designed to prevent subsequent, possibly parasitic suits when a "first-filed complaint contains enough material information (the essential facts) about the potential fraud, [that] the government has sufficient notice to launch its investigation." Ultimately, the court held that "[a] complaint that does not comply with Rule 9(b)'s particularity requirements to protect the defendant's interests may nonetheless provide the government sufficient notice to begin an investigation of an alleged fraudulent scheme."

Consequently, the First Circuit held that for purposes of the FCA's first-to-file provision, earlier-filed *qui tam* complaints need not satisfy Rule 9(b)'s pleading requirements, and will still bar later-filed *qui tam* complaints if they allege enough material facts to put the government on notice to initiate an investigation of the alleged fraud. The court held that the earlier-filed complaint at issue served the purpose of alerting the government to the suspected fraud, and thus, was sufficient to preclude the later-filed complaint. As a result, the circuit court affirmed the district court's dismissal of the present action for lack of subject matter jurisdiction.

In re Pharm. Indus. Average Wholesale Price Litig., 2013 WL 2420912 (D. Mass. May 31, 2013)

The U.S. District Court for the District of Massachusetts was asked to resolve a dispute that arose following the resolution of two separate False Claims Act *qui tam* actions filed by two different relators. Both suits alleged the same Medicare/Medicaid fraud scheme against the same defendant—a drug manufacturer. The scheme alleged in both *qui tam* actions involved the defendant manipulating and inflating the average wholesale price of many drugs, which caused private insurers, patients, and, more importantly for FCA purposes, Medicare and Medicaid to overpay for those drugs.

The first *qui tam* action was filed by a corporate relator, and was settled—with the federal government's consent—for $25 million. The corresponding settlement agreement included a provision that "fully and finally releases, acquits, and forever discharges" the defendant from "any claim, action, suit, demand, right, cause of action, liability, judgment, damage, or proceeding" that either had been asserted, could have been asserted, or could be asserted in the future, with respect to any and all of the drugs marketed and sold by the defendant. The second *qui tam* action alleged the same fraud scheme, but discussed the fraud in the context of a drug not expressly included in the first *qui tam* action. The two relators who filed the second complaint argued unsuccessfully that the settlement agreement did not extinguish their claims, because the drug identified in their complaint was not mentioned in the suit that was settled. The court disagreed and granted the defendant's motion for summary judgment against the second-filed relators, due to

the broad settlement agreement. The court, though, allowed the second relators to move to re-open the earlier suit and to hold a hearing on the fairness of the settlement agreement, finding that the settlement agreement constituted an "alternate remedy" for the second relators' claims. Both the defendant and the first-filed relator opposed that motion, arguing that the court lacked subject-matter jurisdiction because the FCA's first-to-file provision barred the second relators' claims.

After a hearing, the district court denied the second relators' motion to re-open the earlier case, agreeing that the first-to-file bar precluded the second relators' claims. While the court acknowledged that the earlier *qui tam* action did not list the drug identified in the second-filed complaint, it still held that the earlier complaint precluded the second action, since the additional drug did not come to the market until after the first complaint had been filed, the drug was administered, marketed, reimbursed, sold, and priced in almost exactly the same manner as the drug identified in the first complaint, and the fraud scheme was materially the same with respect to both drugs. Thus, the court held, the first complaint revealed the "essential facts" of the fraud alleged in the second complaint, and served to bar the second complaint pursuant to the first-to-file provision. The court denied the second relators' request to re-open the earlier, settled *qui tam* action.

U.S. ex rel. Palmieri v. Alpharma, Inc., 2013 WL 821965 (D. Md. Mar. 5, 2013)

A relator filed a *qui tam* suit on behalf of the United States and several state governments, alleging that several pharmaceuticals companies improperly marketed a pain medication administered through a patch for off-label purposes. The relator alleged that the defendants improperly induced physicians to prescribe the drug for off-label uses by providing them with kickbacks, in violation of the Anti-Kickback Statute. The relator claimed that as a result of the defendants' marketing scheme, false Medicare and Medicaid claims were submitted to the government entities on whose behalf the relator's suit was filed. None of the governmental entities intervened in the relator's lawsuit. The defendants moved to dismiss the suit, arguing that the false claims act laws' "first-to-file" provisions barred the relator's complaint; that the complaint failed to state a claim for relief under the FCAs; and that the fraud allegations were not pled with particularity.

Holding: The U.S. District Court for the District of Maryland granted the defendants' motion to dismiss, finding that the relator's complaint failed to state a claim. The complaint was dismissed without prejudice, however, which gave the relator an opportunity to amend the complaint.

First-to-File Rule

First the defendants argued that the relator's claims were precluded by the FCA statutes' respective "first-to-file" provisions, which bar *qui tam* actions based on facts underlying other, pending actions. The defendants contended that another *qui tam* suit, raising the same allegations, had been filed four days before the present relator's complaint was filed, and deprived the court of subject matter jurisdiction over the relator's claims. The court first confirmed that the relator's suit was filed while the prior *qui tam* action was still pending in a different district court, that the relators in both cases were former sales representatives for a defendant named in both suits, and that both relators alleged the same fraud scheme on behalf of the federal government and the same group of state governments. The relator, though, argued that the earlier-filed *qui tam* complaint should not bar his claims, because although that earlier case was pending when the present relator filed his *qui tam* suit, the earlier suit had been dismissed and was no longer pending, and therefore, the first-to-file bar did not apply. The defendants countered that the first-to-file rule applies at the time a second relator brings a *qui tam* case that is related to a pending *qui tam* case, and thus, the court's lack of subject matter jurisdiction was determined based on when the two actions were brought. The defendants reasoned that since the present relator's suit was filed while the prior suit was still pending, the court never had jurisdiction over the present relator's complaint. The court, though, determined that after the first *qui tam* complaint was dismissed, the relator filed an amended complaint, and since there was no prior, pending *qui tam* case at the time the present relator amended his complaint, the prior complaint did not preclude the relator's action. The court made clear that the filing of an amended complaint can be deemed an "event of jurisdictional significance," finding support for its view in various circuit court opinions and even in the U.S. Supreme Court's ruling in *Rockwell Int'l Corp. v. United States*. The district court noted that since the relator filed an amended complaint at a time when the prior suit was no longer pending, if the court were to dismiss that amended complaint without prejudice, then the first-to-file rule would not stop the present relator "from filing an identical pleading under a new case number tomorrow." The defendants' first-to-file argument was rejected and the court refused to dismiss the relator's complaint for lack of subject matter jurisdiction.

Failure to State a Claim/Plead Fraud with Particularity

The court then considered the defendants' argument that the relator's fraud claims were not pled with particularity. The defendants argued that the relator's complaint was deficient because it did not allege any particular instance in which a false claim was submitted to the government. The court recognized that the complaint included numerous details regarding the defendants' alleged off-label marketing, but noted that the relator did not detail the submission of any reimbursement claim to any government for the defendants' drug. The relator countered that he did not need to plead the actual fraudulent submissions that resulted from the defendants' alleged misconduct,

since he detailed the defendants' improper marketing scheme. The court acknowledged "an emerging circuit split on this issue," but ultimately agreed with those courts that have held that the particularity standard is not satisfied merely by describing a fraud scheme in detail without providing factual support for the corresponding allegation that false claims based on that fraud scheme were submitted to the government. Since the court determined that the relator failed adequately to connect the alleged fraud scheme to the submission of false claims to Medicare and Medicaid, the court dismissed the relator's complaint for failure to state a claim.

The court, though, granted the relator's motion for leave to amend his complaint to cure the deficiencies, noting that this was the first time the sufficiency of the relator's allegations had been challenged and that discovery had not yet commenced.

U.S. ex rel. Shea v. Verizon Bus. Network Servs., Inc., 2012 WL 5554792 (D.D.C. Nov. 15, 2012)

A relator brought a *qui tam* action against a group of affiliated telecommunications companies, alleging that the defendants violated the False Claims Act by knowingly billing the government for non-allowable surcharges. Two years earlier, the relator had previously filed a separate *qui tam* action alleging that the same defendants knowingly submitted prohibited surcharges to the government. The United States intervened in the earlier suit and the parties agreed to a $93.5 million settlement. The defendants moved to dismiss the relator's second *qui tam* complaint, arguing that the complaint was barred by the False Claims Act's first-to-file rule, which precludes *qui tam* complaints that are filed while a "related" action based on the same facts is still pending. The relator countered that his second *qui tam* complaint did not violate the first-to-file rule, since he filed both actions and the rule was designed only to bar other *qui tam* relators from filing a related action; the first *qui tam* suit was no longer pending at the time the second suit was filed; and the two suits are not related, since they allege fraud by the defendants against different government agencies, under different contracts, and involving different surcharges.

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

The court observed that the plain language of the first-to-file bar states that "no person other than the Government" is allowed to bring a *qui tam* action that is related to another, pending *qui tam* action. The court held that this language makes clear that "the first-to-file bar applies to successive related actions brought by the same relator," thereby rejecting the relator's first argument. The court also found that the first *qui tam* action was still pending when the relator filed his second complaint, finding that the first action was not dismissed until well over a year after the second action was filed. Thus, the court also rejected the relator's second argument. Finally, the court held that both *qui tam* suits were related. Relying on

D.C. Circuit Court precedent, the district court held that the first-to-file provision precludes subsequent *qui tam* actions that allege "the same material elements of fraud" as a prior, pending action. The court concluded that the first *qui tam* suit put the government on sufficient notice to discover the fraud alleged in the relator's subsequent complaint, and therefore the two suits were based on the same material facts.

The court granted the defendants' motion to dismiss for lack of jurisdiction as to the relator, but without prejudice to the government.

U.S. v. Aseracare, 2012 WL 5289475 (N.D. Ala. Oct. 24, 2012)

A relator filed a *qui tam* action against a group of defendants, and the government declined to intervene in the case. Subsequently, the government moved to intervene in the relator's suit for good cause, pursuant to section 3730(c)(3) of the False Claims Act. The defendants opposed the government's motion, arguing that the relator's *qui tam* case was barred by the FCA's first-to-file rule, and therefore, the court did not have subject matter jurisdiction over the matter in order to grant the government's motion. The defendants further argued that the government did not meet the "good cause" standard for intervening in a *qui tam* case at a later time.

Holding: The U.S. District Court for the Northern District of Alabama granted the government's motion.

The court first addressed the subject matter jurisdiction issue and held that "[e]ven though a *relator's* claims may be barred by the first-to-file rule, the government's intervention in a *qui tam* action may change the claims that are currently asserted." (emphasis in original) The court decided to defer ruling on the subject matter jurisdiction question until after the government had intervened in the relator's suit and decided which claims it would pursue.

Next, the court addressed the defendants' contention that the government had not shown good cause for intervening after initially declining to do so. The court noted that the False Claims Act does not define "good cause," but observed that "courts have found good cause in cases where the government realized the magnitude of the alleged fraud was much larger than it had originally anticipated; where the government received additional and new evidence about the case; and where intervention would protect the interests of the relators." Here, the government asserted that it discovered new information, namely a set of reports that the government claimed provided new evidence of the defendants' alleged fraud. The defendants argued that the government already had the information contained in the reports, and therefore, the reports offered no new evidence. The court, though, held that the government met its burden and granted the government's motion to intervene.

U.S. ex rel. Simpson v. Bayer Corp., 2012 WL 3600302 (D.N.J. Aug. 21, 2012)

Two relators separately filed *qui tam* actions under the federal False Claims Act and several state FCA laws, alleging that a group of affiliated pharmaceutical drug companies illegally marketed one of their drugs. The two lawsuits were filed in different districts courts, about three months apart. The United States declined to intervene in either case. While the second-filed case was still under seal, the relator who filed that case sought the defendants' consent to the consolidation of the two cases. The defendants refused. The relator then moved to consolidate the two cases anyway, arguing that, to save judicial and government resources, the U.S. Attorney in the district where the second case was filed approved the consolidation and transfer of that case to the United States District Court for the District of New Jersey, where the first case was filed. The New Jersey district court granted the motion, unsealed the relators' consolidated complaint, and ordered them to serve the complaint on the defendants. Subsequently, the defendants opposed the transfer and consolidation, arguing that they had no notice of the relator's motion or an opportunity for a hearing on the issue.

The defendants argued that consolidation was improper because the False Claims Act's "first-to-file" provision divests courts of subject matter jurisdiction over claims by individuals who intervene in or bring related actions based on the same essential facts that were alleged in a prior, pending *qui tam* action, and that this provision bars the second-filed complaint. The relators countered that while the first-filed complaint alleged the federal False Claims Act claims, the second-filed complaint was the first to allege certain state FCA claims. Thus, they contended, consolidation allowed the court to exercise its jurisdiction over the state FCA claims, pursuant to the FCA or the court's authority to hear supplemental state law claims, which led to a more efficient result that would not result in conflicting rulings or duplicative proceedings and a waste of resources.

First, the court dismissed the federal FCA claims brought in the second-filed complaint, noting that the relators agreed with the defendants that those claims were barred by the first-to-file rule. The court then refused to exercise jurisdiction over the state FCA claims brought in the second-filed complaint. The relators argued that those state law claims should be consolidated with the first-filed case, pursuant to section 3732(b) of the federal FCA, which provides that '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 an action brought under [the federal False Claims Act]." The court rejected this argument, finding that the provision relied on by the relators did not apply when the federal and state law claims arose in separate lawsuits; instead, the court determined that the provision applied when a

single complaint alleged violations of both federal and state false claims act provisions, and the court has jurisdiction over the federal FCA claims. Since the court dismissed the federal FCA claims filed in the second case, it held that it did not have jurisdiction over the state law claims included in that complaint. The court then declined to exercise supplemental jurisdiction over the state FCA claims, noting that it was within the court's discretion not to do so, since the court did not have original jurisdiction over the federal FCA claims included in the second-filed complaint. The court observed that the state FCA claims can still go forward in the court in which they were filed, and that the state governments involved will be allowed to intervene in those claims, if they choose do so.

As a result of these findings, the court granted the defendants' motion to vacate the consolidation and to strike the consolidated complaint.

U.S. ex rel. Powell v. American Intercontinental Univ., Inc., 2012 WL 2885356 (N.D. Ga. July 12, 2012)

A group of four relators brought a *qui tam* action against a for-profit higher learning institution and its affiliates, alleging that the defendants violated the False Claims Act by making false statements in "Program Participation Agreements" with the Department of Education regarding their compliance with the Higher Education Act's prohibition against incentive-based compensation for enrollment counselors; applicable accreditation standards; and student eligibility requirements under federal law. The defendants moved to dismiss the relators' complaint for lack of subject matter jurisdiction, arguing that the relators' claims are barred by the FCA's public disclosure and first-to-file provisions, as their complaint contained information that had already been included in five prior *qui tam* suits. The defendants also moved for summary judgment on the claims brought by three of the four relators, arguing that each of those three relators agreed not to bring any claims against the defendants, and signed releases to that effect prior to filing their *qui tam*.

Holding: The United States District Court for the Northern District of Georgia granted the defendants' motion to dismiss for lack of subject matter jurisdiction, and denied their motion for summary judgment.

First-to-File Rule

The defendants argued that the relators' fraud claims were precluded by the FCA's first-to-file bar, which prohibits *qui tam* actions based on underlying facts in a pending action. They pointed to multiple prior *qui tam* actions which they claimed barred the relators' suit. The relators countered that the first-to-file provision did not preclude their claims, since the prior actions had all been dismissed prior to the filing of their lawsuit, and thus, none of those prior suits was still "pending" at the time the rela-

tors' suit was filed. The court looked to the plain language of the statute to determine whether or not the relators' claims were barred and concluded that, for purposes of the first-to-file rule, "pending" does not simply mean "active." The court held that such a definition "would create perverse incentives," and would encourage potential relators to "sit on the sidelines hoping that the first relators' claims would be dismissed so that they could then file their own complaint later and receive the bounty." The court noted that the first-to-file rule is designed to create a "race to the courthouse" among relators who wish to assist the government in exposing fraud, and that a rule that incentivized relators to wait until prior actions were dismissed would subvert that purpose while allowing fraud to continue to occur. Moreover, the court stated that the relators' view that "pending" means "active" would allow relators to engage in forum shopping by filing *qui tam* actions in one jurisdiction, and then dismissing those actions and re-filing them in another jurisdiction. The court also noted that the government, whom the court called "the actual plaintiff in a *qui tam* suit," has already been made aware of potential fraud once the first *qui tam* action is filed and that in this instance, the government, as the ultimate plaintiff, has already sued the defendants several previous times regarding the same alleged fraud. The court stated that "[i]f a subsequent relator's claims are exactly the same as prior relators' claims, the policies behind the state do not support successive suits simply because the first suits were dismissed." The court noted that the first-to-file bar only precludes subsequent *qui tam* suits, but does not prejudice the government's ability to file subsequent actions under the FCA, to protect its own interests. As a result of these determinations, the court held that "pending" as used in the FCA's first-to-file provision, includes prior, previously dismissed actions. Since the relators' allegations regarding the defendants' allegedly false certifications of compliance with the ban on incentive-based compensation and with the criteria for student eligibility had been previously brought in prior *qui tam* actions, the court held that those claims were "related" to the prior suits for first-to-file purposes. As a result, the court dismissed those claims, without prejudice.

Public Disclosure Bar

Since the court dismissed the relators' claims for lack of subject matter jurisdiction under the first-to-file rule, it declined to address the defendants' argument that the claims should be dismissed under the FCA's public disclosure provision.

Waivers/Releases of FCA Liability

Finally, the court considered the defendants' summary judgment motion, in which they argued that the claims brought by three of the four relators should be dismissed because those relators had signed broad releases when they left their employment with the defendants, in which they agreed not to bring any claims against the defendants arising out of their employment. These three relators did not dispute the language of their respective employment agreements, but argued that these contractual provisions

should not be enforced for public policy reasons. The court, agreeing with the position announced by the United States in *amicus curiae* briefs filed in other cases, held that when the government has already been made aware of potential FCA claims, policy considerations weigh in favor of enforcing pre-filing releases, but when the government is unaware of potential FCA claims prior to the filing of a *qui tam* actions, then public policy considerations weigh against enforcing pre-filing releases. The court rejected the defendants' argument that pre-filing releases should always be enforced, unless the government intervenes in the *qui tam* action, noting that non-intervention is not a signal of the government's disinterest in a *qui tam* suit and observing that fewer relators would come forward with fraud allegations, if they needed assurances that the government would intervene in their suits.

The court noted that only the relators' claims regarding the incentive-compensation ban and the student eligibility criteria were dismissed under the first-to-file rule. The defendants never made a similar argument with respect to the relators' claims that the defendants falsely certified compliance with applicable accreditation standards. Since there was no evidence that the government had been made aware of those potential fraud claims before any relator signed a pre-filing release, the court allowed the relators to maintain their fraud claims based upon those allegedly false certifications.

U.S. ex rel. Hoggett v. Univ. of Phoenix, 2012 WL 2681817 (E.D. Cal. July 6, 2012)

Two relators sued an educational institution under the federal False Claims Act and the California False Claims Act, alleging that the defendant submitted false claims for federal and California student financial aid funds. Specifically, the relators' alleged that the defendant fraudulently asserted that it had complied with the provisions of the Higher Education Act's ban on compensation to recruiters that is based solely on enrollment numbers. The defendant moved to dismiss the relators' action, arguing that a prior *qui tam* suit—a suit that had already been settled—deprived the court of subject matter jurisdiction over the relators' claims, pursuant to the FCA's first-to-file rule and public disclosure provision. In addition, the defendant argued that the relators' did not state a viable claim under the FCA.

Holding: The United States District Court for the Eastern District of California denied the defendant's motion to dismiss.

First-to-File Rule

The defendants pointed to a previously-filed—and settled—*qui tam* suit that alleged the same fraud scheme and argued that the FCA's first-to-file rule barred the present relators' action. While the relators acknowledged the existence of the prior suit and its similar claims, the contended that the defendant's misconduct was not deterred or altered by the prior settlement and that the defendant continued to knowingly de-

fraud the federal government and the State of California. The relators further asserted that their claims allege fraud that occurred after the earlier *qui tam* case was settled, and therefore, their claims were not encompassed by the prior settlement. Since the previous case was settled nine months before the relators filed the present action, they argued, that prior case was no longer "pending" under the first-to-file rule, and thus, could not preclude their suit. The defendant argued that, under the first-to-file rule, the prior complaint precludes the relators' present action, since the same fraud scheme was alleged in both suits—even though the present relators alleged that the fraud continued during a different time period.

The court agreed with the relators that since the prior *qui tam* action was dismissed before the present relators filed suit, the prior case was not "pending" under the first-to-file rule. The court declared that "[u]sing the first-to-file rule to bar whistleblower suits that allege new fraud perpetrated by a wrongdoer after completion of a previous suit would thwart the statute's purpose to encourage whistleblowers to come forward." The court noted that the defendant's argument could lead to the "absurd result" of encouraging fraudsters who have been caught to merely perpetrate related frauds, so as to shield themselves from subsequent *qui tam* suits. The court denied the defendant's motion to dismiss pursuant to the first-to-file rule.

Public Disclosure Bar

Next, the court considered the defendant's argument that the relators' action was barred by the public disclosure rule. The court quickly disposed of this defense argument, noting that the relators' complaint alleged that the defendant continued to defraud the government even after the previous case was settled. The court stated that the relators' suit was not barred under the public disclosure rule because the relators "have provided information that is independent of and materially adds to the information publicly disclosed," and therefore, qualified for the "original source" exception to the public disclosure bar.

The court denied the defendant's motion to dismiss under the public disclosure rule.

Failure to State a Claim

Next, the court denied the defendant's motion to dismiss for failure to state a claim, in which the defendant argued that the relators did not plead the alleged fraud scheme with particularity, and that the defendant's actions were allowed under a safe harbor provision under the Higher Education Act. The court first determined that the relators' claims were pled with the requisite particularity, as the relators named individuals who were alleged to have participated in the fraud and provided detailed information regarding how the fraud was allegedly carried out. Next, the court determined that the relators' complaint, at the pleading stage, was sufficient to state plausible allegations that the defendant violated the FCA. The court noted that additional facts regarding the application of the HEA's safe harbor provision would be revealed during discovery, and denied the defendant's motion to dismiss for failure to state a claim.

State Law Claims

Finally, the court considered the defendant's argument that the relators' claims under the California False Claims Act were barred by the applicable statute of limitations and that the relators' failed to state a claim under that statute because, for a portion of the time period in question, California law explicitly allowed recruiter compensation based on enrollment numbers. First, the court rejected the defendant's argument that the claims under the California False Claims Act were untimely, finding that there was no reason to infer that, as a matter of law, appropriate California officials were put on notice of the defendants alleged violations of the California FCA by the prior *qui tam* action alleging violations of the federal FCA. The court also rejected the defendant's argument that the relators failed to state a claim under California law, stating that even if California law did allow for the defendant's alleged practices for part of the time period at issue, "that does not justify dismissing Relators' claims in their entirety at the pleading phase."

The defendant's motion to dismiss the state FCA claims was denied.

U.S. ex rel. Heineman-Guta v. Guidant Corp., 2012 WL 2582359 (D. Mass. July 5, 2012)

A relator filed a *qui tam* action on behalf of the United States and twenty-three U.S. States, alleging that her former employers engaged in a scheme of providing illegal kickbacks—including trips, entertainment, grants, lavish meals, monetary payments, and job placement assistance—to induce physicians to select and recommend their cardiac rhythm medical devices to patients. She alleged that these improper inducements violated the False Claims Act, as they caused physicians to present false reimbursement claims to Medicare and Medicaid, and that the defendants conspired to defraud the government. The defendants moved to dismiss the relator's complaint, arguing that her claims were barred pursuant to the FCA's first-to-file provision because two earlier-filed *qui tam* actions pled the essential elements of the present relator's alleged fraud scheme.

Holding: The United States District Court for the District of Massachusetts granted the defendants' motion to dismiss.

First-to-File Rule

The court examined both previously-filed complaints and quickly determined that the first complaint did not preclude the present relator's complaint, since it did not tie any alleged kickback scheme to the promotion or sale of the defendant's cardiac rhythm products. However, the court found that the second prior *qui tam* action "disclosed a scheme nearly identical to" the one alleged by the present relator. The relator contended that her action was not barred by this earlier suit because the earlier ac-

tion was itself deficient, as it did not satisfy the particularity requirements of Federal Rule of Civil Procedure 9(b). The court disagreed with the relator, concluding that the purpose of *qui tam* actions is to put the government on notice of potential fraud and stating that it is plausible that a complaint that does not satisfy Rule 9(b) might still provide sufficient information to cause the government to investigate potential fraud. Moreover, the court observed that the prior-filed complaint at issue was not dismissed for lack of specificity, but was voluntarily dismissed. Thus, there was never an opportunity for a court to evaluate the sufficiency of the allegations raised in that complaint.

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

See *U.S. ex rel. Galmines v. Novartis Pharms. Corp.*, 2013 WL 2649704 (E.D. Pa. June 13, 2013), at page 205.

See *U.S. ex rel. Carter v. Halliburton Co.*, 2013 WL 1092732 (4th Cir. Mar. 18, 2013), at page 135.

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

U.S. ex rel. Oliver v. Philip Morris USA Inc., 2013 WL 2637032 (D.D.C. June 13, 2013)

A relator—the president and chief executive officer of a tobacco company—filed a *qui tam* suit against another tobacco company, alleging violations of the False Claims Act. The relator alleged that the defendant supplied the Navy Exchange Service Command (NEXCOM) and the Army and Air Force Exchange Service (AAFES) with cigarettes, pursuant to contracts that required the defendant to give the government "most favorable customer" warranties—promises to give the government the same discounts, rebates, etc. that are offered to its other customers. The defendant claimed that the defendant knowingly misrepresented to NEXCOM and AAFES that their cigarette prices complied with the warranties, even though the defendant was providing identical cigarettes to its own affiliates at lower prices. Moreover, the defendant alleged that these affiliates operated in the same markets as NEXCOM and AAFES, and re-sold the defendant's cigarettes in those markets at prices lower than NEXCOM and AAFES paid. He alleged that the defendant violated the False Claims Act by falsely certifying its compliance with the warranties it gave to the government. The defendant moved to dismiss the relator's complaint, arguing that the court did not have subject-matter jurisdiction over the suit, or in the alternative, that the relator failed to state a claim for relief under the False Claims Act.

Holding: The U.S. District Court for the District of Columbia granted the defendant's motion, finding that it lacked subject-matter jurisdiction over the relator's claims, due to the False Claims Act's public disclosure bar provision.

Public Disclosure Bar

The defendant argued that the relator's allegations were based on information that had been publicly disclosed before the *qui tam* suit was filed. First, the defendant claimed that one of its interoffice memos discussed the differences in cigarette prices for the government and the defendant's affiliates—and that the memo was produced during discovery in a RICO action the United States brought against several large tobacco companies, and was also uploaded to publicly-available websites before the relator's *qui tam* suit was filed. The court concluded that the memo qualified as a public disclosure, since the websites containing the memo constituted the "news media" for FCA purposes, and since—at least arguably—the discovery materials from the RICO case constituted information disclosed in a "civil hearing." The court then determined that the relator's allegations were "based upon" the public disclosure, as the relator's complaint and the memo alleged the same facts. The court rejected the relator's argu-

ment that even though the memo revealed the price disparity, his *qui tam* claims could not be based upon that disclosure because the memo did not reference "most favored customer" or imply that the pricing disparity was problematic. Rather, the court found that the memo not only disclosed the pricing disparity and identified the same affiliates who received lower prices than the government, but it also discussed the fact that NEXCOM and AAFES had previously complained about the disparity. Thus, the memo made clear that the government was aware of the pricing differential, and the court agreed with the defendant that the government was presumed to be on notice of the most favored customer provisions contained in the NEXCOM and AAFES contracts with the defendant. Thus, the court held that, pursuant to the FCA's public disclosure bar provision, the memo deprived the court of subject-matter jurisdiction over the relator's complaint.

Finally, the court considered whether or not the relator qualified as an "original source" of the information on which his complaint was based. If so, then his complaint would be exempted from the public disclosure rule. The court held that, in order to qualify as an original source, the relator must demonstrate that he was 'an individual with 'direct and independent knowledge' of the information on which his allegations are based who has voluntarily provided that information to the Government before filing suit." The court found that he could not meet that standard. First, the court observed that the relator's complaint only stated that he learned of the defendant's alleged fraud "through his relationships with the United States military and his involvement in the sale of tobacco products to NEXCOM." Even in the face of the defendant's motion to dismiss, the relator made no attempt "to explain how, exactly, he learned of the alleged price differentials or of Defendant's participation in, or awareness of, the alleged fraudulent violations of the 'most favored customer' provision." As a result, the court held that the relator could not establish "direct and independent knowledge" of the allegations underlying his *qui tam* complaint. Moreover, the court held that the relator failed to establish that he voluntarily provided the government with information regarding the alleged fraud to the government before filing his complaint; the relator's disclosures to the government did not describe the most favored customer warranties and did not contain details that would have prompted the government to investigate the defendant's cigarettes prices. Consequently, the court held that the relator could not establish original source status. His complaint was dismissed for lack of subject-matter jurisdiction.

U.S. ex rel. Paulos v. Stryker Corp., 2013 WL 2666346 (W.D. Mo. June 12, 2013)

A doctor filed a *qui tam* suit against three medical device manufacturers, alleging that the defendants violated the False Claims Act by marketing pain pumps for uses that were not approved by the Food and Drug Administration (FDA) and by failing to disclose certain deleterious effects of the devices to providers and to the FDA, thereby causing doctors and hospitals to submit false claims for reimburse-

ment to the federal government healthcare programs. The defendants moved to dismiss the relator's claims, arguing that the court lacked subject-matter jurisdiction over the relator's complaint, that the relator failed to state a claim under the False Claims Act, and that the relator's claims were time-barred.

Holding: The U.S. District Court for the Western District of Missouri dismissed all of the relator's claims. The court found that the claims were barred by the False Claims Act's public disclosure provision. The court also dismissed several of the relator's claims for failure to state a claim, including all of the claims against one of the defendants.

Public Disclosure Bar

The defendants raised a subject-matter jurisdiction defense, arguing that the relator's complaint was barred by the FCA's public disclosure bar provision. Specifically, the defendants claimed that before the relator's *qui tam* suit was filed, numerous media reports published on various websites, as well as several lawsuits, the defendants' own public SEC filings and reports to the FDA, and published FDA warnings, publicly disclosed the deleterious effects of the defendants' pain pumps, as well as the defendants' alleged failure to warn the medical community of those effects while advising doctors to use the products for non-approved uses. Before determining whether or not these media reports constituted public disclosures under the False Claims Act, the court noted that the public disclosure provision was amended in 2010, as part of the Patient Protection and Affordable Care Act. Since the alleged fraud began prior to the amendment, but the *qui tam* complaint was filed after the amendment—and since the court observed the U.S. Supreme Court's holding that the amendment is not retroactive—the court needed to determine which version of the public disclosure bar applied. The court determined that both versions of the public disclosure bar applied: the prior version applied to the alleged conduct occurring before the amendment and the current version applied to conduct that allegedly occurred after the amendment. Ultimately, however, the court held that "under the circumstances of this case it does not matter" which version of the rule was applied. The relator, though, contended that the version of the public disclosure rule that was applied was significant, noting that the public disclosure rule no longer deprives courts of subject-matter jurisdiction and instead allows only for dismissal of certain *qui tam* actions. The relator argued that, pursuant to Federal Rule of Civil Procedure 12(b)(1), courts faced with challenges to their subject-matter jurisdiction are permitted to consider materials outside the pleadings—such as the purported public disclosures relied on by the defendants. But since the public disclosure rule is no longer a jurisdictional bar, the relator argued that the court could not consider the additional materials submitted by the defendants in support of their motion to dismiss. The court, though, held that, even if the current version of the public disclosure bar applied, it was still allowed to consider the defendants' additional materials, since "all of the material Defendants have submit-

ted consists of documents filed in court proceedings, media reports, and reports from government agencies," and the court was allowed to take judicial notice of the content of such materials.

The court then turned to the substance of the defendants' public disclosure argument. First, the court acknowledged that the disclosures relied on by the defendants constituted public disclosures under the FCA. Next, the court compared the relator's allegations to the information that had been previously publicly disclosed and determined that, for FCA purposes, the relator's allegations were "based upon" the public disclosures, since the allegations and the disclosures were the same. The court rejected the relator's argument that the public disclosure bar was not triggered because there had been no public disclosure of the fact that doctors and hospitals submitted claims for the defendants' products to the federal healthcare programs. Instead, the court held that this additional allegation was the "logical and obvious consequence of information that was already publicly disclosed, and thus, is itself included as part of that public disclosure." Finally, the court evaluated the relator's status as an original source who could overcome the public disclosure bar. The court noted that although the FCA's original source provision was also amended, both versions of that provision still require relators to have "direct" knowledge of the information on which their claims are based. According to the court, it was only after reading published reports that the relator confirmed his suspicions about the harmful effects of using the defendants' products. Moreover, the relator had no first-hand knowledge of any false representations the defendants made to other doctors or hospitals. The court held that the relator's suspicions, strongly-held beliefs and second-hand information do not constitute direct knowledge. As a result, the court concluded that the relator was not an original source and held that his claims were barred under the False Claims Act's public disclosure provision.

Failure to State a Claim

The defendants also moved to dismiss the relator's claims for failure to state a claim for relief under the False Claims Act. The court dismissed all of the claims against one of the defendants—the successor in interest to a different company against whom the relator alleged fraud—because that defendant "is not alleged to have engaged in any of the wrongful act described" in the relator's complaint. Since the relator failed to allege facts showing that this defendant was responsible for its predecessor's liabilities, the court held that the relator failed to state a claim against the successor defendant. The court denied the relator's request to conduct discovery regarding the appropriateness of including this defendant, finding that the relator "has placed the cart before the horse," and must first be able to allege that the company is liable under the FCA. Consequently, the court dismissed all claims against that defendant.

The remaining defendants argued that the relator could not state a claim under the FCA based on the defendants' alleged failure to report harmful effects of their products to the FDA. The court agreed with the defendants that such alleged fail-

ures to disclose do not constitute making or using false statements or records under the False Claims Act—particularly since the relator did not establish a connection between the alleged reporting failures and false claims submitted to the government and since the reporting failures can be remedied through the FDA's regulatory scheme or through tort law. The court rejected the defendants' failure to state a claim argument with respect to the relator's remaining claims, finding that those arguments were "too fact-bound for proper consideration [on a motion to dismiss]." Instead, the court held that those arguments were best suited for summary judgment—in the event that court's public disclosure ruling was reversed.

Statute of Limitations

Finally, the court denied the defendants' argument that at least some of the relator's fraud claims were time-barred. The defendants argued that the FCA's statute of limitations is six years from the date of the violation, and that the subset of the relator's claims alleging fraud that occurred more than six years before his *qui tam* complaint was filed should be dismissed. The relator countered that the Wartime Suspension of Limitations Act has tolled the FCA's statute of limitations since 2001, when Congress first authorized the use of military force in Afghanistan—where U.S. troops are still stationed. The court agreed with the relator, recognizing a recent opinion on the issue by the Fourth Circuit. Thus, the court held that the relator's claims were not time-barred.

U.S. ex rel. Health Dimensions Rehab., Inc., 2013 WL 2181242 (E.D. Mo. May 20, 2013)

A relator alleged that two affiliated rehabilitation companies caused false claims—tainted by the defendants' illegal scheme to provide kickbacks to nursing homes that referred Medicare/Medicaid patients to the defendants' facilities—to be submitted to Medicare and Medicaid. The government intervened in the relator's suit. The defendants argued that, pursuant to the False Claims Act's public disclosure provision, the relator was barred from the action because his allegations were based on publicly disclosed information from internet news media articles and from an SEC administrative report. The defendants sought summary judgment against the relator.

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

Public Disclosure Bar

The defendants argued that the relator—which was one of their direct business competitors—based its fraud allegations on information revealed when the defendants broadcasted on their website a live conference call in connection with the Form 8-K

SEC report they filed earlier that day. The defendants argued that the conference call's reference of the payment of a "recruiting fee," disclosed the alleged illegal kickbacks, and that the relator first contacted the government with its fraud allegations less than a week after the call. In addition, the relator's complaint was not filed until after internet news reports and a transcript of the call had been published. The relator, supported by a statement of interest from the government, countered that the purported public disclosures did not reveal the essential elements of the alleged fraud and could not preclude his *qui tam* suit, but instead that a year-long investigation into the recruiting fees alerted the relator to the fraud.

The defendant then argued that the relator filed—and later voluntarily dismissed—a virtually identical *qui tam* complaint in a different district court only days after the conference call, and that this earlier filing undermined the relator's claim that its independent research, and not the conference call, served as the basis for the relator's fraud claims. Further, the defendant urged the court to disregard the government's statement of interest, arguing that the government was aware of the relator's prior suit and opted not to intervene in that case, and therefore knew that the relator's allegations were not the product of the relator's year-long investigation. The relator countered that the prior suit was not unsealed and provided to the defendant until 18 months after the present suit was filed. Since the prior suit did not become public until it was unsealed, the relator argued that it could not serve to preclude the current action. In addition, the relator argued that the government only learned of the fraud after the relator, using its experience and expertise, analyzed and investigated its suspicions of the defendants' recruitment fees and determined that the fees resulted from an illegal kickback arrangement. The court thus denied the defendants' motion to dismiss under the public disclosure bar.

U.S. ex rel. Trinh v. Northeast Med. Servs., Inc., 2013 WL 1789712 (N.D. Cal. Apr. 26, 2013)

Two relators filed a *qui tam* suit in the U.S. District Court for the Northern District of California, alleging violations of the federal False Claims Act and the California False Claims Act against their former employer, a non-profit health center that received federal and state Medicare (Medi-Cal) funds in exchange for agreeing to provide medical services to communities with limited access to healthcare, regardless of their ability to pay. Specifically, the relators alleged that the defendant received regular estimated reimbursement payments from a managed care organization the state of California contracted to administer Medi-Cal payments. These estimated payments to the defendant were based on the defendant's prospective costs for treating Medicaid enrollees for the upcoming year. At the end of each year, the defendant was required to report its actual costs to the State, in order to reconcile the payments actually received with the payments that should have been received. The relators alleged that the defendant intentionally underreported the amount of funding it received from the managed care organization on its recon-

ciliation reports, and consequently received millions of dollars in inflated year-end Medi-Cal payments. The federal and state governments joined the relators' suit and filed a complaint-in-intervention, alleging the false claims act violations, as well as several common law claims. The defendant moved to dismiss the plaintiffs' fraud allegations, arguing that as a "federal agency or instrumentality," it had sovereign immunity from the plaintiff's suit; that the plaintiffs' complaint was precluded under the false claims statutes' public disclosure bar provisions (which the court referred to as "the government action rule"); and that the claims were untimely.

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

Sovereign Immunity

The defendant argued that, as a federal qualified health center, in possession of federal funds, it enjoyed sovereign immunity from the plaintiffs' lawsuit. The court, though, determined that the defendant did not enjoy sovereign immunity, noting that the only other federal court to address the question of the sovereign immunity status of federal qualified health centers reached the same conclusion. The court noted that although the defendant "receives considerable federal funding and must comply with an extensive regulatory regime, it still maintains control over its own-day-to-day activities." Moreover, unlike some other non-profit organizations which have been held to enjoy sovereign immunity, the court observed that the present defendant "does not carry out federal policy and maintains control of its own funds. As a result, the court rejected the defendant's sovereign immunity argument and denied its motion to dismiss on that basis.

Public Disclosure Bar

Next, the court turned to the defendant's public disclosure bar argument, in which the defendant claimed that the federal government previously asserted the same claims in a prior suit between the parties that was settled years before the present complaint was filed. Not only did the court refer to the public disclosure bar as the "government action rule," but it also seemed to have conflated the statutes' public disclosure bar provisions with their "first-to-file" provisions, stating that the statutes "bar[] relators from filing copycat lawsuit against a suspected FCA violator who is already the defendants in a pending FCA action by the government." Again, slightly departing from typical public disclosure bar analysis, the court further stated that the public disclosure rule "creates a jurisdictional bar to any claims asserted in a prior FCA action in which the government has already intervened." The court then rejected the defendant's argument and concluded that the since "the government action rule only bars claims by private parties—not the federal government—this argument is unavailing." The court noted that principles of *res judicata* and collateral estoppel render the defendant's reading of the bar superfluous. Ultimately, the court held that even if the rule could apply to the present case, the defendant failed to show why it should apply, since the defendant did

not produce a copy of the prior settlement agreement or otherwise demonstrate that the government's claims in the two suits were the same.

Statute of Limitations

Finally, the court considered the defendant's statute of limitations argument. Without discussing the false claims acts' six-year limitations period, the court immediately focused on the alternative limitations period, which specifies that FCA fraud claims must be filed "no more than 3 years after the date when 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." The defendant argued that the government entities should have known about their prospective fraud claims almost four years before the relators' *qui tam* complaint was filed, when a different relator filed a California False Claims Act suit alleging the same misconduct by the defendant during a subset of the time period alleged by the present relators. The court, though, held that the prior state court suit did not reveal the alleged fraud—certainly not to the federal government—since the prior suit could not have revealed the amount of alleged overpayments each year. The court noted that if the type of information contained in the prior suit was sufficient to reveal the amount of annual fraud, then the yearly reconciliation process would be unnecessary. Thus, the court rejected the statute of limitations argument and denied the motion to dismiss on that basis.

As a result of the above findings, the court denied the defendant's motion to dismiss.

U.S. ex rel. Pishghadamian v. Nicor Gas, Inc., 2013 WL 1787817 (N.D. Ill. Apr. 25, 2013)

A *qui tam* relator filed suit under the federal False Claims Act and the Illinois Whistleblower Reward and Protection Act, alleging that a public gas company defrauded the United States and the State of Illinois by overcharging customers whose energy bills were paid for with government funds under state and federal Low Income Home Energy Assistance Programs (LIHEAP). Specifically, the relator alleged that the defendant intentionally underestimated LIHEAP customers' gas usage during months in which gas prices were low, and then "corrected" the bills during months when gas prices were higher, which caused the governments to overpay. The government entities declined to intervene in the relator's suit. The defendant moved to dismiss the relator's complaint, arguing that the court lacked subject matter jurisdiction, due to the statutes' public disclosure bar provisions. In addition, the defendant argued that the relator failed to state a claim for relief and failed to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Northern District of Illinois granted the defendant's motion, finding that the relator's claims were precluded, due to the public disclosure bar. The court declined to reach the defendant's other arguments.

The defendant argued that the relator's fraud allegations had been previously publicly disclosed in a 2008 state court case, through an investigation of the defendant's alleged overbilling scheme conducted by the Illinois Commerce Commission, and through the news media. The relator countered that while the public sources involved the alleged underestimating/overbilling scheme, none of those sources led to the conclusion that the federal and/or state governments were being defrauded. The court agreed with the defendant. The court observed that the prior state court case was filed as a class action lawsuit on behalf of customers whose bills were not paid for with government funds; although the state court action was not filed on behalf of government entities, it was sufficient to trigger the public disclosure bar, since it alleged the same fraudulent billing scheme as the relator's *qui tam* complaint. Having determined that the relator's allegations were "substantially similar to," and therefore, "based upon" the publicly disclosed information, the court turned to the question of whether or not the relator was an original source of the information on which her claims were based. The court held that she was not. Although the relator claimed that she learned about the alleged fraud scheme through customer calls and through her access to the defendant's proprietary information and management officials, the court held that her allegations were insufficient to demonstrate "independent" knowledge of the alleged fraud, since she claimed to have learned about the fraud around the same time the state court class action suit was filed. Due to the proximity of those two events, the court concluded that the relator did not meet her burden of proving independent knowledge, and thus, she did not qualify as an original source. The court dismissed her claims for lack of subject matter jurisdiction.

U.S. ex rel. Casady v. Am. Int'l Group, Inc., 2013 WL 1702777 (S.D. Cal. Apr. 19, 2013)

Two relators brought a *qui tam* action against a group of financial institutions, alleging violations of the False Claims Act. The relators claimed that during the 2008 financial crisis, the defendants engaged in a scheme in which they inflated the value of assets and submitted inaccurate financial statements when making claims to the United States for "bailout" loan funds. The United States declined to intervene in the relators' suit. The defendants separately moved to dismiss, arguing among other things lack of subject matter jurisdiction pursuant to the False Claims Act's public disclosure bar provision and failure to plead the alleged fraud with particularity.

Holding: The United States District Court for the Southern District of California granted the defendants' motions, but dismissed the relators' complaint without prejudice.

Public Disclosure Bar

First the court considered the argument raised by some of the defendants that the court lacked subject matter jurisdiction over the *qui tam* complaint because the relators' allegations were based on publicly disclosed information. The court agreed with the defendants, finding that the relators could not "demonstrate by a preponderance of the evidence that the allegations are not 'based upon' publicly disclosed information. The court determined that the relators' complaint "tells the same story already reported by the government and the news media," noting that the complaint repeatedly cited to public sources, and that when the complaint did not rely on public information, it was only with respect to facts that were not essential to alleging the fraud scheme. The relators argued that they—not the public disclosures—revealed the "true facts," which was only possible after extensive investigation and research. While the relators conceded that they reviewed publicly disclosed information, they contended that their analysis of "raw data" should not bar their *qui tam* action. The court, though, held that "[t]he fact that public documents may be presented in a data format does not exclude it as a "disclosure" within the meaning of [the False Claims Act's public disclosure bar provision]. . . Relators cannot escape the public disclosure bar by basing a fraud claim on their review of government and public documents." In addition, the court held that the relators did not qualify for the "original source" exception to the public disclosure bar, finding that they could not demonstrate direct and independent knowledge of the information on which their fraud claims were based. The court concluded that relators who rely on information received from third-party insiders or from their attorneys cannot qualify as original sources for public disclosure bar purposes. As a result of these findings, the court held that it lacked subject matter jurisdiction over the relators' claims, which warranted dismissal of those claims. The court, though, granted the relators leave to amend their complaint to cure its deficiencies.

Failure to Plead Fraud with Particularity

Although the court dismissed all of the relators' claims against all of the defendants for lack of subject matter jurisdiction, it still considered the defendants' alternative arguments. First, the court determined that the relators' complaint failed to satisfy Federal Rule of Civil Procedure 9(b)'s heightened pleading requirement. Rather than plead the alleged fraud scheme with particularity, the relators merely summarized the events the led to the 2008 financial crisis and the resulting federal bailout loans, and then alleged that the events constituted fraud. The court held that the relators did not identify any specific false statements made by the defendants and relied on by the government and did not describe the "who, where, when and how of the allegedly fraudulent scheme."

U.S. ex rel. Boggs v. Bright Smile Family Dentistry, P.L.C., 2013 WL 1688898 (W.D. Okla. Apr. 18, 2013)

Two relators filed a *qui tam* complaint against a multitude of dentists and dentistry companies, alleging that the defendants violated the federal False Claims Act and the Oklahoma Medicaid False Claims Act by offering improper inducements to Medicaid patients, including gas gift cards and courtesy transportation. The government declined to intervene in the relators' suit. The defendants filed multiple motions for summary judgment.

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

Scienter

Several defendants argued that the relators could not show that they had knowledge of improper inducements being offered to Medicaid patients. These defendants claimed that the relators could not satisfy the "scienter" element of false claims act liability. The court agreed with those defendants, concluding that the relators merely alleged that the defendants "could have" acted knowingly, but failed to allege facts to support that statement. Ultimately, the court held, the "[r]elators' theories are mere speculation," based largely on allegations regarding unidentified persons.

Public Disclosure Bar

In addition, the court accepted the argument raised by some of the defendants that the relators' allegations were barred, pursuant to the false claims acts' public disclosure bar provisions. The court held that "[t]he FCA bars any *qui tam* action that is even partly based upon publicly disclosed allegations or transactions." The court then agreed with the defendants that the relators' allegations were based on several of the defendants' advertisements—published in various magazines before the relators' complaint was filed—which included coupons for gas gift cards. The court noted that both relators contended that they first learned of the gas cards after seeing one of the defendants' magazine advertisements. The relators countered that the advertisements themselves did not reveal the defendants' alleged fraud, arguing that the gas cards could have been legitimate, had the defendants abided by applicable laws when distributing them. The court rejected that argument, finding that by the relators' admission, the offer of the gift cards itself led them to conclude that Medicaid fraud was occurring and was sufficient to establish liability under the false claims act statutes. The court held that the relators' contentions were insufficient to create a genuine issue of fact regarding whether or not the public disclosures revealed the alleged fraud. Since the court determined that the relators' allegations were based on public disclosures, it then turned to the question of whether or not the relators qualified as "original sources." The court held that they

did not. While the relators claimed to have used their personal knowledge to examine non-public Medicaid billing documents to confirm that the defendants were engaged in Medicaid fraud, the court held that such an investigation was unnecessary, given the fact that the relators alleged that the defendants' alleged misconduct tainted all of their respective Medicaid claims, rendering all of their claims false. The court concluded the relators' investigation—which the court described as being "entirely derivative" of the advertisements—"cannot be said to materially add to the publicly disclosed information appearing in the advertisements." Consequently, the court held that the relators were not original sources.

As a result of all of the above findings, the court granted summary judgment in favor of all the defendants.

U.S. ex rel. Estate of Cunningham v. Millennium Labs. Of Ca., Inc., 2013 WL 1490435 (1st Cir. Apr. 12, 2013)

The estate of a deceased *qui tam* relator appealed the dismissal of the relator's complaint alleging that a laboratory and a multitude of unnamed physicians violated the False Claims Act when the laboratory encouraged the physicians to fraudulently bill the federal healthcare programs. The relator—who had been employed by a different, competing laboratory—claimed that the defendant lab developed a urine drug-testing program to help physicians monitor patients' medications. He further alleged that, unlike other labs, the defendant's business model allowed physicians to receive payments based upon their orders for the testing program. The relator alleged that, because of that arrangement, the lab was able to convince physicians to fraudulently bill the government, by (1) billing multiple times for single tests; (2) billing for excessive tests; and (3) billing for medically unnecessary confirmation testing of negative results. Five days before the relator's complaint was filed, the laboratory filed its own suit against the relator's lab, alleging defamation and intentional interference with contractual relations stemming from three emails the relator's company allegedly sent to one of the defendant's customers, describing a scheme to bill the government twice for the same testing and warning that the customer could risk legal exposure. Eventually, the relator's estate filed an amended complaint.

The defendants moved to dismiss the amended complaint, arguing that the prior lawsuit precluded the relator's claims, pursuant to the False Claims Act's public disclosure bar provision. The U.S. District Court for the District of Massachusetts agreed and dismissed the relator's suit with prejudice for lack of subject matter jurisdiction. The relator appealed the district court's ruling to the U.S. Court of Appeals for the First Circuit.

Holding: The First Circuit affirmed the district court's decision in part and reversed it in part.

Public Disclosure Bar

The relator's estate argued that the district court erred by finding that the defendant's prior lawsuit publicly disclosed all of his fraud allegations. The estate claimed that the relator's complaint alleged three types of fraud: (1) aspect 1, alleging multiple bills for the use of single test kits; (2) aspect 2, alleging fraudulent billing for excessively frequent testing; and (3) aspect 3, alleging fraudulent billing for unnecessary tests to confirm prior negative results. The estate contended that the emails disclosed in the prior suit were insufficient to constitute public disclosures of fraud, for FCA purposes, since the emails only contained rumors. The estate further argued that the emails could not possibly have disclosed the fraud schemes involved in aspects 2 or 3, and therefore, the district court had no basis on which to dismiss those claims. Before considering each argument in turn, the appeals court noted the district court's error or not making clear that its public disclosure analysis was based on the allegations contained in the relator's original complaint. The court further stated that it "share[d] Relator's concern that a person or entity committing fraud against the government could theoretically shield itself from a *qui tam* action through preemptively filing its own action, thus creating a sanitized public disclosure while barring a future whistleblower action," but ultimately concluded that "the Supreme Court has been clear that self-disclosure can bar such suit under the FCA, and it has further characterized concerns about insulation from FCA liability as unwarranted in most cases."

The appellate court then turned to the estate's substantive arguments. First, the court rejected the estate's argument that the emails consisted of "mere rumors" and thus, did not constitute public disclosures. Instead, the court, quoting language from the emails, held that the earlier lawsuit and emails "could not have been more explicit . . . about billing for multiple tests when in fact only a single unit was tested." Consequently, the circuit court held that the district court did not err when it found that the emails constituted a public disclosure. Moreover, the court held that the relator's suit was "based upon" the public disclosure, since allegations raised in both suits were "substantially similar." Based on the court's findings, the emails from the prior suit clearly disclosed the allegations in aspect 1, regarding multiple billings for single test kits. The court further determined that the prior lawsuit disclosed the relator's allegations in aspect 3, regarding billing for unnecessary confirmation tests, noting that the emails included such alleged billing as part of its discussion of double-billing. As a result, the court held that the prior lawsuit barred the estate's claims with respect to aspects 1 and 3. The circuit court rejected the estate's argument that the relator qualified for the FCA's "original source" exception to the public disclosure rule, observing that the argument was being raised for the first time on appeal and thus, had been waived. In addition, the court held that even if the argument had not been waived, it would have failed. Although the relator claimed to have conducted an independent investigation of the defendant laboratory's practices, he obtained his information from third parties, including co-workers and leading industry personnel and by synthesizing information

from different public sources; the circuit court held that the relator did not possess "direct" knowledge of the alleged fraud and therefore did not qualify as an "original source."

Based on these findings, the court affirmed the district court's dismissal of the *qui tam* complaint, with respect to aspect's 1 and 3. The court further held that the district court did not abuse its discretion when dismissing those claims with prejudice, since the estate could not show that it could cure the jurisdictional defect by offering additional facts. The circuit court, though, held that the *qui tam* allegations regarding aspect 2—excessively frequent billing—had not been previously disclosed in the prior lawsuit. Thus, the court held that the district court erred when it dismissed the estate's claims with respect to aspect 2. The district court was directed to consider the defendants' alternative grounds for dismissing aspect 2 claims—that the estate failed to state a claim and failed to plead the alleged fraud with particularity.

U.S. ex rel. Osheroff v. Healthspring, Inc., 2013 WL 1399344 (M.D. Tenn. Apr. 5, 2013)

A relator filed an eight-count *qui tam* action on behalf of the United States and the State of Tennessee, alleging fraud and conspiracy claims under the False Claims Act against two medical centers and an individual who served as a director of both. The relator alleged that the defendants violated the Anti-Kickback Statute and the civil Anti-Inducement Act by providing free "luxury" transportation and meals to Medicare patients, without regard to medical necessity, in order to improperly induce such patients to use the defendants' services. Due to these alleged violations, the relator claimed that the defendants' Medicare reimbursement claims for patients who were improperly induced were "false," for FCA purposes. Both the U.S. and Tennessee declined to intervene in the relator's suit. The defendants moved to dismiss the complaint, arguing that the relator's allegations were based on prior public disclosures made in the news media, and therefore, the court lacked subject matter jurisdiction over his claims. The defendants also argued that the complaint should be dismissed for failing to satisfy Federal Rule of Civil Procedure 9(b)'s particularity requirement and for failing to state a claim for relief, pursuant to Rule 12(b)(6).

The U.S. District Court for the Middle District of Tennessee granted the defendants' motion, finding that the relator's suit was barred under the public disclosure rule. The court observed that the relator filed a similar suit alleging the same fraud scheme in a different district court and against a different group of defendants. That suit was dismissed for lack of subject matter jurisdiction, as the court found that several news articles had previously disclosed the fraud scheme alleged by the relator. Similarly, the district court in the present case held that those same articles—some of which identified the defendants by name—publicly disclosed the relator's fraud allegations before he filed his *qui tam* complaint. In addition, the

court held that advertisements on one of the defendant's websites disclosed the relator's allegations. While the court acknowledged that none of the disclosures explicitly accused the defendants of fraud, it also noted, citing Sixth Circuit opinions, that "the words fraud or allegation need not appear in the disclosure for it to qualify . . . [n]or does the allegation have to be exactly what Relators allege." The court further noted that "the information suggesting fraud need not even come from the same source as long as the different sources together provide information that leads to a conclusion of fraud."

The court rejected the relator's argument that his theory of liability was that the defendants knowingly violated the Anti-Kickback Statute and the Anti-Inducement Act, which differed from the prior public disclosures which, according to the relator, only revealed that the defendants offered gifts to potential Medicare enrollees—offers that might possibly have been allowed under one of several statutory safe-harbor provisions. Since the public disclosures did not allege any wrongdoing, the relator reasoned, they could not bar his *qui tam* claims. Noting that the relator unsuccessfully made this same argument in his other *qui tam* suit, the court held that since the Anti-Kickback and Anti-Inducement laws are implicated upon the mere offer of remuneration, the public disclosures were sufficient to put the government on notice of the possibility of fraud. In addition, the court held that the relator did not qualify as an "original source" because he did not provide information regarding the alleged fraud to the government prior to public disclosures—which the court presumed he could not do because he derived much of the information regarding his fraud allegations from the public sources.

As a result of these findings, the court dismissed the relator's complaint for lack of subject matter jurisdiction. The court further determined that "it would be futile to allow another amendment," and thus dismissed the complaint with prejudice.

U.S. ex rel. John Doe v. Staples, Inc., 2013 WL 1192982 (D.D.C. Mar. 22, 2013)

An anonymous relator filed a *qui tam* suit against several companies that, among other things, violated the False Claims Act by knowingly importing pencils from suppliers in China for sale in the United States, and then falsifying the pencils' origin to U.S. Customs and Border Protection in order to avoid applicable tariffs and duties. The relator based his claim on the pencils' price and on his own evaluation of the pencils' physical characteristics. The defendants moved to dismiss the relator's suit, arguing that due to the False Claims Act's public disclosure bar provision, the court lacked subject matter jurisdiction over the relator's claims. Specifically, the defendants argued that the relator based his fraud allegations on publicly-available reports published by a company that compiles information submitted by shippers to Customs.

The U.S. District Court for the District of Columbia agreed with the defendants. The court held that the published reports were public disclosures for False Claims Act purposes, since they were readily available on a company website, which the court held constituted a non-traditional "news media" source. In addition, the court noted that the relator relied on various information that was available to all subscribers to a U.S. Customs service, as well as certain information available on the U.S. International Trade Commission website; the court held that these materials were "administrative reports" for FCA purposes. The court rejected the relator's contention that the public disclosure bar did not apply because he provided more details regarding the price and physical appearance of the defendants' pencils. Instead, the court observed that those characteristics were also sufficient to enable the government to investigate the pencils' origin, and therefore, the relator's observation did not add anything new.

Finding that the relator's fraud allegations were based on the prior public disclosures, the court then turned to the question of whether or not the relator qualified for the FCA's "original source" exception to the public disclosure rule. The court held that he did not. The court declared that to qualify for the exception, a relator must have direct and independent knowledge of the information on which the fraud allegations were based, and must voluntarily provide that information to the government before filing the *qui tam* suit. The relator claimed that he had direct and independent knowledge of the defendants' alleged fraud scheme, due to his conversations with industry insiders, his analysis of trade data, and based on information he received from hired investigators. However, the court held that these types of communications do not meet the "original source" standard, likening the relator to one who "relied on several layers of hearsay," and thus did not have direct, first-hand knowledge.

As a result of these findings, the court granted the defendants' motion and dismissed the relator's suit.

U.S. ex rel. Beauchamp v. Academi Training Ctr., Inc., 2013 WL 1189707 (E.D. Va. Mar. 21, 2013)

Two *qui tam* relators filed suit against a government contractor that provided, among other things, security services to the United States in high-risk environments, such as Iraq and Afghanistan. The relators alleged that the defendant engaged in two schemes to submit false claims under a contract with the U.S. State Department: (1) routinely submitting falsified weapons qualification test scores for security personnel; and (2) submitting false reports and bills for work that was not performed. The defendant moved to dismiss the relators' suit, arguing that the relators were precluded from filing suit pursuant to the False Claims Act's first-to-

file and public disclosure rules. They further argued that the relators' complaint failed to state a claim and failed to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Eastern District of Virginia granted the defendants' motion to dismiss, finding that the relators' complaint was barred by the FCA's first-to-file and public disclosure rules.

First-to-File and Public Disclosure Rules

The defendant asserted that years before the present relators' suit was filed, two other relators filed a *qui tam* action against the defendant's predecessor in interest, alleging that the defendant submitted false claims to the government during an overlapping time period. The prior suit proceeded to trial and the jury returned a verdict in favor of the defendant, which was upheld on appeal. The defendant argued that this prior suit, which was still pending when the present relators' suit was filed, barred the present complaint, pursuant to the first-to-file and public disclosure rules. In addition, the defendant claimed that a second lawsuit, filed by two plaintiffs before the present relators amended their complaint to allege the weapons qualification scheme with more specificity, alleging violations of the False Claims Act's anti-retaliation provision, revealed the alleged scheme to defraud the government. The defendant further argued that an online news publication published a story about the retaliation suit which discussed the fraud alleged by those plaintiffs. Moreover, the defendant contended that the alleged fraud was disclosed in a State Department report regarding the defendant's performance under its government contract, as well as in statements made during a congressional hearing, in various audit reports commissioned by the State Department, and in a congressional memorandum. The court held that, pursuant to the first-to-file and public disclosure rules, the prior *qui tam* lawsuit barred the relators' claims regarding false billing, because that suit was still pending at the time the present relators' suit was filed, and it disclosed the same fraud scheme. The court noted that the prior *qui tam* suit did not allege the weapons qualification fraud scheme, and thus, did not bar those claims. With respect to the public disclosure rule, the court held that neither relator qualified for the "original source" exception, since their purported independent knowledge of the fraud did not materially add to the publicly disclosed information.

After dismissing the false billing claims, the court turned to the weapons qualification claims. The court held that the State Department reports and other governmental disclosures did not reveal the fraud alleged by the present relators, and therefore, were not public disclosures for FCA purposes. The court further noted that the anti-retaliation lawsuit did not constitute a public disclosure, since the government was not a party to that suit. However, the court determined that the news article based on the retaliation suit was a public disclosure, as it discussed the alleged fraud scheme through the "news media." Again, the court observed that neither relator satisfied the original source criteria—in this instance, the court held that the relators failed to voluntarily provide the government with information regarding the alleged fraud, since the relators only

submitted information to the government pursuant to their statutory obligations to provide the government with a "written disclosure of substantially all material evidence and information" they possessed, which the court held was not "voluntary."

Based on these findings, the court dismissed all of the relators' claims.

U.S. ex rel. Mateski v. Raytheon Co., 2013 WL 692798 (C.D. Cal. Feb. 26, 2013)

A relator brought a *qui tam* action against his former employer—a company contracted by the U.S. government to develop a weather sensor that would be used to collect meteorological, oceanographic, environmental, and climactic data—alleging that during a 10-year period the defendant violated the False Claims Act by submitting 48 false claims to the government, resulting in approximately $1 billion in improper payments. The relator had been assigned to work on the project for about three years. The defendants moved to dismiss the relator's complaint, arguing that the False Claims Act's public disclosure bar provision deprived the court of subject matter jurisdiction over the relator's complaint, among other reasons.

Holding: The U.S. District Court for the Central District of California granted the defendant's motion, finding that the relator's complaint was precluded by the public disclosure bar. The court denied the relator's request for leave to amend the complaint, holding that the deficiencies in the complaint could not be cured.

Public Disclosure Bar

The court determined that the relator's allegations fell into three categories: cost overruns; design, engineering, and manufacturing defects; and mismanagement. The court further determined that each of those issues had been publicly known before the relator's complaint was filed—the court observed that some of the exhibits attached to the relator's complaint were public disclosures—and had been "addressed extensively in government hearings, administrative reports, and news media." The relator argued that the public disclosures lacked the detail contained in his complaint, and therefore should not bar his suit. The court rejected that argument, stating that "there is no particularity requirement for a suit to fall under the public disclosure bar—the phrase 'allegations or transaction' is construed broadly," and noting that "public disclosures need not detail information underlying allegations or transactions so long as they supply enough information for the United States to pursue an investigation." The court found that the United States actually held hearings and conducted investigations into problems with the defendant's weather sensor, and even became more involved in the day-to-day work on the project. The court determined that the public disclosures at issue, while not as detailed as the relator's allegations—"all point to systematic technical and management problems," which was sufficient to bar the relator's complaint.

The court then determined that the "original source" exception to the public disclosure bar did not apply. The court noted that, in the Ninth Circuit, an "original source" must satisfy four criteria: the person must have (1) direct; and (2) independent knowledge of the information on which the allegations are based; (3) the person must have voluntarily provided the information to the government before filing the *qui tam* complaint; and (4) the person must have had a hand in the public disclosure—an element that several other circuits do not require. The court noted that the relator failed to offer any evidence showing that he had a hand in the public disclosures at issue. The court held that republishing the public disclosures was insufficient, stating, "a whistleblower sounds the alarm; he does not echo it." The court continued, finding that the relator failed to demonstrate his direct and independent knowledge of the alleged fraud. The court determined that the relator made generalized statements regarding the alleged fraud, but did not describe how he acquired the information his allegations were based on—particularly since the relator alleged fraud during periods when he was not working on the weather sensor project. Moreover, the court noted that there was no evidence showing that the relator's responsibilities included billing, management, or high-level technical oversight. Thus, the court concluded that while the relator may have witnessed technical failures and non-compliance, he could not demonstrate knowledge that the defendant knowingly committed fraud and could only "jump[] to the conclusion." The court further found no evidence showing that the relator voluntarily provided information regarding the alleged fraud to the government before filing his *qui tam* complaint. Instead, the court determined that the relator first briefed the government on his claims about a month after his suit was filed.

As a result of the above findings, the court held that the relator's complaint was precluded by the public disclosure bar and that he was not an original source. The *qui tam* complaint was dismissed with prejudice.

U.S. ex rel. Conrad v. Abbott Labs, Inc., 2013 WL 682740 (D. Mass. Feb. 25, 2013)

A relator brought a *qui tam* action against twenty-four drug manufacturers, distributors, and labelers, alleging that the defendants fraudulently misrepresented their products as eligible for Medicaid reimbursement, which healthcare providers to seek reimbursement from the Medicaid program for prescriptions for the defendants' products. The relator alleged that Medicaid improperly paid more than $500 million for the defendants' drugs. The United States declined to intervene in the relator's lawsuit. The defendants moved to dismiss the relator's claims, arguing that the relator's suit was barred, pursuant to the False Claims Act's public disclosure provision.

Holding: The U.S. District Court for the District of Massachusetts granted the defendants' motion, as it held that it lacked subject matter jurisdiction over the

relator's claims, because the information on which those claims were based had been publicly disclosed before the relator filed his *qui tam* complaint.

Public Disclosure Bar

The defendants argued that the relator's allegations were based on five public disclosures, including drug data, billing code, and drug approval information periodically published by government agencies including Centers for Medicare and Medicaid Services (CMS) and the Food and Drug Administration (FDA), as well as through notices published in the Federal Register. The relator responded that none of the sources disclosed the defendant's allegedly fraudulent scheme. Additionally, she argued that the information at issue did not constitute public disclosures for FCA purposes.

While the defendants did not argue that the alleged public disclosures directly alleged the fraud scheme described in the relator's complaint, they argued that, if the relator's allegations were true, then both the misrepresented facts and the true facts would have been available to anyone who consulted the five public sources, which would have revealed the defendants' alleged false statements, as well as the FDA's list of approved drugs (which did not include the defendants' products). Since both the allegedly false statements and the "true" facts were available in the purported public disclosures, the court agreed that the public disclosure bar would apply—in the event that the sources were deemed "public." Although the court acknowledged that a relator who studied the information available in the sources at issue would still need "substantial expertise in the field in order to find the alleged discrepancy," it ultimately held that "[a] relator cannot bring a qui tam suit based on publicly disclosed facts, even if her expertise makes her the first to understand the alleged fraud."

The court also determined that the CMS publications were public disclosures for FCA purposes, as they are available for the public to download via the CMS website and contain thousands of lines of drug data, organized and sorted. Notwithstanding the fact that the CMS data does not include any analysis but only included "raw data," the district court, relying on the U.S. Supreme Court's opinion in *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, held that the CMS data qualified as a public disclosure, since it constituted a federal government report that summarized information in a federal agency's possession, in the same way that an agency's response to a FOIA request does. The court also rejected the relator's argument that the FDA's list of approved drugs should not be deemed a public disclosure; essentially, the relator argued that the public disclosure bar is not implicated when a disclosure by omission occurs. The court concluded that adopting the relator's argument would mean that the FDA would have to include a separate list "everything that is not an approved drug," including the defendants' products. This approach, the court reasoned, was inconsistent with the FCA's language, which the court held "refers broadly to a 'public disclosure,' not narrowly to an 'affirmative public disclosure," and that the term "disclosure" is not inherently restricted to affirmative disclosures. The court held that, by listing all FDA-approved drugs, the FDA's list necessarily disclosed the fact that all other products were not

FDA-approved drugs. This disclosure, the court said, was sufficient to trigger the FCA's public disclosure bar.

Based on the above findings and the relator's failure to assert that she qualified for the FCA's "original source" exception to the public disclosure rule, the court held that it was without subject matter jurisdiction over the relator's claims and dismissed the claims on that basis.

Malhotra v. Steinberg, 2013 WL 44140 (W.D. Wash. Feb. 5, 2013)

Two relators filed a *qui tam* action alleging that a former bankruptcy trustee violated the False Claims Act by orchestrating an illegal kickbacks scheme in which he undervalued real estate in bankruptcy proceedings—including the relators' own bankruptcy proceeding—and then engaged in straw-man real estate transactions with real estate agents with whom he had partnered. The defendant moved to dismiss the relators' complaint, arguing that the fraud claims were barred by the False Claims Act's public disclosure bar provision.

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

Public Disclosure Bar

The court held an evidentiary hearing to resolve factual disputes regarding the defendant's public disclosure bar argument. During the hearing, the court learned that the relators had a negative gut reaction to the defendant's handling of their bankruptcy estate and conducted a six-month investigation of the defendant's handling of numerous other bankruptcy estate properties; the relators' investigation involved searching and reviewing thousands of documents and interviewing other debtors, witnesses, and the defendants business associates. At the start of their investigation, the relators also had multiple meetings with the defendant's supervisor at the Office of the United States Trustee (OUST) and shared their suspicions about—and their dissatisfaction with—the defendant. Notably, the supervisor did not recall the relators making any allegations that the defendant was secretly profiting from illegal kickback arrangements with real estate agents. The supervisor testified that he encouraged the relators to continue their investigation, but stated that the relators' information did nothing to help uncover the defendant's alleged fraud. Instead, the supervisor noted that years after the relators' meetings with him, OUST received a letter from one of the defendant's former employees that described the defendant's fraudulent scheme and provided documentary evidence regarding specific transactions reflecting illegal kickbacks. OUST then began investigating the defendant and suspended him from his work. OUST later deposed one of the real estate agents who was allegedly involved in the defendant's scheme, as part of the relators' bankruptcy proceeding; OUST could only conduct the deposition as part of an open bankruptcy case involving both the

defendant and the deponent, and the relators' case was the only one that fit the criteria. The relators were allowed to attend the deposition, and the deposition testimony corroborated their suspicions of an alleged illegal kickbacks scheme.

The defendant argued that the deposition constituted a public disclosure under the False Claims Act, and thus, the court did not have subject matter jurisdiction over the relators' fraud claims under the False Claims Act, as they were merely attempting to capitalize on information the government—OUST—already knew. The relators disagreed with the defendant's characterization of the deposition as a public disclosure, and also argued that even if there was a prior public disclosure of their fraud allegations, they qualified for the False Claims Act's "original source" exception to the public disclosure rule. The court considered each argument in turn.

The court first determined that the deposition triggered the False Claims Act's public disclosure bar provision, since: (1) it was given as part of a government (OUST) investigation; (2) it was made "public," as the relators—who were outsiders to the OUST investigation—were present and sought to take advantage of the information by filing a *qui tam* suit; and (3) the relators' allegations were "based on" the public disclosure, as the allegations involved "identical subject matter" and relied on information revealed during the deposition.

The court then rejected the relators' "original source" argument. The court, relying on Ninth Circuit authority, stated that an original source must: (1) have direct and independent knowledge of the information on which the allegations were based; (2) must voluntarily provide the information to the government prior to filing the *qui tam* complaint; and (3) must have had a hand in the public disclosure. Since the parties did not dispute that the relators' satisfied the second factor, the court focused on the first and third factors. With respect to the first factor, the court held that the relators did not demonstrate "true knowledge" of the defendant's fraud until OUST began its investigation and conducted the deposition at issue. Before then, the court held, the relators merely had suspicions and speculations of fraud, and even admitted that they had a "gut feeling." In addition, the court held that the third factor—which is unique to the Ninth Circuit—was not satisfied, since the relators did not have a hand in the public disclosure, since the OUST representative testified that the relators did not trigger the OUST investigation and subsequent deposition.

As a result of these findings, the court dismissed the relators' complaint pursuant to the public disclosure bar.

U.S. ex rel. Schumann v. Astrazeneca Pharms. LP, 2013 WL 300745 (E.D. Pa. Jan 25, 2013)

A relator filed a *qui tam* suit against a group of pharmaceuticals companies, alleging that the defendants violated the federal False Claims Act and various state counterparts by providing improper kickbacks to a large pharmacy benefit management company (PBM) that acted as a middleman between pharmaceutical

companies and government entities that purchase prescription drugs. The claims against several of the defendants were dismissed, pursuant to the False Claims Act statutes' public disclosure bar provisions. The remaining defendant moved to dismiss the relator's remaining claims on the same basis.

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

Public Disclosure Bar

The defendant argued that the relator's allegations had been publicly disclosed before he filed his *qui tam* complaint, through various complaints, government investigations, and media reports. The relator, though, argued that the prior disclosures were fundamentally different from his claims, since his claims described alleged kickbacks between the defendant and its PBM, and introduced additional allegations regarding the participation of two other managed care plans. The court agreed with the defendant, finding that the alleged fraud had been previously disclosed in a class action lawsuit, as well as in other previous cases and in media reports—and that the participation of the PBM was specifically mentioned. The relator argued that since these disclosures did not also describe the managed care plans involved in the alleged kickback scheme. The court rejected the relator's argument, finding that the "nature of the fraud was not changed with the addition of two more named participants," and further found that some of the public disclosures mentioned the involvement of additional parties.

After finding that the public disclosure bar applied to the relator's claims, the court evaluated whether or not the relator qualified as an original source of his allegations. The court held that he did not. The court determined that the relator's contention that he learned of the alleged kickback scheme in the course of his employment was insufficient to establish direct knowledge for original source purposes, noting that the relator must acquire direct knowledge "without deriving that information from others." The court determined that the relator failed to adequately describe how he learned of the defendant's alleged fraud, and that this failure was fatal to his original source argument. The court stated that it was "left to guess how he obtained knowledge of the fraud," and therefore held that the relator was not an original source.

Consequently, the court dismissed the relator's claims with prejudice, finding that allowing the relator to file an amended complaint would be futile.

U.S. ex rel. Lockey v. City of Dallas, TX, 2013 WL 268371 (N.D. Tex. Jan. 23, 2013)

Two relators filed a *qui tam* suit against the city of Dallas, TX and the city's housing authority. The relators alleged that they proposed to the city converting a vacant high-rise office building in downtown Dallas into a large affordable housing project for low-income tenants. The relators further alleged that they met with

the city's economic development director and explored the possibility of using federal funds from the US Department of Housing and Urban Development (HUD) to help fund the project, since the defendants were already receiving grant funds from HUD. They claimed that city officials indicated that they did not want low-income housing—much of which would be occupied by African American and Latino individuals and families—in downtown Dallas. Consequently, the city imposed various hurdles that hindered the development of the relators' proposed project. The relators alleged that they subsequently conducted a 15-month investigation that confirmed their suspicions that the defendants "actively discouraged the development of low-income housing and minority residents in certain sectors of the City, particularly in Downtown Dallas." The relators alleged that the defendants violated the False Claims Act when they requested HUD funds while falsely representing to HUD that they were in compliance with federal civil rights certifications—which were a precondition for eligibility to receive the HUD funds the defendants requested. According to the relators, the defendants' representations to HUD were false because the defendants did not take necessary measures to affirmatively further fair housing, as required by the applicable HUD regulations. In fact, the relators alleged that the various impediments to fair housing imposed by the defendants, segregation within the city remained the same or even increased. The defendants moved to dismiss the relators' claims, arguing that the court lacked subject matter jurisdiction over the claims, due to the FCA's public disclosure bar provision, and that the relators failed to state a claim for relief under the FCA.

Holding: The U.S. District Court for the Northern District of Texas granted the defendants' motion to dismiss for lack of subject matter jurisdiction.

Public Disclosure Bar

Before evaluating the substance of the defendants' public disclosure argument, the court first noted that about a year before the relators filed their *qui tam* complaint, the public disclosure bar provision was amended by Congress, as part of the Patient Protection and Affordable Care Act (PPACA). The relators argued that the new provision applied to their complaint and, more significantly, that the new provision does not deprive courts of subject matter jurisdiction. While the relators agreed that the prior version of the public disclosure bar provision created a jurisdictional bar—as it specified that "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions..."—they argued that the amended public disclosure bar provision—which states that "court[s] shall dismiss an action or claim under this section, unless opposed by the Government…"—created an affirmative defense and shifted the burden of proving all elements of that defense to the defendants. Moreover, the relators argued that this amendment was merely a procedural change, and therefore applied retroactively to claims based on the defendants'

conduct both before and after the amendment's effective date; other amendments to the provision reflected substantive changed and only applied to claims based on the defendants' alleged conduct after the effective date.

The court declined to reach either jurisdiction question, finding that "even assuming Relator is [sic] correct, Defendants would meet this burden of proof of the public disclosure bar provision." The court, though, agreed with the relators that the other, substantive changes to the public disclosure bar provision only applied prospectively, and stated that the relators' claims regarding alleged misconduct that occurred before the amendments effective date would be evaluated under the old public disclosure bar provision, while claims regarding alleged misconduct that occurred after the amendments became effective would be evaluated under the new provision.

Old Public Disclosure Bar

The court first analyzed the relators' claims based on alleged fraud that occurred before the public disclosure bar provision was amended. The defendants claimed that all of those claims were based on information that had already been publicly disclosed, including "HUD published guidelines, census data, publicly disclosed reports, information disclosed by news media, and other information disclosed in statutory sources." The relators dismissed these purported public disclosures as "innocuous information" that did not constitute "allegations or transactions" when compared to the relators' complaint. The court noted that the U.S. Supreme Court has held that under the FCA's public disclosure bar provision, "allegations or transactions" is to be given a broad meaning. In addition, the district court observed the Fifth Circuit's guidance to consider whether or not the relator "could have produced the substance of the complaint merely by synthesizing the public disclosures' description of the scheme." (internal citation omitted) Applying these principles, the court concluded that the relators' fraud claims were based on public disclosures. The court held that a news article published before the relators' complaint was filed specifically questioned whether the city "scammed" HUD by submitting false claims, and explained that the city was required annually to certify that it was using HUD funds to further fair housing; the court held that this disclosure was sufficient to also implicate the housing authority. The court also determined that several other prior disclosures, when taken together, led to the inference that the defendants had submitted false claims to HUD. Among those findings, the court held that the relators' complaint to HUD that the defendants' conduct resulted in violations of the Federal Fair Housing Act could have led to an inference that the defendants submitted false claims, and thereby could constitute a public disclosure. In addition, the court held that a prior lawsuit, in which the housing authority and HUD were both parties, disclosed information on which the relators' fraud allegations were based, as it alleged that the defendants were not affirmatively furthering fair housing and implied that the defendants were submitting false claims to the government.

The court then considered whether or not the relators qualified for the "original source" exception to the public disclosure bar provision. The defendants argued that they did not qualify, as the allegations in their complaint had been a matter of public discussion, the relators did not have direct and independent knowledge of their fraud allegations, and the relators did not disclose the fraud to the government prior to filing their *qui tam* suit. The relators countered that they did qualify as original sources, arguing that the acquired direct and independent knowledge of the alleged fraud through their personal involvement with the public housing project they proposed, from their meeting with the city's economic development director, and as a result of their independent investigation of the defendants. The court agreed with the defendants that the relators were not original sources, finding that the relators did not have direct and independent knowledge of the alleged fraud. The court determined that the relators' knowledge was not "direct," to the extent that it was acquired from second-hand sources. The court also discounted the relators' independent investigation, finding that it only amounted to "looking through public documents detailing racial and ethnic housing information in Dallas," as well as researching the city's financial information and budget, and rules and policies regarding affordable housing. While the court accepted the relators' contention that the news article was not a public disclosure for FCA purposes, since they were the sources of the information included in the article, the court still held that the relators' did not qualify for the original source exception, finding that the information contained in the news article still did not reflect the relators' "direct" knowledge, and that the other public disclosures—which did not originate with the relators—were sufficient to bar their *qui tam* suit. Since the court held that the relators did not satisfy the "direct and independent knowledge" element of original source status, it declined to address the second element, namely, whether or not the relators disclosed the fraud to the federal government prior to filing their complaint.

As a result of these findings, the court dismissed the relators' claims alleging fraud that occurred before the PPACA amendments to the public disclosure bar took effect.

New Public Disclosure Bar

Next, the court examined the relators' claims regarding alleged fraud that occurred after the PPACA amendments took effect. The court noted that the post-PPACA public disclosure bar provision limited the sources of public disclosures to federal sources and to the news media. Again, the court concluded that the relators' claims were based on public disclosures and that the relators' did not meet the criteria for original source status. The court again combined the questions of whether or not the relators' allegations had been previously publicly disclosed and if so, whether or not the relators' allegations were based upon those prior disclosures. The court concluded that the same prior disclosures discussed earlier—most notably, the news article and lawsuit mentioned above—qualified as public disclosures under the new public disclosure bar provision, since the disclosures were made in the news media and in civil proceedings

in which the federal government was a party. Consequently, the court held that the relators' fraud claims were based on public disclosures.

The court then determined that the relators did not qualify for the FCA's amended original source exception to the public disclosure rule. The court first noted that the post-PPACA FCA offers relators two separate ways to qualify as original sources: (1) they must voluntarily disclose the fraud to the government prior to any public disclosure; or (2) they must have independent knowledge of the fraud that materially adds to the public disclosure and they must voluntarily disclose the fraud to the government before filing their *qui tam* suit. The relators argued that they qualified as original sources under both tests. The court, however, held otherwise. First, the court found that the relators did not voluntarily disclose the defendants' alleged fraud to the government prior to any public disclosure. The relators argued that their complaint to HUD qualified as such a disclosure to the government, but the court observed that public disclosures of the alleged fraud had been made before the relators filed their complaint with HUD. In addition, the court held that under the FCA, for original source purposes, relators' voluntary disclosures to the government must be in the form of "[a] copy of the complaint and written disclosure of substantially all material evidence and information the [relator] possesses." The court held that the relators' HUD complaint did not meet these requirements, noting that the relators conceded that they did not submit their confidential disclosure to the government, as described in the statute, until after public disclosures had occurred. Therefore, the relators did not meet the first test for original source status. In addition, applying the same rationale as discussed above, the court held that the relators did not fulfill the second standard for original source status, since their knowledge of the defendants' alleged fraud was not independent of the public disclosures—the court mentioned that the relators did not specify how their purportedly independent knowledge of the fraud materially added to the public disclosures.

Thus, the court dismissed the relators' claims regarding the defendants' alleged post-PPACA misconduct, pursuant to the public disclosure bar.

Berg v. Honeywell Int'l, Inc., 2012 WL 6759950 (9th Cir. Dec. 19, 2012)

A group of five relators filed a *qui tam* suit against two affiliated corporations, alleging that the defendants violated the False Claims Act in their dealings with the U.S. Army. The defendants moved to dismiss the relators' complaint for lack of subject matter jurisdiction, arguing that Army Audit Agency (AAA) reports and a Government Accountability Office (GAO) report publicly disclosed the information on which the relators' fraud claims were based prior to the relators filing their *qui tam* action, and that none of the relators qualified as an "original source" that could overcome the FCA's public disclosure bar provision. The U.S. District Court for the District of Alaska agreed and dismissed the relators' suit. The relators appealed the district court's ruling to the U.S. Court of Appeals for the Ninth Circuit.

Holding: The Ninth Circuit reversed the district court's ruling and remanded the matter for further proceedings, finding that neither of the disclosures relied on by the defendants constituted "public disclosures" for FCA purposes.

Public Disclosure Bar

The circuit court began its analysis by examining whether any of the information at issue was a "public disclosure" under the FCA. The court noted that the AAA reports had been provided to a private company hired by the government, but held that such a private disclosure to a third party acting on behalf of the government did not implicate the FCA's public disclosure bar provision. The court also noted that the AAA reports were potentially available to the public through FOIA requests, but held that unless a member of the public requested and actually received the reports from the government prior to the filing of the relators' *qui tam* suit, the reports were not publicly disclosed under the FCA. Since no member of the public had requested and received the reports prior to the relators' complaint being filed, the circuit court held that the AAA reports did not bar the relators' suit, and reversed the district court's ruling.

The appellate court then turned to the GAO report. While the court recognized that the GAO report generally disclosed information about government contractors engaging in the type of fraud alleged by the relators, that report discussed more than 250 contracts over a 4-year period, and made no reference to specific contractors or specific locations where fraud may have occurred. The appeals court held that, given its lack of specificity, the report was insufficient to enable the government to pursue an investigation against the specific defendants named in the relators' suit. Therefore, the court held that the GAO report was not a public disclosure under the FCA either, and again reversed the district court's ruling.

As a result of these findings, the district court's judgment dismissing the relators' complaint for lack of subject matter jurisdiction was reversed and the matter was remanded to the district court for further proceedings.

Amphastar Pharm. Inc. v. Aventis Pharma SA, 2012 WL 5512466 (C.D. Cal. Nov. 14, 2012)

A pharmaceuticals company filed a *qui tam* lawsuit against one of its competitor companies. Long before the suit was filed, the defendant received a U.S. patent for an anti-coagulant drug, which it gave a brand name and sold. The defendant company argued to the Food and Drug Administration (FDA) that the patented drug was essential to its manufacturing process and that any generic versions of the product should only be approved if they could be shown to contain the same drug as the defendant's product. Subsequently, the relator company sought FDA approval of a generic version of the defendant's drug, arguing that the defendant's patent was invalid, unenforceable, or not infringed upon. In response, the de-

fendant filed a patent infringement action against the relator, which, by regulation, prevented the FDA from approving the relator's application for 30 months, thereby excluding the relator from the market. The relator responded to the defendant's suit by filing an antitrust counterclaim. The Federal Circuit Court affirmed the district court's finding that the defendant's patent was unenforceable on the grounds of inequitable conduct. The antitrust counterclaim was dismissed based on the *Noerr-Pennington* doctrine, which generally immunizes private entities from liability under antitrust laws for conduct related to lobbying the government for redress.

The relator then filed the present suit, alleging that the defendant violated the False Claims Act by making false statements to the U.S. Patent & Trademark Office (PTO) while prosecuting its patent action, by making false statements to the FDA, and by misrepresenting data and manufacturing modes in an unlawful attempt to exclude competitors from seeking market approval for generic drugs. The relator alleged that the defendant's allegedly false statements fraudulently inflated the price of the defendant's drug, causing the federal and state governments to overpay when paying for the drug through their respective healthcare programs. The defendant moved to dismiss the relator's complaint for lack of subject matter jurisdiction, failure to state a claim, and failure to satisfy the FCA's requirements.

Holding: The U.S. District Court for the Central District of California granted the defendant's motion to dismiss, but granted the relator leave to amend its complaint.

Public Disclosure Bar

The defendant argued that the relator's prior antitrust litigation, other court filings and judicial decisions, as well as FDA submissions publicly disclosed the relator's fraud allegations before the relator filed its complaint and therefore, the complaint was barred by the False Claims Act's public disclosure provision. The court agreed that the documents constituted public disclosures and further held that the relator's allegations were based on the publicly disclosed information, since the information presented "the essential elements of the fraud" sufficiently to allow the Government to investigate. The court acknowledged that the public disclosures "did not state that the government was paying brand-name prices for a non-patented drug, or that false claims were submitted to the government," but held that "fraud need not be explicitly alleged to constitute public disclosure adequate to raise the jurisdictional bar." The court, however, declined to dismiss the relator's action on public disclosure grounds, finding that the relator alleged sufficient facts to establish that it satisfied the criteria for the "original source" exception to the public disclosure rule. When applying the original source criteria, the court accepted that the relator's knowledge of the alleged fraud was "independent" of the public disclosures, noting that the relator possessed

knowledge before the public disclosures occurred. But the court was unable to determine whether or not the relator's knowledge was "direct"—which the court defined as "firsthand," and obtained through the relator's "own labor unmediated by anything else." The court observed that the relator was "not the typical relator—an insider—but competitor," but gave credence to the relator's contention that its knowledge was "direct" because it conducted its own investigation into the defendant's patents; the court noted that an evidentiary hearing might be necessary to confirm that fact. Moreover, the court found that the relator voluntarily provided the government with information regarding the alleged fraud before filing the *qui tam* action. Thus, the court denied the defendant's motion to dismiss for lack of subject matter jurisdiction.

Failure to State a Claim

Next, the court determined whether the relator properly pled a claim under the False Claims Act by examining each of the elements of pleading an FCA fraud claim. The court began by evaluating the FCA's "falsity" and scienter elements, and applying it to the relator's theory of liability: that the defendant falsely certified its compliance with patent and FDA regulations, or alternatively, promissory fraud. The court held that the relator's allegations were sufficient to plead falsity and scienter under either theory of liability, since the relator alleged that the defendant knowingly made false representations to and concealed information from the PTO and FDA, which allowed the defendant to obtain patent protection, exclude generics and monopolize the market for its drug—and then knowingly overcharge the government. The court then held that the relator's complaint satisfied the FCA's "materiality" element as well, since its allegations of the defendant's false statements had the "natural tendency to influence" the PTO and FDA's decisions with respect to the defendant's drug.

The court, though, ultimately dismissed the relator's complaint, holding that the relator's failure to allege even a single, actual false claim submitted to the government was fatal. The court observed that the relator's allegations of false statements were likely "relevant to, or [ ] capable of influencing, the government's decision to enter contracts or make payments," but determined that the allegations did not adequately plead that false claims were submitted to the government. The court recognized that *qui tam* complaints may satisfy Rule 9(b)'s heightened pleading requirements even without including representative examples of false claims, but held that such complaints must allege sufficient details with "reliable indicia that lead to a strong inference that claims were actually submitted." The court held that the relator's complaint did not meet this standard, since the relator's allegations did not allege details regarding a scheme to submit false claims to the government.

As a result of these findings, the court granted the defendant's motion to dismiss for failure to plead the alleged fraud scheme with particularity. However, the court provided the relator with an opportunity to amend its complaint and cure the deficiency.

Malhotra v. Steinberg, 2012 WL 5497978 (W.D. Wash. Nov. 13, 2012)

Two relators filed a *qui tam* suit under the False Claims Act, alleging that a former bankruptcy trustee and a group of real estate agents and their employers defrauded the government by orchestrating an illegal kickback scheme connected to sales of real estate in bankruptcy proceedings—including in the relators' own bankruptcy proceeding. The defendants moved to dismiss the relators' claim, arguing that it was barred under the FCA's public disclosure rule, and that the claim did not belong to the relators and should have been included in their bankruptcy estate.

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

Public Disclosure Bar

The court rejected the defendants' public disclosure argument, finding that the defendant's only allegation of a public disclosure was that the allegedly false statements were made in public. Moreover, the court determined that the relators would have qualified for the original source exception to the public disclosure rule, since they alleged that they searched thousands of documents and conducted interviews as part of their own investigations into the defendants' alleged misconduct.

Bankruptcy Proceedings

The defendant contended that the relators did not have standing to pursue their FCA claim, arguing that since the alleged misconduct that gave rise to the relators' FCA claim occurred before the relators filed for bankruptcy, the relators had an "interest" in the FCA claim at that time and the bankruptcy estate took ownership of the relators' interest in their FCA claim when they filed for bankruptcy protection. The court appeared to validate the defendant's theory, but ultimately rejected it, noting that the relators' FCA claim was based on alleged conduct that occurred after they filed for bankruptcy protection, which is when the relators' first became acquainted with the defendants. Consequently, the court held that the bankruptcy estate did not take possession of the relators' FCA claim, and denied the defendants' motion to dismiss on that basis.

U.S. ex rel. Heath v. Wisconsin Bell, Inc., 2012 WL 4128020 (E.D. Wisc. Sept. 18, 2012)

A relator filed a *qui tam* suit against a telecommunications services provider, alleging that the defendant fraudulently obtained government subsidies by falsely

certifying that it was providing services to schools and libraries at the lowest rate charged to similarly-situated customers. The defendant moved to dismiss the complaint for lack of subject matter jurisdiction pursuant to the False Claims Act's public disclosure bar provision, for failure to state a claim, and for untimeliness.

The U.S. District Court for the Eastern District of Wisconsin granted the defendant's motion to dismiss for lack of subject matter jurisdiction, finding that the relator's fraud allegations had previously been publicly disclosed when information showing that the defendant charged a lower rate to one of its other similarly-situated customers was posted to a state government webpage; the court noted that the state government disclosure constituted a "report" for public disclosure bar purposes, and that the disclosure occurred before the public disclosure bar provision was amended to make clear that only federal government reports deprive courts of subject matter jurisdiction over *qui tam* claims brought under the FCA. The court determined that the relator actually derived the information on which his complaint was based after reviewing the publicly disclosed information and thus did not qualify for the "original source" exception to the public disclosure provision. As a result of these findings, the court dismissed the complaint for lack of subject matter jurisdiction. The court declined to address the defendant's other arguments for dismissal.

State of California ex rel. Bates v. Mortgage Elec. Registration Sys., Inc., 2012 WL 4054142 (9th Cir. Sept. 17, 2012)

A relator filed a *qui tam* action under the California False Claims Act (CFCA) alleging that a mortgage registration company and a group of financial institutions defrauded numerous California counties by naming the registration company as a beneficiary in recorded mortgage documents in order to avoid or decrease recording fees. The defendants moved to dismiss the suit for lack of subject matter jurisdiction and for failure to state a claim. The relator moved to amend his complaint. The U.S. District Court for the Eastern District of California—the defendant successfully removed the action to federal court on diversity jurisdiction grounds—granted the defendants' motion, finding that the CFCA's public disclosure bar provision required dismissal of the action for lack of subject matter jurisdiction. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Ninth Circuit, arguing that the district court erred when it denied his motion to remand the action to California state court and when it held that his suit was precluded by the CFCA's public disclosure bar provision.

First, the relator argued that the district court should have remanded the action to state court, since the State of California was the real party in interest in his *qui tam* suit and that this factor outweighed diversity jurisdiction. The circuit court rejected that argument, agreeing with the district court that several California coun-

ties—but not the state itself—were the real parties in interest, since the recording fees at issue would have been payable to and usable by to the counties exclusively, and because if the suit were successful, the state would not realize any benefit.

The appellate court also agreed with the district court's dismissal of the relator's complaint on public disclosure grounds. The court found that the facts underlying the relator's allegations had already been disclosed in the public domain through other cases an in news articles. The court also found that the relator did not qualify for the "original source" exception to the CFCA's public disclosure rule, since he did not discover the fraud until after many of the public disclosures had occurred and therefore could not have provided the information that led to the public disclosure, as required under the CFCA.

The district court's rulings were affirmed and the relator's action was dismissed for lack of subject matter jurisdiction.

U.S. ex rel. Monaghan v. New York City Dep't of Housing, Preservation and Dev., 2012 WL 4017338 (S.D.N.Y. Sept. 10. 2012)

A relator alleged that New York City's housing agency and a group of affiliated corporate defendants defrauded the federal government and the State of New York by withdrawing a housing complex they developed from a state program that offered low-interest government mortgages and tax exemptions to private developers in exchange for the developers' agreement to maintain the properties as low-income housing for a specific period of time. Following the corporate defendants' announcement that they would withdraw the housing complex from the program, the tenants of the complex—whose rent was subject to increases—filed suit against the corporate defendants, seeking injunctive relief. Ultimately, those defendants reached settlements with various tenants who qualified for federally-subsidized Section 8 housing vouchers and the remaining tenants' claims were dismissed for lack of standing. The relators' suit was filed years later and alleged that the corporate defendants made false claims and statements in connection with the submission of tenants' claims for Section 8 vouchers, since the submissions were based on the defendants' improper withdrawal of the housing complex from the low-income housing program; the relator alleged that the corporate defendants' application for Section 8 vouchers were fraudulent because the need for the subsidies was due to the defendants' improper withdrawal from the state program.

The defendants moved to dismiss the relators' complaint, arguing, among other things, that the court lacked subject matter jurisdiction over the relator's complaint, pursuant to the public disclosure bar. The U.S. District Court for the Southern District of New York agreed, finding that the tenants' earlier suit against the corporate defendants publicly disclosed the facts underlying the relator's fraud

allegations. The court further held that the relator did not qualify for the "original source" exception to the public disclosure bar because he did not assert that he had direct and independent knowledge of the information upon which his fraud claims were based—instead, the court noted, the relator confirmed that he became aware of the defendants' alleged fraud when he reviewed various documents that had also been included in the tenants' earlier lawsuit against the corporate defendants. The court dismissed the relator's complaint for lack of subject matter jurisdiction.

U.S. ex rel. Black v. Health & Hosp. Corp. of Marion County, 2012 WL 3538820 (4th Cir. Aug. 17, 2012)

A relator filed a *qui tam* complaint in the U.S. District Court for the District of Maryland, alleging that healthcare entity operated by a municipal corporation and political subdivision of the State of Indiana committed Medicaid fraud and violated the federal False Claims Act. The United States declined to intervene in the suit. The defendant moved to dismiss the relator's complaint, arguing, among other things, that the court did not have subject matter jurisdiction over the relator's claims pursuant to the FCA's public disclosure bar provision and that the relator failed to state a claim under the FCA and failed to plead the alleged fraud with particularity, as required by Federal Rules of Civil Procedure 12(b)(6) and 9(b). The relator responded to the defendant's motion and also moved to defer any potential motion for leave to amend his complaint until after the motion to dismiss was decided. The district court agreed with all three defense arguments, dismissed the relator's amended complaint with prejudice, and denied the relator's motion to defer. The relator then moved to amend his complaint and moved for reconsideration of the court's denial of his motion to defer. The court denied both motions. The relator then appealed the district court's rulings to the U.S. Court of Appeals for the Fourth Circuit.

Holding: The Fourth Circuit affirmed the district court's ruling on subject matter jurisdiction pursuant to the public disclosure bar, and the dismissal of the relator's complaint. The court declined to examine the other district court rulings on appeal on mootness grounds.

Public Disclosure Bar

The circuit court agreed with the district court that the relator's claims were barred by the FCA's public disclosure provision, finding that the relator's claims "largely mimic" information that had been previously publicly disclosed in various materials produced by the Centers for Medicare and Medicaid Services, through public congressional hearings and legislative reports, and in the media. The relator had argued that the district court's public disclosure ruling was erroneous because "the district court did not parse in detail the alleged similarity between the [public disclosures], as compared

with the highly specific allegations" made in his *qui tam* complaint. But the circuit court found that the public disclosure bar provision does not require that relators' allegations match public disclosures "with specificity." The appeals court held that the relator's allegations had been previously publicly disclosed and that the district court did not err when it determined that it did not have subject matter jurisdiction over the relator's claims, since the relator's claims were at least partly based upon the public disclosures. The appellate court also held that the relator failed to show that he qualified for the original source exception to the public disclosure bar, since he was unable to establish that he had direct and independent knowledge of the alleged violations, as his allegations were based on documents and communications with others, and since he admitted that he did not have access to specific documents and information that would demonstrate the alleged fraud, and instead relied on his "gut."

Leave to Amend *Qui Tam* Complaint

The relator argued that the district court erred when it denied his motion to defer a motion for leave to amend his complaint; denied his subsequent motion for leave to amend his complaint; and denied his motion for reconsideration. The Fourth Circuit agreed with the district court that the purpose of a motion to amend a complaint is to "provide the district court with a means by which to determine whether the amendment would cure the defects in the initial complaint." The circuit court affirmed the district court's holding that the relator failed to meet this standard. The court further held that the district court did not abuse its discretion when it denied the relator's motion for reconsideration, since the relator had already amended his complaint three times before.

U.S. ex rel. Rostholder v. Omnicare, Inc., 2012 WL 3399789 (D. Md. Aug. 14, 2012)

A relator brought a *qui tam* action under the federal False Claims Act and the corresponding statutes of 22 states against Heartland Repack (his former employer) and Heartland's parent company, Omnicare. The relator alleged that the defendants violated the false claims act laws by knowingly billing Medicare and Medicaid for products that had been cross-contaminated and adulterated. The relator claimed that Omnicare formed Heartland to provide "repackaging" services to its patients and long-term care facility residents—repackaging is the process by which Heartland individually segregated Omnicare's patients' particular regimens of daily drugs—and that Heartland sold adulterated products to Omnicare, which then sought reimbursement from the federal government and various state governments. Specifically, the relator, who had been employed as a senior director of repackaging operations at Heartland, alleged that, at Omnicare's direction, Heartland added penicillin to the list of drugs it repackaged, and that all of the drugs were repackaged in the same warehouse, which often kept its doors open and used

the same heating and ventilation system throughout the building. He claimed that he discovered that Food and Drug Administration (FDA) regulations prohibited Heartland from repackaging penicillin in the same facility as other drugs, due to concerns about cross-contamination and allergic reactions, and that he notified an Omnicare Senior Vice President as well as the manager of Heartland's warehouse about the FDA violations. He claimed that the defendants did nothing to remedy the quality control issues, and that he eventually resigned from his job as a result of the inaction, and that he later filed his *qui tam* action. Both defendants moved to dismiss the relator's claims for failure to state a claim for relief and for lack of subject matter jurisdiction pursuant to the FCA's public disclosure bar.

Holding: The U.S. District Court for the District of Maryland granted the defendants' motions.

Public Disclosure Bar

The relator alleged that a few months after resigning from his job, he contacted the FDA to report Heartland's alleged violations and the FDA sent inspectors to Heartland's repackaging facility. He claimed that Heartland attempted to deceive the FDA regarding its practices, but that, after he provided more information, the FDA eventually discovered that penicillin was being repackaged at the same facility as other drugs and issued a warning letter to Heartland regarding cross-contamination. The defendants claimed that under the False Claims Act, the warning letter constituted a public disclosure and barred his *qui tam* complaint. The relator did not dispute that the letter was a public disclosure, but he argued that since his complaint was not "based upon" the letter, he was not precluded from filing his suit. In addition, he claimed that he qualified for the "original source" exception to the public disclosure bar. The court agreed that the relator was an original source of the information on which his complaint was based, and rejected the defendants' argument on subject matter jurisdiction.

The court found that the relator satisfied the original source elements. First, the court determined that the relator voluntarily gave the government information regarding the alleged fraud before filing his suit. The court noted that, before filing suit, the relator reported the "core" information regarding the defendants' alleged wrongdoing to the FDA and later assisted the FDA with its investigation—information the relator provided was later verified by the FDA and included in its warning letter. In addition, the court found that the relator had direct and independent knowledge of the facts on which his claims were based. The defendants had argued that the relator was not an original source because he did not have direct and independent knowledge of specific false claims to the government. The court, however, noted that the FDA warning letter did not contain information about the defendants' Medicare and Medicaid claims, and thus, the relator was not required to prove that he was an original source of that information. While the court recognized that Rule 9(b) of the Federal Rules of Civil Procedure usually requires FCA plaintiffs to plead facts regarding specific false claims

to the government, it also declared that the heightened pleading standard can be relaxed when the existence of a fraudulent scheme has been adequately pled. The court held that the relator met that standard.

Consequently, the court held that the public disclosure bar did not apply to the relator's allegations and that the court was not deprived of subject matter jurisdiction over his claims.

Failure to State a Claim

After assuming jurisdiction over the relator's claims, the court granted the defendants' motions to dismiss them, for failure to state a claim. The court concluded that the relator failed to state an FCA claim based on his theory that all of Omnicare's claims to federal and state governments were false, since the defendants had committed material violations of Medicare/Medicaid regulations. The court suggested that the relator could not maintain his claims without alleging a false statement or some fraudulent conduct by the defendants, but acknowledged that "clearer guidance from the Fourth Circuit" was needed. The court further held that the relator failed to state a claim because he failed to plead facts regarding the process by which Omnicare allegedly submitted false claims to the government based on Heartland's alleged regulatory violations, including facts concerning the applicable regulations, forms, manuals, etc.

Based on its findings, the court granted the defendants' motions to dismiss the complaint for failure to state a claim. The court refused to grant the relator leave to amend his complaint, noting that he had already been permitted to amend the complaint twice before. However, the dismissal was without prejudice against the United States or the states on whose behalf the relator's complaint was filed.

U.S. ex rel. Newell v. City of St. Paul, Minn., 2012 WL 2979061 (D. Minn. July 20, 2012)

A relator filed a *qui tam* suit alleging that a city violated the False Claims Act by submitting false certifications of compliance with various HUD regulations in order to receive federal funds. The United States declined to intervene in the suit. The city moved to dismiss the action for lack of subject matter jurisdiction, failure to state a claim, and failure to plead the alleged fraud with particularity.

Holding: The United States District Court for the District of Minnesota granted the motion and dismissed the relator's complaint with prejudice pursuant to the FCA's public disclosure bar.

Public Disclosure Bar

The city first argued that the relator's claims were based on information that had been publicly disclosed in several documents before the relator filed his *qui tam* suit, and

that the court did not have subject matter jurisdiction over those claims, pursuant to the FCA's public disclosure bar. The city stated that, more than 25 years before the relator's complaint was filed, another individual filed a complaint against the city with HUD, alleging noncompliance with the same HUD regulations. In addition, this individual and others subsequently filed three lawsuits against the city, alleging similar claims. Moreover, the city asserted that the relator's fraud claims were based on an internal city memorandum that had been released to the public via a request under the state's FOIA law. Furthermore, the city pointed to an audit report commissioned by the city council that found that it was unclear whether or not the city had complied with the HUD regulations at issue—the report was posted on the city's website. Finally, the city focused on the relator's FOIA requests to HUD for documentation corroborating his claims, as well as a HUD complaint the relator filed and a lawsuit the relators and other plaintiffs filed, alleging the city's failures to satisfy the HUD requirements.

The court noted that the FCA's public disclosure bar provision was amended a year after the relator's *qui tam* complaint was filed and applied the provision as it existed at the time the complaint was filed. The court then examined each of the purported public disclosures. The court determined that the prior lawsuits publicly disclosed information regarding the city's alleged failures to comply with the HUD regulations at issue. Even though the relator's allegations involved a different time period—some 20 years apart—from the prior HUD complaint and lawsuit, the court held that the two sets of allegations were "substantially similar," since the relator was "complaining that the City performed the same fraudulent acts in succeeding years." The court further held that the relator's allegations were "based upon" those public disclosures for FCA purposes, since the relator's allegations were "supported by" those prior complaints. Similarly, the court held that the relator's complaint was supported by, and thus based upon, the internal city memorandum.

Next, the court held that the relator's prior litigation against the city constituted a public disclosure of his *qui tam* claims, since the allegations had been previously disclosed in a public civil hearing and since the prior claims were "essentially the same" as the relator's current claims. The court also concluded that the relator's FOIA request resulted in a publicly disclosed HUD "report," pursuant to U.S. Supreme Court precedent, and that his *qui tam* claims were supported by and based upon the publicly disclosed information.

After finding that the relator's allegations were based upon these various public disclosures, the court held that the relator did not have direct and independent knowledge of any of the information on which his fraud claims were based. Therefore, the court held that the relator did not qualify as an "original source," exempt from the public disclosure bar. Instead, the court held that "the information on which Relator bases his fraud claim was acquired second-hand, from other sources and prior public disclosures, and that the "Relator's own contributions are limited to: relaying public information to HUD and City employees to instigate investigations; and recognizing

the alleged fraud after compiling information gathered from others. Such contributions do not qualify him as an original source because the information was available to anyone who chose to look for it." As a result of these findings, the court held that it did not have subject matter jurisdiction over the relator's *qui tam* action and granted the city's motion to dismiss the relator's suit with prejudice.

Stennett v. Premier Rehabilitation, LLC, 2012 WL 2526619 (5th Cir. July 2, 2012)

A relator filed a *qui tam* action alleging that a rehabilitation hospital and affiliated corporations and individuals engaged in fraudulent Medicaid billing, in violation of the False Claims Act. The relator alleged that he had been hired as the administrator of the hospital, and in that capacity, he oversaw the defendants' Medicaid billing and reimbursement practices, which he alleged included fraudulent billing. He claimed that he notified the individual defendants of his discovery, and soon after was terminated from his job. During the time of the relator's employment, the State of Louisiana conducted an in-depth survey, audit, inspection, and examination of the hospital's files and published a report noting multiple deficiencies with the hospital's compliance with Medicare and Medicaid regulations.

The defendants moved to dismiss the relator's fraud claims, arguing that he failed to state a claim under the FCA. The U.S. District Court for the Western District of Louisiana dismissed the complaint, based on its finding that the plaintiff's "factual allegations fail to allege, with the specificity required by Rule 9(b) of the Federal Rules of Civil Procedure, that Plaintiff is the 'original source' of the information forming the basis of the complaint or that any of the Defendants acted with the requisite scienter to establish a cause of action under the [FCA]." The relator appealed the district court's ruling to the United States Court of Appeals for the Fifth Circuit.

Holding: The Fifth Circuit affirmed the district court's dismissal of the relator's complaint, finding that the *qui tam* action was barred by the FCA's public disclosure rule.

Public Disclosure Bar

The circuit court first observed that the relator's complaint stated that the Louisiana audit report served as the primary foundation on which the fraud claims were based. Notwithstanding the fact that the audit report was released by a state government—not the federal government—and without explanation, the circuit court agreed with the district court that the relator's allegations were publicly disclosed by the audit report, for purposes of the FCA's public disclosure provision. The circuit court also agreed with the district court that the relator's allegations were "based upon" the public disclosure. Although the relator conceded that his claims were actually derived

from the purported public disclosure, the court reiterated the Fifth Circuit's view that, for purposes of the FCA's public disclosure rule, "based upon" means "substantially similar to," and thus, the relator's claims would have been barred even if he had never become aware of the audit report. Finally, the appellate court held that the relator did not qualify for the "original source" exception to the public disclosure bar, since he admitted that "he did not become aware of the regulations regarding billing practices or their applicability to [the defendants] until after he reviewed the Government Audit Report," and thus, had no direct or independent knowledge of the information on which his fraud claims were based.

See *U.S. ex rel. Galmines v. Novartis Pharms. Corp.*, 2013 WL 2649704 (E.D. Pa. June 13, 2013), at page 205.

See *U.S. ex rel. Ahumada v. National Ctr. For Employment of the Disabled*, 2013 WL 2322836 (E.D. Va. May 22, 2013), at page 152.

See *U.S. ex rel. Fox Rx, Inc. v. Omnicare, Inc.*, 2013 WL 2303768 (N.D. Ga. May 17, 2013), at page 153.

See *U.S. ex rel. Yarberry v. Sears Holdings Corp.*, 2013 WL 1287058 (S.D. Ill. Mar. 28, 2013), at page 216.

See *U.S. ex rel. Spay v. CVS Caremark Corp.*, 2012 WL 6645537 (E.D. Pa. Dec. 20, 2012), at page 11.

See *U.S. ex rel. Daugherty v. Bostwick Labs.*, 2012 6593804 (S.D. Ohio Dec. 18, 2012), at page 6.

See *U.S. ex rel. Watson v. King-Vassel*, 2012 WL 5272486 (E.D. Wis. Oct. 23, 2012), at page 232.

See *Little v. Shell Exploration & Prod. Co.*, 2012 WL 3089777 (5th Cir. July 31, 2012), at page 118.

See *U.S. ex rel. Osheroff v. Tenet Healthcare Corp.*, 2012 WL 2871264 (S.D. Fla. July 12, 2012), at page 249.

FALSE CLAIMS ACT RETALIATION CLAIMS

Brazill v. California Northstate Coll. of Pharmacy, LLC, 2013 WL 2449544 (E.D. Cal. June 5, 2013)

A plaintiff brought numerous employment law claims against his former employer—a university and its college of pharmacy—including a claim for retaliation under the False Claims Act. The plaintiff alleged that he was hired to chair the defendants' clinical and administrative services department and that in the course of performing his job, he began to believe that the defendants' students were using federal student aid funds from a different school to pay for the defendants' expenses. He claimed that he expressed his concerns about this practice—which he believed was illegal—to his supervisor and other co-workers. Two months after his last such complaint, the plaintiff was terminated from his position by the president of the university. The defendant moved for summary judgment on the FCA retaliation claim, arguing that the plaintiff was fired because he improperly hired faculty to work in his private pharmacy, he treated another faculty member inappropriately, and he complained about his department's lack of faculty during a visit from an accreditation organization—not for any retaliatory reason.

Holding: The U.S. District Court for the Eastern District of California granted the defendants' motion to dismiss the FCA retaliation claim, finding that the plaintiff could not support his allegation that he was terminated for a retaliatory reason.

Retaliation

The plaintiff alleged that the defendant violated the FCA's anti-retaliation provision by terminating his employment in response to his protected whistleblower activity. He claimed that he repeatedly reported students' "illegal" conduct to his co-workers and superiors and then was fired two months later. The court, though, held that the plaintiff's allegations were not sufficient to maintain his retaliation claim. The court held that even if the plaintiff's reports constituted protected activity—an issue the court did not decide—the temporal proximity between his complaints and his termination could not, alone, establish a causal connection between the two. The court based its conclusion solely on the fact that the university president was the only person with the decision-making power to fire the plaintiff, and the plaintiff never alleged that he complained to the president, nor could he offer evidence that would lead to an inference that the president learned about the plaintiff's complaints from another source. Since the plaintiff could not rely on temporal proximity to establish a causal connection between his protected activity and the alleged retaliation he experienced, the court held

that he could not create a genuine issue of fact as to causation. As a result, the court granted the defendants' summary judgment motion.

Layman v. MET Labs, Inc., 2013 WL 2237689 (D. Md. May 20, 2013)

A plaintiff filed suit against his former employer, a laboratory company, alleging a violation of the False Claims Act's anti-retaliation provision. Specifically, the plaintiff alleged that the defendant took actions to induce his resignation after he refused to approve an allegedly fraudulent report with respect to testing for equipment that would be sold to the U.S. military. The relator had previously filed the FCA retaliation claim in a prior suit alleging additional causes of action, and the claim was dismissed without prejudice. The relator then filed the present suit. The defendant again moved to dismiss the relator's allegation, arguing that he failed to state a claim for relief.

The U.S. District Court for the District of Maryland denied the defendant's motion. The court observed that the relator's second suit was filed after the FCA's anti-retaliation provision was amended and broadened as part of the Fraud Enforcement and Recovery Act of 2009 (FERA). The court held that following the amendment, plaintiffs must "allege fraudulent claims for federal funds and not merely address concerns about general misconduct," but concluded that, unlike the pre-FERA FCA, plaintiffs are not required to take some action "in furtherance" of a *qui tam* suit. Ultimately, the court determined that the plaintiff was required to allege that "(1) he engaged in activity protected by the statute; (2) his employer knew he engaged in protected activity; and (3) he was discharged because he engaged in protected activity." The defendant argued that the plaintiff failed to establish the first two elements. The court considered each element in turn.

First, the court held that the plaintiff's allegations were sufficient to establish protected activity, since he alleged that he investigated and discovered that his former employer instructed test engineers to report fraudulent test results to a government contractor and to provide false certifications that equipment to be sold to the U.S. military met all necessary requirements, and he alleged that he informed the defendant that he would not sign the report in his capacity as the manager overseeing the testing because it constituted fraud on the government. Next, the court held that the plaintiff adequately pled that fraudulent claims were involved, since even though the defendant's alleged false statements were made to a government contractor and not directly to the government, the report was ultimately part of a government contract. Finally, the court determined that the plaintiff properly pled that the defendant had notice of his protected activity, noting that, "[p]ost-FERA, courts have continued to hold that internal reporting suffices to put the employer on notice as long as the employee specifically told the employer that he is concerned

about fraud." Since the plaintiff alleged that he informed his employers of his concerns about fraud on the government, the court held that this element was satisfied as well. Consequently, the court denied the defendant's motion to dismiss.

Skrynnikov v. Federal. Nat'l Mortgage Ass'n, 2013 WL 1901037 (D.D.C. May 8, 2013)

A plaintiff filed an action under the False Claims Act against the Federal National Mortgage Association ("Fannie Mae"), alleging retaliation. He alleged other federal and state law violations as well. The plaintiff's allegations arose following the termination of his two-year employment as a Senior Financial Analyst for the defendant. He alleged that he was terminated in retaliation for investigating and disclosing falsehoods in executive compensation data the defendant reported to Congress. The defendant moved to compel arbitration on the FCA retaliation claim, noting that the plaintiff signed acknowledgements—both when he applied for the job and when he accepted it—in which he agreed to arbitrate employment-related claims against the defendant. The plaintiff did not dispute that he was aware of the defendant's Dispute Resolution Policy, but instead argued that the policy was unenforceable.

The U.S. District Court for the District of Columbia rejected the plaintiff's argument, noting that the cases he cited in support of his argument that the arbitration agreement was not enforceable because it was not "clear and unmistakable" and only contained "sweeping broad statements" was inapplicable, because the policy was not the result of a collective bargaining agreement, and thus, was not subject to a stricter standard. Moreover, the court held that the language in the arbitration agreement was, in fact, clear and unmistakable. In addition, the court rejected the plaintiff's argument that the arbitration agreement was ambiguous and only applied to a small set of possible claims he could bring, and did not apply to his FCA retaliation claim—which he never agreed to arbitrate. The court disagreed, finding that the agreement explicitly applied to *any* employment-related claim, and that such language in defendant's dispute resolution policy had been applied to whistleblower retaliation claims in the past. The court held that to the extent the language was ambiguous, the agreement provided that the arbitrator would make all determinations regarding whether or not particular claims were arbitrable or not. Thus, the court concluded, the plaintiff's retaliation claim "must be submitted to the arbitrator who will decide arbitrability issues."

The plaintiff's FCA retaliation claim was stayed, pending the conclusion of the arbitration.

Cabotage v. Ohio Hosp. for Psychiatry, LLC, 2013 WL 1281940 (S.D. Ohio Mar. 26, 2013)

A plaintiff filed suit against two affiliated healthcare companies, alleging claims for retaliation under the False Claims Act and the Ohio Nurses' Whistleblower Act. She claimed that she had been employed as a registered nurse by one of the defendants—an entity that was operated by the other defendant. She further alleged that during the course of her employment, she became concerned that her employer's medical director was falsifying documents and engaging in Medicare and Medicaid fraud. She claimed that at the suggestion of her chief nursing officer, she gathered evidence to support her suspicions, which she turned over to the chief nursing officer. Subsequently, both the plaintiff and the chief nursing officer met with their employer's human resources vice president. Less than two weeks later, the chief nursing officer was fired, which caused the plaintiff to worry that her complaints would be ignored. She took copies of the evidence she collected to her home, in case she needed the documents to prove that her concerns were legitimate. She also contacted the Medicare Fraud Hotline and reported her concerns. The next day, the state conducted an on-site investigation. The plaintiff claimed that few days later, a patient told her that the medical director had not treated her and that she did not want to take the medicine that he had prescribed. The plaintiff alleged that the patient asked her to call and inform her daughter of the situation—the plaintiff claimed that she had the patient's written consent to contact her daughter. The plaintiff then called the patient's daughter during her drive home from work. A few weeks later, the plaintiff was terminated from her job for violating her employer's policy against "fraternizing with patients' families outside of work." The defendants claimed that the plaintiff did not have the necessary written consent to communicate with the patient's family outside of work and that the plaintiff improperly removed patient-identifying information in order to call the patient's daughter.

The defendants moved for summary judgment on the plaintiff's claims, arguing that the medical director at the heart of the case was not their employee and thus, any investigation the plaintiff conducted could not constitute protected activity under the False Claims Act.

The U.S. District Court for the Southern District of Ohio granted the defendants' motion. The court determined that while the plaintiff alleged that she believed that her former employer was improperly billing Medicare and Medicaid for the medical director's services, she did not allege that she ever investigated whether any fraudulent claims were ever actually submitted to the government. The court concluded that the relator "assumed that [her former employer] billed for [the medical director]'s services, and she took no action to substantiate this ultimately incorrect assumption." In addition, by her own admission, the plaintiff's investiga-

tion was focused on the allegedly dangerous and substandard care the defendants provided to patients. Thus, the court concluded that although the defendants may have been aware of the plaintiff's investigation, the plaintiff could not show that she engaged in protected activity because she did not allege that she ever characterized the defendants' alleged conduct as fraudulent or illegal in her communications with her supervisors. Consequently, the court held that the plaintiff failed to create issues of material fact regarding whether or not she engaged in protected conduct and whether or not the defendants were aware of any such conduct. Correspondingly, the court concluded that the plaintiff could not establish that she was terminated from her job in retaliation for engaging in protected conduct.

Moreover, the court held that even if the plaintiff could establish a *prima facie* case of retaliation, the defendants met their burden of showing that she was terminated from her job for a non-retaliatory reason, namely, the plaintiff's alleged violation of the defendants' patient confidentiality policies. The court rejected the plaintiff's argument the defendants' proffered reason for terminating her employment was pretextual, since the plaintiff did not dispute that she contacted a patient's relative outside of work, and could not provide documentation showing that she had proper authorization from the patient to do so. The court stated that the "Defendants' employment policies are facially legitimate and, as such, will not be 'second-guessed' by this Court." As a result, the court granted the defendants' summary judgment motion and dismissed the plaintiff's False Claims Act claim with prejudice.

The court then declined to exercise supplemental jurisdiction over the plaintiff's state law claims, which were dismissed without prejudice.

Clayton v. District of Columbia, 2013 WL 1154098 (D.D.C. Mar. 21, 2013)

A plaintiff brought several federal, state, and common law employment claims against the District of Columbia and the D.C. National Guard, including claims for retaliation under the False Claims Act and the D.C. Whistleblower Protection Act. She also alleged constitutional violations. Specifically, the plaintiff alleged that she was appointed to a career service position and charged with leading the D.C. Government Operations Division of the D.C. National Guard—an agency of the D.C. government. In her role, the plaintiff reported to the Commanding General of the Joint Force Headquarters of the D.C. National Guard—a federal employee of the Department of Defense. Among the plaintiff's job duties were investigating and disciplining wrongdoing and reporting fraud, waste, and abuse. She alleged that she reported several incidents of unlawful conduct within the D.C. National Guard, including another employee's report of sexual harassment by the commanding general. The plaintiff claimed that after she reported the

sexual harassment claim, the commanding general threatened to terminate her employment—which occurred on multiple occasions over a year-plus period. The plaintiff further alleged that she reported a human resources supervisor's wrongdoing to the commanding general, including the supervisor's alleged improper use of a D.C. National Guard credit card and other financial misconduct.

The plaintiff claimed that while she was reporting these instances of alleged misconduct to the commanding general, the general was seeking advice from the D.C. Attorney General regarding his authority over personnel decisions with respect to employees within the plaintiff's division. The attorney general replied that the plaintiff's division was a subordinate of the D.C. Mayor and that the commanding general was free to collaborate with the mayor and other D.C. government officials on significant personnel matters. One month later, the plaintiff was informed that her position was being converted from a career position to an at-will position. After learning that no career positions were vacant, the plaintiff alleged that she accepted the change to her job description. However, less than a month after accepting her new at-will position, she was given two weeks' notice that she was being terminated from the position without cause. The plaintiff subsequently filed her complaint against the defendants. The defendants moved to dismiss the plaintiff's claims for failure to state a claim. In addition, the D.C. National Guard moved to dismiss for lack of subject matter jurisdiction, arguing that neither it nor Congress waived sovereign immunity from the plaintiff's suit.

Holding: The U.S. District Court for the District of Columbia granted the D.C. National Guard motion and dismissed the plaintiff's claims against that defendant. However, the court denied the city's motion and allowed the plaintiff to maintain her FCA and DCWPA claims against that defendant.

Retaliation

The D.C. National Guard argued that, as a federal entity, it enjoyed sovereign immunity from the plaintiff's suit, and thus, the court lacked subject matter jurisdiction over the plaintiff's claims against it. The plaintiff did not dispute that this defendant was a federal entity, but argued that the court had subject matter jurisdiction over her claims because federal courts have jurisdiction to hear claims regarding military personnel decisions where constitutional wrongs are alleged. The court acknowledged that federal courts have jurisdiction to hear claims alleging constitutional violations with respect to military personnel decisions, but held that this authorization does not disrupt "the well-settled principle that sovereign immunity bars claims against federal agencies for *damages* caused by constitutional violations." (emphasis in original) Since the plaintiff failed to show that the D.C. National Guard's sovereign immunity was waived, the court held that it lacked subject matter jurisdiction over her claims against that defendant. As a result, the plaintiff's claims against the D.C. National Guard were dismissed.

The court then turned to the plaintiff's claims against the District of Columbia. The city argued that the plaintiff failed to allege sufficient facts to establish a causal connection between her alleged protected conduct and the adverse employment action taken against her. The court observed that, at the motion to dismiss stage, alleging retaliation presents "a low hurdle." The plaintiff argued that she adequately pled that the reclassification of her job to an at-will position and her eventual termination from that job constituted retaliation for her protected conduct—particularly given the close temporal proximity of about two months between the time of her final complaints regarding alleged misconduct and the adverse employment actions taken against her. The court held that the plaintiff's allegations were sufficient to state a claim and denied the city's motion to dismiss on that basis. The court then considered the city's argument that the plaintiff's claim under the D.C. Whistleblower Protection Act alleging that the reclassification of her job to an at-will position should be dismissed for untimeliness. The city contended that by statute, the plaintiff's DCWPA claims expired three years after the alleged violation occurred or one year after the plaintiff first became aware of the violation, whichever occurred first. The plaintiff's complaint was filed about 11 months after she was terminated from her job, but about 13 months after her position was reclassified. Thus, there was no dispute that the plaintiff's claim based on the termination was timely, but there was a dispute regarding the timeliness of the DCWPA claim based on the job reclassification. The court found that the parties implicitly agreed that a one-year limitations period applied to the plaintiff's DCWPA claim regarding the reclassification of her job to an at-will position. However, while the defendants argued that the year-long period began to run when the plaintiff first learned about the reclassification, the plaintiff argued that the period did not begin to run until she was terminated from her job two months later and first realized that the reclassification was retaliatory. The court sided with the plaintiff and held that if the plaintiff did not discover that the reclassification was retaliatory until she was terminated from her job, then her corresponding claim was not untimely. The court denied the city's motion to dismiss the DCWPA claim on that basis.

Glynn v. EDO Corp., 2013 WL 1150523 (4th Cir. Mar. 21, 2013)

A plaintiff filed an action under the False Claims Act's anti-retaliation provision, alleging that his former employer and its parent company fired him in retaliation for reporting the former employer to the government for what he believed was fraudulent conduct. Specifically, the plaintiff alleged that his former employer manufactured counter-improvised explosive devices (C-IEDs) for the U.S. government. He claimed that he was hired as an engineer for the company and that he raised concerns to his supervisor regarding his perception that the company's devices did not function properly at elevated temperatures, which, in his opinion, may have resulted in non-compliance with contract specifications. The plaintiff alleged that the defendant eventually began testing for the elevated temperatures

issue and placed a corrective component into the system to fix the problem the plaintiff discovered. However, the plaintiff claimed that the fix was only applied to units that the defendants had in stock, and not to the 800 units that were in the field—which the defendants refused to recall. Subsequently, the plaintiff contacted an Assistant United States Attorney and reported his concern that his former employer was shipping units that put U.S. troops in jeopardy. He later shared his concerns with an FBI agent and an agent with the Department of Defense Criminal Investigative Service. Eventually, the government conducted two rounds of testing on the units—including tests on units in the field. While the units from the field did not test as well as those the defendants had in stock, the government concluded that the reduction in quality was not significant and concluded that the field units passed the testing. The plaintiff, though, continued to maintain that the field units had failed the test. Weeks later, the plaintiff's former employer made the decision to terminate his employment, effective two months later—after the plaintiff completed his work on a final project. The plaintiff then filed his lawsuit. Both parties moved for summary judgment. The U.S. District Court for the District of Maryland granted the defendants' motion, finding that the plaintiff did not engage in "protected conduct" under the False Claims Act, and thus, was not entitled to protection under the anti-retaliation provision. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit.

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

The circuit court first noted that in order to prove his retaliation claim, the plaintiff must show that he: (1) engaged in protected activity by acting in furtherance of a *qui tam* claim; (2) his former employer was aware of his conduct; and (3) his former employer took adverse action against him as a result of his conduct. With respect to the first element, the plaintiff argued that he engaged in protected conduct by investigating and opposing his former employer's provision of allegedly defective units to the government; that he investigated and opposed the company's allegedly false certifications of compliance with contractual requirements; and that he initiated a government investigation of the company's allegedly fraudulent conduct. The circuit court, though, relying in part on the government's own testing and corresponding conclusions, held that the issues about which the plaintiff complained did not rise to the level of a contractual violation, and thus, did not result in the defendants' alleged false certifications of compliance. Consequently, the circuit court held that the plaintiff's "purported investigation activities did not raise a distinct possibility of a viable FCA action and are not protected."

The court clarified that its conclusion was not based on the fact that the plaintiff has not reviewed the contracts at issue and thus, could not necessarily articulate that the defendants falsely certified compliance with contractual specifications. With respect to that issue, the court stated that "such a requirement would allow employers to insulate themselves by prohibiting employees from ever accessing

contractual documents. Circumstantial evidence can raise a distinct possibility of a viable FCA action even where an employee does not have access or has not actually viewed the contractual documents." Still, the Fourth Circuit ultimately held that the plaintiff did not engage in protected conduct because the defendants' allegedly false certification to the government was not "material" under the False Claims Act, since the defendants—through the plaintiff—actually conducted the testing required under the contract, and the contract did not require the defendants to do more. Thus, the defendants' certifications of compliance with the contract's requirements were true.

The circuit court also rejected the plaintiff's assertion that he engaged in protected conduct since his complaints resulted in a government investigation of the defendants' practices. For the reasons discussed above, the court held that the plaintiff's complaints to various government agencies did not create the distinct possibly of a viable FCA claim. As a result, the circuit court affirmed the district court's decision to dismiss the plaintiff's retaliation claim.

Guerrero v. Total Renal Care, Inc., 2013 WL 1136672 (W.D. Tex. Mar. 18, 2013)

A plaintiff—a registered nurse—alleged that his former employer—a renal care facility—terminated his job in retaliation for his internal report of another nurse's Medicare and Medicaid fraud. The defendant claimed that there was no unlawful retaliation, but instead, that the plaintiff was fired because of his history of disciplinary problems at work. Both parties moved for summary judgment, among other pre-trial motions.

Holding: The U.S. District Court for the Western District of Texas denied both parties' motions, finding that disputed issues of material fact precluded summary judgment in favor of either party.

Retaliation

The plaintiff claimed that he had worked for the defendant for about 6.5 years and provided in-patient dialysis and related services pursuant to contracts the defendant had with local hospitals. He further alleged that he discovered that another nurse misreported the type of treatment he (the other nurse) had performed on documents the defendant used for billing purposes. The court determined that the defendant would not have directly submitted the other nurse's documentation to the federal government as part of a Medicare or Medicaid reimbursement claim, but acknowledged that defendant would use applicable nurses' records when preparing Medicare and Medicaid bills. The relator claimed that he discussed the matter with two members of the defendant's senior staff, and that he was terminated from his job in part because he reported this matter. The defendant denied that the plaintiff ever discussed this

incident with any senior staff members and claimed to have discovered the incorrect reporting independent of the plaintiff. The defendant stated that it concluded that the inaccurate reporting was merely a mistake, since the employee accurately reported the type of treatment on other documentation.

According to the defendant, the plaintiff was fired because of continuing disciplinary problems. The defendant pointed to an incident in which a patient complained about the plaintiff's unprofessional behavior during a treatment. This complaint was eventually relayed to the defendant's senior staff—including one of the staff members to whom the relator allegedly complained about the other nurse's misreporting. The court determined that the defendant investigated the complaint and that the senior staff employee interviewed a few witnesses, but the results of the investigation were inconclusive. However, after the senior staff member met with the complaining patient, he went to speak to the plaintiff about the issue. The senior staff member claimed that the plaintiff changed the subject from the patient's complaint about him to other nurses' alleged misconduct that resulted in patient deaths. The plaintiff agreed that he changed the subject to other nurses' misconduct, and that during that discussion, he alleged the misreporting discussed above. After the conversation ended, the plaintiff claimed that he then contacted the other senior staff member to discuss the alleged reporting fraud. Both senior staff members deny ever speaking to the plaintiff about his allegation that other nurses committed Medicare or Medicaid fraud. About a week after these conversations occurred, the two senior staff members called the plaintiff into a meeting and informed of their decision to terminate his employment. The plaintiff received an unsigned letter that did not provide a reason for the termination; neither senior staff member verbally explained to the plaintiff why he was being terminated either. The plaintiff alleged that the termination was retaliatory, while the defendant claimed that the decision was made due to the plaintiff's history of disciplinary problems, including the most recent patient complaint.

Both parties moved for summary judgment. The district court denied both motions. First, the court concluded that "[r]easonable minds could differ as to whether a preponderance of the evidence show that Plaintiff made an internal complaint regarding a falsified record related to a claim for payment from the government." The court rejected the defendant's contention that since the plaintiff never made a complaint through the defendant's internal compliance program, he did not engage in protected activity for FCA purposes. Instead, the court held that, at the summary judgment stage, it would draw all reasonable inferences in favor of the non-moving party—here, the plaintiff—and would not make credibility determinations. The court also held that it was irrelevant that the plaintiff did not threaten to file a *qui tam* action, since the complaints the plaintiff allegedly made would have put the defendant on notice that the plaintiff was investigating fraud.

The court also determined that there were issues of disputed fact regarding why the plaintiff was fired. The plaintiff offered evidence in support of his allegation that the decision to fire him was retaliatory, including the fact that he was fired only a week after allegedly reporting his concerns about Medicare/Medicaid fraud to the defen-

dant, the fact that the decision to fire him was made by the two senior staff members to whom he allegedly complained, and the fact that the defendant's termination letter provided no reason for the termination. The defendant offered evidence of non-retaliatory reasons for firing the plaintiff, namely, his history of disciplinary problems, which included "write-ups" over three consecutive years and the plaintiff's purported general "attitude problem."

Based on these findings, the court denied both parties' summary judgment motions.

Winston v. Academi Training Ctr., Inc., 2013 WL 989999 (E.D. Va. Mar. 13, 2013)

Two plaintiffs filed a claim against their former employer, a company that had been contracted by the U.S. Department of State, alleging that the company wrongfully retaliated against them when they reported the company's allegedly false claims and false records to the government. They alleged causes of action under the False Claims Act's anti-retaliation provision, as well as under state law. Specifically, they alleged that the defendant's contract with the government required periodic weapons qualification recertification reports. The plaintiffs further claimed that the defendant hired both of them as independent contractors to serve as firearms instructors, and that in that capacity, they witnessed other contractors submitting false firearm certification records for shooters they were instructing—one of the plaintiffs also claimed that he was asked to complete a weapons qualifications report using made-up numbers. The plaintiffs alleged that they were fired from their jobs one day after reporting this misconduct to their supervisor and were placed on the State Department's "Do Not Use" list, which prevented them from obtaining future employment under State Department contracts; the defendant claimed that the two were fired for failing to report the fraud in a timely manner and for participating in the fraud themselves. The defendant moved to stay or dismiss the plaintiffs' action, claiming that the parties' dispute was subject to arbitration.

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

Retaliation

The court first noted that, as a cause of action that arises under federal law, the plaintiffs' claim under the False Claims Act's anti-retaliation provision was presumably subject to arbitration under the Federal Arbitration Act. However, the court also noted that arbitration must not be compelled in "cases which are inarbitrable—where arbitration could not vindicate a federal statutory cause of action." In resolving disputes over whether or not arbitration is required, the court looked not to "the conditions under which the agreements were signed, only to whether the terms of the agreement describe a sufficient forum for vindicating the plaintiff's right." The court, relying on

Fourth Circuit precedent, further found that arbitration agreements will not be enforced where the arbitration provision gives the defendant the unilateral right to select the group from which the arbitrator will be selected and/or allowed the defendant to establish the rules and procedures by which the arbitration would be conducted. In the present case, the court found that, although the arbitration provision did not give the defendant sole discretion to choose the arbitrator, it did "preclude the effective vindication of the Plaintiffs' rights under the FCA" because it eliminated all discovery—which the court stated would make the plaintiffs' claims nearly impossible to prove—and it required the plaintiffs to pay the defendants' fees and costs, regardless of the outcome—which contradicted the FCA's fee-shifting provision, which requires defendants to pay successful plaintiff's fees and costs. Not only did the court determine that these provisions restricted the plaintiffs' ability to vindicate their rights, it held that the arbitration provision was unconscionable. The court further held that severing the unconscionable terms of the arbitration clause and leaving in the remaining terms was not proper, since doing so would "create[] an incentive to get away with as many 'bad' arbitration provisions as possible, knowing that the worst case scenario is a court sending the case to arbitration with some of [the bad provisions] stripped out. Consequently, the court refused to enforce the arbitration provision in its entirety and denied the defendant's motion.

U.S. ex rel. Howze v. Allied Physicians Inc., 2013 WL 950536 (N.D. Ind. Mar. 11, 2013)

A plaintiff brought a race discrimination claim against his former employer—a group of affiliated physicians and the sleep center they operated. The parties entered into a settlement and release agreement, and the plaintiff's suit was dismissed with prejudice. While the plaintiff's suit was still pending, however, he filed a *qui tam* complaint against the defendants on behalf of the United States and the State of Indiana. The *qui tam* suit also included a claim under the False Claims Act's anti-retaliation provision. The United States declined to intervene in the *qui tam* action, but did not make its decision—which allowed for the *qui tam* complaint to be unsealed and served on the defendants—until after the settlement agreement had been reached in the race discrimination case. The defendants moved to dismiss the *qui tam* complaint, arguing that the retaliation claim was barred by *res judicata* and that the plaintiff could not proceed with his fraud claims as a *pro se* relator.

The U.S. District Court for the Northern District of Indiana granted the defendant's motion to dismiss the retaliation claim, but denied the motion to dismiss the fraud claims.

The court agreed with the defendants that *res judicata* applied to the retaliation claim. First, the court observed that the same parties were involved in both the

plaintiff's race discrimination case and his FCA retaliation claim—a fact the parties did not dispute. Next, the court held that a final judgment on the merits was reached in the race discrimination case, since the case was resolved by the parties' stipulation of dismissal. Finally, the court concluded that there was an identity of causes of action between the two suits, since both employment law claims arose out of the same operative facts. In addition, the court held that the settlement agreement "irrevocably and unconditionally" released the defendants from all liability—and specifically stated that the plaintiff would not pursue any additional claims related to his prior employment with the defendants. The court held that the agreement barred the plaintiff's FCA retaliation claim. The court rejected the plaintiff's argument that the settlement agreement was void for lack of consideration, since the evidence showed that the plaintiff received a monetary payment in exchange for the release—the court would not inquire into the adequacy of the consideration the plaintiff received. Consequently, the court dismissed the retaliation claim. Additionally, the court granted the defendants' request for attorneys' fees, as the settlement agreement explicitly provided for that remedy.

The defendants also moved to dismiss the plaintiff's fraud claims, brought under the federal and Indiana false claims acts, arguing that the plaintiff's *qui tam* counsel had withdrawn from the case and that he could only proceed as a false claims act relator through counsel. The court, though, observed that the plaintiff had secured new counsel, noting that the court had granted another attorney's application to appear *pro hac vice* in the *qui tam* suit. As a result, the court held that the relator was represented by counsel and could proceed with his *qui tam* claims.

Leggins v. Orlando Housing Auth., 2013 WL 937739 (M.D. Fla. Mar. 11, 2013)

A plaintiff brought several employment law claims against her former employer—a municipal housing authority—including a claim under the False Claims Act's anti-retaliation provision. The plaintiff alleged that she had been employed as the defendant's finance director for eight years and took over the job duties of the defendant's CFO when he became ill and later passed away. She alleged that she requested to receive the CFO's salary, but that her request was denied. She claimed that during her employment, she discovered that the defendant was misusing federal funds. She alleged that she reported her discovery to the defendant's COO and CEO multiple times and tried to stop some of the abuses. However, she said that after she raised her concerns, she was transferred to another housing authority, her computer access was restricted, and she was again not promoted to the permanent CFO position. Her employment was terminated months later. The defendant moved to dismiss the plaintiff's claims, arguing that her claim under the False Claims Act should be dismissed because she could not obtain punitive damages under that statute.

Holding: The U.S. District Court for the Middle District of Florida granted the defendant's motion to dismiss the False Claims Act retaliation claim, to the extent that the plaintiff sought punitive damages with respect to that claim.

Retaliation

The court began its analysis by noting that the Eleventh Circuit has not yet commented on the availability of punitive damages under the FCA's anti-retaliation provision. However, after looking to the plain language of the statute, the court observed that while the statute lists specific forms of relief available to plaintiffs—namely, reinstatement with the same seniority status, twice the back pay owed, interest on the back pay, and "compensation for special damages" which includes costs and attorneys' fees—it does not include punitive damages. The court further noted that the FCA does allow for the imposition of punitive damages—in the form of civil penalties—against those who violate the statute's anti-fraud provisions. Consequently, the concluded that "Congress did not intend for a prevailing employee to receive punitive damages under [the anti-retaliation] section."

Huang v. Rector and Visitors of Univ. of Va., 2013 WL 865845 (W.D. Va. Mar. 7, 2013)

A plaintiff brought a claim against two doctors affiliated with the state university that had previously employed him, alleging that the defendants violated the False Claims Act's anti-retaliation provision. The university was also named as a defendant. The plaintiff claimed that he was hired by the university as a research assistant professor and that he performed research in a lab run by one of the individual defendants (Dr. Li)—whom the plaintiff alleged was his supervisor and mentor. The other individual defendant (Dr. Johnson) was the chairman of the department within the university that oversaw the plaintiff's research. The plaintiff alleged that he applied for federal grant funds from the National Institutes of Health (NIH) for a proposed research project and received approval from the individual defendants and from NIH to serve as the "principal investigator" on the project, even though the work would be performed in Dr. Li's lab. The plaintiff claimed that shortly after he began working on the project, he became concerned that someone else had taken control over the grant funds, as he had not been receiving monthly status reports regarding the grant. He alleged that he contacted Dr. Johnson with his concerns and eventually received the status reports, which revealed that Dr. Li had made unauthorized changes on the grant that inaccurately reflected the work that was being performed on the project—Dr. Li's changes allegedly allocated inappropriate salaries and expenses to the plaintiff's project, resulting in a misappropriation of grant funds to work that was not performed on the plaintiff's grant project. The plaintiff alleged that he reported Dr. Li's conduct to Dr. Johnson, who denied that Dr. Li had done anything wrong, but assured

the plaintiff that Dr. Li's changes would be adjusted so that any grant funds that had been withdrawn would be returned. Soon after, the plaintiff alleged that he was informed by Dr. Johnson that the university would not renew his employment contract. The plaintiff believed that this decision was made in retaliation after he raised concerns about the appropriation of the grant funds. He subsequently filed his lawsuit alleging retaliation. After a four-day jury trial, Drs. Li and Johnson were found liable and judgment was entered in favor of the plaintiff—the plaintiff was awarded more than $150,000 in lost wages and $500,000 in compensatory damages. The individual defendants then moved for judgment as a matter of law or for a new trial and for a new trial *nisi remittitur*—which challenged the award to the plaintiff as excessive. The plaintiff moved for equitable relief in the form of front pay, *in lieu* of reinstatement to his prior position.

Holding: The U.S. District Court for the Western District of Virginia denied the defendants' motion for judgment as a matter of law, but granted their motion for a new trial *nisi remittitur*. In addition, the plaintiff's compensatory damages award was reduced from $500,000 to $100,000, and the plaintiff's motion for front pay was denied.

Retaliation

The individual defendants first argued that they were entitled to judgment as a matter of law because the False Claims Act's anti-retaliation provision does not provide for individual liability. The court observed that prior to 2009, the FCA clearly did not provide for individual liability, but noted that in 2009, Congress amended the statute and removed references to retaliation "by an employer." The court held that this change "arguably expand[ed] the universe of possible defendants to include individual supervisors," which would affect the present case, since the alleged retaliation occurred in late 2009, months after the retaliation provision was amended. The defendants then argued that the court should re-visit the individual liability question, stating that if there is no individual liability under the FCA's anti-retaliation provision, then the court did not have subject matter jurisdiction to hear the plaintiff's case. The court disagreed, finding that the "[d]efendants' argument about the availability of individual liability does not raise a jurisdictional question; rather it goes to whether Plaintiff can state a claim and to the merits of his case." Thus, the court held that the defendants did not raise a non-waivable jurisdictional argument. The court then rejected the defendants' argument that they had not waived their individual liability argument because there was an intervening change in the law regarding that issue. Instead, the court found, in line with the defendants' own arguments, that for nearly 150 years, the False Claims Act's anti-retaliation clearly did not provide for individual liability. Thus, the court reasoned, the defendants could have raised the individual liability issue at an earlier stage of the litigation. The court held that there was no "intervening change in the law that would excuse Defendants' failure to raise the issue of individual liability

before or during trial, and they have therefore waived that argument." The court then refused to decide the issue as moot.

The court then considered the defendants' argument that they were entitled to a new trial because the court allowed the plaintiff to argue to the jury a claim that was different from that alleged in his complaint and which was not supported by the jury instruction filed before the trial. They argued that they were unfairly surprised by the jury instructions the plaintiff proposed during the trial, which specified that a violation of the FCA's anti-retaliation provision would include "knowingly making, using, or causing to be used, a false record or statement material to a false or fraudulent claim." The defendants argued that this instruction transformed the plaintiff's case from a dispute over the alleged misappropriation of federal funds to a case that only required the creation of a false record that could potentially have resulted in the submission of a false claim. The court, though, concluded that the jury instruction was proper, since the FCA's anti-retaliation provision specifically protects individuals from retaliation when they engage in lawful acts in furtherance of an FCA case or to stop violations of the statute, and since the jury instruction was taken directly from one of the FCA's anti-fraud provisions—and it was the violation of that same provision that the plaintiff alleged he was trying to stop.

In addition, the court held that the evidence presented to the jury supported their verdict in favor of the plaintiff, rejecting the defendants' arguments that: (1) the jury unreasonably found that the plaintiff suffered retaliation because he was going to be fired anyway for a non-retaliatory reason; and (2) neither defendant knew that a false claim would be submitted to NIH, and thus, could not have retaliated against the plaintiff for engaging in protected activity under the False Claims Act. The court held that the jury had a reasonable basis to conclude that the plaintiff was fired for a retaliatory reason, given the temporal proximity between when he raised his concerns to the defendants and when the decision was made not to renew his contract. The court further noted that the plaintiff's retaliation claim was not dependent on proof that the defendants defrauded NIH, stating that "Plaintiff did not need to prove that Defendants knowingly presented to the government false or fraudulent claims or even that they knowingly made false records or statements material to a false or fraudulent claim. All he had to prove is that Defendants retaliated against him [in violation of the FCA's anti-retaliation provision]." The court held that the plaintiff presented sufficient evidence to support the jury's finding that all elements of the retaliation claim had been satisfied, namely, that (1) the plaintiff engaged in protected activity, based on his reasonable belief that the defendants had improperly allocated a portion of the NIH grant funds to a different project, resulting in a fraud on the government; (2) the defendants had knowledge of his protected activity, since he pled that Dr. Li had personal knowledge of the false records and since the plaintiff directly told Dr. Johnson about the alleged fraud; and (3) the defendants took an adverse action against the plaintiff in retaliation for his protected activity, since, as mentioned above, there was evidence suggesting that the plaintiff's contract was not renewed, at least in part, because he engaged in protected activity.

The court then turned to the defendants' argument for a new trial *nisi remittitur*, in which they asserted that the $500,000 award to the plaintiff for compensatory damages was excessive. The defendants requested that the plaintiff accept $10,000 in compensatory damages or submit to a new trial. The court began its analysis by reviewing similar cases within the circuit. First, the court determined that the Fourth Circuit has not announced a bright-line rule regarding the appropriateness of six-figure compensatory damages awards in the absence of medical evidence, and has even allowed plaintiffs' awards to be based solely on a plaintiff's testimony. However, the circuit court has also made clear that plaintiffs who seek large compensatory damages awards for emotional distress "must reasonably and sufficiently explain the circumstances of the injury and not resort to conclusory statements." In addition, the Fourth Circuit had indicated that past awards should serve as guidelines to assist judges in determining whether to grant a new trial *nisi remittitur*. After reviewing the damages awards in several past cases, and after considering whether or not the jury's compensatory damages award was proportional to the injuries the plaintiff's alleged he suffered, the court concluded that "the specific amount of compensatory damages awarded was against the weight of the evidence. Plaintiff did not present any medical evidence of his emotional distress, nor did he testify that he ever sought any medical attention or psychiatric or psychological treatment." However, the court did find that the plaintiff presented evidence showing that after his university contract was not renewed, which ended his career at the university and caused the NIH research project to fail, the plaintiff's ability to receive future NIH grant funds was damaged and thus, his career options were limited. The plaintiff also alleged, without contradiction, that he lost 50 pounds as a result of the distress he suffered, his sleep pattern was disrupted, and his marriage suffered when his wife was forced to find a job to support him. The court balanced these considerations and granted the defendants' motion for a new trial *nisi remittitur*, reducing the compensatory damages to award to the plaintiff from $500,000 to $100,000. The court gave the plaintiff the options to either accept the new compensatory damages award or to proceed to a new trial.

Finally, the court denied the plaintiff's motion for more than $600,000 in front pay. The plaintiff argued that such an award was proper because the parties agreed that reinstatement of the plaintiff's job was not a viable option. The court noted that front pay is an equitable remedy that is not designed to halt a present or continuing violation of federal law, but rather, seeks prospective relief. As such, the court held, the remedy of front pay was barred in this instance by the Eleventh Amendment, since the two individual defendants, in their official capacities, were synonymous with a state-owned university.

Master v. LHC Group Inc., 2013 WL 786357 (W.D. La. Mar. 1, 2013)

A plaintiff brought a claim against her former employer, a healthcare consulting firm, alleging retaliation under the False Claims Act. The plaintiff alleged that the defendant had been hired to perform a Medicare compliance audit for a healthcare

company and that the relator worked on that project. She further alleged that her employment was terminated a few months after she was hired. Soon after, she filed a *qui tam* action against the healthcare company that was subject to the audit, and the United States intervened in and eventually settled some of her claims, resulting in a multi-million dollar award to the relator. The plaintiff's former employer learned of the *qui tam* suit when it was unsealed and served on the healthcare company, and then filed its own suit against the plaintiff in Texas state court, alleging that she violated her employment contract by using records obtained during the course of the audit as evidence in her *qui tam* suit. The plaintiff then amended her *qui tam* action to add the present FCA retaliation claim against the former employer. She alleged that the company retaliated against her by firing her, and also filed the state court action against her in retaliation for being unwillingly implicated in her *qui tam* suit, which damaged the company's relationship with the *qui tam* defendant. In addition, she sought a declaratory judgment proclaiming that the defendant's state law claims were preempted by federal law, namely the False Claims Act. She also sought to remove the defendant's state law claim to federal court, arguing that the case involved the resolution of significant issues of federal law. Her request to remove the defendant's suit was denied, however.

The defendant moved to dismiss the retaliation claim, arguing that the claim was barred under principles of *res judicata* and collateral estoppel; that her claims for pre-termination retaliation were barred by the FCA's three-year statute of limitations; and that she could not state a claim for post-termination retaliation, since the False Claims Act does not provide a remedy for such claims.

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

Retaliation

The Louisiana district court first considered the defendant's *res judicata*/collateral estoppel argument. The defendants argued that the retaliation claim had been previously litigated and resolved in their favor, when the relator's request to transfer the defendant's Texas state court suit to federal court was denied—the defendant argued that the Texas district court rejected the plaintiff's theory of liability. But the Louisiana district court held that its sister court in Texas did not make any findings with respect to the retaliation claim and merely found that it lacked subject matter jurisdiction over the defendant's state law claim. Thus, neither *res judicata* nor collateral estoppel barred the plaintiff's retaliation claim. Moreover, the court noted that the defendant had already waived its right to assert these defenses by failing to amend its answer to include those defenses before the deadline for doing so expired.

The court then turned to the defendant's argument that the claims for pre-termination retaliation were untimely—they argued that the False Claims Act establishes a three-year statute of limitations, but that the plaintiff's *qui tam* suit was not amended

to include the retaliation claim until four and a half years after any such retaliation was alleged to have occurred. The plaintiff countered that her claim was saved by the Texas savings statute or by Louisiana's prescriptive rules. The court agreed with the defendants. First, the court found that the Texas savings statute only applies to counterclaims and cross-claims, and thus, could not save the plaintiff's FCA claim, which was a separate claim in a different lawsuit, and not a counterclaim in the Texas state court action. The court also found that Louisiana's prescriptive rules could not save the plaintiff's claim. The plaintiff argued that the filing of her *qui tam* action interrupted prescription for all other claims arising out of that cause of action—including her FCA retaliation claim. The court, though, found that the statute of limitations was not interrupted, since the original *qui tam* filing did not include any claims against her former employer. The court reasoned that the plaintiff's former employer was not put on notice of any legal demands by the plaintiff until after it filed its state law claim and was subsequently added as a defendant to the plaintiff's FCA suit. Since the plaintiff did not bring any claims against the defendant until more than four years after any pre-termination retaliation was alleged to have occurred, the court granted the defendant's motion to dismiss those claims.

The court also dismissed the plaintiff's post-termination claims. The plaintiff argued that the FCA provides a remedy for post-termination retaliation, relying on a single district court case that recognized the "potential" for such relief. The court rejected the plaintiff's argument, finding that "all courts to have addressed this issue have . . . held that [the FCA's anti-retaliation provision] does not provide a remedy for post-employment retaliation."

Once the retaliation claims were dismissed, the court likewise dismissed the plaintiff's request for declaratory judgment, finding that the court had no independent ground for jurisdiction to consider the motion.

Watts v. Lyon County Ambulance Serv., 2013 WL 557274 (W.D. Ky. Feb. 12, 2013)

A plaintiff brought employment claims against a county fiscal court and a county ambulance service. The plaintiff alleged that he was contracted to serve as the director of the county ambulance service and that the county fiscal court approved the contract. He further claimed that during his employment, he was instructed by members of the ambulance service's board to overcharge Medicare and Medicaid for ambulance services, and when he refused to do so and made his decision known to the ambulance service's board members, the defendants conspired to induce a former ambulance service employee to falsely claim that he sexually harassed them, in exchange for reemployment. After the sexual harassment claim was made against him, the board terminated his employment. As a result of this alleged conduct, the plaintiff brought several claims against the defendants, including a claim under the False Claims Act's anti-retaliation provision. The defendants moved to dismiss, with the fiscal court arguing that it was never the plain-

tiff's employer, and therefore, the plaintiff could not maintain his employment claims against it, and the ambulance service arguing that the plaintiff failed to state a claim under the False Claims Act.

Holding: The U.S. District Court for the Western District of Kentucky granted the fiscal court's motion to dismiss—which was ultimately converted into a motion for summary judgment. The court also granted theambulance service's motion to dismiss.

Failure to State a Claim

The district court first converted the fiscal court defendant's motion to dismiss into a motion for summary judgment, noting that the fiscal court introduced affidavits and facts outside the pleadings in support of its contention that it was not the plaintiff's employer and took no adverse employment action against him. The district court determined that summary judgment was appropriate, since even after drawing all reasonable inferences and construing all facts in favor of the plaintiff, there were no genuine factual disputes regarding the fiscal court's relationship to the plaintiff. The fiscal court presented evidence supporting its claim that it exercised no oversight or control over the ambulance service and its employment decisions, and that ambulance service employees are not employed by the county. In addition, the fiscal court argued that, pursuant to state law, only the ambulance service's board—not any governmental unit—was authorized to employ personnel and compensate them. The court further found no evidence to support the plaintiff's contention that the fiscal court reviewed his employment contract; the plaintiff was not referenced in the fiscal court's meeting minutes immediately before and immediately after his hiring. Finding no issues of disputed material fact regarding whether or not the fiscal court could be deemed the plaintiff's employer, the court held that summary judgment in favor of the fiscal court was warranted, and dismissed the plaintiff's claims against that defendant.

The district court then turned to the ambulance service's motion to dismiss, and determined that "[t]o establish a prima facie case of retaliation under § 3730(h), a plaintiff must show: (1) he is engaged in a protected activity; (2) his employer knew he was engaged in the protected activity; and (3) his employer took adverse action against him as a result of the protected activity." The district court examined each element in turn. First, the court noted that, in the Sixth Circuit, "protected activity" under the False Claims Act must relate to exposing fraud against the government or otherwise be connected to "a false claims disclosure"—the court reasoned that, under Sixth Circuit precedent, reporting wrongdoing to supervisors, urging compliance with applicable laws and regulations, and making a "one-time verbal challenge to [an] employer's alleged unlawful conduct" is not enough to meet the "protected activity" standard. The court concluded that the plaintiff's alleged refusal to overcharge Medicare and Medicaid and his alleged notification to the ambulance service board was "based on a single event," and was akin to a "one-time verbal challenge." The court noted that the plaintiff did not

allege that he submitted a report or any other communication to his employer alleging fraud against the government or that he took any other action in furtherance of a *qui tam* action. In addition, the court noted that the plaintiff never alleged that the ambulance service actually submitted false Medicare or Medicaid claims. Consequently, the court held that the plaintiff could not prove the first element of an FCA retaliation claim, and granted the ambulance service's motion to dismiss the plaintiff's FCA claim.

Solano-Reed v. Leona Group, LLC, 2013 WL 501612 (E.D. Mich. Feb. 11, 2013)

A plaintiff filed an action against her former supervisors at a charter high school where she worked as a guidance counselor, as well as the company that owned and operated the school. The plaintiff alleged that she had been hired under a contract that provided for annual renewals. She alleged that after five years, her contract was not renewed, in retaliation for her efforts to investigate her suspicions that the school was improperly administering a state-required standardized exam only to a select group of eligible students, in order to receive federal and state funding under the No Child Left Behind Act. She alleged that she repeatedly reported her concerns to one of her supervisors –a defendant in the case—which caused her relationship with that supervisor to deteriorate. She later sent a memo to two other supervisors—also defendants—informing them that she felt threatened, harassed, and intimidated by the first supervisor. She eventually sent an anonymous email to the state's department of education, inquiring about the legality of the school's testing protocol with respect to which students would be given the standardized test. The government official did not take issue with the school's testing practices, but indicated that, at some point, the school would be required to test the students who did not receive the test the first time. The plaintiff also contacted the CEO of the school's parent company, and complained of the alleged harassment she experienced on the job. However, the CEO determined that her complaints were unfounded. When she later received a poor performance review, she refused to sign it and instead drafted a rebuttal in which she detailed why the review was "malicious." After her contract was not renewed, she filed a complaint against the defendants, alleging, among other things, violations of the False Claims Act and the Michigan Whistleblower's Protection Act. The defendants moved for summary judgment on these claims, arguing that the plaintiff did not engage in protected activity under either statute and thus, could not show that any such activity led to the retaliation she allegedly suffered.

Holding: The U.S. District Court for the Eastern District of Michigan granted the defendants' motion and dismissed the plaintiff's claims.

Retaliation

The plaintiff argued that she tried to stop the school from defrauding the No Child Left Behind Act, and thus, engaged in protected activity under the False Claims Act and the Michigan Whistleblower's Protection Act. The court disagreed, finding that the plaintiff offered no evidence that any of her actions were motivated by concerns about the government's allocation of funds to the school or the school's use of those funds; instead she could only show that she objected to the school's practices because of her ethical obligations as a guidance counselor. Since her actions did not further a viable *qui tam* action, the court held that they did not constitute "protected activity" under either statute.

The court also determined that the plaintiff "failed to show that he retaliation was motivated at least in part by her engaging in protected activity," as the court found that the plaintiff failed to show that the defendants believed that she was contemplating a *qui tam* action against the school. As a result, she could not prove causation under either statute.

As a result of these findings, the court dismissed the plaintiff's retaliation claims under the False Claims Act and the Michigan Whistleblower's Protection Act.

Ross v. Bob Dean Enter., Inc., 2013 WL 393108 (E.D. La. Jan. 30, 2013)

A plaintiff filed a claim under the False Claims Act's anti-retaliation provision against her former employer, a nursing home. She alleged that the nursing home treated about thirty Medicare or Medicaid patients who required wound care services. She further alleged that, as a licensed nurse, she provided the wound care services on the weekends and eventually discovered that the nursing home was billing Medicare and Medicaid for wound treatments that had not occurred and even for wounds that did not exist. She alleged that she reported the fraud to the state board of nursing, but asked the board not to pursue the claim after the defendant fired a major participant in the fraud. However, she allegedly began to suffer retaliation in the workplace, and after again complaining to the board, she was terminated from her job; according to the plaintiff, the defendant claimed that she was fired so that full-time nurses could work the weekend shifts, although another weekend nurse was subsequently hired. About two and a half years later, the plaintiff filed a *qui tam* suit against the nursing home, alleging healthcare fraud. Her complaint also included the present claim for retaliation. The *qui tam* suit was filed under seal. After the government successfully moved the court to extend the seal three times and after the case was reassigned to a different judge, the government informed the court of its decision not to intervene in the suit, and the court ordered that the complaint be unsealed. Months later, a summons was issued, and the defendant was served with the complaint a few weeks later.

The defendant moved to dismiss the plaintiff's claim, arguing that the claim was time-barred under the False Claims Act's statute of limitations and that service of the complaint was not timely. The defendant argued that, at the time the plaintiff was terminated from her job—in 2007—the False Claims Act did not include a statute of limitations for retaliation claims, and that, pursuant to a U.S. Supreme Court ruling, courts were directed to apply "the most closely analogous state limitations period." The defendant argued that the state's one-year limitations period applicable to personal injury actions applied to the plaintiff's retaliation claim. In addition, the defendant argued that the plaintiff's complaint was served in an untimely manner, because the plaintiff was obligated to serve the complaint within 120 days of the court unsealing it. The complaint was served more than 270 days after unsealing—and more than two years after the complaint was filed. The defendant claimed that the plaintiff did not show good cause for the delay in serving the complaint or request an extension of time, as required by Rule 4 of the Federal Rules of Civil Procedure.

Holding: The U.S. District Court for the Eastern District of Louisiana granted the defendant's motion to dismiss the retaliation claim.

FCA Retaliation Claims

Service of Process

The plaintiff countered that, pursuant to statute, her complaint was filed under seal, and she was not permitted to serve the complaint "until the court so orders." She further argued that after the complaint was unsealed, the court merely ordered that it be served on the defendant—without specifying a service date. The plaintiff argued that the defendant's assertion of a 120-day deadline was mistaken, as there is no rule that requires service of a complaint within 120 days of unsealing. The court turned to the plain language of the False Claims Act and found that the statute "contemplates the application of Rule 4(m)," as the FCA states that "defendant[s] shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure." The court was not persuaded that, after unsealing, the plaintiff's nearly ten-month delay in serving her complaint on the defendants was justified, merely because the court did not order service within a specified time. However, the court refused to dismiss the complaint on that basis, pursuant to its discretion, noting that, after the docket call, the court did specify that service should be accomplished within 30 days, and the plaintiff effected service on the 23rd day. The defendant's motion to dismiss the complaint on the basis of untimely service was denied.

Statute of Limitations

Ultimately, the court dismissed the plaintiff's retaliation claim with prejudice on statute of limitations grounds, finding that a one-year limitations period applied. The plaintiff, who filed her complaint about two and a half years after she was terminated, conceded that the claim was untimely.

Dillon v. SAIC, Inc., 2013 WL 324062 (E.D. Va. Jan. 28, 2013)

A plaintiff sued his former employer—a company that provided scientific and technical products and services—under the False Claims Act's anti-retaliation provision. The plaintiff alleged that he had been employed by the defendant as an engineer/manager for sixteen years. He claimed that in his managerial capacity, he supervised two other employees, but that—although his salary and benefits remained the same—his supervisory responsibility was taken away and he was demoted in retaliation for alerting his employer that his supervisor had instructed him to improperly bill time spent on non-billable, administrative tasks to a billing code used to bill the government, as well as for reporting that staff had improperly billed the government for unbillable "remedial" work that needed to be performed because of a major failure at one of the defendant's facilities. Subsequently, the plaintiff was terminated from his job. According to the defendant, the termination resulted from customer complaints, but the plaintiff alleged that he was fired in retaliation for complaining about time charging discrepancies. After he was terminated from his job, the plaintiff, for the first time, raised his concerns with the defendant's "employee ethics council." The defendant moved for summary judgment on the plaintiff's claim.

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

FCA Retaliation Claims

The plaintiff alleged that he engaged in four distinct acts that should be considered "protected activity" for purposes of the FCA's anti-retaliation provision, namely: (1) investigating his superior's instructions to bill purportedly non-billable administrative time to the government; (2) investigating the superior's instructions to other employees to directly bill the government for non-billable remedial work; (3) investigating employees who allegedly billed one client code for work that was done for a different client, with respect to the remedial project; and (4) filing an ethics complaint with his former employer. The defendant argued that none of the protected activity claimed by the plaintiff qualified for protection under the False Claims Act, since none of the plaintiff's alleged conduct put the defendant on notice that *qui tam* litigation was a reasonable possibility. The defendant noted that, while the plaintiff was employed

by the defendant, his complaints did not threaten potential FCA action or otherwise inform the defendant about possible fraud against the government, but merely presented questions about proper time-keeping procedures. The court agreed with the defendant, finding that the plaintiff "failed to tie his opposition [to the defendant's time-keeping instructions] to fraudulent behavior." Moreover, the court held that the plaintiff's complaint to the defendant's ethics department—which occurred after the plaintiff had been terminated—was not protected under the FCA, since it occurred after the alleged retaliation. Thus, the retaliation could not have resulted from the ethics complaint.

The court also found that the decisions to demote and eventually terminate the plaintiff from his job were "based on a sound business decision and not the product of retaliatory motives." The court observed that the plaintiff conceded that, before being reassigned, he informed the defendant that he felt underutilized in his managerial role, which echoed comments that his two direct reports had made, wherein they reported to superiors that the plaintiff's supervision was unnecessary. In addition, the court held that defendant had a legitimate reason for firing the plaintiff, relying on evidence the defendant presented that showed that the plaintiff was fired as a result of a customer's request.

The court held that there were no genuine issues of material fact regarding the circumstances surrounding the alleged retaliation, and concluded that "no protection is owed to [the plaintiff] based on his activities." Consequently, the court granted the defendant's motion for summary judgment on the plaintiff's retaliation claim.

Howell v. Town of Ball, 2012 WL 6680364 (W.D. La. Dec. 21, 2012)

A plaintiff brought a series of claims against a town and several individuals, alleging, among other things, violations of the False Claims Act's anti-retaliation provision. The individual defendants moved to dismiss the plaintiff's FCA claims, arguing that they were not subject to suit, since they were not the plaintiff's "employer." The U.S. District Court for the Western District of Louisiana granted the defendants' motion. While the court noted that the FCA's anti-retaliation provision was amended and broadened in 2009, the court concluded that he statute was only expanded to broaden the scope of those who would be protected under the law—not those who could be held liable under the law. Thus, the amended law still only imposes liability on employers. The court held that the individual defendants were not the plaintiff's employer in either their official capacities or their personal capacities and therefore were not subject to the plaintiff's suit. The court did, however, allow the plaintiff's retaliation claim against the town—his actual employer—to go forward. The court also denied the plaintiff's request for reconsideration of its order.

Brazill v. California Northstate Coll. of Pharm., LLC, 2012 WL 5289330 (E.D. Cal. Oct. 24, 2012)

The plaintiff, a licensed pharmacist and professor of pharmacy with over twenty-five years of experience, filed an action against his former employers, a university and its college of pharmacy, alleging that the defendants wrongfully terminated his employment in violation of the False Claims Act's anti-retaliation provision, among other laws. He alleged that he had been hired by the defendants as a department chair and had received an outstanding performance review and salary increase after his first year on the job. However, he further alleged that when the defendants' accreditation board visited the college and asked him to assess the defendants, he responded that the college was not equipped to accomplish its education goals, due to cost-cutting measures that sacrificed students' education. He also claimed that he informed the accreditation board of the defendants' allegedly fraudulent tuition practices—practices about which he also confronted the college's administration. He claimed that the defendants' tuition practices were "fraud" and warned that the defendants could be subject to civil and criminal sanctions by the federal government. Specifically, the plaintiff alleged that the defendants encouraged students to apply for enrollment at an accredited school, then fraudulently to apply for excessive student loans from the federal government by telling the government that the funds would only be used at an accredited school, and then to use part of the financial aid funds to pay for tuition at the defendants' still-unaccredited school. The plaintiff alleged that after learning about his comments to the accreditation board, the defendants advised him that he could resign or be fired, claiming that the plaintiff was being removed from his job for allowing faculty members to work in his retail pharmacy—even though the dean had expressly authorized the plaintiff to do so. After the plaintiff was terminated from his job, the university hired an assistant professor with far less experience to replace him.

The defendants moved to dismiss the plaintiff's FCA retaliation claim for failure to state a claim.

Holding: The U.S. District Court for the Eastern District of California denied the motion.

The court noted that plaintiffs need not have specific awareness of the False Claims Act in order to be protected by its anti-retaliation provision. However, the court stated, plaintiffs must be investigating matters that could reasonably lead to a viable FCA action. The court held that the plaintiff's allegations regarding the defendants' tuition practices were sufficient to meet that standard, since the plaintiff alleged that he reported to the defendants that their conduct could lead to civil and criminal liability. Moreover, the court determined that the plaintiff alleged that he brought his complaints to the attention of the defendants' dean, and

as a result he was fired. The court held that the plaintiff's complaint satisfied each of the elements of stating a claim for retaliation under the False Claims Act. The defendants' motion to dismiss was denied.

Fisch v. New Heights Academy Charter School, 2012 WL 4049959 (S.D.N.Y. Sept. 13, 2012)

A plaintiff filed suit against his former employer—a charter school—and several of the school's officers and directors, alleging various employment claims, including a retaliation claim under the False Claims Act. The plaintiff alleged that the charter school receives federal funding to support its operations and that after he was hired as the school's chief operating officer, he discovered that the school had engaged in various financial improprieties that resulted in the mismanagement of government funds. He alleged that he reported his discovery to the individual defendants named in the suit, but was instructed by the defendants not to reveal his findings, as the school was "too small to get caught." He claimed that he continued to complain to his superiors, voiced his concerns about the inaccurate audit report the school planned to submit to the federal government, included the alleged improprieties in his report to the school's board of trustees, told the defendants that "someone could go to jail," and contacted an attorney about what he'd found. He alleged that the defendants retaliated against him for his efforts to investigate and report what he had observed, beginning with a negative performance review he subsequently received. He further alleged that the school submitted its audit report and other statements regarding federal payments and reimbursements to the federal government over his objections, and that those submissions resulted in violations of the fraud provisions of the False Claims Act. He stated that when he again informed the school's board of trustees, the board's treasurer finally agreed with him and indicated that he would raise the matter with the board. Two days later, the plaintiff was terminated from his job, supposedly because he was "not a good fit" at the school. The defendants moved to dismiss his claims.

Holding: The U.S. District Court for the Southern District of New York dismissed the plaintiff's FCA retaliation claims against the individual defendants, but denied the charter school's motion to dismiss.

Retaliation

The individual defendants argued that they were not subject to the FCA's anti-retaliation provisions, since they were not the plaintiff's "employers," as required by the FCA. The court agreed, noting that the FCA's anti-retaliation provision—as written at the time of the alleged retaliation—only applied to "employers." The court determined that "it is the corporation, only, not its officers, that is the employer of the corpora-

tion's employees." The court rejected the plaintiff's argument that his claims against the individual defendants should go forward because Congress amended the FCA to remove the word "employer" from the anti-retaliation provision, and that at least one other court in the circuit had interpreted the new anti-retaliation provision to apply to individual defendants. Instead, the district court noted that the revised FCA anti-retaliation provision—which was not retroactive—was enacted a few days after all the alleged retaliation occurred, and therefore did not apply to the plaintiff's claim.

The court, though, allowed the plaintiff to maintain his claim against the school itself, since he satisfied all of the elements of an FCA retaliation case. First, the court held that the plaintiff properly alleged that he engaged in protected conduct by investigating a variety of alleged financial improprieties and false statements by the school with respect to the receipt of federal funds—an investigation that reasonably could have led to a viable FCA action. The court rejected the defendants' argument that the plaintiff did not engage in protected conduct, since he was merely fulfilling his job duties as COO, and since he did not cite any specific false statement the defendants submitted to the government or allege that the school's purchase orders and invoices were false on their face. The court disagreed, finding that FCA retaliation claims are not subject to Rule 9(b)'s heightened pleading standard, and thus, the plaintiff was not required to plead the alleged underlying fraud with particularity. The court declared that plaintiffs in FCA retaliation cases only need to establish that they were investigating matters that could lead to viable FCA actions, and that the plaintiff's investigation of large-scale financial and accounting irregularities that were included in submissions to the federal government to justify payments and reimbursements of federal funds satisfied that standard. Next, the court held that the plaintiff properly pled that the school was on notice of his protected conduct, since the plaintiff claimed that he repeatedly complained to the board about the alleged financial improprieties, and even cautioned that "someone could go to jail" as a result. He even claimed that the defendant acknowledged his complaints, but stated that no changes would be made, since the school was "too small to get caught." Irrespective of the plaintiff's job duties, the court held that his actions were sufficient to put the school on notice of a potential *qui tam* suit. Finally, the court held that the plaintiff properly alleged facts that would permit a jury to conclude that his employment was terminated in retaliation for his protected conduct, and not for the reasons the school offered.

As a result of these findings, the FCA retaliation claims against the individual defendants were dismissed, but the claims against the school were allowed to go forward.

Layman v. Met Labs., Inc., 2012 WL 4018033 (D. Md. Sept. 12, 2012)

A plaintiff brought an action under the anti-retaliation provision of the False Claims Act, alleging that his former employer—an independent electrical testing and certification lab—terminated his employment as manager of various test

engineers after he refused to approve a testing report for equipment he believed would be sold to the U.S. military, since the report included fraudulent data. He alleged that the defendant was hired by another private company to perform various testing for a "military client," and that he informed his supervisor of issues with the equipment and his reasons for refusing to approve the test report. He alleged that the supervisor responded by instructing the engineers working under the plaintiff to continue their work and threatened the plaintiff with disciplinary action. The plaintiff further alleged that when he confronted his engineers for falsifying data, they replied that they were merely following the supervisor's orders. He alleged that the supervisor eventually submitted a final report to the company that hired the defendant, and that the report contained false information that he believed would be passed on to the U.S. government. He also alleged that about two weeks later, the supervisor began soliciting complaints about his work performance, which led to a demotion and 15-20% pay cut, no supervisory authority, and no opportunity for advancement, even though he never reviewed the complaints against him nor had he ever received a negative performance review. He claimed that he resigned on the day that he was demoted, which amounted to a constructive discharge. The defendant moved to dismiss the retaliation claim, arguing that the plaintiff failed to state a claim under the FCA, since his allegations did not establish that he engaged in protected conduct by taking actions in furtherance of a *qui tam* suit.

Holding: The U.S. District Court for the District of Maryland granted the defendant's motion and dismissed the plaintiff's FCA retaliation claim without prejudice.

Retaliation

The court began its evaluation of the plaintiff's claim by noting that the plaintiff never alleged that any false information was ever submitted to the U.S. government or that any claim for payment based on false information was ever submitted to the government. Instead, he only alleged that he believed that the equipment for which the testing was conducted would be sold to some branch of the U.S. military. The court held that the plaintiff could not maintain his retaliation claim because he did not allege that anyone "knowingly present[ed] to the government a false or fraudulent claim for payment or approval." Moreover, even if he had met this pleading requirement, the court held that his retaliation claim would still be deficient, since he failed to adequately allege that he engaged in protected conduct or acted in furtherance of a viable FCA action. The court held that the plaintiff's allegations of reporting problems with the testing were insufficient to meet the standard of "protected conduct," and that it appeared that the plaintiff was merely performing his job. Furthermore, the court determined that even if the relator could have established that he had engaged in protected conduct, he could not show that the defendant was on notice of his efforts. Although the plaintiff alleged that he told his supervisor that the defendant's conduct amounted to fraud, those allegations were made in the context of the defendant's contractual

relationship with another private company—and were not raised in the context of a contract with the government or claims submitted to the government. Consequently, the court dismissed the retaliation claim, but without prejudice.

McCollum v. Jacobs Eng'g Group, Inc., 2012 WL 3811750 (S.D. Miss. Sept, 4, 2012)

A plaintiff brought a claim under the False Claims Act's anti-retaliation provision, alleging that his former employer—an engineering company—terminated his employment in retaliation for his whistleblowing activity. Specifically, the plaintiff alleged that the defendant was contracted by the Federal Bureau of Prisons to provide management services related to the construction of a new federal women's correctional facility, and committed fraud by allowing the company that was building the prison to falsify and inflate its bills to the government. He further claimed that he informed his supervisor of the alleged fraud, but soon after was placed on temporary leave of absence and ultimately was terminated from his job as a field engineer.

The defendant moved for summary judgment and the dismissal of the plaintiff's claim, arguing that the plaintiff could not show a causal link between any protected whistleblowing activity he may have engaged in and the alleged retaliation he suffered. The plaintiff responded by arguing that, before the court rules on summary judgment, he should be allowed an opportunity to engage in discovery in order to further develop his case. He also argued that an affidavit and additional materials he submitted to the court create a genuine issue of fact regarding the causal connection between his protected conduct and his termination, precluding summary judgment in the defendant's favor. The court agreed with the plaintiff, noting that the case was "in its infancy," as the defendant had not yet answered the complaint, no initial disclosures had been exchanged between the parties, and no case management conference had taken place. Consequently, the court held that the defendant's summary judgment motion was premature and would be denied without prejudice to the defendant's right to move for summary judgment after the plaintiff had been given an opportunity to conduct discovery and to prepare his case.

Jonassen v. Port of Seattle, 2012 WL 3812016 (W.D. Wash. Sept. 4, 2012)

A plaintiff brought an action against the Port of Seattle—which, among other things, operates a waste water treatment plant for the Seattle-Tacoma International Airport—alleging a claim for retaliation under the False Claims Act. He alleged that while working as a waste water treatment plant operator, he discovered that the plant for the airport was not operating properly, resulting in pollution of the Puget Sound Waterway in violation of the plant's permit. He claimed that he alerted management about this problem, as well as his discovery of thefts and oth-

er abuses by contractors, but suffered retaliation as a result of his complaints. The defendant moved for summary judgment on the plaintiff's claim, arguing that the facts pled by the plaintiff do not amount to retaliation under the False Claims Act.

The U.S. District Court for the Western District of Washington granted the defendant's motion, finding that the plaintiff did not meet the elements for an FCA retaliation claim. First, the court noted that, in order to engage in protected conduct under the FCA's anti-retaliation provision, a plaintiff must have a reasonable, good faith belief that his employer was possibly committing fraud against the government. The court noted that while the plaintiff may have subjectively believed that the defendant was committing fraud against the government, he could not establish that his belief was *objectively* reasonable, since he only complained about alleged violations of environmental permit provisions and other regulations, and thefts of the defendant's property and services. Such complaints, the court held, are not protected activity, since a reasonable employee in the same circumstances would not have believed that the defendant's alleged conduct amounted to a fraud against the government.

While the court agreed that the plaintiff did engage in protected conduct when he filed a *qui tam* suit against the defendant alleging fraud, it observed that, before the alleged retaliation occurred, "there is no evidence that he informed his superiors that he was going to file a *qui tam* action or that the litigation he contemplated filing has anything to do with the FCA or fraud against the federal government." Consequently, the court determined that the defendant did not know that the plaintiff was engaged in any protected conduct prior to terminating him from his job. The court further noted that, in order to properly do his job, comply with all applicable environmental regulations, and keep his license to process and treat water, the plaintiff was required to raise any concerns he may have had about plant operations—including fraudulent activity—with his superiors. Therefore, the plaintiff needed to take "additional steps to put the [defendant] on notice that he was acting in furtherance of an FCA action, rather than merely alerting the [defendant] to mechanical, operational, and defective issues." Since he did not take any additional steps to put the defendant on notice of his protected conduct, the court held that his retaliation claim failed. The defendant's motion for summary judgment on the plaintiff's FCA retaliation claim was granted and the claim was dismissed.

U.S. ex rel. Gentilello v. Univ. of Texas Southwestern Health Sys., 2012 WL 3638676 (N.D. Tex. Aug. 24, 2012)

A relator filed suit under the False Claims Act, alleging that the state university system and its medical center and other affiliates submitted fraudulent claims to the U.S. government and retaliated against him for engaging in protected whistleblowing activity. Subsequently, the relator's fraud claims were resolved through

a settlement between the government and the defendants. Only the retaliation claim remained. The defendants argued that that claim should be dismissed, since they, as state government entities, are not subject to FCA suits brought by individuals due to sovereign immunity and Eleventh Amendment protections. The plaintiff countered that the defendants only enjoy such protections from *qui tam* suits brought on behalf of the federal government, but not to suits brought under the FCA's anti-retaliation provision. He also argued that the defendants waived their sovereign immunity and Eleventh Amendment arguments when they settled the *qui tam* claims alleging fraud.

The court agreed with the defendants, noting that the U.S. Supreme Court has held that "a private individual has standing to bring suit in federal court on behalf of the United States under the False Claims Act [citation omitted], but that the False Claims Act does not subject a state (or state agency) to liability in such actions," and made no distinction between suits brought under the FCA's fraud provisions or its anti-retaliation provisions. The court stated that if Congress wants to alter the constitutional balance between the States and the federal government with respect to retaliation claims brought under the False Claims Act, it must clearly do so. Since the court could find no clear modification of states' sovereign immunity or Eleventh Amendment protections with respect to suits under the FCA, it held that the plaintiff's retaliation claim should be dismissed.

The court rejected the plaintiff's waiver argument, finding that the case relied on by the plaintiff held that a settlement agreement constitutes a waiver of jurisdiction with respect to disputes over the claim that was settled as part of the agreement. The present dispute, however, involved the defendants' settlement of fraud claims and did not effect a waiver of separate retaliation claims. In addition, the court observed that the defendants' settlement with the government included language that made clear that the defendants were not waiving defenses that might be available in other cases or controversies—including under the FCA. As a result, the court granted the defendants' motion to dismiss and dismissed the retaliation claim with prejudice.

Halasa v. ITT Educ. Servs., Inc., 2012 WL 3290217 (7th Cir. Aug. 14, 2012)

A plaintiff sued his former employer under the False Claims Act's anti-retaliation provision. The defendant was a for-profit educational institution and the plaintiff formerly served as the director of one of the defendant's colleges. He alleged that the defendant violated federal regulations and submitted false claims to the federal government for student financial aid funds and that he was fired from his job after reporting the defendant's regulatory violations. The defendant moved to dismiss the plaintiff's claim. The defendant asserted that the plaintiff was fired for

exhibiting poor management skills—among other things, he allegedly smoked a hookah pipe in the campus parking lot during a student orientation event, referred to himself as "King," and concocted a plan to close all restrooms on campus simultaneously—and for delivering poor results.

The U.S. District Court for the Southern District of Indiana granted summary judgment in favor of the defendant, and the plaintiff appealed that ruling to the U.S. Court of Appeals for the Seventh Circuit.

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

Retaliation

The circuit court first determined that the plaintiff was required to provide evidence showing that he engaged in protected conduct and that he was fired because of that conduct. The court noted that the plaintiff investigated alleged regulatory violations and misconduct and reported them to his superiors—actions the court held "would permit a trier of fact to find that he engaged in 'efforts to stop' potential FCA violations." The appeals court, though, did not find that the plaintiff demonstrated that he was fired because of his protected conduct. The court determined that the evidence indisputably showed that the decision to fire the plaintiff was made by individuals who were not alleged to have had knowledge of the plaintiff's protected conduct. The court refused the plaintiff's request to impute to the defendant the knowledge of those employees to whom the plaintiff made reports regarding alleged misconduct; the court stated doing so "would defeat the specific statutory requirement that an employee's termination be 'because of' [his] protected conduct." The circuit court held that the district court's grant of summary judgment in the defendant's favor was proper.

U.S. ex rel. Parks v. Alpharma, Inc., 2012 WL 3291705 (4th Cir. Aug. 14, 2012)

A relator filed an action against her former employer, a pharmaceuticals company, alleging fraud under the False Claims Act. She also alleged that the defendant violated the FCA's anti-retaliation provision by terminating her pharmaceuticals sales representative job—a job in which she had received many awards—after she questioned her superiors' instructions to illegally market the defendant's drug for off-label purposes and began gathering facts to disclose the alleged fraud. The relator's fraud claims were settled as part of a $42.5 million settlement agreement she and the United States reached with the defendant, leaving only her retaliation claim. The defendant moved for summary judgment on the retaliation claim and the U.S. District Court for the District of Maryland granted the motion. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit.

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

Retaliation

The Fourth Circuit determined that "[i]n order to defeat summary judgment on her FCA claim, [the relator] must establish a genuine issue of fact showing that (1) she took acts in furtherance of an FCA suit; (2) [the defendant] knew of those acts; and (3) [the defendant] treated her adversely because of these acts." The defendant argued that the relator's retaliation claim failed to satisfy any of the three elements. The district court determined that her claim met the first element, since she made internal complaints regarding issues that were identifiable as disclosures of fraud, but that her claim did not meet the other two elements. The circuit court examined the second element—that the defendant was aware of the relator's acts in furtherance of her FCA suit. The court found that this element must be viewed from the perspective of the defendant and that the defendant must be put on notice that FCA litigation is a reasonable possibility. The relator argued that since the district court determined that her retaliation claim satisfied the first element, it must have satisfied the second element out of necessity—in essence, the relator argued that she could not have acted in furtherance of an FCA action by reporting alleged fraud to her superiors without the defendant having been made aware of her conduct. The circuit court disagreed, finding that the relator failed to show that any of her actions put the defendant on notice that she was contemplating or acting in furtherance of an FCA action. The court determined that her complaints to her superiors "were couched in terms of concerns and suggestions, not threats or warnings of FCA litigation." The court further held that the relator failed to demonstrate that the defendant's alleged illegal conduct led to a physician writing a prescription for the drug and then submitting a false claim to the government for reimbursement, or to produce evidence showing that the defendant's alleged off-label promotion would inevitably lead to the submission of false claims to the government. Thus, the Fourth Circuit agreed with the district court that the relator failed to satisfy the second element of FCA retaliation claims, and affirmed the district court's dismissal of that claim.

Sharma v. District of Columbia, 2012 WL 3195141 (D.D.C. Aug. 8, 2012)

A plaintiff filed a claim against the District of Columbia, alleging violations of the False Claims Act's anti-retaliation provision, the D.C. Whistleblower Protection Act, and other laws. D.C. moved to dismiss the FCA allegation for failure to state a claim, arguing that the claim was not pled with particularity and that the relator failed to allege that D.C. presented a false claim to the federal government. The U.S. District Court for the District of Columbia granted the defendant's motion. The court rejected D.C.'s particularity argument, noting that only fraud claims—and not retaliation claims—are subject to Rule 9(b)'s heightened pleading standards. However, the court agreed that the relator could not maintain his retaliation claim without alleging that the defendant presented a false claim to the

federal government. Since the relator failed to include any such allegation in his complaint, the court granted D.C.'s motion and dismissed it.

McBride v. Peak Wellness Ctr., 2012 WL 3156325 (10th Cir. Aug. 6, 2012)

A plaintiff filed several employment law claims against her former employer, including a claim under the False Claims Act's anti-retaliation provision. The FCA claim was based on the plaintiff's allegations that she exposed various accounting improprieties to the defendant's board of directors and was fired because the defendant believed she was considering bringing a *qui tam* suit. The defendant moved for summary judgment on the plaintiff's claim, and the U.S. District Court for the District of Wyoming granted the motion. The plaintiff appealed the district court's ruling to the U.S. Court of Appeals for the Tenth Circuit.

The circuit court affirmed the district court's ruling, finding that the plaintiff failed to produce sufficient evidence to show that the defendant was on notice that she might pursue a *qui tam* action. Without such evidence, the plaintiff could not show that her termination was retaliatory and the circuit court held that her claim could not survive summary judgment.

Brazill v. California Northstate College of Pharmacy LLC, 2012 WL 3204241 (E.D. Cal. Aug. 2, 2012)

A pharmacist and pharmacy professor brought various employment law claims against his former employers—a university and its college of pharmacy—including a claim under the False Claims Act's anti-retaliation provision. Although the plaintiff recognized that the college is unaccredited and thus, does not receive federal student financial aid funds, he alleged that some of the college's tuition practices violated federal law. He stated that he did not support the college when he was interviewed regarding the college's candidacy for accreditation and stated that the college put profits before education. He claimed that he was treated hostilely by the president and administration of the college once they learned of his complaints about the school's tuition practices and his replies to accreditation questions. He said that from that point on, the administration implied that it would seek to replace him, and he was eventually offered the choice of resigning or being fired—purportedly because he had allowed faculty members to work in his retail pharmacy. The U.S. District Court for the Eastern District of California dismissed the FCA retaliation claim, as it determined that the complaint only alleged that the plaintiff challenged the defendant's tuition practices, which did not amount to an attempt to recover money for the government or to investigate fraud against the government.

Cabotage v. Ohio Hosp. for Psychiatry, LLC, 2012 WL 3064116 (S.D. Ohio July 27, 2012)

The plaintiff brought various employment law claims under the False Claims Act and Ohio law, alleging that her former employers—a psychiatric hospital and a behavioral center—wrongfully terminated her four-month employment as a registered nurse after she raised concerns that they were engaged in fraudulent and illegal activities. The plaintiff began recording her observations of alleged misconduct on forms that included patients' names, ages, and room numbers. She removed these documents and other patient information from the hospital, took the materials home, and subsequently provided copies to an investigator from the Department of Health and Human Services and to her attorney. The investigator determined that his agency would not pursue any claims against the hospital based on the information the plaintiff provided. The hospital terminated the plaintiffs' employment, stating that she had improperly "fraternized" with patients' families outside of work and had wrongfully removed confidential patient-identifying information in order to make such contacts.

During discovery, the hospital learned that that the plaintiff possessed hospital documents that contained protected patient information. The plaintiff refused the hospital's request to return those documents, and the hospital moved for the return of the materials, citing the confidentiality provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The plaintiff countered that she was authorized under HIPAA to retain the hospital's documents to establish a *prima facie* case of retaliation by the hospital, in support of her lawsuit. She asked the U.S. District Court for the Southern District of Ohio to deny the hospital's motion or, alternatively, to take possession of the documents at issue and to allow her to use them as needed to prove her claim or to rebut the defendants' testimony.

Holding: The U.S. District Court for the Southern District of Ohio denied the hospital's motion for the return of its documents.

Retaliation

The court determined that it lacked authority to award the hospital the relief it requested, noting that HIPAA does not grant the court such authority, as "HIPAA creates neither an express nor an implied cause of action for private citizens to enforce its terms." The court concluded that, to the extent the plaintiff's action violated HIPAA, the Secretary of Health and Human Services is the only entity authorized to enforce that law.

The court, though, held that it did have the authority to issue an order regarding the plaintiff's planned use of the documents at issue—documents the court noted were obtained outside the scope of discovery. The court held that the plaintiff was precluded from using the documents in connection with her lawsuit. However, the

court mentioned that the plaintiff could seek the same information through discovery, if she believed that the documents were discoverable in connection with her lawsuit, and that the hospital would have an opportunity to seek a protective order, should it be compelled to produce the documents.

Dermott-Morrison v. Sacramento Employment Training Agency, 2012 WL 2704274 (E.D. Cal. July 6, 2012)

A plaintiff filed a *qui tam* action alleging that her former employer—which operated a head start program and a workforce development program—knowingly mismanaged federal grant funds. The plaintiff also alleged that she met with the defendants' fiscal chief, objected to the improper use of funds, and began trying to reach appropriate federal government officials to report the wrongful conduct. Soon after, she alleged that she was asked to tender her resignation. She claimed that she refused to resign and a week later, received a letter from the defendant explaining that she was deemed to have resigned. As a result, the plaintiff filed claims under the False Claims Act alleging fraud against the government, as well as a personal claim under the FCA for retaliation. While the plaintiff voluntarily dismissed her fraud allegations, she retained her retaliation claim. The defendant moved to dismiss that claim for failure to state a claim under the FCA.

The United States District Court for the Eastern District of California denied the defendant's motion, finding that the plaintiff alleged all three elements of an FCA retaliation claim, namely: (1) that she engaged in protected activity; (2) that her employer knew that she engaged in protected activity; and (3) that her employer retaliated against her because she engaged in protected activity. The court determined that the plaintiff satisfied all three elements since she pled that: (1) she engaged in protected activity by inquiring about her former employer's alleged misconduct—misconduct that she reasonably believed in good faith could have resulted led to an FCA claim; (2) she put her former employer on notice of her protected activity by conveying to the defendant's fiscal chief that she was unwilling to abide by the allegedly fraudulent practices; and (3) she alleged that the defendant requested her resignation—a retaliatory act—in response to her protected activity.

The defendant's motion to dismiss the plaintiff retaliation claim was denied.

See *U.S. ex rel. Odoms v. YWCA of Bucks County*, 2013 WL 3213355 (E.D. Pa. June 25, 2013), at page 283.

See *U.S. ex rel. Bahnsen v. Boston Scientific Neuromodulation Corp.*, 2013 WL 2404816 (D.N.J. May 31, 2013), at page 210.

See *U.S. ex rel. Hood v. Satory Global, Inc.*, 2013 WL 2274798 (D.D.C. May 23, 2013), at page 212.

See *U.S. ex rel. Meyer v. Kempf Surgical Applicance, Inc.*, 2013 WL 1438025 (S.D. Ohio Apr. 9, 2013), at page 4.

See *U.S. ex rel. Mooney v. Americare, Inc.*, 2013 WL 1346022 (E.D.N.Y. Apr. 3, 2013), at page 156.

See *U.S. ex rel. Marquis v. Northrop Grumman Corp.*, 2013 WL 951095 (N.D. Ill. Mar. 12, 2013), at page 220.

See *U.S. ex rel. Isley v. Lockheed Martin Corp.*, 2013 WL 772810 (N.D. Ga. Feb. 28, 2013), at page 223.

See *U.S. ex rel. Pecanic v. Sumitomo Elec. Interconnect Prods., Inc.*, 2013 WL 774177 (S.D. Cal. Feb. 28, 2013), at page 167.

See *U.S. ex rel. Herron v. Indianapolis Neurosurgical Group, Inc.*, 2013 WL 652538 (S.D. Ind. Feb. 21, 2013), at page 169.

See *U.S. ex rel. Miller v. Weston Educ., Inc.*, 2012 WL 6190307 (W.D. Mo. Dec. 12, 2012), at page 277.

See *Hooper v. Lockheed Martin Corp.*, 2012 WL 3124970 (9th Cir. Aug. 2, 2012), at page 20.

See *Gonzalez v. Fresenius Med. Care North America*, 2012 WL 3065314 (5th Cir. July 30, 2012), at page 243.

See *U.S. ex rel. Liotine v. CDW Gov't, Inc.*, 2012 WL 2807040 (S.D. Ill. July 10, 2012), at page 123.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Arbitration

Deck v. Miami Jacobs Bus. Coll. Co., 2013 WL 394875 (S.D. Ohio Jan. 31, 2013)

A class of plaintiffs filed a putative class action against a private college, two of its successive corporate companies, and an investment company with an ownership interest in one of the successors, alleging that they paid tuition and incurred significant debt, and lost wages and earning capacity in the pursuit of education and degrees that the defendants falsely represented as accredited marketable degrees. The plaintiffs brought several claims against the defendants under state and federal law. In addition, three members of the class filed a non-class, *qui tam* claim against the defendants, alleging a False Claims Act violation; the United States declined to intervene in the *qui tam* claim. The defendants moved to dismiss the action or to stay the action pending arbitration—including the FCA claim—arguing that all members of the putative class were required to pursue their claims through arbitration, pursuant to the terms of the enrollment agreement they signed.

Holding: The U.S. District Court for the Southern District of Ohio granted the defendants' motion in part and denied it in part. The court ordered the plaintiffs to arbitrate the FCA claim in accordance with the provisions of their enrollment agreements. The court, though, declined to dismiss the claim, and instead stayed the claim, pending the arbitration.

Arbitration of FCA Claims

The defendants argued that the plaintiffs' claims—including the claim under the False Claims Act—were subject to arbitration. The plaintiffs argued that their claims were not subject to arbitration and noted that the United States did not consent to arbitrate the FCA claim, which was brought by three individual plaintiffs and which was a non-class claim. The court noted that the Supreme Court has repeatedly enforced arbitration agreements to resolve federal statutory claims and has held that "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." The court then examined whether or not Congress intended for claims brought under the FCA to be subject to arbitration and determined that most other courts had rejected the plaintiffs' contention that arbitration clauses conflict with the underlying purpose of the FCA. In addition, the court observed that the United States—which filed a statement of interest in the case—informed that court that any settlement of the FCA

claim required the consent of the Attorney General, and asserted that, since the government was not a party to the enrollment agreement, any arbitration ruling would only serve as a non-binding recommendation to the government. As a result, the court held that "[e]ven if mandatory arbitration of the Plaintiffs' FCA claim is not binding on the United States, arbitration is appropriate given the substantive and procedural posture. Moreover, as the United States has affirmatively elected not to intervene, it cannot prevent the arbitration of Plaintiffs' FCA claims against the Defendants." The court held that since the plaintiffs' *qui tam* claim was brought "for the person and for the United States," it represented a claim belonging to the plaintiffs themselves, and therefore, fell within the scope of the arbitration agreement the plaintiffs signed. Consequently, the court enforced the arbitration agreement and granted the defendant's motion to compel arbitration with respect to the *qui tam* claim but refused to dismiss the claim. Instead, the court stayed the case pending the arbitration and stated that after arbitration of the FCA claim, "the parties shall either request that the Attorney General consent to the resolution of the FCA claims as determined at arbitration or resume litigation on the FCA claims in this Court."

B. Breach of Contract

U.S. ex rel. Santa Ana v. Winter Park Urology Assocs., P.A., 2012 WL 2886617 (M.D. Fla. July 13, 2012)

A relator filed a *qui tam* action against his former employer—a healthcare service provider—another affiliated company, and three individuals. The employer-defendant filed a counterclaim against the relator, alleging breach of fiduciary duty, breach of contract, and malicious prosecution. The relator moved to dismiss the defendant's counterclaims. The U.S. District Court for the Middle District of Florida granted the relator's motion.

The court found that the defendant failed to allege any specific acts that constituted the relator's breach of a fiduciary duty, but merely "conclusorily alleges that the Relator 'failed to exercise diligence and good faith in matters relating to his employment' and 'breached his duty of allegiance.'" The counterclaim for breach of fiduciary duty was dismissed without prejudice. The court also dismissed the defendant's claim for breach of contract, in which the defendant alleged that the relator was required to repay a prorated portion of relocation expenses the defendant had paid on his behalf. The court agreed with the relator that this term of the employment contract was only effective in the event that the relator—not the employer—terminated the relator's employment. Since the court found that it was undisputed that the employer-defendant terminated the relator's employment, it held that the contract provision was inapplicable and dismissed the defendant's claim for breach of contract with prejudice. The court then dismissed the defendant's claim for malicious prosecution without prejudice, noting that that claim was based on the relator's prosecution of the underlying *qui tam* suit, and that no determination could be made with respect to that claim until after the defendant's liability in the underlying case had been decided.

The relator further argued that the defendant's counterclaims were not subject to the court's supplemental jurisdiction, since they were not "part of the same case or controversy," as required by 28 U.S.C. § 1367. The court rejected that argument, as it held that the relator's underlying complaint included a claim for retaliatory termination and the employer-defendant's counterclaim was related to his past employment.

C. Government-Employee Relator

Little v. Shell Exploration & Prod. Co., 2012 WL 3089777 (5th Cir. July 31, 2012)

Two relators—Little and Arnold—filed a *qui tam* action against an oil company, alleging that the defendant violated the False Claims Act by failing to remit certain royalty payments to the U.S. Department of the Interior and by taking unauthorized deductions for expenses to gather and store oil on twelve of its offshore drilling platforms. At the time the suit was filed, relator Little was a Senior Auditor and relator Arnold was a Supervisory Auditor for the Minerals Management Service, which was at that time a federal government agency within the Department of Interior that administered the defendant's lease to drill for oil on federal government property and which was charged with uncovering fraud in corresponding royalty programs. Before filing suit, Little and Arnold reported the information they discovered to their mutual supervisor, as their jobs indisputably required. However, to the relators' knowledge, the government never acted on their information. After the relators filed their *qui tam* case, the government declined to intervene. The United States District Court for the Southern District of Texas granted summary judgment in favor of the defendant, finding that, as federal government employees, the relators were not proper "persons" to file *qui tam* suits under the FCA, and that their suit was barred by the FCA's public disclosure bar provision. The relators appealed the district court's rulings to the United States Court of Appeals for the Fifth Circuit and the United States filed a brief in the appeal, urging the circuit court to construe the FCA as barring government employees from being relators when they discover fraud within the scope of their official duties.

Holding: The Fifth Circuit reversed the district court's ruling regarding government employee relators and reversed and remanded the district court's ruling regarding the public disclosure bar.

Who Can Be a Relator?

The Fifth Circuit noted that the issue of whether or not government employees can serve as relators is a question of first impression in the Fifth Circuit, but that the defendant's and government's position is at odds with the Eleventh Circuit's and Tenth Circuit's holdings and would likely be at odds with jurisprudence in the Ninth and Sixth Circuits as well. The court, however, observed that the First Circuit has taken the position that at least some federal government employees may not serve as *qui tam* relators. The circuit court then turned to the language of the FCA, which includes a provision titled, "Certain actions barred," and which enumerates four statutory limitations on courts' jurisdiction over *qui tam* claims. None of these limitations prohibits government employees from being relators, which the circuit court called "instructive."

The court also considered and rejected the defendant's (and government's) argument that the FCA's section titled "Actions by *private* persons" limits the universe of relators to non-governmental persons, since government employees are not "private" persons when acting in their official capacities as government employees. The appeals court concluded that the designation of "private" persons was not determinative, since that language could have been used simply to distinguish *qui tam* suits from suits filed by the Attorney General. The court also considered the relators' argument that the FCA explicitly excludes members of the armed services from being relators in suits against other military personnel, and such an exclusion would be completely unnecessary if "private person" extended to all federal government employees—which would include all members of the armed services. The court further considered the defendant's argument that, since relators are allowed to bring suits "for the person and for the United States," *qui tam* suits by government employees are precluded, since government employees *are* the United States in that instance. The court rejected the defendant's argument and held that government employees can have two legal identities—one official and one individual, and that the text of the FCA supported the relators' position that they could bring *qui tam* claims on behalf of the government.

The court then examined the defendant's and the government's argument that federal government employees are subject to statutory ethical obligations to report fraud against the government—reporting such fraud as a realtor, they argued, would result in a conflict of interest. The court recognized the potential difficulty these statutory obligations might impose on government employees who wish to be relators, but, ultimately, the court concluded that "Congress should be assumed to have legislated [the FCA] with reference to the [statutory ethical obligations]." The court noted that "using the conflict rules to override the False Claims Act's terms would interfere with the other two coordinate branches of our government. We would thwart a cause of action Congress permitted." Moreover, the court noted that the "Relator Share Guidelines" created by the U.S. Department of Justice contemplate government employee-relators and allow for a decrease in relator's share when the "relator learned of the fraud in the course of his Government employment." Finally, the court mentioned that allowing government employees to serve as relators "does not prevent the government from promulgating new personnel guidelines (or enforcing old ones)," and noted that the government can intervene in such cases and move to dismiss them. Thus, the court reversed the district court's ruling that the relator's were precluded from filing their *qui tam* action because they discovered the alleged fraud in the course of their jobs as government employees.

Public Disclosure Bar

The appeals court then turned to the relators' second issue on appeal—that the district court did not have jurisdiction over their claims because of the FCA's public disclosure bar. The defendant pointed to five purported prior public disclosures, including: prior FCA civil proceedings, news media accounts, published articles, communications be-

tween the defendant and MMS, and a government audit report. The district court found similarities between the supposed public disclosures and the relators' allegations and determined that the relators were barred from pursuing their fraud claims. The circuit court, though, found that the district court's conclusion was based on an overly broad definition of the public disclosure bar and did not fully examine how the relators' specific allegations regarding the identity of the defendant, the time period in which the alleged fraud occurred, and the details of the alleged scheme were based on the prior information. Thus, the Fifth Circuit remanded the issue to the district court for further proceedings to determine whether the relators' allegations were based on public disclosures. Notably, the circuit court concluded that the relators did not qualify for the "original source" exception to the public disclosure bar, because they could not meet the FCA's requirement that original sources must "voluntarily" provide their information regarding fraud to the government. The Court reasoned that since the relators were both government auditors, charged with rooting out fraud within their agency, they could not voluntarily provide information regarding the fraud they alleged to the government, but were required to do so.

D. Not Knowingly False

U.S. ex rel. Arnold v. CMC Eng'g, Inc., 2013 WL 2318813 (W.D. Pa. May 28, 2013)

A relator filed a *qui tam* action alleging that an engineering company violated the False Claims Act by misrepresenting the credentials of its consultants in order to receive higher pay rates for work performed on a federally-funded construction contract with the Pennsylvania Department of Transportation (PennDOT). The defendant moved for summary judgment, arguing that its descriptions of consultants' credentials were accurate, in accordance with its interpretations of the definitions of applicable terms—the defendant argued that these definitions fell within a "gray area" and that PennDOT accepted its classifications of consultants' qualifications. The defendant claimed that the relator could not establish that the defendant acted "knowingly," and that since the relator could not establish the scienter element of FCA liability, the defendant was entitled to summary judgment.

The U.S. District Court for the Western District of Pennsylvania agreed with the defendant, finding that testimony from various PennDOT officials made clear that the defendant's interpretation of the credentials requirements was reasonable, particularly since PennDOT occasionally disregarded its own requirements when it sought to secure the services of certain individuals—PennDOT even instructed those individuals to submit classification levels that were higher than their credentials supported and knowingly paid them at higher rates. Applying the "government knowledge inference," the court held that the defendant did not possess the necessary scienter to violate the False Claims Act, and thus, granted summary judgment in the defendant's favor.

United States v. Fadul, 2013 WL 781614 (D. Md. Feb. 28, 2013)

The United States brought an action against a doctor and the mobile diagnostic company he created alleging, among other things, violation of the False Claims Act. The government alleged that the defendants knowingly submitted fraudulent Medicare claims by improperly billing for multiple services that would not generally be performed on the same patient on the same day. The government alleged that although the type of billing the defendants allegedly engaged in should occur only rarely, the defendants routinely engaged in such improper billing over 10,000 times over a five-year period, costing the federal government hundreds of thousands of dollars in improper reimbursement payments. The defendants admitted much of the government's basic facts, and the government moved for summary judgment on its claims.

Holding: The U.S. District Court for the District of Maryland denied the government motion for summary judgment on its False Claims Act claims.

The court noted that the government presented sufficient evidence showing that the doctor was responsible for the company's healthcare claims, and that when he enrolled the company in the Medicare program, he certified that he was familiar with applicable Medicare laws and regulations and would not present or caused to be presented false or fraudulent claims. The defendant, though, denied that he knowingly submitted false Medicare claims, stating that he usually was not involved in billing, but turned those tasks over to others within the company. He also claimed that he relied on a software system provided by a third party for his company's billing needs and that his staff consulted with counsel to ensure that their billing practices were in accordance with applicable laws and regulations. The government, however, presented evidence—including testimony from the defendants' former employees—showing that the defendant doctor was involved with the defendant company's billing activities. Moreover, the government offered evidence showing that the doctor was aware that the company's billing practices were improper—the government noted that various employees informed the doctor of this and that private insurance companies had rejected similar claims that were submitted to them.

The court, however, refused to grant the government's summary judgment motion, finding that there were still issues of disputed fact regarding the doctor's knowledge of the allegedly false Medicare claims. First, the court rejected the government's attempt to argue that the "collective knowledge" of the doctor and his employees was sufficient to establish scienter under the False Claims Act, noting that the Fourth Circuit had not adopted that approach. And although the government presented evidence to demonstrate the doctor's level of knowledge, the court noted that some of the events upon which the government relied pre-dated many of the allegedly false claims the defendants submitted, and thus, could not provide the basis for the doctor's knowledge regarding the alleged fraud during the entire time period. In addition, although the court determined that a reasonable jury could conclude that the doctor had actual knowledge of the alleged falsity of the company's Medicare claims, it could not hold, as a matter of law, that the government satisfied the scienter element of FCA liability. The court concluded that the doctor's assertions that he delegated responsibility over billing to other employees; he and his staff consulted with legal advisors; he purchased billing manuals each year so that his staff could have updated information and could be made aware of rules changes; and he made use of third-party software that was designed to handle the company's coding and billing were sufficient to create disputes of fact regarding whether he even acted recklessly with respect to the truth or falsity of his company's claims.

As a result, the court held that summary judgment on the government's fraud claims against either defendant was inappropriate. The government's motion was denied.

U.S. ex rel. Armfield v. Gills, 2013 WL 371327 (M.D. Fla. Jan. 30, 2013)

Two relators filed a *qui tam* suit alleging that two doctors violated the False Claims Act by knowingly submitting false Medicare claims. Specifically, the relators alleged that the defendants fraudulently billed Medicare for lens rotations disguised as lens repositions and for duplicative evaluations and management services. The defendants moved for summary judgment on the relators' claims, arguing that their Medicare claims were not false, and that even if the claims were ultimately erroneous, they were not knowingly false since they were based on objectively reasonable interpretations of ambiguous regulatory provisions. The relator argued that summary judgment was not proper because there were disputed issues of material fact.

Holding: The U.S. District Court for the Middle District of Florida agreed with the relators, finding that the parties' competing experts created disputed issues of material fact regarding the proper coding and medical necessity of the procedures for which the defendants billed Medicare. The court rejected the defendants' argument that, as a matter of law, they could not have knowingly submitted false Medicare claims, since their submissions were based on objectively reasonable interpretations of the applicable regulations. Instead, the court held that, based on the evidence and all reasonable inferences to be drawn from the evidence, a jury could determine that that the defendants acted with deliberate ignorance or reckless disregard of whether or not its Medicare claims were false—such a finding would satisfy the FCA's scienter requirement.

The defendants' motion for summary judgment was denied.

U.S. ex rel. Liotine v. CDW Gov't, Inc., 2012 WL 2807040 (S.D. Ill. July 10, 2012)

A relator sued his former employer—a government contractor—alleging that the defendant violated the False Claims Act by submitting inflated invoices for sales to the General Sales Administration and by retaliating against him for investigating the alleged misconduct. Specifically, the relator alleged that the defendant committed fraud by charging the government for shipping in connection with sales, even when its contracts provided for free shipping; by failing to offer the government its "most favored price," as required by contract; by failing to remit required fees to the government; by selling items that it was not authorized to sell to the government; and by selling non-trade compliant items. He alleged that the defendant retaliated against him in response to his attempts to provide evidence to the government regarding the alleged fraud. He claimed that he was directed to engage in fraudulent practices in his dealings with the government and that,

when he questioned this directive and refused to follow it, he became a target for termination and was written up, suspended, and verbally abused. He contacted government officials regarding the fraud he observed—contrary to what he was directed to do by the defendant—and emailed evidence of the defendant's fraud to himself, as he realized he would soon be fired from his job. He alleged that after being questioned by the defendant about what he knew and what he had provided to the government, he was fired.

Both parties moved for summary judgment on the fraud claims, and the defendant moved for summary judgment on the retaliation claim.

Holding: The United States District Court for the Southern District of Illinois granted the motions in part and denied them in part.

Scienter

The defendant moved for summary judgment on the relator's fraud claims, alleging that the relator did not demonstrate a knowing violation of the False Claims Act. The court examined each of the relator's fraud claims in turn and found that the relator raised a genuine issue of fact with respect to the defendant's knowledge of sales of non-trade compliant goods to the government, as the relator's deposition testimony offered evidence that the relator had personal knowledge that the defendant had knowingly engaged in such behavior. In addition, the court rejected the defendant's argument that summary judgment was warranted because the relator could not show any damages to the government due to the sales of non-trade compliant goods, since the government kept those items. Instead, the court held that the government's purposes in imposing trade statutes would be thwarted if the defendant was allowed to profit from illegal sales of goods—the court declared that the defendant "is not allowed to keep money obtained from the government under false pretenses."

Similarly, the court held that genuine issues of fact existed regarding the relator's allegations that the defendant defrauded the government by charging inflated shipping fees and by failing to remit certain fees to the government. The court further noted the testimony of one of the defendant's representatives who corroborated the relator's allegations, at least with respect to a subset of claims to the government that were reviewed by the defendant.

The court denied the relator's motion for partial summary judgment on the fraud claims, noting that a jury would make the final determination regarding whether or not the relator proved his claims. The court also granted the relator's motion for summary judgment with respect to the defendant's affirmative defenses of waiver, estoppel, and laches, as those defenses are not available against the United States—the real party in interest. The court also rejected the defendant's affirmative defense arguing that the relator must show damages to the government, since the FCA does not require measurable damages before liability for committing fraud can be imposed.

Retaliation

Lastly, the court considered the defendant's motion for summary judgment on the retaliation claim. The court found that material issues of fact existed with regard to the relator's allegations of each element of an FCA retaliation claim: (1) the relator alleged that he told his superiors that the defendant's conduct was wrong and resulted in the government being cheated; (2) the relator alleged that he refused to take advantage of the government, as directed by the defendant, and the relator was not employed in a position in which such conduct was part of his job, such that he had to make special efforts to ensure that the defendant was on notice of his protected whistleblowing conduct under the FCA; and (3) the relator alleged sufficient facts to support his contention that the defendant terminated him from his job in retaliation for his protected activity. The court denied the defendant's motion for summary judgment on the retaliation claim.

E. Primary Jurisdiction

See *U.S. ex rel. Wall v. Circle C Constr., LLC*, 2012 WL 4477367 (6th Cir. Oct. 1, 2012), at page 237.

F. Pro Se Relator

Williams v. Department of Corrections, 2013 WL 3305485 (W.D. Wash. June 27, 2013)

An inmate filed a *qui tam* suit against a department of corrections and a community college, alleging that the defendants violated the False Claims Act by accepting government money and offering G.E.D. programs to inmates who already had a high school diploma or a G.E.D. The relator proceeded *pro se*. The U.S. District Court for the Western District of Washington dismissed the relator's suit. First, the court noted that the relator did not pay the requisite filing fee for his case and did not file an application to proceed *in forma pauperis* to have that requirement waived. He did, however, request that the court appoint counsel to represent him, stating that he had only received $30 in the prior twelve months from family and friends. Thus, the court deemed his request for counsel as a request to proceed *in forma pauperis*. The court, though, denied that request, finding that the relator did not provide sufficient information in support of his indigence claim, even though he had previously "filed numerous cases in this district *pro se* while he has been incarcerated." In addition, the court observed that since *qui tam* actions are brought on behalf of the government, relators are not allowed to appear as the government's attorneys, and therefore, may not proceed *pro se*. The court further noted that the relator filed the case without an attorney, and held that "it would not be proper for the court to permit [the relator] to initiate the suit without counsel;" furthermore, the court determined that since the relator alleged that he had received the G.E.D. program unnecessarily, "he could arguably be considered a defendant instead of a relator," and that it would be improper for the court to provide counsel to such a litigant. Finally, and most significantly, the court held that the relator did not satisfy the "extraordinary circumstances" criteria for having counsel appointed to him, since his FCA allegation failed to state a claim, as it did not allege facts supporting fraudulent conduct by the college.

As a result of these findings, the court dismissed the *qui tam* complaint *sua sponte*.

Hopson v. Weinburg Attorney's At Law, 2013 WL 557263 (W.D. Ky. Feb. 12, 2013)

A *pro se* relator filed a complaint against a law firm and several individuals, alleging, among other things, a violation of the False Claims Act. The relator alleged that the defendants presented false testimony against him and conspired to blackmail his family. The U.S. District Court for the Western District of Kentucky dismissed the relator's complaint. The court, relying on 28 U.S.C. § 1654—which prohibits plaintiffs from appearing "*pro se* where interests other than their own are at stake"—held that since the relator was proceeding *pro se* on behalf of the

United States, his complaint would be dismissed. Moreover, the court noted that it was empowered, at any time, to dismiss a complaint for lack of subject matter jurisdiction when the complaint was frivolous and devoid of merit. The court held that the relator's complaint fell into that category and dismissed the complaint on that basis as well.

U.S. ex rel. Prather v. Ewert, 2013 WL 500864 (C.D. Ill. Feb. 11, 2013)

A *pro se* relator filed a *qui tam* action alleging that a county treasurer violated the False Claims Act by illegally retaining more than $40,000 from taxes that were overpaid. The United States declined to intervene in the relator's suit and subsequently moved to dismiss the *qui tam* action on the grounds that the complaint did not state a claim under the False Claims Act, and that the relator could not proceed on behalf of the United States without counsel.

The U.S. District Court for the Central District of Illinois agreed with the government and dismissed the relator's complaint. The court held that the relator's allegations did not involve property owned by the United States, nor did he allege that the United States had any interest in the money the defendant allegedly illegally retained, which had been collected by a county treasurer's office. As a result, the court held that the relator's allegations did not state a claim under the False Claims Act, and should be dismissed on that basis.

The court further stated, in accordance with Seventh Circuit precedent, that "non-attorney pro se litigants may not proceed in a *qui tam* action on behalf of the United States." Consequently, the court granted the government's motion to dismiss on that basis as well.

U.S. ex rel. Pantoja v. Citigroup, Inc., 2013 WL 444030 (E.D.N.Y. Feb. 5, 2013)

A *pro se* relator filed a *qui tam* action against a bank and two of its subsidiaries, alleging that the defendants made false representations to unqualified mortgagees, knowingly failed to comply with Freddie Mac requirements, and made false statements and certifications to the Federal Housing Administration and other federal agencies in order to receive payments from the government. Notably, the relator did not claim that he was suing on behalf of the federal government. Instead, he alleged that the defendants' actions caused him to be criminally prosecuted and convicted and subject to more than $1 million in restitution. He requested that judgment be entered in his favor.

The U.S. District Court for the Eastern District of New York noted that although relators are permitted to control FCA litigation, *qui tam* claims still belong to the United States. Moreover, the court recognized that, pursuant to 28 USC § 1654, *pro se* plaintiffs are only allowed to litigate their own claims. Consequently, the court dismissed the relator's complaint.

Kelly v. Housing Auth. of Omaha, 2012 WL 2871750 (D. Neb. July 12, 2012)

A *pro se* plaintiff filed a *qui tam* action alleging that numerous agencies and individuals violated the False Claims Act by submitting false information to the U.S. Department of Housing and Urban Development. The United States declined to intervene in the relator's suit. Before allowing the action to proceed, the United States District Court for the District of Nebraska sought to determine whether summary dismissal of the suit was appropriate, due to the relators' *pro se* status. The court determined that "[t]he law in the Eighth Circuit is clear that a pro se plaintiff may not prosecute a *qui tam* action on behalf of the United States. Since the United States declined to intervene in the relator's suit, the court, on its own motion, granted the plaintiff 30 days to obtain the services of a licensed attorney and to have the attorney enter an appearance in the *qui tam* case, lest the case be dismissed.

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

See *U.S. ex rel. Howze v. Allied Physicians Inc.*, 2013 WL 950536 (N.D. Ind. Mar. 11, 2013), at page 88.

G. Relator Released Defendant from FCA Claims

See *U.S. ex rel. Powell v. American Intercontinental Univ., Inc.*, 2012 WL 2885356 (N.D. Ga. July 12, 2012), at page 30.

H. *Res Judicata* and Collateral Estoppel

U.S. ex rel. May v. Purdue Pharma L.P., 2012 WL 4056720 (S.D. W. Va. Sept. 14, 2012)

Two relators filed a *qui tam* suit under the federal False Claims Act and several state false claims act statutes, alleging that two affiliated pharmaceuticals companies trained their sales forces to falsely represent to doctors and other "institutional decision makers" that a single dose of one of their pain relievers was equivalent to two doses of the benchmark drug, and therefore, the defendant's drug was cheaper than the benchmark even though its drug was more expensive per dose. The relators alleged that the defendant knew that these representations were false, since there was no scientific basis to support them, but still used the representations to market the drug to hospitals, physicians, pharmacies and hospices. They alleged that by systematically encouraging doctors to prescribe its drug over a period of more than 10 years, the defendant caused the submission of false healthcare claims to the various governments on whose behalf they filed suit—they claimed that <u>all</u> claims for prescriptions for the drug submitted to the government healthcare programs at issue were false, since those entities were being asked to pay for materially less of the defendant's drug, in terms of pain relief, than the defendant had represented to the prescribing physicians. Neither the federal government, nor any of the states involved, intervened in the relators' suit.

This was the second time the defendants were sued in a *qui tam* action alleging this fraud scheme. The first such suit—which was filed in the same court as the present case—was brought by the husband of one of the present relators—he was also a former co-employee and manager of the other relator. The prior suit was dismissed for failure to satisfy Rule 9(b)'s pleading requirements. The dismissal was affirmed by the U.S. Court of Appeals for the Fourth Circuit, but on different grounds—the circuit court determined that the relator was barred from filing the suit, pursuant to a pre-filing release agreement he signed as part of his severance package when he left his job with the defendants' company.

The defendants moved to dismiss the relators' allegations, arguing that their claims were barred by *res judicata*, since their complaint was merely a re-litigation of the earlier *qui tam* action. In addition, the defendants argued that the relators' complaint was barred by the FCAs' respective public disclosure bar provisions;

that the fraud allegations were not pled with particularity; and that allegations regarding all allegedly fraudulent claims identified by the relators were time-barred.

Holding: The U.S. District Court for the Southern District of West Virginia granted the defendants motion to dismiss the federal FCA claims with prejudice. The supplemental state FCA claims were dismissed without prejudice.

Res Judicata

The court assumed, without deciding, that the relators' claim was not barred on public disclosure grounds, and that the relators' allegations were pled with the requisite particularity. The court then turned to the defendants' *res judicata* argument. The court noted that principles or *res judicata* apply when there is: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both suits; and (3) an identity of parties in the two suits. The defendants argued that all three elements were satisfied, and thus, the relators were precluded from re-litigating the claims. The relators did not challenge the second two elements of *res judicata*, leaving the court only to decide the first element—"whether there has been a judgment on the merits in a prior suit."

The relators argued that it was the circuit court's dismissal of the prior *qui tam* case—on the grounds that the suit was barred by the former relator's pre-filing release agreement with the defendants—that controlled the *res judicata* analysis; moreover, they contended that the circuit court's ruling was based on a lack of standing and not the merits of the former relator's claims. Thus, they argued, the prior suit did not result in a judgment on the merits and *res judicata* did not apply. The defendants countered that the circuit court's ruling was not based on a lack of standing, but rather on the defendants' affirmative defense of the release agreement. Therefore, they argued, the prior suit was decided on the merits and *res judicata* did apply. The court agreed with the relators that the Fourth Circuit's ruling controlled. The court, though, disagreed with the relators' characterization of the circuit court's ruling, and instead found that the circuit court did not dismiss the prior suit for lack of standing and that the parties appeared to agree that the former relator had standing to sue, subject to the ultimate enforcement of the release agreement. The court found support for the defendants' argument that the prior suit was dismissed based on their affirmative defense of the release agreement, particularly since the circuit court referenced the defendants' argument in favor of enforcing the pre-filing release as a "release defense." Furthermore, the court concluded that the circuit court's ruling was a summary judgment determination, which the court noted has always been a final disposition for *res judicata* purposes.

As a result of its findings, the court held that the instant federal FCA case was barred by the *res judicata* doctrine—the federal FCA claims were dismissed with prejudice. The court declined to consider the parties' statute of limitations dispute. Having dismissed the federal FCA claims, the court also declined to exercise supplemental jurisdiction over the relators' state FCA claims. Those claims were dismissed without prejudice.

See *U.S. ex rel. Dismissed Relator v. Lilwani*, 2012 WL 4739922 (C.D. Ill. Oct. 3, 2012), at page 139.

See *U.S. ex rel. Dismissed Relator v. Murchison*, 2012 WL 4739938 (C.D. Ill. Oct. 3, 2012), at page 141.

I. Sovereign Immunity

U.S. ex rel. Howard v. Shoshone Paiute Tribes, Duck Valley Indian Reservation, 2012 WL 6725682 (D. Nev. Dec. 26, 2012)

Two relators brought a *qui tam* action against their former employer—a health facility operated by a Native American tribe—alleging Medicare/Medicaid fraud. The United States declined to intervene in the relators' suit. The defendant moved to dismiss the relators' complaint, arguing that, as a federally-recognized Indian Tribe, it was immune from *qui tam* suits. Alternatively, the defendant argued that the relators' complaint was not properly pled with particularity, in accordance with Federal Rule of Civil Procedure 9(b).

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

Sovereign Immunity

The court first observed that in general, Indian tribes are viewed by courts as sovereigns and enjoy common-law immunities of sovereign powers. Tribes' immunity is not absolute, though, and tribes may be subject to suit under federal law where they have waived sovereign immunity or where Congress has authorized the suit. The relators did not argue that the defendant tribe waived its sovereign immunity; instead, they asserted that, as *qui tam* plaintiffs suing on behalf of the United States, their lawsuit overrode the defendant's immunity. The defendant, though, argued that although the FCA authorizes relators to file *qui tam* suits, it does not vest relators with the authority of the United States to override sovereignty, and, even if it does, the relators' suit still must fail because tribes are not "persons" subject to liability under the FCA.

The court, relying on the U.S. Supreme Court's ruling in *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, analogized the defendant's sovereignty to that of states, and concluded that "Congress did not intend Indian tribes to be subject to *qui tam* liability under the FCA. Indian tribes, like states, are separate sovereigns only subject to suit when, absent a voluntary waiver, Congress has abrogated their immunity. Consequently, Indian tribes are also entitled to the application of the 'longstanding interpretive presumption' that they are not 'persons' subject to *qui tam* liability under the FCA absent a showing of statutory intent to the contrary." (internal citations omitted) Based on that reasoning, the court held that the relators failed to state a claim under the FCA and dismissed the relators' complaint for lack of subject matter jurisdiction.

U.S. ex rel. Oberg v. Pennsylvania Higher Educ. Authority, 2012 WL 6099086 (E.D. Va. Dec. 5, 2012)

A *qui tam* relator filed a suit under the False Claims Act against a group of corporations that were created and owned by several states and designed to facilitate

higher education opportunities and financial aid funding. The relator alleged that these defendant corporations received improper payments from the government by submitting false claims to the U.S. Department of Education. The defendants all moved to dismiss the relator's suit, arguing that the U.S. Supreme Court has held that state agencies are not considered "persons" under the False Claims Act, and since they were created as state-owned entities with powers defined by their respective states' code, they were not "persons" subject to *qui tam* suits. The U.S. District Court for the Eastern District of Virginia initially granted the defendants' motion to dismiss, but the relator appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit vacated the district court's ruling, finding that the district court failed to apply the appropriate legal standard—the arm-of-the-state test that is used to determine sovereign immunity for Eleventh Amendment purposes. The issue was remanded to the district court.

After applying the arm-of-the-state test, the Eastern District of Virginia granted the defendants' motion to dismiss, finding that each of the defendants was an arm of its respective state, and thus, not a person for FCA purposes. The court stated that the arm-of-the-state test involves four nonexclusive factors: (1) whether any judgment against the entity will be paid by the state or whether any recovery by the entity will benefit the state; (2) how much autonomy the entity enjoys, including how the entity's directors and officers are appointed, who funds the entity, and whether the state retains veto power over the entity's actions; (3) whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns; and (4) how the entity is treated under state law.

The court found that all of these factors weighed in favor of the defendants. First, the court found that a judgment against any of the defendants would burden that defendant's state. The court noted that the fact that some of the defendants generated and used their own revenue to fund their operations was not dispositive, since those entities' states would need to appropriate additional funds to support the entities' operations, should the entities be required to use their own revenues to pay a judgment. Next, the court held that although the defendants enjoyed varying levels of operational independence, they were still largely subject to state control, as outlined in their respective statutory schemes that often authorized the governors of the states to appoints the entities' officers and directors, and the fact that the entities were required to seek approval from the state before engaging in certain conduct and/or transactions. The court then turned to the third factor, and determined that all of the defendants operated on a statewide basis and served citizens throughout their respective states. Finally, the court applied the last factor, and concluded that each of the defendants' states had somehow designated the defendants as an instrumentality or political subdivision of the state or as a state agency. As a result of these findings, the court granted the defendants' motion to dismiss.

See *U.S. ex rel. Trinh v. Northeast Med. Servs., Inc.*, 2013 WL 1789712 (N.D. Cal. Apr. 26, 2013), at page 41.

See *U.S. ex rel. Gentilello v. Univ. of Texas Southwestern Health Sys.*, 2012 WL 3638676 (N.D. Tex. Aug. 24, 2012), at page 107.

J. Statute of Limitations

U.S. ex rel. Carter v. Halliburton Co., 2013 WL 1092732 (4th Cir. Mar. 18, 2013)

A relator filed a *qui tam* suit against a group of affiliated government defense contractors, alleging that the defendants violated the False Claims Act by fraudulently billing the United States for services provided to military forces in Iraq in 2005. The U.S. District Court for the Eastern District of Virginia dismissed the relator's suit with prejudice, finding that it lacked subject matter jurisdiction over the *qui tam* claims, pursuant to the False Claims Act's first-to-file rule. The district court also held that the *qui tam* action was untimely, as it was filed beyond the FCA's six-year statute of limitations—the court held that the limitations period was not tolled by the Wartime Suspension of Limitations Act (WSLA), as the court concluded that the WSLA does not apply to non-intervened *qui tam* cases. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit.

Holding: The Fourth Circuit reversed the district court's decision and remanded the matter, holding that the district court had subject matter jurisdiction over the relator's complaint and that the WSLA applied to the relator's suit.

First-to-File Rule

The relator filed his initial *qui tam* complaint on February 1, 2006. The suit was dismissed in January 2009 for failure to plead the alleged fraud with particularity. The relator then amended and re-filed his complaint. Subsequently, some of the relator's claims were dismissed, and others were allowed to go forward. The case then proceeded through discovery. One month before trial, the U.S. Department of Justice informed the parties of the existence of another *qui tam* suit that contained similar allegations against the defendants, and which was filed in December 2005—about two months before the present relator filed his complaint. The defendants argued that this prior *qui tam* suit precluded the present relator's suit, pursuant to the first-to-file rule. The relator argued that the prior suit was not a "related" action for first-to-file purposes, because the two suits alleged different frauds—the relator contended that the earlier suit alleged that the defendants overbilled the government by systematically billing for twelve hours of work per day without regard for the actual number of hours worked, but that his suit alleged that the defendants submitted fraudulent bills to the government that falsely represented that they had performed certain work that had not actually been performed. The district court agreed with the defendants and dismissed the present relator's suit.

The relator appealed the district court's ruling. While the appeal was still pending, the relator re-filed his *qui tam* suit in a different district court and sought to dismiss his appeal. The appeal was dismissed, but soon after, the relator's second *qui tam* action

was also dismissed, on the grounds that the relator's second suit was filed while the appeal regarding the first suit was still pending, and therefore, pursuant to the first-to-file rule, the relator's first suit barred the filing of his second suit. The relator chose not to appeal this ruling, but instead, re-filed his complaint yet again. Once the complaint was unsealed and served, the defendants moved to dismiss the action, pursuant to the FCA's first-to-file bar, statute of limitations, and public disclosure provisions.

With respect to the first-to-file argument, the defendants alleged that two related *qui tam* actions were pending when the relator's most recent complaint was filed. The district court agreed that at least one of those suits barred the relator's action and dismissed the relator's suit with prejudice. The relator argued that the district court erred, because his suit alleged frauds involving different employees in different divisions of the defendants' business. The appeals court disagreed and concluded that the allegations in the two actions were substantially similar. The circuit court then turned to the relator's argument that the prior suit could not preclude his complaint since the action had been voluntarily dismissed months after his complaint was filed and thus, was not "pending," as required by the first-to-file rule. The court stated that "we look at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar," and concluded that the earlier suit barred the relator's action. The relator then argued that the earlier suit, which was no longer pending, could not forever bar his present suit. The Fourth Circuit agreed and held that "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case." Since the earlier suit had been dismissed and since the first-to-file bar allows relators to bring their claims at a later time, the appellate court held that there was no obstacle to the relator's suit once the earlier suit was dismissed and no longer pending, and thus, the district court's dismissal of the relator's action with prejudice was erroneous. The Fourth Circuit reversed the district court's ruling with respect to the first-to-file bar.

Statute of Limitations

The district court also found that the relator's most recent suit—which was filed in 2011—was untimely, since the alleged fraud occurred in 2005, more than six years before the most recent suit was filed. On appeal, the relator argued that the statute of limitations was tolled by the WSLA—a statute that tolls applicable statutes of limitations for offenses involving frauds against the United States while the United States is "at war." The Fourth Circuit determined that the United States was "at war," for purposes of the WSLA when the alleged fraud occurred—and was still "at war" when the relator's complaint was filed—and therefore, the WSLA tolled the statute of limitations governing the relator's claims. The circuit court reasoned that the WSLA does not require a formal declaration of war and stated that "[t]he purpose of the WSLA—to combat fraud at times when the United States may not be able to act as quickly because it is engaged in 'war'—would be thwarted were we to find that the United States must be involved in a declared war for the Act to apply." Moreover, the court concluded that when, in October 2002, Congress authorized the President to

use military force in Iraq, the United States was "at war," for WSLA purposes. In addition, the circuit court held that the United States was still at war for WSLA purposes when the relator's operative complaint was filed, since the hostilities in Iraq had not been terminated pursuant to a Presidential proclamation or Congressional resolution. The Fourth Circuit rejected the defendants' argument that the WSLA only applied to criminal cases, finding that "offenses" involving fraud against the United States, as used in the WSLA, also applies to civil claims, since Congress did not specify otherwise. Moreover, the circuit court rejected the defendants' argument—which the district court had accepted—that the WSLA only applies to actions in which the United States is a party. While the appellate court recognized that the FCA contains specific limitations periods for claims brought by relators and claims brought by the government, that distinction had no bearing on the applicability of the WSLA to *qui tam* actions. Instead, the court simply stated that "whether the suit is brought by the United States or a relator is irrelevant to this case because the suspension of limitations in the WSLA depends upon whether the country is at war and not who brings the case." Consequently, the circuit court reversed the district court's ruling and held that the relator's action was not time-barred.

Public Disclosure Bar

The district court did not address the defendants' public disclosure rule argument, as it found alternate grounds on which to dismiss the suit. The defendants argued to the circuit court that the relator's suit should be dismissed on the alternative ground that the district court lacked subject matter jurisdiction due to the FCA's public disclosure bar provision. The Fourth Circuit declined to address the defendants' argument, finding that the district court should have the first opportunity to address the issue. As a result, the circuit court remanded the public disclosure bar issue to the district court.

Malhotra v. Steinberg, 2012 WL 5342509 (W.D. Wash. Oct. 29, 2012)

Two relators filed a *qui tam* suit under the False Claims Act, alleging that a former bankruptcy trustee and a group of real estate agents and their employers defrauded the government by undervaluing real estate throughout the relators' bankruptcy proceeding, as part of an illegal kickback scheme. The government declined to intervene and one of the real estate company defendants—along with one of its employees who was named as a defendant—moved for summary judgment on the relators' claims, arguing that the relators' claims were time-barred, that the relators were improperly trying to hold the defendant company liable for its former employee's conduct, and that the relators' complaint failed to state a claim under the False Claims Act.

Holding: The U.S. District Court for the Western District of Washington denied the motion for summary judgment.

The court first held that the FCA's "complex statute of limitations" generally provides a six-year period, but noted that the provision also includes "a 10-year statute of repose and an 'equitable tolling' provision, under which the plaintiff has three years to bring an action" after the appropriate government official should have become aware of the government's right of action. The court determined that the parties disputed whether or not the equitable tolling provision applied, as they argued about when the government should have known all the relevant facts regarding its right of action. As a result of this dispute of material fact, the court held that summary judgment was not appropriate.

The court also denied the real estate company defendant's request for summary judgment with respect to its argument that the relator had improperly attempted to hold the company liable for the acts of an individual defendant who had begun working for a different real estate company during the time the alleged fraud was occurring. The court determined that the relator had not sued the company solely based on the conduct of this one former employee, but rather alleged that the company itself "was involved in the kickback scheme and 'actively concealed the fraud even after'" the former employee had stopped working there. Again, the court held that issues of disputed fact existed, warranting a denial of the summary judgment motion.

Finally, the court held that, when the relators' version of the facts was accepted as true, the relators stated a claim for relief under the False Claims Act, since the relators alleged that the defendants defrauded the government out of its money. Further, the court found that issues regarding whether or not the funds in questions were unpaid taxes—and thus, not actionable under the False Claims Act—were in dispute, and therefore inappropriate for summary judgment.

U.S. ex rel. Klein v. Omeros Corp., 2012 WL 4874031 (W.D. Wash. Oct. 15, 2012)

A relator sued a company, alleging violations of the False Claims Act. The relator alleged that a subsidiary of the defendant company purchased another company and that the purchased company falsely certified to the government that it was a "small business" and was eligible to receive a Small Business Innovation Research (SBIR) grant, since it knew that it was ineligible for the grant because it was majority-owned by the defendant company. The relator alleged that the defendant company, as successor to the purchased company, is liable for those false claims. Both parties moved for summary judgment, with the defendant arguing that the relator's claims were time-barred and with the relator arguing for successor liability.

Holding: The U.S. District Court for the Western District of Washington denied both motions.

Statute of Limitations

The defendant argued that the relator's fraud claim was barred by the FCA's six-year statute of limitations. While the defendant recognized that the FCA provides for tolling the statute of limitations up to ten years, it argued that the tolling provision is only available to an "official of the United States," and since the relator does not meet that criterion, his claim was time-barred. The court, though, noted that the Ninth Circuit has held that the tolling provision does apply to *qui tam* relators. The defendant countered that the Ninth Circuit jurisprudence was overruled by the U.S. Supreme Court's opinion in *U.S. ex rel. Eisenstein v. City of New York*, in which the Court held that the government is not a party to *qui tam* litigation unless it affirmatively intervenes in the relator's suit; until then, the United States remains the "real party in interest." The district court held that *Eisenstein* – which dealt with the length of time relators have to file notices of appeal in non-intervened *qui tam* suits—did not overrule the Ninth Circuit's ruling, stating that the Ninth Circuit's "holding that the statutory language of the FCA evinces Congress' intent that the tolling provision apply to *qui tam* plaintiffs is not irreconcilable with *Eisenstein's* holding that the United States is not a 'party'" for purposes of filing notices of appeal "to a *qui tam* lawsuit in which it has declined to intervene." Consequently, the court held that the relator's claim was not time-barred and denied the defendant's motion for summary judgment.

Successor Liability

The relator argued that the defendant, as successor to the majority-owned subsidiary that allegedly made false statements to the government, was liable under the FCA. The court noted that the traditional exceptions to successor non-liability under both federal common law and Washington state law were identical, and that under these laws, asset purchasers are not liable as successors unless they expressly or impliedly agree to assume the predecessor's liability; the transaction amounts to a "de-facto" merger; the successor is merely a continuation of the predecessor; or the transaction was fraudulently entered into in order to escape liability. The court held that these exceptions apply in the context of FCA claims, noting that the relator failed to direct the court to any clear expression of congressional intent not to allow these exceptions to apply to FCA cases. The court refused to decide the relator's summary judgment motion on successor liability, as it held that the parties failed to adequately address whether any of the exceptions to successor non-liability applied.

U.S. ex rel. Dismissed Relator v. Lilwani, 2012 WL 4739922 (C.D. Ill. Oct. 3, 2012)

A relator brought a *qui tam* action under the federal False Claims Act and the Illinois False Claims Act, alleging that a medical transportation services provider and an affiliated individual defrauded the federal healthcare programs. The United

States and the State of Illinois intervened in the relator's lawsuit and the plaintiffs filed an amended complaint alleging that the defendants knowingly submitted duplicate claims for payment, claims for services that were not provided, and claims for services without a corresponding medical service. The defendants moved to dismiss the plaintiffs' fraud claims as untimely and for failure to plead the alleged fraud with particularity. The defendants also contended that the plaintiffs' claims should be dismissed because of prior settlements and principles of claim preclusion.

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

Statute of Limitations

The court observed that the relator filed his *qui tam* action on November 7, 2006. The government entities received several extensions of the initial 60-day FCA seal and finally filed their complaint-in-intervention on August 8, 2011. The defendants argued that, pursuant to the FCA's statute of limitations provision, the plaintiffs' claims should only go back to August 8, 2008—three years from the date when the government entities had all the necessary information to bring their complaint. The court disposed of that argument, noting that the FCA's statute of limitations provision makes clear that plaintiffs have a 6-year limitations period from the time the FCA violation occurs, as well as a three year period from the date when the government official authorized to act should have known about the fraud—"whichever occurs last." The court held that the three-year limitations period did not apply. The court also noted that both the Federal Rules of Civil Procedure and the Illinois counterpart allow for "relation back" of amended pleadings to the date of the original pleading, when the amendment asserts claims that arose out of the same conduct as described in the original pleading. The court held that the complaint-in-intervention alleged claims that arose out of the same conduct as the claims alleged in the relator's original *qui tam* complaint. As a result of these findings, the court held that the plaintiffs' claims were not time-barred.

Pleading Fraud with Particularity

Next, the court took a single paragraph to state its holding that the plaintiffs' allegations were pled with the requisite particularity, noting that the complaint "satisfies these requirements by pleading the who, what, when, where, and how of the alleged fraud."

Res Judicata

Finally, the court considered the defendants' argument that since the State of Illinois had already accepted the defendants' offer to settle claims of overpayments covering 2000 through 2004, had collected additional funds from the defendants to cover the period of 2005 to 2008, and has shared those funds with the federal government, the plaintiffs' claims were barred by *res judicata*. The court, though, determined that *res*

judicata is an affirmative defense, and cannot serve as the basis for a motion to dismiss. The court declined to turn the defendants' motion to dismiss on *res judicata* grounds into a motion for summary judgment, but mentioned that the defendants could raise that defense again at the appropriate time during the litigation.

U.S. ex rel. Dismissed Relator v. Murchison, 2012 WL 4739938 (C.D. Ill. Oct. 3, 2012)

The relator from the case immediately above filed a separate *qui tam* action alleging that another transportation company and an affiliated individual violated the federal False Claims Act and the Illinois False Claims Act by knowingly submitting duplicate claims for payment, claims for services that were not provided, and claims for services without a corresponding medical service. Again, the United States and the State of Illinois intervened in the relator's suit and filed a complaint-in-intervention. These defendants also moved to dismiss the plaintiffs' claims, arguing that the claims were time-barred and not pled with the required particularity.

Holding: The U.S. District Court for the Central District of Illinois applied the same rationale as described in the case immediately above in concluding that the plaintiffs' claims were not time-barred and that their claims were pled with the requisite particularity. The defendants' motion to dismiss was denied.

U.S. v. BNP Paribas SA, 2012 WL 3234233 (S.D. Tex. Aug. 6, 2012)

The United States brought an action under the False Claims Act and common law doctrines, alleging that a group of corporate and individual defendants in the commodity exports business defrauded the Supplier Credit Guarantee Program—a program operated by the Commodity Credit Corporation, which is a federally-chartered corporation within the U.S. Department of Agriculture. The corporate defendants moved to dismiss the government's FCA claims for failure to state a claim and for failure to plead the alleged fraud scheme with particularity. They also argued that the government was judicially estopped from bringing its claims, and that the claims were time-barred. The individual defendant—a former vice president of one of the corporate defendants, moved to partially join the corporate defendants' motions to dismiss.

Holding: The U.S. District Court for the Southern District of Texas granted the corporate defendants' motions to dismiss for failure to plead the alleged fraud with particularity. The government was granted leave to file an amended complaint. The individual defendant's motion to adopt arguments of the corporate defendants was denied.

Judicial Estoppel

The corporate defendants argued that the government was estopped from alleging that they committed fraud, since the government had repeatedly explained to the court that those defendants were victims of the individual defendant's conspiracy and fraud. The court rejected that argument, since the corporate defendants failed to show that the government had taken a position that was clearly inconsistent with a position it had taken in any related criminal proceeding. Ultimately, the court held that the corporate defendants' claims of being victimized were not inconsistent with the government's allegations that they knowingly submitted false claims to the United States. The court rejected the judicial estoppel argument.

Statute of Limitations

The corporate defendants argued that the government's FCA claims were time-barred and should be dismissed, claiming that the government filed its complaint more than a month after the FCA's six-year statute of limitations expired. The court noted that the "FCA provides a six-year statute of limitations and a three-year tolling period, and bars the United States from filing FCA claims over ten years old." The defendants claimed that the three-year tolling provision did not apply, since the government should have known about the alleged fraud long before it filed suit. The government countered that many of its claims fell within the six-year limitations period; that the FCA's three-year tolling provision did apply; and, more comprehensively, that the Wartime Suspension of Limitations Act (WSLA) suspended all statutes of limitations for all claims of the United States. The court rejected the government's argument that it brought claims within the six-year limitations period, noting that the government's cause of action did not arise when the allegedly false claims were paid—as the government had argued—but rather when those claims were submitted. The court also held that the question of whether the United States knew or should have known the material facts regarding its claims could not be answered at the pleading stage, before any discovery; instead, the court held that the government's claims were not subject to dismissal on that basis.

The court, however, agreed with the government's third rationale—that all statutes of limitations regarding claims of the United States are suspended pursuant to the WSLA, which suspends statutes of limitations for claims "involving fraud or attempted fraud against the United States or any agency thereof" until five years after any war involving the U.S. has ended, as declared by the President or a congressional resolution. The defendants argued that the WLSA did not save the government's claims, because the WSLA does not apply to civil FCA cases and because the United States was not at war when the allegedly false claims were submitted to the government.

Regarding the first argument, the defendants argued that the WSLA only applies to "offenses" involving fraud, which they asserted limits application of the statute to criminal cases—they argued that the FCA itself provides the exclusive statute of limitations for FCA fraud claims and claimed that the Fifth Circuit has concluded that

the FCA provides an "absolute limitations period," and has rejected any form of tolling not included in the FCA. The district court, though, held that the defendants' reliance on Fifth Circuit precedent was misplaced, as the cases cited by the defendants only make clear that relators who are not "in direct identity with the United States" cannot benefit from the FCA's tolling provision and that an older version of the FCA did not allow for equitable tolling. Neither of those situations had arisen in the present case. Consequently, the district court held that, because the WSLA, by its plain language, applies to "any statute of limitations," it applied to the FCA's statute of limitations. The court also rejected the defendants' argument that Congress would have specifically referenced the WSLA's applicability to civil proceedings if it had intended for the statute to apply to limitations provisions of civil laws like the FCA. The defendants cited a 50-year old district court opinion in support of their proposition. The court noted that the district court in that case had relied on a U.S. Supreme Court decision that did not directly address the question, and therefore, was of limited value. Moreover, the court observed that the case cited by the defendants was the only example it could find in which a court held that the WSLA only applies to criminal proceedings, declaring that "all other courts to have faced the issue . . . have concluded the WSLA applies to [civil] actions," including FCA. The court further held that "offense" is not synonymous with "crime," and that had Congress intended to restrict application of the WSLA to criminal proceedings, it could have specified that the statute only applies to "crimes," "criminal offenses," etc., rather than use the word "offenses." Furthermore, the court held that the legislative history of the WSLA supports application of the statute to civil claims, as the statute was amended in 1944 to remove descriptive "now indictable" language from "offense," indicating that the Act applied to claims for both criminal and civil offenses, including claims brought under the civil FCA.

With respect to their second argument, the defendants claimed that, even if the WSLA applies to FCA claims, it did not toll the limitations period for the government's claims because the United States was not at war in 2005, when the alleged false claims were submitted and gave rise to the government's fraud claims. Notably, the defendants asserted that the United States' conflicts in Iraq and Afghanistan were not "wars" as that term is used in the WLSA; alternatively, they claimed that even if those conflicts were deemed wars, the wars had concluded by 2003, well before the alleged false claims at issue were submitted to the government. Additionally, they argued that the WSLA was amended in 2008—after the government's fraud claims arose—to make the statute applicable to congressional enactments authorizing the use of the armed forces pursuant to the War Powers Resolution, and that the amendment is not retroactive and thus, does not apply to the conflicts in Iraq or Afghanistan. The court, however, agreed with the government that the United States was "at war" in 2005, when the government's fraud claims arose. The court found that, as a result of Congress's 2001 Authorization for Use of Military Force, which authorized President Bush to use all "necessary and appropriate force" against those responsible for the 9/11 attack and Congress' 2002 Authorization for the Use of Military Force Against Iraq, which authorized military force, if necessary, to remove the then-Iraqi government

and replace it with a democratic regime, the United States was "at war" in Iraq and Afghanistan. The court then considered the defendants' assertion that the Afghanistan war ended in 2001 when Hamad Karzai's government was formally recognized, and that the war in Iraq ended in 2003 when President Bush declared that major combat operations had concluded. The court, relying on Fifth Circuit precedent, concluded that neither of these wars has ended yet. Consequently, the United States was "at war," for WSLA purposes, in 2005. In addition, the court determined that Congress' 2008 amendments to the WSLA applied to the government's FCA claims. Again relying on Fifth Circuit precedent, the court explained that the question of whether or not to apply a newly-enacted statute of limitations turns on whether or not the cause of action at issue expired before the newly-enacted statute became effective. Since the amended WSLA became effective in 2008, before the government's six-year statute of limitations expired, the court held that the amended WSLA applied to the government's fraud claims.

As a result of these findings, the court concluded that the government's fraud claims were not time-barred.

Failure to State a Claim/Plead Fraud with Particularity

The corporate defendants alleged that the government's fraud claims failed as a matter of law because their complaint did not allege vicarious liability for the actions of the individual defendant, whom they asserted victimized them by accepting bribes and by conspiring to defraud the government. In addition, they claimed that the government's brief did not allege that <u>they</u> submitted any false claims to the government, nor did the government plead the alleged fraud scheme with particularity. The court considered each of the defendants' arguments in turn.

The court first determined that the government properly alleged that the corporate defendants submitted false claims, as the government alleged that those defendants conspired with others to engage in a scheme to submit false claims. Moreover, the government specifically alleged that the corporate defendants made claims to the government that they knew were false. Thus, the court disposed of that defense argument. Similarly, the court determined that the government's complaint pled sufficient facts to allege that the corporate defendants knowingly violated the FCA. These defendants argued that their former vice president was responsible for all of the alleged fraud, and that the government's claims against them failed, since the government did not allege that any of the corporate defendants knew of or approved the vice president's alleged misconduct. They further claimed that they did not benefit from the vice president's actions, but rather, sustained substantial losses and reputational harm. They argued that the vice president's knowledge should not be imputed to them. The court disagreed, finding that the government alleged that the vice president was acting within the scope of his employment and for the benefit of the corporate defendants when he allegedly committed the wrongful acts at issue. Therefore, the court refused to dismiss the government's complaint on that basis.

The court then turned to the question of whether the government pled the alleged fraud scheme with particularity. The government argued that its claims were specific enough to put the defendants on notice of the facts alleged against them, as required by Rule 9(b) of the Federal Rules of Civil Procedure. The court agreed with the defendants on this issue, finding that the government's allegations did not distinguish between the alleged fraudulent conduct of the various defendants with any particularity.

Consequently, the court held that the government's complaint did not meet Rule 9(b)'s heightened pleading requirements and dismiss. Though court gave the government 30 days to amend its complaint and to provide greater specificity regarding the FCA claims against each of the respective defendants.

See *U.S. ex rel. Paulos v. Stryker Corp.*, 2013 WL 2666346 (W.D. Mo. June 12, 2013), at page 37.

See *U.S. ex rel. Trinh v. Northeast Med. Servs., Inc.*, 2013 WL 1789712 (N.D. Cal. Apr. 26, 2013), at page 41.

See *U.S. ex rel. Goldberg v. Rush Univ. Med. Ctr.*, 2013 WL 870651 (N.D. Ill. Mar. 6, 2013), at page 164.

See *Hooper v. Lockheed Martin Corp.*, 2012 WL 3124970 (9th Cir. Aug. 2, 2012), at page 20.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Soulias v. Northwestern Univ., 2013 WL 3275839 (N.D. Ill. June 27, 2013)

A relator brought a *qui tam* action against a university hospital, alleging violations of the False Claims Act. Specifically, the relator alleged that the hospital double-billed the federal government under Medicare for services provided to patients in research trials. The United States declined to intervene in the relator's suit. The defendant moved to dismiss, arguing that the relator failed to plead the fraud allegations with particularity.

The U.S. District Court for the Northern District of Illinois granted the defendant's motion and dismissed the relator's complaint without prejudice. The relator was given one final opportunity to amend her *qui tam* complaint. In reaching its holding, the court rejected the relator's argument that she was only required to plead a "plausible" claim, citing the U.S. Supreme Court's rulings in *Ashcroft v. Iqbal* and *Bell Atlantic Corp. v. Twombly*. Instead, the court held that the relator's *qui tam* allegations were subject to Federal Rule of Civil Procedure 9(b)'s heightened pleadings requirements, and that "[b]y arguing that she states a 'plausible' fraud claim, [the relator] tacitly (if not explicitly) concedes that she fails to plead her fraud claim with particularity as Rule 9(b) requires. The court further observed that the relator did not identify any actual false claims submitted by the hospital—let alone any claims that were knowingly false—and instead alleged conclusory allegations of "many, many instances" of double-billing, even though she alleged that she was personally aware of the alleged fraud. Ultimately, the court held that the relator was "required to provide some actual examples of the double billing she alleges, with enough specificity to satisfy Rule 9(b). The court thus dismissed the relator's fraud allegations, but granted her leave to amend her complaint.

U.S. ex rel. Berg v. Honeywell Int'l, Inc., 2013 WL 3223391 (D. Alaska June 24, 2013)

Five *qui tam* relators filed suit against two affiliated government contractors, alleging that the defendants violated the False Claims Act by fraudulently inducing the U.S. Army to award a contract and by submitting false information to the government in order to get the government to pay the claims they submitted under the contract. Specifically, the relators claimed that the Army issued a 25-year contract

to the defendants that required the defendants to install energy-efficient lighting at two locations and to convert the locations from a public utility power supply to commercial gas and electricity. Pursuant to the contract, the defendants were required to establish a baseline of the government's energy costs, which would be used to estimate, and then measure, the level of savings created by the defendants' services. The contract provided that if the defendants did not generate savings, then they would not receive a payment. After the first year, no savings were realized as a result of the defendants' efforts. Subsequently, the Army commissioned an audit of the defendants' contract, which revealed that the defendants submitted incorrect baselines when estimating the government's level of savings. The audit also revealed that the Army did not give complete information to the defendants, which played a role in the miscalculation. As a result of the audit, the parties modified the contract. The relators—all of whom were employed by the Army—asserted *qui tam* claims against the defendant, alleging that the companies knowingly provided false baseline calculations to the government and knowingly made false statements to the government in support of their claims for payment.

The United States declined to intervene in the suit. The defendants moved to dismiss the relators' complaint, arguing, among other things, that the court lacked subject matter jurisdiction over the *qui tam* claims, due to the False Claims Act's public disclosure bar provision. The U.S. District Court for the District of Alaska granted the defendants' motion, finding that the relators' complaint was precluded by the public disclosure bar. The court did not reach the defendants' other arguments. The relators appealed the district court's ruling to the U.S. Court of Appeals for the Ninth Circuit, which reversed the district court's order. The defendants then renewed their motion to dismiss, arguing that the *qui tam* allegations were not pled with particularity, as required by Federal Rule of Civil Procedure 9(b).

Holding: the Alaska district court granted the defendants' motion to dismiss, finding that the relators failed to plead their fraud claims with particularity.

The court stated that "[t]he essential elements of a FCA claim are: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to [pay] out money." The court determined that the relators' allegations focused on the defendants' alleged fraudulent conduct in making their baseline calculations, but failed to allege that any false claim for payment was actually submitted. The court noted that even if the defendants had manipulated its baseline calculations, it could not have submitted a claim for payment to the government because the government did not realize any savings. The court rejected the relators' argument that their allegations were based on a fraud in the inducement theory of FCA liability, and therefore, they were not required to show that the defendants actually submitted false claims. Instead, the court held that the relators' allegations were still deficient because they could not show that the defendants' alleged miscalculations were made "knowingly," and were not

merely the result of mistakes or "bad math." The court reasoned that since the defendants would not be paid unless they could generate cost savings for the government, the defendants took on the risk of non-payment and therefore, the relators' allegation that the defendants knew that their estimated level of saving might not come to fruition was insufficient to maintain their claim. As a result, the court held that the relators' fraud allegations did not meet Rule 9(b)'s requirements and thus, should be dismissed. The court then considered the relators' motion to further amend their complaint—the defendants opposed this motion, arguing that the granting the motion would be futile. The court again agreed with the defendants, concluding that the relators' proposed amended complaint still only amounted to allegations of "bad math, bad data, and sloppy estimations," which the court held were inadequate to plead fraud under the False Claims Act. The court denied the relators' motion.

U.S. ex rel. Duxbury v. Ortho Biotech Prods., L.P., 2013 WL 2501930 (1st Cir. June 12, 2013)

A relator filed a *qui tam* suit against a pharmaceutical company, alleging that the defendant violated the False Claims Act by providing a variety of illegal kickbacks to Medicare providers to induce them to submit false Medicare claims for one of the defendant's drugs. The U.S. District Court for the District of Massachusetts dismissed the relator's claim, finding that the claim had not been pled with particularity, as required by Federal Rule of Civil Procedure 9(b). The relator appealed the district court's ruling to the U.S. Court of Appeals for the First Circuit. The First Circuit reversed the district court's ruling, finding that the kickback allegation had been pled with sufficient particularity to satisfy Rule 9(b), since the relator identified multiple providers to whom the defendant allegedly providing kickbacks, and detailed the dates and amounts of allegedly false reimbursement claims the providers submitted to Medicare. The circuit court remanded the case to the district court.

On remand, the defendant moved for an order clarifying that, in light of the circuit court's decision, and the FCA's statute of limitations and public disclosure bar provisions, the relator's claims were limited to the 8-month period for which allegedly false claims were identified, and to the geographic region where the providers he identified were located. The relator agreed that his allegation was restricted by the statute of limitations, but argued that the scope of his allegations included a nation-wide fraud scheme over a six year period. The district court granted the defendant's motion and severely limited the scope of the relator's suit. At the close of discovery, the defendant moved for summary judgment on the relator's claims, arguing that the relator could not support his claims with documents, witnesses or other admissible evidence. The district court granted the defendant's motion. The relator again appealed the district court's ruling to the First Circuit, arguing

that the district court erred when it limited the scope of the relator's discovery to a small subset of claims. The relator claimed that the district court incorrectly held that it lacked subject-matter jurisdiction over a portion of the relator's allegations—allegations of fraud outside the time the relator was employed by the defendant. In addition, the relator contended that the district court's discovery limitations contradicted the circuit court's prior ruling and the court's application of a more relaxed Rule 9(b) standard.

The First Circuit affirmed the district court's ruling. The appellate court did not reach the first argument, finding that the district court's discovery limitations were consistent with its prior ruling—which established the time period for which the relator pled fraud allegations with particularity—and were within the district court's broad discovery to manage discovery. The circuit court further held that the district court "was not required to expand the scope of discovery based upon the amended complaint's bald assertions that the purported kickback scheme continued" after the defendant fired the relator from his job, "or that it was nationwide in scope." The circuit court also noted that at the close of discovery, the relator failed to uncover any evidence to support his argument that the scope of his allegations should be expanded, and "[t]hus, this was not a case in which evidence was discovered of a nationwide scheme, which might then have been the basis for widening discovery."

U.S. ex rel. Lampkin v. Johnson & Johnson, Inc., 2013 WL 2404238 (D.N.J. May 31, 2013)

A *qui tam* relator filed suit against a group of pharmaceuticals companies, alleging that the defendants violated the False Claims Act by promoting an ocular antibiotic to doctors for uses that were not approved by the Food and Drug Administration, and then providing illegal kickbacks to the doctors (in the form of free and discounted surgical kits and equipment) to induce them to prescribe the drug for the non-approved uses, while billing the federal government healthcare programs for reimbursement for those prescriptions. In fact, the relator alleged that 99% of the drug's nation-wide sales were for non-approved, off-label uses—most of which were not medically necessary—and thus, claims to the government for those sales were false. In addition to her allegation that the defendants caused doctors to submit false claims, to the government, she alleged that the defendants violated the False Claims Act by conspiring to defraud the government. The defendants moved to dismiss the relator's complaint for failure to state a claim and for failure to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the District of New Jersey granted the defendants' motion and denied the relator's motion to amend her complaint.

Failure to State a Claim/Plead Fraud with Particularity

The defendants argued that the relator's complaint did not plead the alleged fraud with particularity, since it did not provide sufficient details regarding when or where the alleged fraud occurred, and failed to identify specific individuals who engaged in the fraud. Similarly, the defendants argued that the relator's complaint did not state a claim because she could not show that the allegedly false claims to the government for the drug contained any false information; the defendants asserted that the claims to the government truthfully identified the drug being prescribed and the reasons for the prescriptions. In addition, the defendants argued that the relator could not demonstrate that they made any false or misleading statements to doctors that induced them to prescribe the drug for off-label uses or that they engaged in a conspiracy to commit fraud.

The court held that the relator's "allegations of the purportedly false claims that were submitted to the government are vague and conclusory," and lacked factual support. The court noted that the relator did not identify any doctors who prescribed the drug for an off-label use, "much less one who submitted a claim for reimbursement to the government," and failed to identify any instances of the defendants' alleged off-label drug promotion. The court likewise held that the relator's illegal kickback allegations were deficient, as the *qui tam* complaint failed to allege that physicians who allegedly received kickbacks from the defendants also prescribed the drug at issue for off-label uses as a result of the kickbacks, and failed to identify any specific false claims submitted to the government. Consequently, the court held that the relator's allegation that the defendants caused doctors to submit false claims to the government were deficient and should be dismissed. In addition, the court held that the relator's allegation that the defendants engaged in a conspiracy to defraud the government would be dismissed, since the relator "failed to allege any meeting of the minds between Defendants and the doctors who prescribed the drugs."

The court further held that the relator's proposed amended complaint did not cure these deficiencies. Although the court observed that the relator's proposed amended complaint "includes certain additional factual allegations in support of her claims," it ultimately held that the additional facts were "still inadequate to plead a claim for violation of the FCA." The court noted that the although proposed amended complaint identified specific doctors who prescribed the drug and who allegedly received illegal kickbacks from the defendants, it simply presumed—without specifying—that those prescriptions were for off-label uses, that the prescriptions were written for government healthcare program patients, or that the doctors only prescribed the drug as a result of the illegal kickbacks they allegedly received. The court also concluded that the proposed amended complaint failed to plead a conspiracy claim—although it identified specific doctors who allegedly engaged in the scheme, it still did not allege an actual agreement between the defendants and those doctors to use false statements or records to commit fraud. As a result, the court denied the relator's motion to amend her *qui tam* complaint finding that allowing the proposed amendment would be futile.

U.S. ex rel. Ahumada v. National Ctr. For Employment of the Disabled, 2013 WL 2322836 (E.D. Va. May 22, 2013)

A *qui tam* relator filed suit against his former employer—the National Center for Employment of the Disabled (NCED)—and the company's president and chief executive officer, alleging that defendants submitted false claims and made false statements while working on a government contract. Specifically, the relator alleged that the defendants were contracted by the government to produce corrugated paper containers for civilian government clients like the United States Post Office, and that 75% of the labor was to be performed by severely disabled individuals. The relator claimed that the defendants falsely represented to the government that they had complied with the contract's requirements. In addition, the relator alleged that the defendants falsely represented the costs of the containers to the government, by failing to disclose the lowest bids they received for work and supplies as well as the rebates they received from suppliers. The relator eventually amended his complaint to include five additional defendants, consisting of four paper supply companies and an organization for the severely handicapped. The relator alleged that these defendants conspired with the other defendants to submit false claims to the government by submitting false invoices to NCED for "raw" box materials, while actually supplying NCED with nearly-complete containers that were pre-printed with "box manufacturing certificates" that falsely represented that 75% of the direct labor to manufacture the containers was performed by severely disabled workers. The United States intervened in, and settled, some of the relator's claims against NCED and its president and CEO, but declined to intervene in the claims against the other defendants. Those defendants then moved to dismiss the relator's claims, arguing that the relator failed to state a claim and failed to allege the fraud scheme with particularity.

The U.S. District Court for the Eastern District of Virginia granted the defendants' motion to dismiss. The court held that the relator's general allegations that "all defendants" engaged in fraud, "provides no insight into the specific culpable conduct accused of." Moreover, the court found that the relator's amended complaint was "devoid of any particularized facts. Not a single employee, specific communication, the specific products shipped, or a specific invoice that was submitted to the Government is mentioned." The court determined that the relator's allegations were not pled with sufficient particularity. Furthermore, the court found that the relator failed to allege the defendants' scienter, since the relator did not establish that the defendants knew that NCED was selling containers to the government under a contract that required labor by severely disabled workers. Likewise, the court held that the relator's conspiracy claim was deficient, since the relator did not allege facts in support of that allegation. All of the relator's claims were dismissed.

In addition, the court noted that, before the relator's suit was filed, two newspapers published several articles about the company's non-compliance with the

terms of its government contract and suggested that the company violated the False Claims Act. The articles named the other defendants as well and included quotes from some of their employees. The court held that these articles constituted public disclosures that precluded the relator's *qui tam* suit—the court found that the relator's allegations "clearly track the news media stories and the public disclosure clearly appears to be the basis of Relator's claim." In addition, the court held that the relator could not demonstrate that he had direct or independent knowledge of the information on which his claims were based, particularly since the relator was only employed by NCED for about six months and his allegations were not particularized. As a result, the court held that the relator did not qualify as an original source under the False Claims Act. Since the court determined that the relator's allegations were based on public disclosures and that the relator could not cure those deficiencies, the court dismissed the *qui tam* complaint and denied the relator's motion for leave to file a second amended complaint.

U.S. ex rel. Fox Rx, Inc. v. Omnicare, Inc., 2013 WL 2303768 (N.D. Ga. May 17, 2013)

A pharmacy company filed a *qui tam* suit against two specialty pharmacies that supply services to long-term care facilities, alleging that the defendants violated the False Claims Act by submitting Medicare reimbursement claims for prescriptions that were not reimbursable because they for off-label uses. The relator was a sponsor of Medicare Part D Prescription Drug Plans (PDP) and received PDP bills from the defendants, which were ultimately paid by the government. The relator's second amended complaint was dismissed for failing to satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). The relator was granted leave to file an amended complaint to re-plead the previously-dismissed allegation. The relator then filed a third amended complaint which also included, for the first time, a "reverse false claims" allegation. The government declined to intervene in the relator's suit. The defendants moved to dismiss the relator's complaint, arguing that the relator failed to obtain leave of the court to add his reverse false claim allegation; that the *qui tam* complaint failed to plead that the defendants acted "knowingly;" and that the fraud claims were again not pled with particularity as required by Rule 9(b). The defendants also moved to dismiss the relator's complaint for lack of subject matter jurisdiction, arguing that the fraud claims were based on numerous forms that were publicly available.

Holding: The U.S. District Court for the Northern District of Georgia granted the defendants' motion in part and denied it in part. The court dismissed the relator's reverse false claim allegation, finding that the claim was not filed in accordance with Rule 15(a)(2). The court also dismissed a subset of the relator's claims regarding prescriptions for off-label uses, finding that the relator's allegations were limited to the claims the defendants submitted to the relator for pay-

ment, and could not encompass all of the defendants' nationwide Medicare Part D claims. The court denied the defendants' motion to dismiss for lack of subject matter jurisdiction.

Amended Complaint

The court granted the defendants' motion to dismiss the relator's reverse false claim allegation, finding that the relator did not satisfy Rule 15(a)(2)'s requirement either to obtain the defendants' consent or leave of the court to add that allegation to its third amended complaint. The court noted that while the relator was granted leave to re-plead the dismissed fraud claims regarding off-label marketing, it never received—nor sought—leave to add the new reverse false claim allegation.

Failure to Plead Fraud with Particularity

The relator alleged that the defendants knowingly presented false claims to the government and knowingly made false statements that were material to their false claims. The court held that in order to plead either cause of action, the relator must allege that the defendants acted knowingly, and that actual false claims existed. The defendants argued that the relator failed to establish either element. The court noted that the relator specifically alleged that the defendants—both of which were dispensing pharmacies with access to patients' diagnostic histories—had actual knowledge or acted in reckless disregard or deliberate ignorance of whether or not patients' prescriptions were for off-label uses. In addition, the relator alleged that the defendants—which were also consulting pharmacies—actually knew or acted in reckless disregard of deliberate ignorance of their obligations under federal law to oversee patients' drug regimens, which would have revealed the absence of medically-accepted indications for the off-label prescriptions. The court held that these allegations were sufficient to plead the scienter element of FCA liability.

The court then considered the defendants argument that the *qui tam* complaint did not plead the alleged fraud with particularity. The court observed that the relator's third amended complaint included spreadsheets that provided detailed prescription information for twenty "sample" patients, including the patients' diagnoses—conditions for which the relators alleged that the prescriptions at issue were not approved. The relator based its diagnoses, at least in part, on certain "RxHCC data" the defendants received from the federal government. These spreadsheets also specified additional facts, including the dates and pharmacy locations that filled the sample prescriptions, the dosage and quantity of the drug, the dates the corresponding Medicare claims were submitted, and the cost of the drug and amounts paid by Medicare. The defendants argued that the spreadsheets still did not provide sufficient particularity, since the relator did not identify specific employees who acted on behalf of the corporate defendants. The court, noting that the defendants did not offer any authority supporting its argument, held that Rule 9(b) does not require such detail. The court further held that, at the motion to dismiss stage, the relator was not required to

show that the defendants relied on the RxHCC data to establish patients' diagnoses, and thus knowingly submitted claims for off-label prescriptions. Instead, the court reminded the defendants that, for purposes of their motion to dismiss, it would assume that all the relator's factual allegations were true. However, after reviewing the relator's spreadsheets and allegations, the court concluded that the relator could only allege fraud involving claims the defendants submitted to the relator, and not claims that were submitted to other PDP sponsors. The court rejected the relator's argument that the defendants' nationwide conduct should be inferred from the relator's allegations, finding that Rule 9(b) does not allow for such an inference. As a result, the court limited the scope of the relator's allegations to claims the defendants submitted to the relator during 2009 and 2010.

Public Disclosure Bar

The court considered the defendants' separate argument, that the relator's complaint should be dismissed for lack of subject matter jurisdiction, pursuant to the False Claims Act's public disclosure bar provision. The defendants argued that the relator's allegations were based on information disclosed in a prior *qui tam* suit filed by different relators against one of the defendants. They further contended that the RxHCC data was a public disclosure, and that the alleged fraud had been previously disclosed through government regulations, media reports, and medical and scientific journals. The court first concluded that the prior *qui tam* suit involved allegations that one of the defendants violated the FCA by soliciting and receiving illegal kickbacks from drug manufacturers in exchange for pressuring doctors to prescribe the drug to their patients. The court held that those prior allegations did not disclose the fraud alleged by the relator, because even though the same drugs were at issue in both suits, the prior complaint did not allege that the drug was prescribed for off-label purposes. The court held that the defendant was alleged to be involved in two different fraud schemes, and thus, the public disclosure bar did not apply. Similarly, the court held that the defendants failed to explain how the RxHCC data was made public, noting that the United States filed a statement of interest in the case—to which the defendants did not respond—explaining that such data is not available to the public. Thus, the court determined that the RxHCC data was not a public disclosure. Moreover, the court concluded that the other purported public disclosures did not preclude the relator's complaint, because they "do not describe a scheme in which pharmacies submit claims to be reimbursed by Medicare for filling off-label [prescriptions]," and "do not allege that Defendants, in particular, have filled, and submitted claims for reimbursement" for off-label prescriptions. The defendants' motion to dismiss for lack of subject matter jurisdiction was denied.

U.S. ex rel. Mooney v. Americare, Inc., 2013 WL 1346022 (E.D.N.Y. Apr. 3, 2013)

Arelator filed a *qui tam* suit under the federal and New York State False Claims Act laws, alleging that a group of affiliated home nursing care companies and individual defendants defrauded Medicare and Medicaid by conspiring and engaging in an illegal scheme in which kickbacks were exchanged for patient referrals, and by falsifying records to justify unnecessary services, in order to support their false claims to the government. The relator had been employed by one of the corporate defendants over a three-year period to review Medicare and Medicaid billings for compliance with applicable regulations, and she further asserted that she was fired from her job in retaliation for reporting and objecting to the defendants' conduct. As a result, she added a claim under the FCA's anti-retaliation provision to her fraud claims. The governments declined to intervene in the relator's suit. The defendants moved to dismiss. They argued that the relator failed to plead her fraud claims with the required particularity, and that she failed to allege the elements of an FCA retaliation claim.

Holding: The U.S. District Court for the Eastern District of New York granted the defendants' motion to dismiss the fraud claims in part and denied it in part. The court also granted the defendants' motion to dismiss the retaliation claim in part and denied it in part—granting the motion of the individual defendants, but denying the corporate defendants' motion.

Failure to Plead Fraud with Particularity

The court first considered the relator's fraud allegations stemming from the defendants' alleged illegal kickback scheme. The court held that the relator failed to plead that alleged fraud with particularity, finding that she "fail[ed] to plead with particularity the 'who, what, when, where and how' of the fraudulent referral scheme. She [did] not provide patient names, claim numbers, dates of service, claim amounts, or reimbursement amounts, if any." The court further noted that the relator failed adequately to support her kickback allegations, as she did not "identify the specific payers or recipients of these kickbacks." Moreover, since many of the alleged participants in the kickback scheme were not named as defendants in the relator's suit, the court held that it was even more important for her to ascribe the wrongdoing alleged to specific defendants. But instead, the court found that the plaintiff generally made collective references to the three corporate defendants. The court further noted that Federal Rule of Civil Procedure 9(b)'s heightened pleading standard would not be relaxed, since the relator worked in the billing department for one of the corporate defendants and purported to have knowledge of specific claims, as well as supporting documents. Thus, the court held that the relator's kickback allegations were deficient and granted the defendants' motion to dismiss those claims. Since the relator conceded that she

could offer no additional specificity in support of those claims, the court declined the relator's request for leave to amend her complaint.

The court then turned to the relator's allegation that the defendants altered medical records to justify unnecessary home health services for which the government was billed. The defendants argued that the relator's allegation was inadequate, noting that she only alleged examples of purportedly fraudulent Medicare claims, but did not specify a single claim that was submitted to Medicaid. The court agreed that the relator's complaint provided no basis for alleging that the defendants defrauded Medicaid, and consequently, dismissed her remaining claims to the extent that they alleged fraud against the Medicaid program. But the court held that the relator "sufficiently alleged the fraudulent alteration scheme relating to Medicare claims." The court noted that she "identifie[d] twelve examples of such conduct," and that although she did not plead every detail of those claims, in most instances she "describe[d] the people implicated (the 'who') and the precise manner in which the records were altered (the 'how'). The claims also identify the 'when' by providing the date of the original order, the date of the alteration of the order, the date the claim was released to billing, or the date that the claim was actually submitted." The court held that these allegations were sufficient to overcome the defendants' motion to dismiss, and thus, the motion was denied with respect to the relator's allegations of Medicaid fraud based on the defendants' falsification of records.

Retaliation

Finally, the court considered the defendants' motion to dismiss the retaliation claim. The relator agreed to dismiss her retaliation claims against the individual defendants. The remaining defendants argued that the retaliation claim could only apply to one of them—the relator's former employer—and therefore, the claim should be dismissed to the extent that it was alleged against the other two corporate defendants. The court disagreed, drawing inferences in favor of the relator and finding that she alleged common ownership and management, and a lack of meaningful separation among the three corporate defendants. Similarly, although the relator admitted that she was fired due to a personality conflict, the court noted that she also contended that the actual reason for her termination was that she was retaliated against for trying to report and correct "systemic fraud and submission of false or fraudulent claims." She claimed that she received her first negative performance review and was relieved of duties concerning Medicare billing review after reporting incidents of records being altered and after pushing for more thorough audits. Soon after, she was fired. The court held that these allegations were sufficient to permit a reasonable jury to conclude that the relator was terminated for a retaliatory reason.

The court also held that the relator properly pled the elements of her retaliation claim. First, she pled that she notified the defendants that she was engaged in protected activity, since she reported her concerns regarding Medicare fraud to her supervisors on multiple occasions, and that in addition to her, two nurses were terminated as

a result of her whistleblowing. Although the defendants argued that they were not on notice that the relator was investigating matters that could lead to a viable FCA action, because the relator was simply doing her job when she reported improper Medicare billings to her supervisors. The court, though, held that the relator's allegations were sufficient, at the motion to dismiss stage. Accordingly, the court allowed the relator's retaliation claim to proceed against the three corporate defendants.

U.S. ex rel. Mastej v. Health Mgmt. Assocs., Inc., 2013 WL 1149255 (M.D. Fla. Mar. 19, 2013)

A *qui tam* relator alleged that two health management companies violated the False Claims Act by presenting false healthcare claims to the federal government, by using false statement to cause the federal government to pay false claims, by using false statements to avoid repayment obligations to the government, and by conspiring to submit false claims to the government. The relator's fraud allegations were based on his claims that the defendants violated the Anti-Kickback Statute and the Stark Law by providing improper kickbacks to physicians—including sham payments to neurosurgeons to be on-call even though the defendant provided no neurosurgery services, free travel on a corporate jet, free car rentals, and free all-access badges to the 2008 Masters Golf Tournament—in exchange for future patient referrals. The relator alleged that, even though the defendants provided proper healthcare to patients physicians improperly referred, the defendants' subsequent Medicare and Medicaid claims for those services were false, since the claims included the defendants' false certifications of compliance with all applicable healthcare laws and regulations, including the Anti-Kickback and Stark laws. The defendants moved to dismiss the relator's complaint, arguing that the alleged fraud was not pled with particularity, as required by Federal Rule of Civil Procedure 9(b).

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

Failure to Plead Fraud with Particularity

The relator's first cause of action alleged that the defendants falsely certified their compliance with healthcare laws and regulations in three ways: (1) in each patient-specific Medicare/Medicaid reimbursement claim they submitted to the government; (2) in three specifically-identified Medicare Hospital cost reports submitted to the government, covering the years 2007, 2008, and 2009; and (3) in three specifically-identified Medicaid cost reports, covering the years 2007, 2008, and 2009.

The court determined that the relator's allegation that the defendants' reimbursement claims included false certifications was not pled with sufficient particularity, since the relator provided "no specific information" regarding essential details, such

as "who submitted the forms, when they were submitted, which patients' forms were involved, or what defendants received as a result." Thus, the court dismissed the relator's claims, to the extent that they were based on alleged false certifications contained in Medicare/Medicaid reimbursement claims.

Next, the court considered the relator's contentions regarding the defendants' Medicare and Medicaid cost reports. The court observed that although the relator alleged more detail with respect to these submissions—including "the type of documents submitted, the dates of presentments, the time period the claims covered, and who signed the claim forms," his allegation was still deficient because he did not "adequately allege which portions of the claims forms were false and what defendants gained as a result of the false claims." The court observed that one of the cost reports at issue covered calendar year 2007. Since the relator alleged that the improper kickbacks to physicians included a trip to the 2008 Masters Golf Tournament—which occurred after the period covered by the defendants' 2007 cost reports—the court held that, to the extent the relator alleged that the defendants' 2007 cost reports were tainted by the alleged golf tournament kickbacks, those allegations would be dismissed. The only remaining allegation that could impact the 2007 cost reports was the claim that the defendants paid neurosurgeons for unnecessary on-call physicians for services in order to induce future patient referrals back to the defendants. While the court determined that the relator identified the forms the defendants submitted, it ultimately held that the relator's allegation failed because he did not specifically identify any patients these physicians referred to the defendant in exchange for the alleged sham payments, and correspondingly, he failed to describe what the defendants received as a result of the alleged fraud. The court held that the relator's allegations that the defendants made false certifications in their 2007 cost reports were deficient, and dismissed his claims based on those allegations.

The court then turned to defendants' respective 2008 and 2009 Medicare and Medicaid cost reports. First, the court noted that both allegations of illegal kickbacks—the alleged sham payments to neurosurgeons as well as the golf tournament provisions—applied to the 2008 cost report, but that the golf outing allegations did not apply to the 2009 cost report. The court did not explain why the 2009 report was not implicated by the 2008 trip, even though the relator alleged that the trip was designed to serve as an inducement of future referrals. Ultimately, though, the court held that the allegations concerning both sets of cost reports lacked the requisite particularity to overcome the defendants' motion to dismiss, since the relator "fail[ed] to specifically identify a single patient referred to defendants for whom services were provided in 2008 or 2009, fail[ed] to identify a single referred patient whose services were included in the 2008 or 2009 Hospital Cost Reports, fail[ed] to identify the individual or cumulative amounts involved in the claims submitted in reference to referred patients, and fail[ed] to identify what defendants gained as a result." As a result, the court dismissed the relator's claims that were based on alleged false certifications contained in the defendants' 2008 and 2009 cost reports.

The court then turned to the relator's second count, in which he alleged that the defendants made false statements to obtain payment from the government. The court observed that the relator could maintain this cause of action without showing that the defendants actually presented false claims to the government. However, the relator was required to show that the defendants' alleged false statements caused the government actually to pay a false claim. The court held that the relator's allegations regarding the defendants' purported false statements were inadequate, since the relator "fail[ed] to specifically plead any actual payment by the government with the requisite specificity," and instead merely alleged that the government paid the defendants' allegedly false claims, without "provid[ing] the dates, amounts, or any other identifying detail of any of these alleged payments." Consequently, the dismissed the second count of the relator's complaint.

Next, the court considered the relator's third cause of action, which alleged that the defendants made false statements to avoid their obligations to repay money to the government. This "reverse false claim" allegation was based on the defendants' alleged false certifications of compliance associated with their initial and interim claims for payments. The court held that this allegation was also lacking, since the relator "fail[ed] to specifically allege any monetary obligation by the defendant to the government." The relator's third count, alleging a violation of the FCA's reverse false claim provision, was dismissed.

Finally, the court evaluated the relator's fourth count, alleging a conspiracy to defraud the government. Again, the court held that the claim could not be maintained, due to a lack of particularity. The court concluded that not only did the relator's conspiracy claim fail Federal Rule of Civil Procedure 9(b)'s particularity requirement, it did not even satisfy Rule 8's notice pleading requirement, as it did not include any "factual support as to any actual agreement among the defendants or others to get a false or fraudulent claim paid by the United States or any specific allegations that put defendants on notice as to the allegations brought against them. Thus, the court dismissed the relator's fourth count as well.

The court dismissed the relator's complaint—his third amended complaint—with prejudice.

U.S. ex rel. Health Dimensions Rehab., Inc. v. RehabCare Group, Inc., 2013 WL 992642 (E.D. Mo. Mar. 13, 2013)

A corporate relator filed a *qui tam* action alleging that a rehabilitation therapy company, two of its subcontractor companies, and a nursing home management company violated the False Claims Act by submitting false Medicare/Medicaid claims or causing others to do so. Specifically, the relator alleged that the majority owner of the rehabilitation therapy services company was also an owner of the management company. The relator further alleged that the rehabilitation company entered into an agreement with the two subcontractors, whereby the subcontractors would provide rehabilitation services at more than 60 facilities managed

by the nursing home management company, in exchange for a one-time $600,000 payment, plus a percentage of the profits received as a result of those rehabilitation services. The relator indicated that soon after the agreement was reached, the rehabilitation services company ceased operations, except for collecting its profits under the terms of the agreement with the subcontractors—which resulted in the rehabilitation company collecting more than $10 million. The relator alleged that the agreement constituted an illegal kickback scheme in which payments were made in exchange for referrals of business. The relator claimed that the parties violated the Anti-Kickback Statute, which rendered their Medicare and Medicaid claims false, for purposes of the False Claims Act. The government intervened in the relator's suit and added its own common law claims.

The defendants moved to dismiss the plaintiffs' allegations, arguing that the subcontractor agreement at issue comported with federal guidelines. They contended that: (1) since the rehabilitation company ceased operations soon after the agreement was executed, it could not have been paid in exchange for future referrals of business; (2) the plaintiffs failed to plead the alleged fraud scheme with particularity, as required by Federal Rule of Civil Procedure 9(b); and (3) the Anti-Kickback Statute, as applied the facts at issue, was void for vagueness—they claimed that the plaintiffs were attempting to apply the statute to an ordinary subcontract for healthcare services.

The U.S. District Court for the Eastern District of Missouri denied the defendants' motion to dismiss. First, the court found that the plaintiffs satisfied Rule 9(b)'s requirements by pleading sufficient facts regarding the alleged fraud scheme. The court stated that "[s]pecific details of every alleged false claim need not be alleged, but some representative examples of false claims must be provided." The court ultimately determined that the plaintiffs' complaint "include[d] enough detail to inform Defendant[s] of the core factual basis for the fraud aspect of the claims." In addition, the court concluded that there was not a "logical inconsistency" between the government's allegation that the rehabilitation company continued to receive illegal kickback payments from its subcontractors even after it ceased operations, and its claim that the defendants violated the Anti-Kickback Statute. Instead, the court found that the government's theory of liability was sufficient to state a claim under the False Claims Act. Finally, the court held that, while the plaintiffs would still need to demonstrate that the Anti-Kickback Statute was violated, in order to maintain their fraud claims, the statute itself was not void for vagueness with respect to the facts of the case. Thus, the court denied the defendants' motions to dismiss.

U.S. ex rel. Lisitza v. Par Pharm. Cos., Inc., 2013 WL 870623 (N.D. Ill. Mar. 7, 2013)

A relator alleged that three pharmaceutical companies—consisting of two affiliated foreign generic drug companies and a pharmaceutical distribution company—violated the False Claims Act by causing the submission of Medicaid claims. Specifically, the relator alleged that the two generic drug companies developed and sought FDA approval for a generic version of a prescription drug, in advance of the expiration of the patent for the original drug. The relator claimed that while the patent was effective, only one company manufactured the drug, and thus, Medicaid only developed reimbursement caps on one form (capsules) and dosage (20 mg) for the drug. The relator alleged that the generic version of the drug was manufactured in a different form (tablet) and in both 10-mg and 20-mg dosages. Once the generic drug received FDA approval, the generic drug companies directed the distribution company to undertake an aggressive marketing campaign that included providing illegal kickbacks to pharmacies and inducing pharmacies to switch the form and/or dosage of the drug to avoid Medicaid's reimbursement cap—since there was no cap on reimbursements for other forms or dosages of the drug, the pharmacies were able to obtain overpayments from Medicaid. The relator alleged that the pharmacies' Medicaid claims included a false certification to the government that the pharmacies had complied with applicable Medicaid laws and regulations, and therefore, the claims were false under the FCA. The relator also alleged that the defendants conspired to defraud the government.

The United States partially intervened in the relator's suit and brought FCA claims against the distribution company. Related claims against the pharmacies alleged to have been involved were settled. The claims against the two generic drug companies remained. Those two defendants moved to dismiss the relator's complaint, arguing that the alleged fraud was not pled with particularity, as required by Federal Rule of Civil Procedure 9(b).

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

Failure to Plead Fraud with Particularity

The relator argued that Rule 9(b)'s heightened pleading standard should be relaxed, given the size and complexity of the fraud scheme he alleged. The court disagreed, finding that the defendants' Rule 9(b) challenge was not based on whether or not the relator could identify specific false claims; rather, the defendants argued that the relator failed to sufficiently allege their participation in the fraudulent scheme. The court determined that the relator offered no reason why he could not describe the defendants' role in the alleged fraud, simply due to the size and duration of the scheme. Thus, the court held that Rule 9(b)'s pleading requirements would not be relaxed. The

two generic drug companies alleged that they could not be held liable for the alleged misconduct of the drug distributor who allegedly marketed the drug to pharmacies on their behalf.

The relator argued that his *qui tam* complaint satisfied Rule 9(b)'s requirements, as it alleged that the two companies directly caused the submission of false Medicaid claims, through their control of the drug distribution company—the relator had alleged that the generic drug companies supervised the distribution company's Sales & Marketing Division, were aware of the relevant regulations governing drug pricing, and knew about and stood to benefit from the alleged prescription switching. The court held that these allegations were insufficient to meet Rule 9(b)'s particularity standard. First, the court noted that the relator's claim that the defendants were aware of the drug switching scheme was not enough to state an FCA claim, since "knowledge of a fraud is not a basis for FCA liability." The court held that the relator's allegations that the defendants caused the submission of false claims were similarly deficient, finding that the relator's description of the defendants' corporate relationship—which included allegations that the generic drug companies and the distribution company had common parentage—were inadequate to establish the generic drug companies' FCA liability, since the FCA does not alter the general rule that parent companies are not liable for the wrongdoing of their subsidiaries. While the court recognized that the relator specifically alleged that the generic drug companies "controlled" and "directed" the distribution company, the court determined that the relator's complaint did not allege sufficient facts to support that conclusion. The court concluded that "the complaint does not allege facts that the scheme itself was controlled or directed by [the generic drug companies,] just that they had control over [the distribution company] in a general sense." The court determined that the relator's allegations that the generic drug companies participated in the selling and marketing of their product did not demonstrate their participation in the fraud allegedly perpetrated by the distribution company and the pharmacies. The court, therefore, dismissed the relator's claims that the generic drug companies caused pharmacies to submit false Medicaid claims.

Similarly, the court dismissed the relator's conspiracy claim, finding that the relator failed to allege with particularity the elements of conspiracy under the FCA, namely, "that the defendants had an agreement, combination or conspiracy to defraud the government by getting a false or fraudulent claim allowed or paid and that they did so for the purpose of obtaining or aiding to obtain payment from the government or approval of a claim against the government." While the court acknowledged that the defendants had financial incentives to market their drug aggressively, it held that the relator failed to identify any affirmative actions they took that showed that they caused false claims to be submitted. According to the court, "[a]t most, the relator alleges that the companies knew of [the distribution company's] fraud and failed to stop it; this is not enough to plausibly allege that these companies 'caused' the false claims within the meaning of the FCA."

The court noted that the relator had twice amended his *qui tam* complaint and determined that there was "little reason to believe that further amendment is likely to cure the complaint's failure to allege the participation of these defendants in the allegedly unlawful scheme." As a result, the relator's complaint was dismissed with prejudice.

U.S. ex rel. Goldberg v. Rush Univ. Med. Ctr., 2013 WL 870651 (N.D. Ill. Mar. 6, 2013)

Two relators filed suit under the federal False Claims Act and the Illinois state law equivalent, alleging that a university teaching hospital and an affiliated surgical center, as well as an orthopedic center and six individual physicians, conspired and defrauded Medicare and Medicaid by billing the programs for simultaneous and overlapping surgeries. The U.S. District Court for the Northern District of Illinois dismissed the relators' complaint, finding that it lacked subject matter jurisdiction due to the False Claims Act's public disclosure bar provision. The U.S. Court of Appeals for the Seventh Circuit vacated the district court's ruling and remanded the dismissal. The relators then filed their fourth amended complaint, in which they alleged that the hospital provides care to Medicare patients and also receives compensation from the government for the use of its facilities for teaching and for expenses incurred in training residents. They alleged that, pursuant to applicable regulations, in order for the hospital to be reimbursed for surgeries, a teaching physician must: (1) have been present during all "key and critical" portions of the procedure; and (2) must have been "immediately available" for the entire procedure, and not involved in another procedure from which he/she could not return. The relators claimed that over an 8-year period, the defendants submitted claims to Medicare and Medicaid that violated the above-referenced regulations, since the claims sought reimbursements for simultaneous and overlapping surgeries and thus, could not have complied with the rules requiring the availability of teaching physicians. While the relators acknowledged that, in the event that a teaching physician could not be immediately available as required, the regulations permitted the teaching physician to arrange for another qualified surgeon immediately to assist residents, they claimed that the defendants failed to comply with that rule as well and simply lied in medical records about the availability of teaching physicians. The relators further claimed that nurses at the facility helped to cover up the misconduct. By engaging in these practices, the relators alleged, the defendants increased the number of surgeries they performed to justify millions of dollars in kickbacks they received from a company that manufactured surgical implants. Both the federal and state governments' declined to intervene in the relators' *qui tam* suit.

The defendants again moved to dismiss the relators' complaint, arguing that the court lacked subject matter jurisdiction. In addition, the defendants argued that the relators' allegations did not state a claim for relief under the False Claims Act

and that the fraud allegations were not pled with particularity. Some defendants also argued that the relators' claims against them were time-barred.

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

Failure to Plead Fraud with Particularity

The defendants argued that the relators only made "conclusory allegations" of fraud, which failed to provide sufficient detail to satisfy Federal Rule of Civil Procedure 9(b)'s heightened pleading requirements. The court first noted that the relators' fraud claims with respect to the orthopedic center and the individual defendants included "specific details," but that the fraud allegations against the hospital and its surgical center did not. Thus, the court dismissed the fraud claims against the hospital and the surgical center.

The court then examined the fraud claims against the remaining defendants. First, those defendants argued that the relators' allegations were deficient because the relators pled some facts "on information and belief." The court rejected that argument, finding that the relators only made such allegations with respect to their claim that the defendants actually submitted false claims to the government. The court noted that the relators did not have access to this information and that none of their other allegations were pled on information and belief. Moreover, the court observed that the relators pled that they believed that the defendants submitted the allegedly false claims to Medicare, since it was their pattern and practice to submit their claims to the government. This allegation, the court held, created a reasonable inference that the defendants submitted false claims. Consequently, the court accepted the relators' allegations that were pled on information and belief.

The court then scrutinized the relators' specific allegations of fraud. The defendants argued that the relators did not plead the alleged fraud scheme with particularity, claiming that the relators failed "to specify the surgeries, and the dates and locations of the surgeries, for which fraudulent Medicare claims were submitted." The court, though, held that the relators' allegations answered the "newspaper questions." The court determined that the relators properly alleged "who" submitted false claims to the government by identifying the defendants; as an aside, the court accepted the relators' explanation that they did not identify the specific patients who received the surgical procedures at issue so as to protect those patients' confidentiality. Next, the court held that the relators' alleged "what" fraudulent activity occurred. The defendants argued that the relators' reliance on surgery schedules was misplaced, since the relators did not specifically identify the procedures that were performed or the false claims that were submitted. They further noted that overlapping surgeries alone do not constitute a Medicare violation. The court observed that the relators not only alleged that overlapping surgeries occurred, but also that the defendants failed to comply with regulations requiring that teaching physicians document their presence during such

procedures and arrange for another qualified surgeon to be immediately available to assist when needed. The court found that the relators pled "where" the fraud occurred by describing the locations of the surgical procedures at issue and the operating rooms used. Similarly, the court held that the relators adequately alleged "when" the fraud occurred by providing examples of fraud that occurred on specific dates. Finally, the court concluded that the relators sufficiently pled "how" the fraud occurred, as they alleged that the defendants failed to document teaching physicians' entry and exit times and knowingly submitted Medicare claims for overlapping surgeries that did not comply with applicable rules. Ultimately, the court held that relators' complaint 'satisfies Rule 9(b) by providing the general outline of a fraudulent scheme and detailed representative examples." The court denied the orthopedic center and the individual physicians' motions to dismiss the fraud claims.

The court did dismiss the relators' conspiracy claim, finding that the relators "fail[ed] to describe a single instance of discussion, agreement, or conspiracy among Defendants." In dismissing that claim, the court stated that "[t]he Complaint may allege who conspired, but it fails to allege with any specificity what they conspired to do, when, where, or how."

Failure to State a Claim

The court again dismissed the claims against the hospital and surgical center, finding that the relators failed to state a claim. The court noted that those two defendants only received Medicare payments under Part A of the program, which provides reimbursements to cover the use of the facilities—not under Part B of the program, which provides reimbursements to teaching physicians. Since the relators did not allege any fraud on Medicare Part A and since they did not allege that the hospital or surgical center defrauded Medicare Part B, the court held that the relators failed to state a claim against either of those defendants. Thus, the claims against the hospital and surgical center were dismissed for failure to state a claim.

The remaining defendants argued that the relators' complaint should be dismissed because the relators did not plead and specific false claims that were submitted to the government, and therefore, could not allege a fraud scheme. The court disagreed, noting that, as outlined in the discussion above, the relators adequately pled the fraud scheme and linked the defendants' alleged conduct to the submission of false claims. Moreover, the court observed that applicable Medicare regulations indeed require teaching physicians to document their presence during procedures and must be immediately available or arrange for a replacement in the case of overlapping surgeries.

Statute of Limitations

Three of the six individual defendants moved to dismiss the relator's claims, arguing that the claims were time-barred, pursuant to the false claims acts' statute of limitations provisions. These defendants argued that the relators only alleged claims against

them that occurred more than six years before their *qui tam* complaint was filed, and therefore, their claims were time-barred. Although both false claims acts' statutes of limitations include tolling provisions that can extend the limitations periods to ten years, the defendants argued that those provisions only apply when the government intervenes in a *qui tam* suit—which did not occur in the present case. The court noted that the Seventh Circuit has not ruled on whether or not the FCAs' tolling provisions are limited to intervened cases, but agreed with the relators that their *qui tam* complaint only included representative examples of the defendants' alleged fraud and that the defendants continued to participate in the scheme within the six-year limitations period. The court held that the relators' claims were not limited to the specific examples of alleged fraud cited in their complaint and denied the defendants' statute of limitations defense as "premature."

U.S. ex rel. Pecanic v. Sumitomo Elec. Interconnect Prods., Inc., 2013 WL 774177 (S.D. Cal. Feb. 28, 2013)

A former sales representative for an electric products company filed a *qui tam* suit in which he alleged that his former employer, an affiliated company, and three individuals who served in senior management positions with the two companies violated the False Claims Act by submitting false claims and by making false certifications to the government in connection with the sale of two groups of its products to the United States for use in military aircraft, weapon systems, and other applications. The relator alleged that before the defendants' products could be sold to the United States or to its contractors, the products were required to be tested and placed on a list of products approved for purchase. In addition, the relator claimed that after the products were approved, the defendants were required periodically to certify that the products were still being manufactured in the same way and still met applicable specifications. The relator alleged that the defendants' certifications to the government were false, because the defendants concealed product defects; falsely claimed that the products were being manufactured in the U.S., when in fact they were being manufactured in Mexico, using parts from China, and the "Made in Mexico" stickers were removed; and cherry-picked the components that were tested in order to improve test results, among other things. The relator further alleged that, for years, he repeatedly complained to his superiors about these issues, but nothing was done to remedy the problems; instead, the relator claimed that he was threatened with termination, and eventually, was fired was from his job. Based on these allegations, the relator alleged violations of multiple provisions of the False Claims Act's anti-fraud and anti-retaliation provisions. The defendants moved to dismiss the fraud claims, arguing that the relator failed to plead those claims with particularity, as required by Federal Rule of Civil Procedure 9(b). In addition, the defendants moved to dismiss the relator's retaliation claim for failure to state a claim.

Holding: The U.S. District Court for the Southern District of California granted the defendants' motion to dismiss the fraud claims, but denied the motion to dismiss the retaliation claim.

Pleading Fraud with Particularity

The court first noted that the relator's fraud allegations were not specific as to the defendants, and that the two corporate defendants were treated as the same entity throughout the complaint. While the relator argued that the two corporate defendants were "sometimes" referred to collectively in the *qui tam* complaint, the court found that they were referred to in this way "almost exclusively," which made it difficult to determine each defendant's respective role in the alleged fraud. In addition, the court held that the relator's characterization of the corporate defendants as a parent and wholly-owned subsidiary, whereby the parent maintained control over the subsidiary with respect to the products at issue, was insufficient to support the relator's treatment of the two companies as one. The court held that the relator must either describe each defendant's specific role in the alleged fraud scheme, or properly allege an alter ego theory of liability. Since the fraud allegations against the two corporate defendants were not specific to either defendant, the court held that they were not pled with particularity. Thus, the fraud claims against the corporate defendants were dismissed on that basis, although the relator was granted leave to amend those claims.

The court then turned to the relator's fraud claims against the three individual defendants. The court quickly disposed of the claims against one of the defendants, as that defendant had not been served with the relator's complaint. The court then determined that the fraud claims against the other two individual defendants had not been properly pled with particularity. The court held that the relator only made "wholesale allegations" regarding the individual defendants' roles in the alleged fraud scheme, and did not provide sufficient detail to support his claims that those defendants directed the alleged false certifications and the alleged sales of defective products to the government—particularly since the individual defendants held high-ranking positions within the two corporate defendant companies, and the relator failed to specify how the two companies were involved in the alleged fraud. As a result, the court dismissed the fraud claims against the two remaining individual defendants. Once again, the relator was granted leave to amend the claims.

Retaliation

The court then considered the defendants' motion to dismiss the relator's retaliation claim for failure to state a claim. The court noted that, unlike fraud claims, retaliation claims brought under the False Claims Act are not subject to Rule 9(b)'s heightened pleadings requirements, but rather, "need only satisfy Rule 8's general pleading standard." The court held that the relator's retaliation claim sufficiently stated a claim under the False Claims Act, since the relator described a variety of the defendants' practices

and products defects that he believed led to the submission of false claims and false certifications to the government. In addition, the court found that the relator alleged that he engaged in protected conduct under the False Claims Act, as he alleged that he investigated the defendants' alleged misconduct by confronting co-workers and assisting government investigators. Furthermore, the relator alleged that the defendants were aware of his protected conduct, as he made numerous complaints to his superiors, informed management that he had been collecting evidence that showed that the defendants' certifications to the government were false, and encouraged the defendants to contact the government so that the allegedly defective products in question could be recalled. Finally, the court held that the relator properly pled that he was terminated from his job in retaliation for his protected conduct, as he claimed that he was fired "solely because of his opposition and objections to [the corporate defendants'] unlawful practices." The court noted that the relator also argued that he was terminated in part because of his refusal to sell certain products and because he kept raising issues about quality and safety, but rejected the defendants' argument that these allegations undercut his retaliation claim. The court stated that it was "not convinced that [the relator] has failed to state a claim because he included in his complaint that he was both retaliated against for investigating fraudulent practices and terminated for refusing to sell the products underlying these practices." Consequently, the court denied the defendants' motion to dismiss the retaliation claim.

U.S. ex rel. Herron v. Indianapolis Neurosurgical Group, Inc., 2013 WL 652538 (S.D. Ind. Feb. 21, 2013)

Two relators filed a *qui tam* suit alleging that a medical facility and multiple physicians who had practiced medicine there violated the federal and Indiana false claims acts by knowingly falsely billing the Medicare program and Indiana's Medicaid program at higher rates than allowed and for services that were not covered. Both relators had been previously employed by the facility and, in addition to their fraud allegations, they both alleged claims under the federal and state statutes' anti-retaliation provisions. The defendants moved to dismiss the relators' fraud claims, arguing that those claims were not pled with the requisite particularity and that subsets of the claims were untimely or otherwise deficient. In addition, the defendants moved to dismiss one of the relators' retaliation claims on multiple grounds.

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

Failure to Plead Fraud with Particularity

The defendant argued that the relators' fraud allegations were not pled with specificity, claiming that the relators treated them as a "homogeneous unit" and failed to pled specific facts regarding each defendant's alleged conduct. The relators countered that their allegations satisfied Federal Rule of Civil Procedure 9(b)'s particularity requirement, arguing that they described the defendants' fraud schemes in detail and that the claims alleged against all of the defendants were adequate because the fraud was widespread across the defendants' entire practice. The court agreed with the relators, finding that, in some instances, they alleged detailed claims against individual defendants. Moreover, although the relators also alleged some fraud claims without giving specific examples of every defendant's conduct, they did so when alleging widespread fraud schemes and provided multiple, detailed examples. The court, however, ordered the relators to prepare a claim table that specified which claims were attributable to which defendants; the claim table would be used "as a benchmark for future discovery, motion practice, and potentially jury instructions."

The court also dismissed claims the relators asserted under the Indiana False Claims Act against two of the individual defendants, whose entire conduct pre-dated the enactment of the statute. However, the court refused to dismiss the relators' claims against the other defendants purely on that basis, noting that the relators generally alleged a widespread and continuing course of conduct against those defendants. The court cautioned that since the Indiana statute does not include a retroactivity provision, the relators would only be allowed to maintain their claims under that law if they could present specific evidence of statutory violations that occurred after the Indiana statute was enacted. Additionally, the court dismissed the relators' fraud claims based on false claims submitted more than six years before the relators filed their original complaint, pursuant to the False Claims Act's six-year statute of limitations for *qui tam* suits.

Retaliation

The court then turned to the defendants' motions to dismiss one of the relators' retaliation claims. The court first dismissed the retaliation claims against two of the individual defendants who did not work at the facility at the time the relator was fired from his job. The remaining defendants argued that the retaliation claim failed because the relator did not plead that they actually knew that he was preparing for a *qui tam* action. Ultimately, the court agreed with the defendants. The court noted that the relator alleged sufficient facts to show that he believed that the defendants were engaged in Medicare and Medicaid fraud <u>and</u> that he communicated his concerns to the defendants—he even alleged that the defendants warned him not to discuss his concerns with physicians—but since the relator was employed in what the court deemed was a "fraud-alert" position, the court determined that, in order to be protected under the false claims acts' anti-retaliation provisions, he was required under Seventh Circuit

law to explicitly indicate to the defendants that he intended to file a *qui tam* suit or otherwise report the alleged fraud to the government. Since the relator made no such allegation, the court granted the defendants' motion to dismiss his retaliation claim. The court noted that the relator could seek leave to amend his complaint to add the necessary allegations to cure the deficiencies in his claim.

U.S. ex rel. Dittman v. Adventist Health Sys./Sunbelt, Inc., 2013 WL 615820 (M.D. Fla. Feb. 19, 2013)

Two relators filed a *qui tam* action against a company that operates several hospitals, alleging that the company violated the False Claims Act by over-billing federal government healthcare programs. Both relators formerly worked at the defendant's facilities. After the U.S. District Court for the Middle District of Florida denied the defendant's motion to dismiss the relator's complaint, the relators amended their complaint and added more allegations of billing fraud. The defendant moved to dismiss this additional claim, arguing that the relators did not demonstrate that they had personal knowledge of the billing activities in connection with their additional claim and thus, could not plead the alleged fraud with particularity. The court, though, determined that the relators' allegations regarding the defendant's billing were supported by their claims of personal knowledge stemming from one of the relators having previously worked in the defendant's revenue management department. As a result, the court held that the relators' allegations "provide[d] the indicia of reliability that is necessary in a complaint alleging a fraudulent billing scheme." The defendant's motion to dismiss the relators' additional claim was denied.

U.S. ex rel. Jajdelski v. Kaplan, Inc., 2013 WL 520418 (9th Cir. Feb. 13, 2013)

A relator filed a *qui tam* suit against his former employer—a for-profit college—alleging that the defendant submitted false claims to the U.S. Department of Education. Specifically, the relator alleged that the defendant submitted financial aid claims for students who were not genuinely in attendance, claiming that school officials told him in confidence that instructors were required to keep attendance records and to produce diplomas for students who had not completed—or never even began—the curriculum. He further alleged that the defendant made false representations to the government regarding its accreditation status. The defendant moved to dismiss the relator's complaint and the U.S. District Court for the District of Nevada granted the motion, holding that the fraud allegations did not state a claim under the False Claims Act and were not pled with particularity. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Ninth Circuit.

Holding: In a 2-1 decision, the Ninth Circuit affirmed the district court's ruling in part and reversed it in part. The relator's claim based on student enrollment was reinstated, but the claim based on accreditation was dismissed.

The court found that the student enrollment claim was properly pled, since the relator alleged sufficient details of a scheme to submit false financial aid claims to the government, and provided indicia of reliability that the defendant actually submitted claims to the government. The court noted that the relator claimed to have first-hand knowledge of the alleged fraud and described the fraudulent scheme "in detail, including the date, place, and participants." The court held that these allegations were sufficient to overcome the defendant's motion to dismiss.

The court, though upheld the dismissal of the accreditation claim, finding that the claim was time-barred, pursuant to the False Claims Act's six-year statute of limitations. That claim was dismissed with prejudice.

U.S. ex rel. Earl v. Chase Home Fin., LLC, 2013 WL 423099 (N.D. Okla. Feb. 1, 2013)

A relator filed a suit under the False Claims Act, alleging that a bank and its successor company defrauded the U.S. Department of Agriculture's Rural Development Rural Housing Service—which provides guaranties of mortgage loans to make homeownership more obtainable for lower-income rural families. The relator alleged that he applied for and received a guaranty through the government program, and then obtained a mortgage loan from the defendant's bank. A few years later, the defendant commenced foreclosure proceedings against the relator and received a judgment against him. The bank then purchased the home at auction and submitted a claim to the rural development program to recover its losses. The government paid the bank over $35,000 and then commenced collection actions against the relator to recover that amount. The relator argued that before submitting its claim to the federal government, the bank was required to seek a deficiency judgment against him; he claimed that since the bank failed to complete this step, it was not entitled to submit a claim to the federal government, and thus, the bank's claim was false, for False Claims Act purposes. The defendant moved to dismiss the relator's claim for failure to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Northern District of Oklahoma granted the defendant's motion to dismiss, but granted the relator leave to amend his complaint.

Failure to Plead Fraud with Particularity

The relator alleged that after the defendant foreclosed on his home, the defendant was required to seek a deficiency judgment against him before submitting a claim to

recover its losses through the federal government's rural development program. The court, though, determined that the regulation relied on by the relator only requires mortgage lenders to first seek a deficiency judgment "if the current situation provides a reasonable prospect of recovery." Thus, the court concluded, the applicable regulations require lenders to consider the possibility of obtaining a deficiency judgment, but ultimately "suggest[] that the lender is not required to obtain a deficient if doing so would be fruitless." The court held that the relator's complaint did not allege sufficient facts regarding whether or not the defendant considered the possibility of a deficiency judgment before submitting its claim to the government. In fact, the court determined that the relator's complaint was devoid of information "about the terms of [the defendant bank]'s guaranty with Rural Development, nor does [the relator] allege that [the bank]'s actions were in violation of any of the terms of that guaranty." Consequently, the court agreed with the defendant that the relator's complaint failed to plead the alleged fraud with particularity. The court dismissed the complaint, but granted the relator's request for leave to file an amended complaint.

U.S. ex rel. Dickson v. Bristol Myers Squibb Co., 2013 WL 360299 (S.D. Ill. Jan. 30, 2013)

A relator alleged that a group of pharmaceutical companies violated the federal False Claims Act, twenty five state statutes (including state false claims act statutes), and one city false claims act ordinance by manipulating clinical trial data to support fraudulent claims regarding the efficacy of one of their drugs and sought to use its sales force to mislead and confuse physicians into believing that the defendants' drug was their best option. The relator claimed that the defendants' false information in turn caused physicians and pharmacists to falsely certify the drug's efficacy and the drug's medical necessity for their patients' treatment—including patients with prescriptions for the drug that were paid for by government-funded healthcare programs. The defendants moved to dismiss the relator's claims, arguing that the relator's complaint was barred by the FCAs' public disclosure bar provisions and that the relator failed to state a claim, as his allegations were not pled with the requisite particularity.

Holding: The U.S. District Court for the Southern District of Illinois granted the defendants' motion in part, but denied it in most respects. The court allowed the relator to maintain his causes of action under the federal FCA, twenty four of twenty five state false claims act laws, and the city false claims act statute. One claim brought under a state law provision that did not provide a private right of action was dismissed.

Public Disclosure Bar

First, the court considered the defendants' public disclosure bar argument, in which the defendants' argued that the court did not have subject matter jurisdiction over the relator's claims because the information on which his claims were based had been publicly disclosed before the relator filed his *qui tam* suit. The court first noted that the defendants raised their jurisdictional argument, not by citing to the FCAs' public disclosure bar provisions directly, but rather by arguing for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). In denying the defendants' motion, the court held that "the record in this case [was] not adequate to make such a factual determination at this stage in the proceedings," and noted that the defendants would be allowed to renew their arguments at a later time.

Failure to State a Claim/Plead Fraud with Particularity

Likewise, the court denied the defendants' motion to dismiss the relator's claims for failure to state a claim or for failure to plead the alleged fraud with particularity. The court held that the relator properly alleged that the defendants instructed its employees—including the relator—to falsely promote their drug to physicians, which caused those physicians to submit false claims to government healthcare programs. Notably, the relator alleged how the defendants' clinical trial data was allegedly manipulated, discussed the defendants' alleged scheme to target physicians whose patients relied on government-funded healthcare, and provided specific dates and locations related to the alleged misrepresentations. These facts, the court held, were sufficient to satisfy Rule 9(b)'s particularity standard. The court held that the specifics regarding which physicians received the defendants' alleged misrepresentations, and which of the defendants' employees were instructed to make those misrepresentations could be gathered during discovery. Consequently, the court denied the defendants' motion to dismiss the vast majority of the relator's claims—including the claim under the City of Chicago False Claims Act—for failure to state a claim.

The court, however, dismissed the relator's claim under a state law that did not provide for a private cause of action.

U.S. ex rel. Long v. GSD & M Idea City LLC, 2013 WL 214590 (N.D. Tex. Jan 18, 2013)

A relator filed a *qui tam* suit against his former employer—a government contractor—alleging violations of the False Claims Act. The relator alleged that he had been employed as the defendant's contracts manager and negotiated and finalized a contract with the Air Force for advertising services. He claimed that, when negotiating with the government, he used figures for overhead costs and for profits that were supplied by the defendant, and certified to the government that those numbers were current, accurate, and complete. After his company was awarded

the advertising contract, the relator alleged that he discovered significant discrepancies with regard to the cost and profit figures he submitted to the government. After conducting his own investigation, the relator filed his *qui tam* suit, alleging that the defendant presented false claims to the government and used false records that were material to false claims. The relator proceeded on two theories of FCA liability: (1) the defendant falsely certified to the government that its overhead costs and profit numbers complied with applicable regulations; and (2) the defendant used false records to fraudulently induce the Air Force to award the advertising contract. The defendant moved to dismiss the relator's complaint, arguing that the relator failed to state a claim under the False Claims Act and failed to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Northern District of Texas granted the defendant's motion and dismissed the relator's complaint without prejudice.

Failure to State a Claim/Plead Fraud with Particularity

The relator alleged that he and previous contract mangers for the defendant inflated and then falsely certified the defendant's costs and profit numbers to the government, in violation of applicable regulations. The defendant argued that this allegation did not state a claim under the False Claims Act, since the relator failed to connect the alleged false certification to the submission of any false claim to the government. The court agreed with the defendant, finding that the relator's false certification theory of liability was not pled adequately, since the relator failed to establish that compliance with the regulation at issue was a prerequisite to the defendant receiving payment under its contract with the Air Force. The court also held that the relator's allegation was not pled with sufficient particularity, as required by Federal Rule of Civil Procedure 9(b), since the relator did not describe how the defendant's alleged misrepresentations led to false claims. Thus, the court dismissed the relator's claims based on the false certification theory.

The court also dismissed the relator's claims based on the fraud-in-the-inducement theory. The court held that the relator's complaint properly alleged an "objective falsehood"—the defendant's alleged false costs and profit numbers that were used to negotiate the Air Force contract—and that he alleged that the defendant's accounting manager cautioned the defendant's management about the numbers discrepancy (establishing scienter), he alleged that the misrepresentations had the natural tendency to influence the government's decision to award the advertising contract to the defendant (which established materiality), and he alleged that the defendant made false claims for payment to the Air Force and that the Air Force made payments. Based on these findings, the court held that the relator stated a claim for relief under the FCA. However, the court held that his claim did not plead the alleged fraud with particularity, since the complaint only refers to anonymous "higher ups" within the defendant's company who had knowledge of the alleged fraud and provided the relator with the false costs and profits information. Moreover, the court determined that the relator's

complaint did not specify when the alleged misrepresentation was made or the contents of the any of the alleged misrepresentations he made or prior contracts managers made to the government. As a result, the court dismissed the relator's fraud-in-the-inducement claims for failure to plead fraud with particularity.

U.S. ex rel. Dennis v. Health Mgmt. Assocs., Inc., 2013 WL 146048 (M.D. Tenn. Jan. 14, 2013)

A relator filed a *qui tam* action on behalf of the United States and the State of Tennessee, alleging that healthcare management company and its subsidiary medical center defrauded Medicare and Medicaid by submitted claims for reimbursement that were tainted with violations of the Stark Law and the Anti-Kickback Statute (AKS). Specifically, the relator alleged that the medical center operated a hospital and recruited physicians—including himself—to work at the hospital by entering into recruitment agreements that improperly based the physicians' financial remuneration on their referrals of patients to the hospital and that provided the physicians with office space at below market rents, free personnel services and other improper kickbacks. The relator alleged that although the recruitment agreement included a provision that stated that compensation was not based on referrals, that provision was merely "empty lip service," and that soon after he relocated his practice to the defendants' hospital, he was pressured to comply with an annual patient referral requirement and was punished when he did not. He claimed that he began referring all patients to the hospital in an attempt to meet his referral requirement and prevent a breach of his recruitment agreement, but the defendants terminated the agreement nonetheless. Moreover, in support of his kickbacks allegations, the relator alleged that the defendants provided various benefits to another doctor at the hospital, including payments in excess of fair market value and free office space.

Neither the United States nor the State of Tennessee intervened in the relator's suit. The defendants moved to dismiss his complaint, arguing that the fraud allegations were not pled with particularity, as required by Rule 9(b) of the Federal Rules of Civil Procedure.

Holding: The U.S. District Court for the Middle District of Tennessee granted the defendants' motion and dismissed the relator's *qui tam* complaint. The complaint was dismissed without prejudice, however, and the relator was given an opportunity to amend it.

Failure to Plead Fraud with Particularity

The court first determined that the analysis of the relator's claims under the federal False Claims Act would apply equally to his claims under the corresponding provisions of the Tennessee Medicaid False Claims Act. The court then examined the rela-

tor's FCA claims one-by-one, beginning with the relator's allegation that the defendants knowingly presented false claims to the government.

The court held that, in order to properly allege a claim under this provision of the FCA, a plaintiff must plead two elements with particularity: (1) a fraudulent scheme; and (2) a misrepresentation presented to the government in the form of a false claim. The court held that the relator failed to plead either element with particularity. The court concluded that the relator's allegation of a fraudulent scheme based on the recruitment agreement was deficient as it determined that the agreement did not require physicians to make illegal referrals. Instead, the court, relying on caselaw from another district court and guidance from the Centers for Medicare and Medicaid Services, decided that the agreement was not improper as it merely required physicians to maintain "active" staff status, which involved admitting at least one patient per month to the hospital and an average of twenty patients each month. Similarly, the court held that the alleged fraudulent scheme based on improper kickbacks was deficient. The court stated that, in order to maintain his illegal kickbacks claim, "the relator must sufficiently allege that the defendants submitted claims that relied upon false certifications of compliance with the AKS or Stark Law. The mere allegation that a defendant violated the AKS or Stark Law does not create FCA liability unless the defendant knowingly submitted claims that falsely certified compliance with those laws, where such compliance was a prerequisite to payment." The court held that the relator's allegations did not adequately describe the defendants' scheme of false certifications of compliance and AKS and Stark Law violations, since the *qui tam* complaint failed "to specify who made the certifications, what was in them, and why they were false." The court further held that the relator's complaint included conclusory and anecdotal allegations, but failed "to allege specific facts that could establish an AKS or Stark violation," either by failing to adequately support his claims of payments in excess of fair market value, or by failing to tie purported improper financial relationships between the defendants and their physicians to false Medicare and Medicaid claims—notably, the relator did not even allege that any of his own referrals to the hospital resulted in the submission of false claims to the government.

The court then addressed the second element, namely, a misrepresentation presented to the government in a false claim. The court again held that the relator's complaint was deficient, noting that the complaint primarily focused on the alleged fraudulent scheme and "makes only very general and conclusory allegations regarding the submission of claims by the defendants." The court observed that the complaint failed to offer details regarding "the presentation of allegedly false claims for payment, such as when the claims were submitted to the government, or what payment from the government was obtained as a result of such claims. In sum, the relator fails to identify a single false claim for reimbursement that was actually presented to the government for payment." On the basis of those findings, the court dismissed the relator's allegations that the defendants presented false claims to the government.

Next, the court turned to the relator's allegation that the defendants violated the FCA by knowingly using false records and/or statements in support of false claims.

The court determined that this claim was also deficient, as the relator failed to identify any false claims, as noted above. However, even if the relator had identified specific false claims, the court held that his cause of action would fail, since he did not plead, with particularity, details regarding the defendants' allegedly false records and/or statements, including the time, place, and content of the statements, and any corresponding claims for payment. Therefore, the court dismissed that claim as well. The court then considered the relator's conspiracy claim, which was also dismissed for failing to satisfy Rule 9(b)'s requirements. The court dismissed this claim due to the lack of "supporting facts to show when, where or how the alleged conspiracy occurred." Finally, the court dismissed the relator's "reverse" false claim allegation, in which the relator alleged that the defendants improperly avoided an obligation owed to the government. Again, the court found that the relator's allegation was devoid of factual support regarding "what fraudulent record or statement the defendants made that caused them to avoid or decrease an obligation to pay the government, who made such a record or statement, when it was made, where it was made, or its contents. Nowhere in the amended complaint does the relator allege any obligation owed by the defendants to the government that the defendants sought to conceal or avoid." Consequently, the court held that the claim was not pled with particularity and that dismissal was warranted.

Although all of the relator's claims were dismissed, the court dismissed the claims without prejudice and afforded the relator an opportunity to file an amended complaint.

U.S. ex rel. Saint Joseph's Hosp, Inc. v. United Distrib., Inc., 2013 WL 142700 (S.D. Ga. Jan. 11, 2013)

Two hospitals filed a *qui tam* suit against a distribution company, its insurance benefits providers, and multiple individuals, alleging that the defendants violated the False Claims Act by submitting improper Medicare claims. The relators alleged that one of the distribution company's truck drivers was injured while on the job. While being treated for his injury at the relators' facilities, doctors discovered an unrelated colon rupture that required surgery. The man developed a widespread infection following the surgery, fell into a coma, and later died. The relators further alleged that when the employee was initially hospitalized, he provided documentation showing that his employer's plan provided his primary insurance coverage. However, the relators claimed that after the employer's workman's compensation claims were denied, the defendants concocted a scheme and falsely claimed that the employee did not take leave from his job under the Family Medical Leave Act and was therefore covered by continuing COBRA insurance coverage. Notably, since the man was over 65 years old, by electing continuing COBRA coverage, Medicare became his primary health insurance and the COBRA plan became his secondary insurance. But the relators alleged that the defendants knew that the employee had not elected COBRA coverage, and thus Medicare was not his primary payer. The relators claimed that the defendants intentionally misled the relators—who billed more than $300,000 to Medicare for the man's care—in order to avoid covering

the man's treatment under their own health plan. The United States intervened in the relator's suit and the defendants moved to dismiss the plaintiffs' claims, arguing that the fraud claims were not pled with particularity.

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

Pleading Fraud with Particularity

The court held that the plaintiffs provided sufficient details to support their allegation that the defendants knowingly caused the relators to submit false claims to the government, noting that the plaintiffs alleged the time, place, and substance of the defendants' allegedly false statements—including the defendants instructions to the relators to submit the employee's claims to Medicare—that led to the submission of false Medicare claims that were paid by the government. The court further rejected the defendants' argument that the plaintiffs failed to allege that the Medicare claims at issue were false. The defendants had argued that the claims were not false as a matter of law, since the workman's compensation claim had been denied and thus, Medicare was authorized under the Medicare Secondary Payer Statute to pay the employee's claims because there was no expectation that the defendants' health plan would make payment promptly. The court, though, accepted as true the plaintiffs' contention that since the workman's compensation claim was denied due to the defendants'"fabricated COBRA election," the subsequent Medicare claims were false. The court denied the defendants' motion to dismiss these fraud allegations.

The court then examined the plaintiffs' allegation that the defendants knowingly made false statements material to false claims, and concluded that those claims were pled with specificity as well. In reaching its holding, the court rejected the defendants' argument that the plaintiffs failed to show how the defendants' alleged misconduct was material to the government. Instead, the court agreed with the plaintiffs that the defendants' alleged false statements caused providers to submit Medicare claims and that the representations included within those Medicare claims—that the employee's coverage had been transferred to COBRA, making Medicare his primary payer—influenced the government's decision to pay the claims. Consequently, the court denied the defendants' motion to dismiss this claim.

Finally, the court granted the defendants' motion to dismiss the plaintiffs' conspiracy claim, finding that the plaintiffs failed to plead that claim with the requisite particularity, since the plaintiffs did not allege the particulars of an alleged agreement among the defendants to change the employee's primary coverage to COBRA. Since the plaintiffs did not "provide factual allegations concerning the statements or specific conduct made as part of the conspiracy," the conspiracy claim was dismissed. However, the court dismissed this claim without prejudice and granted the plaintiffs' request for leave to amend its complaint to cure the pleading deficiencies.

U.S. ex rel. Nathan v. Takeda Pharms. North Am., Inc., 2013 WL 136030 (4th Cir. Jan. 11, 2013)

A relator brought a *qui tam* action against his former employer—a pharmaceutical company—and one of its affiliates, alleging that the defendants violated the False Claims Act by causing false healthcare claims to be submitted to the government. More specifically, the relator alleged that the defendants marketed one of their drugs to treat gastroesophogeal reflux disease (GERD)—an off-label use that had not been approved by the Food and Drug Administration. In addition, the relator alleged that prescriptions for the drug that were written for such off-label uses were not reimbursable under the federal health insurance programs, and that the defendants' alleged misconduct caused false claims for prescriptions for the defendants' drug to be submitted to the federal government. The relator alleged that the defendants engaged in this alleged misconduct because the patent for another of its drugs—a drug that had been approved for treating GERD—was set to expire and the defendants were looking to fill the void that would be left when the patent expired. After the relator amended his original complaint twice and filed a third amended complaint, the defendants moved to dismiss the complaint, arguing that the complaint failed to state a claim under the FCA. The U.S. District Court for the District of Maryland granted the defendants' motion. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit, arguing that the district court erred when holding that the relator did not sufficiently allege that false claims had been presented to the government or that the defendants caused any such claims to be presented. The relator also argued that the district court abused its discretion when it denied his request to amend his complaint again.

Holding: The Fourth Circuit affirmed the district court's rulings. First, the circuit court rejected the relator's argument that, in order to satisfy Rule 9(b)'s pleading requirements, he was only required to allege the existence of a fraudulent scheme that supported the inference that false claims were presented to the government. Instead, the Fourth Circuit stated that the FCA is not intended to punish every type of fraud committed on the government, but specifically imposes liability on those who cause false claims to be presented to the government. Thus, the court held, a relator's *qui tam* complaint must include allegations of that false claims were presented to the government, and if those allegations are not pled with particularity, then Rule 9(b)'s requirements have not been met. The court observed that Rule 9(b)'s requirements may be satisfied if an FCA plaintiff provides "some indicia of reliability" that actual false claims were presented to the government, and concluded that "when a defendant's actions, as alleged and a reasonably inferred from the allegations, *could* have led, but *need not necessarily* have led, to the submission of false claims, a relator must allege with particularity that specific false claims actually were submitted to the government for payment." (emphasis in original) The circuit court held that the relator's allegations of the defendants' fraud scheme

did not necessarily result in the presentment of false claims to the government, and therefore, the relator could not satisfy Rule 9(b) without identifying specific false claims. The court held that the relator's complaint did not include the necessary level of specificity, because his complaint focused on the defendants' alleged off-label drug marketing, but generally failed to allege that off-label prescriptions were filled by patients and that corresponding claims were submitted to the government. Further, in the instances in which the relator did allege that claims for the drug at issue were presented to the government, he failed to adequately allege that the prescriptions were for off-label uses. The circuit court concluded that "the Relator essentially has alleged that some claims must have been presented to the government for payment, because prescriptions of this kind frequently and routinely are obtained by persons who participate in health care programs sponsored by the federal government or because federally insured patients received off-label prescriptions. As we have explained, allegations of this type are insufficient because they are inherently speculative in nature." As a result, the Fourth Circuit affirmed the district court's dismissal of the relator's complaint.

The circuit court also affirmed the district court's denial of the relator's request for leave to file a fourth amended complaint, holding that "granting of leave to file another amended complaint, when Relator was on notice of the deficiencies before filing the most recent amended complaint, would undermine the substantial interest of finality in litigation and unduly subject [the defendants] to the continued time and expense occasioned by Relator's pleading failures."

U.S. ex rel. Salvo v. Central Georgia Foot & Ankle Ctr., P.C., 2013 WL 84101 (M.D. Ga. Jan. 7, 2013)

A relator filed a *qui tam* action against a healthcare center and others, alleging that the defendants violated the federal False Claims Act and the Georgia False Medicaid Claims Act. In addition to her fraud claims, the relator alleged a personal claim for retaliation under the False Claims Act. The defendants moved to dismiss the relator's complaint, arguing that the complaint failed to state a claim and did not satisfy Rule 9(b)'s heightened pleading requirements. The U.S. District Court for the Middle District of Georgia denied the defendants' motion, finding that the relator's fraud claims were pled with particularity, since the relator "set[] forth specific dates of the alleged fraud, where the alleged fraud occurred, the substance of the Defendants' alleged fraud, and specific amounts the Defendants were paid because of the alleged fraud." The court held that Rule 9(b)'s pleading requirements did not apply to the relator's retaliation claim, and further held that the relator's complaint adequately alleged the elements of a False Claims Act retaliation claim—namely, that the relator protested the defendants' illegal activity at a time when there was a distinct possibility that the relator or the government would

sue the defendants under the False Claims Act; and that the defendants' retaliatory conduct occurred after the relator's protests. As a result of these findings, the court denied the defendants' motion to dismiss.

U.S. ex rel. Ellis v. City of Minneapolis, 2012 WL 6652885 (D. Minn. Dec. 21, 2012)

Three relators brought a *qui tam* suit against two cities, a municipal council, and several individuals, alleging that the defendants falsely certified to the United States Department of Housing and Urban Development that they were acting to further fair housing, when in fact, they had taken actions that reduced the availability of low-income housing for their constituents. The defendants moved to dismiss the relators' complaint.

Holding: The U.S. District Court for the District of Minnesota dismissed the relators' complaint for failure to satisfy the pleading requirements of Federal Rules of Civil Procedure 8(a), 8(d) and 9(b). The court observed that the complaint—which was 64 pages and 187 paragraphs long—failed adequately to distinguish the various allegations among the multiple defendants, often included "broad, imprecise claims," and included superfluous allegations that were unrelated to the alleged violations of the FCA. The court stated that "much of the complaint is written so poorly that it is very difficult to know what relators are trying to say." The court then dismissed the relators' complaint, but offered the relators one opportunity to file an amended complaint—of no more than 10,000 words—that comports with the Rules.

U.S. ex rel. Piscitelli v. Kaba Ilco Corp., 2012 WL 6553274 (N.D. Ohio Dec. 14, 2012)

A relator filed a suit under the federal False Claims Act and the equivalent statutes of eighteen States and the District of Columbia, alleging that a locks and keys company committed fraud by marketing and selling locks to various governments even though the defendant knew that the locks included a "design flaw" that allowed them to be easily opened by anyone with a small magnet. The defendants moved to dismiss the relator's complaint on three grounds: (1) that the court lacked subject matter jurisdiction over the relator's claims; (2) that the relator's complaint failed to identify any false claim that the defendant allegedly submitted to the government; and (3) that the relator failed to plead the alleged fraud scheme with particularity, as required by Federal Rule of Civil Procedure 9(b).

Holding: The U.S. District Court for the Northern District of Ohio granted the defendant's motion to dismiss and denied the relator leave to amend his complaint.

Subject Matter Jurisdiction

The defendant argued that the relator represented a class of plaintiffs in a multi-district litigation proceeding against the defendant, and that the multi-district litigation (MDL) proceeding was filed before the relator's *qui tam* suit was filed. The defendant argued that, for False Claims Act purposes, the prior MDL suit publicly disclosed the information on which the relator's fraud claims were based, and consequently, the court did not have subject matter jurisdiction over those claims. In addition, the defendant argued that the relator could not qualify for the "original source" exception to the public disclosure. The court determined that although no government entity was a party in the MDL suit, since the relator completely failed to respond to the defendant's public disclosure argument, "dismissal for lack of jurisdiction is required."

Pleading Fraud with Particularity

The court noted that even if subject matter jurisdiction existed, the complaint was still deficient because the relator failed to identify anyone who heard or received the defendant's allegedly false statements, and only made general allegations that referenced "governments" paying for the defendant's allegedly defective locks, but failed to identify any specific government entity that received claims for the defendant's products or that ever purchased those products. Furthermore, the complaint did not describe the timing of any of the relevant events (such as when false statements were made, false claims were submitted, etc.), and instead merely references a 34-year span during which the fraud allegedly occurred. The court held that the relator's complaint "falls far short of satisfying Rule 9(b)'s pleading requirements and dismissal is warranted on that basis." Since the relator contended that his complaint contained as much specificity as it possibly could, without additional discovery, the court denied his request for leave to amend his complaint. The court found that the request was futile, since the relator could not use discovery in order to properly lead his claim—especially since the governments on whose behalf the suit was filed (and which likely possessed additional information), declined not to join the relator's suit.

A1 Procurement, LLC v. Hendry Corp., 2012 WL 6214546 (S.D. Fla. Dec. 13, 2012)

A corporate relator alleged that, with respect to some 185 government contracts, a group of other corporations falsely certified to the federal government that they were at least 51% owned by a veteran, resulting in liability under the False Claims Act. The defendants moved to dismiss the relator's complaint on three grounds: (1) the relator failed to state a claim because it did not allege any objectively false representation that was made to the government; (2) the relator failed to plead the alleged fraud with particularity; and (3) the relator improperly added defendants when filing its second amended complaint.

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

Amending *Qui Tam* Complaint

First, the court considered the defendants' motion to dismiss on the basis of the relator's failure to comply with Federal Rule of Civil Procedure 15, when filing a second amended complaint to join additional defendants. The court agreed with the defendants, finding that the relator never sought or received leave of court to join the new defendants. As a result, the court held that the relator's claims against those defendants were abandoned. The court, though, refused to dismiss the relator's claims against the original defendants, a remedy that the court considered a "drastic sanction."

Failure to State a Claim/Plead Fraud with Particularity

The defendants argued that the relator failed to state a claim under the FCA because it did not allege any objectively false representation made by the defendants to the government. The defendants argued that the relator misconstrued the law and was mistaken in contending that the defendants' owners were required to possess documentation proving their veteran status. The court agreed to some extent, and rejected the relator's theory that the defendants were liable under the FCA because they were ineligible to bid on contracts under Small Business Administration programs, since they did not have proper documentation regarding the veteran status of their owners. But while the court held that the defendants were not necessarily required to possess certain documentation, as claimed by the relator, it held that the relator's complaint *did* allege an objective falsity, namely, the defendants' representations that they were at least 51% owned by a veteran. This allegation alone, when viewed in the light most favorable to the relator, was sufficient to overcome the defendants' motion to dismiss.

Finally, the court considered the defendants' argument that the relator's complaint was not pled with particularity, because the relator failed to allege who engaged in the fraud and what each individual actually did. The court disagreed and held that the relator pled the alleged fraud scheme with sufficient specificity. Notably, although the relator's allegations generally only identified "high level officer[s] owner[s], manager[s], or subsidiar[ies]" as the specific individuals who submitted the defendants' false claims to the government, the court held that the relator's complaint still identified "who" allegedly committed the fraud. The court also rejected the defendant's argument that the relator's complaint did not contain any "indicia of reliability" that false claims were actually submitted to the government. The court held that an "indicia of reliability" analysis is required when a relator asks the court to make assumptions about a defendant's billing practices. In this case, the court noted, the relator did not allege a fraud that might have led to the submission of false claims; rather, the fraud alleged by the relator in the present case was the submission of the defendants' claims themselves, which the court deemed sufficient to satisfy Rule 9(b).

The relator's claims against the newly joined defendants were dismissed, while the claims against the original defendants were allowed to go forward.

U.S. ex rel. Bibby v. Wells Fargo Bank, N.A., 2012 WL 5866137 (N.D. Ga. Nov. 19, 2012)

Two relators filed a *qui tam* action under the False Claims Act, alleging that a group of fourteen affiliated banking and mortgage companies engaged in a scheme to defraud a U.S. Department of Veterans Affairs refinancing program. Specifically, the relators, both of whom were mortgage brokers, alleged that retired and active duty veterans who have a VA mortgage on their home can apply for a special refinancing loan program for veterans, which includes a guaranty from the government, lower interest rates and shorter repayment periods. The relators claimed that lenders were restricted in the closing costs they could charge on such loans and that such costs could not exceed one percent of the loan amount. Moreover, the relators alleged that lenders were required to affirmatively certify to the VA that they had complied with these rules as a pre-condition to the VA's issuance of a loan guaranty. The relators alleged that while working with these federally-backed loans on behalf of veterans who were attempting to refinance through the defendants' institutions, they discovered that the defendants routinely violated the rules by including impermissible closing costs, and then falsely certified their compliance to the VA. They asserted that the defendants' misconduct constituted false claims and caused the government to guaranty thousands of unqualified loans. The defendants moved to dismiss the relators' claims for failure to state a claim under the False Claims Act and for failure to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Northern District of Georgia granted the defendants' motion in part and denied it in part. The court allowed the relators to maintain their claims that were based on the defendants' alleged false statements that induced the government to provide guaranties for loans that included unallowable closing costs. But the court dismissed the relators' claims that were based on the defendants' alleged submission of false claims to the government for payments under the loan guaranty program for loans that had defaulted.

Failure to State a Claim/Plead Fraud with Particularity

As an initial matter, the court noted that while a fraudulent application or certification used improperly to obtain a government-backed loan "does not result in immediate drain on the federal fisc, it does result in the government taking on an obligation to expend funds if the loan goes into default. Thus, the initial fraudulent conduct in obtaining a government guaranty creates an inchoate FCA violation that becomes choate if and when a loan subsequently goes into default and results in a demand for government payout." The court also rejected the defendants' preliminary argument that the

relators' claims should be dismissed because the relators failed to allege specific conduct to specific defendants, and instead "lumped together" all of the defendants. Instead, the court noted that the relators described the fraud scheme, provided an example loan that they alleged was fraudulently procured and resulted in a default and submission to the VA for payment and contended that their fraud claims applied equally and identically to each of the defendants. The court said that the relators' "collective pleading" did not result "in a lack of clarity as to what conduct is alleged against each individual defendant," and therefore, the complaint was not deficient on that basis.

Next the court considered the defendants' argument that the relators' claims should be dismissed because they failed to provide particularized facts to support their claim that the defendants actually presented false claims for payment to the government. The court determined that in the Eleventh Circuit, "a somewhat more flexible, case-by-case approach . . . may be properly applied where the relator's complaint provides 'indicia of reliability' that support the relator's allegations that the defendant submitted actual fraudulent claims to the government." The court noted that the relators had active roles as mortgage brokers in preparing the mortgage paperwork at issue in the case and worked directly with veterans applying for loans through the program at issue and with the defendant companies. The court also observed that although the relators did not attend loan closings, the defendants sent them copy of each post-closing settlement statement, and the relators alleged that those documents confirmed the defendants' scheme to hide closing cost overcharges. The court held that the relators' manifestation of personal knowledge of the defendants' alleged false certifications to the government added reliability to their allegations that the defendants made false statements to the government, sufficient to overcome any need for producing actual claims containing those statements. However, the court held that the relators' knowledge only extended to whether or not false claims were presented to the government. Quoting Eleventh Circuit precedent, the district court stated that in order to satisfy Rule 9(b)'s pleading requirements, "[r]elators must allege with particularity 'that [Defendant's] false statements ultimately led the government to pay amounts it did not owe.'" The court held that the relators did not demonstrate any indicia of reliability regarding whether or not the defendants presented false claims on *defaulted* loans for which the government was asked to provide guaranty payments, since the relators had no involvement with how the defendants handled defaulted loans. So while the court held that the relators' could maintain their fraud allegations regarding the defendants' alleged false statements to the government, they could not maintain claims based on the defendants' alleged presentment of false claims for payment.

Next, the court turned to the FCA's "materiality" element and held that the relators' complaint satisfied this element. The defendants contended that since the VA "Lender Handbook" does not require that loan guaranties tainted by unauthorized closing costs be automatically voided, the defendants' allegedly false statements to the VA were not necessarily material to the government. The court rejected that argument, finding that the handbook was superseded by regulations that made clear that the government would not provide a guaranty for loans that were procured by fraud,

and which explicitly stated that lenders' certifications of compliance with the rules regarding allowable closing costs would be a condition precedent to receiving a VA loan guaranty. The court held that the relators pled false certifications that could plausibly materially affect the VA's decision to honor a loan guaranty, and therefore, satisfied the FCA's materiality element.

As a result of these findings, the court held that the relators' claims regarding the defendants' alleged false statements to induce the government to provide loan guaranties—but not with respect to any subsequent claims for payment that the defendants may have presented to the government when/if any of those loans defaulted—were properly pled and could proceed.

Bankruptcy Proceedings

Two years after the relators' *qui tam* suit was filed, one of the two defendants filed a Chapter 7 bankruptcy case. The defendants moved to dismiss the relators' complaint on that basis, arguing that the relator in bankruptcy failed to disclose the claims to the bankruptcy court and therefore, the claims are the property of the bankruptcy estate and the relator lacked the standing to pursue the claims. The court concluded that at the time the *qui tam* suit was filed, the relator had not yet filed his bankruptcy case and thus, still owned his interest in the suit. However, at the moment the bankruptcy case was filed, the Chapter 7 Trustee became the real party in interest in the bankrupt relator's case and was entitled to pursue that relator's claims. This finding was not problematic, though, as the court observed that although the Trustee was never formally joined or substituted into the *qui tam* suit, he ratified the action by obtaining an order from the bankruptcy court, authorizing the relator to pursue the *qui tam* action on behalf of his estate. The court denied the defendants' motion to dismiss on the basis of the bankruptcy proceeding.

U.S. ex rel. Boros v. Health Mgmt. Assocs., Inc., 2012 WL 5304172 (S.D. Fla. Oct. 25, 2012)

Two relators filed an action under the False Claims Act, alleging that a group of healthcare companies presented false claims for unnecessary cardiac catheterizations to Medicare and other federal government healthcare programs. The defendants moved to dismiss the relators' complaint for failure to state a claim and for failure to plead the alleged fraud with particularity. The U.S. District Court for the Southern District of Florida granted the defendants' motion, finding that the relators did not allege sufficient facts in support of their complaint. The court observed that although the relators identified various patients who allegedly received unnecessary catheterizations, and although the complaint alleged that claims were submitted to the government regarding these patients' treatment, the complaint was still deficient, since the relators did not "identify any details about Defendants' alleged submission of a false claim to the government or the govern-

ment's payment of that claim." The court noted that such details would include the identity of specific person or entities who participated in the various steps of the claims submission process, as well as the dates, times, and amounts of allegedly false claims. As a result, the court held that the complaint was not pled with particularity, as Rule 9(b)'s heightened pleading standard requires, and the complaint was dismissed.

U.S. ex rel. Tucker v. Christus Health, 2012 WL 5351212 (S.D. Tex. Oct. 23, 2012)

A relator filed a *qui tam* action alleging that four affiliated healthcare companies she previously worked for as a registered nurse violated the False Claims Act by submitting false claims to Medicare and other government healthcare programs. Specifically, the relator alleged that the defendants submitted claims: (1) reflecting stays for patients that were improperly extended beyond medical necessity, resulting in increased reimbursements and misclassifications of the defendants as long term care hospitals; (2) for patients who were unnecessarily admitted; (3) for equipment that was not medically necessary; and (4) for medical procedures that were delayed in order to increase reimbursements from the government. The government declined to intervene in the suit. The defendants moved to dismiss the relator's claims for failure to state a claim under the False Claims Act and for failure to plead the fraud claims with particularity.

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

The court first held that the relator properly stated a claim under the False Claims Act, as her complaint alleged that the defendants presented false Medicare claims to the government themselves, or caused others to do so. Moreover, the relator's complaint included allegations regarding why and how the defendants' claims were false, with specific examples. Finally, the court determined that the relator alleged resulting damages o the government.

The court also held that the relator's complaint satisfied Rule 9(b)'s heightened pleading requirement, since the relator "identifies by name individuals who participated in submitting the false claims to Medicare, and she describes the manner in which the Medicare billing was false and/or fraudulent. She specifies the time period during which the false claims were submitted to Medicare. She provides specific examples of each category of fraudulent billing, and explains that Defendants received millions of dollars thereby." Although the court noted that the relator did not identify each of the defendants' allegedly false claims by date and patient name, nor did she identify every individual who allegedly participated in the fraud, the court held that her allegations "are adequately particular to survive" the defendants' motion to dismiss. In addition, the court rejected the defendants'

argument that the relator's complaint was deficient because it did not assert claims against each defendant individually. Instead, the court held that "[t]o the extent possible without discovery, Relator has adequately alleged the complicated relationship among the four remaining defendants. Additionally, certain allegations are against only certain Defendants, while others are asserted against Defendants as a group. The allegation that Defendants are inter-related and that they acted together does not alone require dismissal under Rule 9(b)."

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

U.S. ex rel. Sanchez v. Abuabara, 2012 WL 5193415 (S.D. Fla. Oct. 19, 2012)

A relator filed a *qui tam* suit under the False Claims Act, alleging that a group of affiliated defendants made false statements to the government in order to secure a contract with the U.S. Army to provide communications network functions. The relator alleged that he possessed the technical expertise to complete the job, but since he had a prior affiliation with the Army, he was ineligible to directly contract with the government. As a result, he stated, he partnered with the defendants, who would bid on the government contract, and then allow the relator to work "behind-the-scenes," which both sides believed was legally permissible. The defendants bid on the contract, stating, in part, that they intended to leverage the relator's expertise, and the government awarded the contract to the defendants. The relator and the defendants executed a preliminary agreement that outlines their respective rights and obligations, but the two sides were unable to reach a final agreement and cut ties with one another. The defendants went on to complete the contract without the relator's assistance. Subsequently, the relator filed suit against the defendants, alleging, among other things, a violation of the FCA. The relator's FCA allegation asserts that the defendants never intended to utilize his expertise and services, but made such representations to the government in order to induce the Army to award the contract to them. He alleged that the defendants knowingly presented false claims to the government, knowingly used false statements that were material to their allegedly false claims, and conspired to violate the FCA. The defendants moved to dismiss all three claims.

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

Pleading Fraud with Particularity

First, the court analyzed the relator's claim that the defendants' representations to the government were merely a sham or "bait-and-switch" attempt to fraudulently induce the Army to accept the defendants' bid on the contract at issue. The court, though, determined that the relator failed to allege "specific facts" from which the court could

infer that this allegation was true. The court stated that it would not impute a "sinister motive" to the defendants, based on deficient factual allegations—the court noted that delays in reaching final agreements are common when parties negotiate contracts, and that the delay in reaching a final agreement in this case doesn't necessarily serve as evidence that the defendants never intended to hire the relator. The court distinguished the "bait-and-switch" cases relied on by the relator, noting that in each of those cases, the defendants were found to have made "objectively false" statements to the government. Here, the relator failed to allege facts indicating that the defendants made any objectively false statements to the government, particularly since the relator did not allege that the defendants continued to represent to the government that he would be involved in the contract, even after the defendants knew that he would not. Instead, the court determined, the defendants informed the government that the relator would not be working on the contract, as soon as that fact became clear. The court concluded that the relator "alleg[ed] fraud by hindsight," and held that his complaint did not plead the alleged fraud with particularity.

Conspiracy

The court dismissed the relator's conspiracy claim, finding that the relator failed to allege the elements of conspiracy, since the complaint did not allege a meeting of the minds to commit fraud among the defendants nor any overt act in furtherance of any alleged conspiracy. Furthermore the court observed the relator's allegation that all of the defendants were inter-connected—he even alleged that one defendant was the "alter ego" of another. As a result, the court held that the intra-corporate conspiracy doctrine applied and warranted the dismissal of the relator's conspiracy claim, since in accordance with the doctrine, a corporation cannot conspire with itself or its employees, and employees acting in their official capacities cannot conspire with each other.

The relator's complaint was dismissed with prejudice.

U.S. ex rel. Upton v. Family Health Network, Inc., 2012 WL 4577553 (N.D. Ill. Oct. 1, 2012)

Four relators brought a *qui tam* action on behalf of the United States and the State of Illinois, alleging that a managed care organization, its president and CEO, and its COO violated the federal False Claims Act and the Illinois False Claims Act by falsely certifying to the Medicaid program that the organization was in compliance with its Medicaid contract and with federal law and was not aware of any fraud, abuse, or misconduct. The relators alleged that these quarterly certifications were required by the government before the defendant organization would receive Medicaid payments, based on an established capitation rate for each person enrolled in the organization's healthcare program. The relators further alleged that these certifications to the government were false because the defendants engaged in a scheme of enrolling a disproportionately healthy population of Medicaid-

eligible individuals into its healthcare program, in order to increase profits from its Medicaid payments by saving on healthcare costs for patients. Specifically, the relators alleged that the defendants "cherry picked" the Medicaid recipients the healthcare company would provide services to and refused to enroll particularly needy, chronically ill, or diseased individuals—for whom services would be more expensive—even though the defendants were required to provide healthcare services to "Illinois Medicaid recipients who requested to participate in [the organization's] program." The relators—who worked for the defendant organization during the time of the alleged fraud—alleged that they were instructed not to enroll certain categories of patients, including pregnant women who were not past their second trimester and patients who would likely require treatment by specialists; they claimed that when they enrolled such individuals anyway, the defendants immediately dis-enrolled them. One relator even alleged that before she began working for the defendant organization, she was an Illinois Medicaid recipient and attempted to enroll herself and her two children in the defendants' program but was denied once the defendants learned that she had endometriosis and required quarterly medicinal injections.

The relators also alleged that the defendants concealed their fraudulent scheme by destroying unprocessed applications to the program in order to make it appear that the applicants never applied, and by creating a sham compliance committee in which the defendant COO served as the liaison between the defendant organization and the government; the relators alleged that when an employee reported to the compliance committee that the defendant organization was systematically refusing to enroll pregnant women in its program, the defendant COO told the employee that no corrective action would be taken, and subsequently fired the employee upon learning that the employee had prepared a written complaint to submit to the state. The relators claimed that the alleged fraud scheme was ongoing from 1999 through the time their complaint was filed in 2009. The defendants moved to dismiss the relators' claims for failure to state a claim under the False Claims Act statutes and for failure to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Northern District of Illinois granted the defendants' motion to dismiss, but gave the relators three weeks to file an amended complaint.

Failure to State a Claim/Plead Fraud with Particularity

The court found that the relators' complaint properly pled the defendants' alleged FCA violations for the period of 2002 through 2008, since, when viewed as a whole and after drawing all inferences in favor of the relators, the complaint plausibly alleged that the defendants discriminated against Medicaid recipients with potentially costly medical conditions. The court noted that the relators alleged multiple instances of the fraud scheme in practice during that time period and rejected the defendants' alterna-

tive explanations for the refusal to enroll certain patients in their program, stating that the court would not make factual determinations at the motion to dismiss stage. Notably, the court dismissed the relators' claims based on alleged fraud between 1999 and 2002 and after 2008, noting that the relators failed to plead those claims with particularity, since they did not cite any specific examples of the alleged fraudulent scheme during those time periods.

The court also rejected the defendants' contention that their practices did not violate their Medicaid contract, which, the defendants argued, did not require them to enroll every Illinois Medicaid recipient who applied, and which even provided specific exclusions. The court, though, held that the defendants' contention did not contradict the relators' allegations that the defendants refused to enroll certain eligible individuals because of the cost of providing services to them, and noted that the defendants failed to assert that any provision of the contract allowed them to refuse to enroll individuals on that basis. Moreover, the court stated that, at the motion to dismiss stage, the relators were not required "to plead around all potential defenses." The court further rejected the defendants' claims that the State of Illinois ultimately decided which applicants would be enrolled in the defendants' program, and thus, the defendants could not unilaterally dis-enroll participants or terminate their benefits. Instead, the court again found that the defendants' explanation did not contradict the relators' allegation, since the defendants were still in a position to deny initially any applicant with a costly medical condition, and were also in a position to discourage such individuals from even applying in the first instance or to dis-enroll from the program on their own. In addition, the court noted that the defendants conceded that the protocol authorizing the state to enroll applicants was not put into place until 2008—long after the alleged fraud began.

Moreover, the court held that the relators' claims were timely, rejecting the defendants' argument that the claims should be dismissed because the alleged conduct occurred outside the FCAs' six-year statute of limitations. The relators countered that the FCAs' ten-year limitations period provision applied, and argued that their claims were filed within that period. The court determined that regardless of which period applied, the relators' claims were timely, since at least some of the conduct alleged occurred within the applicable limitations period.

Similarly, the court held that the relators properly pled that the defendants not only violated their duty to report suspected fraud, abuse or criminal activity regarding its healthcare program, but actually falsely certified their compliance with applicable contractual and regulatory provisions. The court held that the relators' specific allegations of the defendants' "cherry-picking" was sufficient to plead their false certification claim, and that they were not required to provide the dates, identification numbers, or verbatim contents of the defendants' allegedly false certifications to the government.

Finally, however, the court held that the relators failed to adequately plead that the defendants' Medicaid payments were conditioned on their certifications to the government. The court held that the relators did not cite any contractual or regulatory provision in support of their conclusory allegation that the certifications were tied to

payments from the government and that the government would not have provided capitation payments to the defendants had it known that the defendants' certifications were false or had the defendants not submitted any certifications at all. The court rejected the relators' argument that even if the certifications at issue were merely conditions of participation in the government healthcare program, any such certifications that are false would lead to FCA liability in the Seventh Circuit. The court, rather, held that, pursuant to Seventh Circuit precedent, conditions of participation can only lead to FCA liability under a fraudulent inducement theory—and the relators did not allege a fraudulent inducement theory of liability.

As a result of these findings, the court dismissed the relators' fraud claims, but without prejudice. The court granted the relators 21 days to amend their complaint.

U.S. ex rel. Reiber v. Basic Contracting Servs. Inc., 2012 WL 3945803 (W.D. Wa. Sept. 10, 2012)

A relator filed a *qui tam* action against a company hired by the government to provide security services and an affiliated individual. He alleged that the defendants knowingly overcharged the government. The defendants moved to dismiss the complaint for lack of particularity. The U.S. District Court for the Western District of Washington agreed that the claims were not pled with specificity, but concluded that "dismissal is not proper at this time." Rather than dismiss the relator's complaint, the court noted that the relator had requested leave to amend the complaint to plead additional facts to support her claims. The court granted that request, observing that the relator had not exhibited undue delay or bad faith and that the defendant bore little risk of being prejudiced, since discovery had not yet begun. The relator was given 30 days to amend her complaint.

U.S. ex rel. Coots v. Reid Hosp. & Health Care Servs., Inc., 2012 WL 3949532 (S.D. Ind. Sept. 10, 2012)

A relator filed a *qui tam* suit against two healthcare companies alleging violations of the federal False Claims Act and the Indiana False Claims Act in connection with a purported Medicare/Medicaid fraudulent billing scheme. Specifically, the relator alleged that the defendants: used false billing codes; upcoded levels of treatments and services; sought duplicative payments; used false diagnostic codes; sought payments for ineligible *locum tenens* physicians (doctors who temporarily fill in when regular doctors or absent or when a facility is short-staffed); sought payment for services that were not provided; and falsely reported the location of services in order to receive increased payments. The defendants moved for a partial dismissal of the relator's allegations, arguing that her allegations that the defendants used false diagnosis codes failed to state a claim under the FCA statutes, and that her allegations that the defendants falsely reported the location of services were not pled with particularity.

Holding: The U.S. District Court for the Southern District of Indiana granted the defendants' motion in part, dismissing the relator's allegations that the defendants falsely reported the location of services, but allowing the relator to maintain her allegations that the defendants used false diagnosis codes.

Failure to Plead Fraud with Particularity

The defendants first moved to dismiss the relator's allegations that they falsely reported the location of services, arguing that in order to plead that claim with the requisite particularity, the relator was required to cite specific examples of claims for payment submitted by the defendants in which the location of services was falsely reported. The relator countered that her complaint included sufficient particularized facts, as she alleged numerous specific examples of the other types of purportedly fraudulent billing practices listed above and identified a specific problem within the defendants' electronic billing system that caused the defendants' reimbursement claims to include the highest-paying location for services by default. She further argued that her complaint referenced a defendants' intraoffice email that identified the billing problem. After applying Seventh Circuit precedent, the district court concluded that "[a]t least one example of the particular fraud alleged must be detailed in the pleading," and granted the defendants' motion to dismiss the false location allegations because the relator's reliance on the defendants' intraoffice email "[did] not lead to the inescapable conclusion that inaccurate bills were submitted and not corrected. There are too many details unaccounted for and this is the type of 'gestalt' method of alleging a *qui tam* claim that has been rejected by the courts in this circuit." The court also noted that the fact that the relator provided specific examples of the other types of billing fraud alleged in her complaint had no bearing on the validity of her false location allegations.

Failure to State a Claim

The defendants also sought to dismiss the relator's false diagnosis allegations, arguing that the court should take judicial notice of the Medicare Claims Processing Manual—which was referenced in the relator's complaint—which made clear that the defendants used acceptable coding practices, and thus, the relator failed to state a claim for relief under the FCA statutes. The relator did not object to the court taking judicial notice of the manual, but countered that the provisions cited by the defendants only applied in rare circumstances, and not to the defendants' alleged conduct. The court held that "full-scale fact pleading is not a requirement" of Rule 9(b). While the court noted that additional facts were necessary to determine whether and how the manual applied to the defendants' alleged conduct, it decided not to "attempt at this stage of the litigation to determine if the facts are such that any particular provision of the Medicare Claims Processing Manual is applicable to any particular circumstance. That is a question to be answered at a later date, perhaps upon a summary judgment motion or at trial, but not one which is ripe for ruling on a motion to dismiss. The defendants' motion to dismiss the false diagnosis claims was denied.

U.S. v. R.J. Zavoral & Sons, Inc., 2012 WL 3871344 (D. Minn. Sept. 6, 2012)

The United States filed an action alleging that a construction company and affiliated individual defendants violated the False Claims Act, other federal laws, and common law. With respect to the False Claims Act, the government alleged that the defendants formed a joint venture with another construction company in order to bid on a U.S. Army Corps of Engineers (COE) contract that was set aside for companies that met the Small Business Administration's (SBA) standards for "socially and economically disadvantaged individuals," which includes women and minorities. The second company involved in the joint venture—which was not a defendant—satisfied the SBA criteria, but the defendant company did not. Consequently, the joint venture was subject to additional conditions and approvals and was required to make periodic reports to the SBA to confirm that it was in compliance with various requirements. The government alleged that the defendants' operation of the joint venture violated the SBA's requirements, since the SBA-qualified company was excluded from most of the work on the contract, even though that company was supposed to do the majority of the work. The government claimed that the defendants fraudulently maintained the joint venture's contract with the COE by submitting false statements and records that falsely certified the joint venture's compliance with those SBA requirements, by engaging in illegal kickbacks and self-dealing schemes, and by falsifying invoices, among other things. The defendants moved to dismiss the government's complaint, arguing that the government failed to state a claim under the False Claims Act and failed to plead the alleged fraud scheme with particularity.

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

Failure to Plead Fraud with Particularity

The defendants argued that the government's fraud claims failed because the government's complaint failed to identify who among the group of defendants made the alleged fraudulent statements at issue. The court, though, found that the government's allegations were particularized, as the government alleged specific conduct by each of the defendants, including describing which of the defendants signed the joint venture agreement that was submitted to the SBA, which defendants signed the COE contract on behalf of the joint venture, which defendants allegedly falsely certified that SBA requirements and/or contractual terms were being met, which defendants signed allegedly fraudulent invoices, etc. The court stated that "[w]hile some of the allegation against Defendants are stated in the conjunctive, the Government's lengthy and detailed complaint sufficiently differentiates between the defendants and sets out the 'who, what, where, when, and how' of the alleged fraud as required." (internal citation omitted) Thus, the court denied the defendants' motion to dismiss the FCA claims for failure to plead fraud with particularity.

Failure to State a Claim

The court then turned to the defendants' argument that the government's complaint failed to state a claim under the FCA. The court determined that "the Government's claim advances a false certification theory," whereby the government alleged that the defendants falsely certified to COE that their requests for payment under the contract were only for work performed in accordance with the contract—which required, among other things, that the defendants' joint venture comply with SBA requirements. The court further concluded that the government alleged facts which, if proven, would show that the defendants knew that the joint venture was not SBA-compliant and attempted to conceal this fact from the SBA and COE by making false representations. The court held that these allegations were sufficient to state a claim under the FCA. The defendants' motion to dismiss the government's FCA claims for failure to state a claim was also denied.

U.S. ex rel. Raynor v. Nat'l Rural Utils. Cooperative Fin., Corp., 2012 WL 36000303 (8th Cir. Aug. 23, 2012)

A relator filed a *qui tam* suit against a rural utilities finance corporation and several of its officers and alleged co-conspirators, alleging False Claims Act violations. More specifically, the relator alleged that the corporation made false statements to the government in order to receive Farmer Mac investments and various government-backed loans; failed to apply Generally Accepted Accounting Principles (GAAP) when accounting for losses on two loans; and failed to disclose an embezzlement scheme to the government. The U.S. District Court for the District of Nebraska dismissed the relator's complaint for failure to state a claim and failure to plead the alleged fraud with particularity. The relator appealed the district court's rulings to the U.S. Court of Appeals for the Eighth Circuit.

Holding: The Eighth Circuit affirmed the district court's dismissal of the relator's complaint for failure to satisfy Rule 9(b).

Failure to Plead Fraud with Particularity

The relator argued that the district court erred by applying Rule 9(b)'s heightened pleading standard to his allegations that the corporate defendant received investments, loans, and loan guarantees in violation of federal law, and that he should be allowed to prove that that defendant knowingly received investments, loans, and loan guarantees in violation of federal law. The circuit court disagreed, finding that the relator's allegations were conclusory, and that he never described "how" the corporate defendant obtained investments, loans, or guarantees in violation of federal law. The appeals court further noted that the relator failed to offer evidence of false claims to the government, and rejected his argument that the corporation's alleged failure to adhere to GAAP accounting standards established falsity, since violations of GAAP alone do not dem-

onstrate knowing fraud, and since the relator failed to show that the defendant failed to comply with any acceptable GAAP accounting treatment—but merely that the defendant failed to comply with his desired GAAP accounting treatment. Consequently, the Eighth Circuit affirmed the district court's dismissal of the relator's fraud allegations on Rule 9(b) grounds.

Jallali v. Nova Southeastern Univ., Inc., 2012 WL 3234278 (11th Cir. Aug. 9, 2012)

A relator filed a *qui tam* suit alleging that a university corporation submitted claims for federal student aid funds that falsely certified its compliance with certain federal regulations. The university moved to dismiss the claim, arguing, among other things, that the relator failed to plead the alleged fraud with the requisite particularity. The U.S. District Court for the Southern District of Florida granted the motion and the relator's third amended complaint was dismissed. The relator appealed to the U.S. Court of Appeals for the Eleventh Circuit.

The circuit court affirmed the district court's ruling, finding that the relator failed to "allege facts identifying the time, place, or substance of the allegedly fraudulent claims for payment." The court noted that the plaintiff did not allege facts showing that the university actually certified compliance with the underlying regulations at issue, nor did he allege that non-compliance would have rendered the university ineligible to receive federal student aid funds.

The circuit court also rejected the relator's argument that the district court erred by dismissing his complaint without the Attorney General's consent. The court concluded that the FCA only requires the Attorney General's consent to the voluntary dismissal of a *qui tam* action.

As a result, the Eighth Circuit affirmed the district court's ruling.

U.S. ex rel. Dittmann v. Adventist Health Sys./Sunbelt, Inc. 2012 WL 3105586 (M.D. Fla. July 30, 2012)

Two relators filed a *qui tam* action on behalf of the United States and the State of Florida, alleging that a hospital operator committed Medicare, Medicaid, and Tricare/Champus fraud by improperly using three billing code modifiers, by inflating the dosage of drugs used, and by falsely billing for Computer Aided Detection (CAD) software analysis of mammograms when no such software had been used. The defendant moved to dismiss the relators' claims, arguing that the *qui tam* complaint was deficient and did not satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). The United States District Court for the Middle District of Florida, though, quickly denied the defendant's motion, noting that the relators were both company insiders who described the alleged

fraud "in extensive and sufficient detail." The court concluded that the relators' complaint "satisfies Rule 9(b)'s requirements of describing the alleged fraudulent acts, why they were fraudulent, when they occurred, and who engaged in them." Consequently, the court denied the motion to dismiss.

U.S. v. Kernan Hosp., 2012 WL 3088210 (D. Md. July 30, 2012)

The United States filed an action under the False Claims Act and common law, alleging that a hospital orchestrated an illegal scheme to fraudulently bill Medicare, Medicaid, and Tricare whereby the hospital systematically increased the complexity of its "case mix"—a factor used to calculate the hospital's reimbursement rate—by improperly inflating the number and severity of cases in which malnutrition or Kwashiorkor (a wasting disease caused by insufficient protein intake) was included as a secondary diagnosis. The government argued that if the hospital added secondary diagnoses to patient's coding profiles, then it case mix would appear more complex, resulting in higher reimbursement rates from the government. The government further asserted that the hospital deliberately disregarded the industry-recognized steps to monitor its healthcare claims for quality control, which led to a 23% error rate in malnutrition and Kwashiorkor diagnoses. The hospital moved to dismiss the government's complaint for failure to state a claim and failure to plead the alleged fraud with particularity.

Holding: The United States District Court for the District of Maryland granted the defendant's motion to dismiss the government's complaint without prejudice.

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

In its complaint, the government referenced four of the hospital's patients, for whom the hospital allegedly submitted false claims. In support of its argument that the government's complaint failed to state a claim under the False Claims Act, the hospital attached the medical records for these four patients to its motion to dismiss. Since those medical records had not been attached to the government's complaint, the government argued that the hospital's motion to dismiss for failure to state a claim should be converted into a motion for summary judgment, since the hospital had introduced evidence outside the four corners of the complaint. In response to the hospital's motion, the government filed an opposition brief and attached more than 500 pages of exhibits. The hospital countered that its motion to dismiss should not be treated as a motion for summary judgment, since the government's complaint specifically described the four patients whose medical records had been attached. The hospital moved to strike the government's opposition brief, including all of its exhibits. The court decided not to strike the government's submission, but to disregard the parties' new documents—the defendant's medical records and the government's exhibits. The court noted that the medical records were likely central to the government's complaint, but determined

that they were not essential to deciding the sufficiency of that complaint. Instead, the court focused on the question of whether or not the government had sufficiently alleged that the hospital submitted false claims to the government, pursuant to the False Claims Act. The court concluded that the government had not.

The court first made clear that the government's FCA allegations were subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). The court then concluded that the government failed to satisfy that standard, stating that "the primary failure of the Government's Complaint is its lack of specificity as to the precise false claims at issue in this litigation—in fact, the Complaint does not identify a single false claim actually submitted to the government for payment." Although the government argued at a hearing that the allegedly false claims were the cost reports the defendant submitted to the government, the court observed that the government's complaint did not identify any of those cost reports either, nor did it explain the circumstances under which such reports were submitted to the government. The court, quoting Eleventh Circuit precedent, declared that "if Rule 9(b) is to be adhered to, some indicia of reliability must be given *in the complaint* to support the allegation of *an actual false claim* for payment being made to the Government." Since the court determined that the government's complaint failed to provide specific details regarding the "who, what, when, where, and how" of the alleged fraud, it held that the complaint failed to meet Rule 9(b)'s pleading requirements and should be dismissed. The court, however, dismissed the government's complaint without prejudice, allowing the government an opportunity to re-plead its fraud allegations.

U.S. ex rel.Streck v. Allergan, Inc., 2012 WL 2593791 (E.D. Pa. July 3, 2012)

A relator brought a *qui tam* action alleging that a group of pharmaceuticals companies violated the federal False Claims Act and the corresponding statutes of twenty-four states and the District of Columbia by fraudulently reporting their Average Manufacturer Price—the price the manufacturer charges to wholesaler and retailers—in an effort to pay a smaller Medicaid rebates. The defendants collectively moved to dismiss the relator's complaint, arguing that his complaint was inadequate under Federal Rules of Civil Procedure 8(a) and 9(b).

Holding: The United States District Court for the Eastern District of Pennsylvania granted the defendants motion in large part, but allowed some of the relator's claims to go forward.

Failure to Plead Fraud

The defendants argued that the relator's allegations failed to meet the notice pleading standards of Rule 8(a) and failed to satisfy the heightened pleading standards of Rule 9(b), as they did not allege sufficient facts to show that the defendants knowingly vio-

lated the False Claims Act. The defendants claimed that they did not knowingly defraud Medicaid, but rather, relied on a good faith interpretation of the FCA's definition of Average Manufacturer Price. The court observed that the relator's complaint did not offer any direct evidence of the defendants' knowledge; the court stated that the relator's claims "rest on the indirect evidence that the statutory and regulatory provisions involved were so clear that Defendants' calculation of AMP was at least reckless," and held that in order to survive the defendants' motion to dismiss, the complaint must plausibly demonstrate that the defendants'"interpretation of how to calculate AMP 'ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.'" The court found that, with respect to calculating AMP in the context of manufacturer discounts on sales of drugs, "there was a definitive change in January 2007 to the guidance in AMP calculations" and analyzed the relator's claims from 2004 to January 2007 (the beginning of the time period alleged in the complaint) and then from January 2007 until the date of the relator's *qui tam* filing. After evaluating the relator's allegations of fraud before January 2007, the court determined that the defendants' interpretation of AMP was reasonable, as there was no guidance regarding the types of discounted services that should be included in the calculation of AMP. The court noted that in 2007 statutory changes were made to the calculation of AMP. The relator asserted that these changes put the defendants on notice that their calculations of discounts were illegal. But the court concluded that "even when there is statutory and regulatory guidance, unless [the defendants'] interpretation is reckless, Plaintiff's claims must fail." The court, though, ultimately held that the defendants' interpretation was, at the very least, reckless, as the defendants tried to re-characterize their discounts in the face of the new statutory framework, so as to continue paying smaller Medicaid rebates.

The court then considered the process for calculating AMP in the context of fees for services and noted that there was a lack of guidance regarding the proper calculation of AMP throughout the time period alleged in the relator's complaint. Thus, the court held that the defendants' interpretation of AMP with respect to service fees was reasonable and warranted dismissal of the relator's claims regarding service fees, for failure to adequately plead scienter.

State Law Claims

The defendants argued that the state FCA claims should be dismissed for a variety of reasons, including: (1) any state FCA claims that correspond to dismissed federal FCA claims should likewise be dismissed; (2) state FCA claims brought under the Delaware and New Mexico FCAs should be dismissed since the relator is not an "affected person" with the right to bring a *qui tam* suit under those laws and since those states neither intervened in the relator's suit nor provided a written determination that there was substantial evidence that a violation occurred; (3) state claims brought under the New Hampshire and Texas FCAs should be dismissed because the attorneys general in those states declined to intervene, as required by state law; and (4) state FCA claims brought under the FCAs of Connecticut, Georgia, Indiana, Montana,

New Hampshire, New Jersey, New Mexico, New York, Oklahoma, and Rhode Island should be dismissed because those statutes were enacted after the relator's complaint was filed and are not to be applied retroactively. The court agreed to dismiss the relator's claims brought New Mexico law, since that statute requires state intervention. The court noted that Delaware eliminated this requirement in 2009, and thus, only dismissed claims under the Delaware FCA that arose before the state amended its law to allow the relator to proceed without state intervention. Similarly, the court determined that New Hampshire and Texas previously required state intervention before *qui tam* actions could proceed but eventually amended their statutes to allow relators to go forward without the government. As a result, the court dismissed the relator's claims under those laws that arose before the aforementioned amendments took effect. The court also acknowledged that many of the states on whose behalf the relator brought claims enacted their FCA laws after the relator's suit was filed—and none of those statutes applied retroactively. Thus, the court dismissed all state FCA claims that arose before those states' respective statutes were enacted and became effective.

See *U.S. ex rel. Badr v. Triple Canopy, Inc.*, 2013 WL 3120204 (E.D. Va. June 19, 2013), at page 266.

See *U.S. ex rel. Heineman-Guta v. Guidant Corp.*, 2013 WL 2364172 (1st Cir. May 31, 2013), at page 23.

See *U.S. ex rel. Casady v. Am. Int'l Group, Inc.*, 2013 WL 1702777 (S.D. Cal. Apr. 19, 2013), at page 44.

See *U.S. ex rel. Capriola v. Brightstar Educ. Group, Inc.*, 2013 WL 1499319 (E.D. Cal. Apr. 11, 2013), at page 270.

See *U.S. ex rel. Palmieri v. Alpharma, Inc.*, 2013 WL 821965 (D. Md. Mar. 5, 2013), at page 25.

See *Amphastar Pharm. Inc. v. Aventis Pharma SA*, 2012 WL 5512466 (C.D. Cal. Nov. 14, 2012), at page 63.

See *U.S. ex rel. Dismissed Relator v. Lilwani*, 2012 WL 4739922 (C.D. Ill. Oct. 3, 2012), at page 139.

See *U.S. ex rel. Dismissed Relator v. Murchison*, 2012 WL 4739938 (C.D. Ill. Oct. 3, 2012), at page 141.

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

U.S. ex rel. Schell v. Bluebird Media, LLC, 2013 WL 3288005 (W.D. Mo. June 28, 2013)

A relator filed suit against his former employer, a telecommunications company, alleging that the defendant and its successor company violated the False Claims Act by knowingly making false statements to the National Telecommunications and Information Administration (NTIA) in order to procure a $45 grant from the American Reinvestment Recovery Act Broadband Technology Opportunities Program to provide broadband internet service in northern Missouri. Specifically, the relator—who had been employed as one of the defendants' vice presidents—alleged that the defendants knowingly: (1) misrepresented that the area to be served by the grant was "under-served;" (2) falsely claimed that a particular bank would match certain funds, as required by the NTIA; (3) falsely claimed an "in-kind" contribution from the State of Missouri; (4) falsely stated that two individuals whom NTIA had declared ineligible to work on the project would not be involved; and (5) falsely claimed that they could create a viable and sustainable business. The relator further alleged that he was terminated from his position as a result of his opposition to these alleged misrepresentations. He filed *qui tam* allegations under the False Claims Act on behalf of the government, as well as a claim a claim for retaliation under the FCA on his own behalf. The defendants moved to dismiss the relator's claims, arguing under Federal Rule of Civil Procedure 12(b)(6) that the relator failed to state a claim, and that the fraud allegations were not pled with particularity as required by Rule 9(b).

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

Failure to State a Claim/Plead Fraud with Particularity

The defendants argued that the relator failed to state a claim, contending that none of the alleged false statements asserted by the relator were actually false. First, the defendants took on the relator's allegation that they falsely claimed that the area to be served by the grant funds was "under-served." The defendants argued that this allegation was "conclusory," claiming that the relator failed to cite any law or grant eligibility requirements defining that term. Moreover, the defendants contended that the relator failed to plead this allegation with particularity, since the *qui tam* complaint did not detail who made the allegedly false representation and which other service providers affected the area's "under-served" status. The court rejected these arguments, noting that "[t]his level of detail is not required even under Rule 9(b)'s heightened pleading standard." The court determined that the defendants were on sufficient notice of the relator's allegation, since the relator specified that the defendants told NTIA that the

area to be served by the grant was "under-served," that serving an "under-served" area was a requirement of the grant, and that evidence existed that challenged the veracity of the defendants' statement. The court further held that, at the pleading stage, the relator was not required to make a legal argument regarding what constitutes "under-served," or to go into detail about who made the statement or which other companies were providing services in the area.

Next, the defendants challenged the relator's allegation that they falsely claimed that a bank would match a certain amount of the grant funds; the relator claimed that the owner of the defendant companies received a letter from a bank containing the required guarantee, but that the letter was provided to the defendants as a personal favor in order to secure the grant, and that the neither the defendants nor the bank ever expected the bank to provide the matching funds. The defendants claimed that any false statement contained in the bank letter was made by the bank—not the defendants—and thus, could not create liability for the defendants. The court again disagreed, noting that the FCA "does not require that the defendant itself 'make' the false representation to the government. Rather, liability attaches to any person who 'knowingly presents, or causes to be presented, a false of fraudulent claim for payment or approval' or 'knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." Thus, the court held that the relator adequately pled that the defendant "caused" the bank's allegedly false statement to be presented to the government and used by the government. According to the court, "[t] he fact that [the defendants] did not make the statement themselves does not affect their potential liability under the False Claims Act." Moreover, the relator's allegation that the defendants knew that the bank's letter was not legitimate was sufficient to establish the defendant's scienter under Rule 9(b).

The court then addressed the defendant's argument regarding the relator's claim that they falsely claimed to have received a required $10.5 million "in-kind" contribution from the State of Missouri. The defendants argued that this allegation was deficient, since the relator did not define "in-kind contribution." The court again rejected the defendants' argument, holding that the relator "need not delve into legal arguments at the pleading stage." Incidentally, the court noted that "the fact that Defendants proceed to challenge this allegation on the merits reveals that [the relator] has provided sufficient factual information so as to permit Defendants to file a responsive pleading." The defendants further argued that the relator failed to establish that the in-kind contribution was material to NTIA's decision to award the grant, noting that they could have satisfied the grant criteria by providing the $10.5 million through their own liquid capitalized assets. The court noted that even though the in-kind contribution was not the only way in which the defendants could establish eligibility for the grant, ultimately, the grant was conditioned on the defendants having $10.5 million. As a result, the defendants' representation to NTIA that they had the necessary funds in place—regardless of the manner in which the funds were allegedly acquired—was material to NTIA's funding decision.

Next, the court considered the defendants' argument that the relator could not maintain his allegation that the defendants falsely claimed that two ineligible individuals—as a result of ongoing bankruptcy proceedings—would not be involved in managing the defendants' project. The relator alleged that the two individuals were always actively involved in managing the project and that the defendants outsourced about one third of the work on the project to a company owned by the two individuals. The defendants claimed that the relator failed to specify when the alleged misrepresentation occurred or particular facts showing that the two individuals participated in the project. Again, the court held that the relator was "not required under Rule 9(b) to allege every specific detail," and concluded that the relator's allegations were sufficient to put the defendants on notice of the allegations against them.

Finally, the court turned to the defendants' argument that the relator could not maintain his allegation that they falsely represented that they would provide "a viable and sustainable business with the proceeds of the grant"—the defendants argued that the allegation was "conclusory." Once again, the court disagreed, finding that the relator's claim that the defendants knew that their statement to NTIA was false was sufficient to satisfy Rule 12(b)(6) and Rule 9(b)'s requirements. The court reiterated that the relator was not required, at the pleading stage, to prove that the defendants' business was not viable or sustainable.

As a result of the above findings, the court denied the defendants' motion to dismiss the relator's fraud claims.

Retaliation

Similarly, the court denied the defendants' motion to dismiss the relator's retaliation claim. The court held that the relator properly pled each of the elements of his retaliation claim, namely, (1) that he was engaged in conduct protected by the FCA; (2) that the defendants knew that he was engaged in protected activity; (3) that the defendants retaliated against him; and (4) that the retaliation was solely motivated by the protected activity. The court observed that the relator—who had served as a vice president for the defendants—had personal knowledge of the defendants' grant application and post-grant conduct, and that he alleged that he expressed concerned about potential FCA violations to the defendants' CEO and to other officers multiple times over a year-long period. He further claimed that as a result of his complaints, his pay was reduced and subsequently, he was terminated from his job. Although the defendants claimed that the relator was fired for a non-retaliatory reason—the elimination of his position entirely—the court determined that the relator offered specific facts to support his allegation of retaliatory discharge, including: the date of the board meeting at which his termination was decided; the instructions given to the CEO to terminate him and the CEO's subsequent conversation with counsel regarding possible legal consequences; and the date of a subsequent meeting at which a pre-textual reason for the termination was concocted.

U.S. ex rel. Galmines v. Novartis Pharms. Corp., 2013 WL 2649704 (E.D. Pa. June 13, 2013)

A relator sued a pharmaceuticals company under the False Claims Act, alleging that the company improperly marketed one of its prescription drugs by telling physicians that the drug was safe for use in infants, even though the drug had only received FDA-approval for use in patients who are at least two years old. The relator, who was employed as one of the defendant's sales representatives, further alleged that the defendant used cash payments and other improper incentives to encourage physicians to prescribe the drug for non-approved, off-label uses. The relator claimed that the defendant's scheme caused physicians to submit false claims for Medicaid and Medicare reimbursements, thereby violating the federal False Claims Act and the corresponding statutes of 10 states and the District of Columbia. He also alleged that the defendant violated the conspiracy provisions of these laws. The defendant moved to dismiss the relator's complaint, arguing that the relator failed to state a claim for relief under the FCA laws, that his fraud allegations were not pled with particularity, and that the court lacked subject matter jurisdiction over his claims.

Holding: The U.S. District Court for the Eastern District of Pennsylvania granted the defendant's motion in part and denied it in part. The court denied the defendant's motion with respect to the relator's off-label marketing allegations, but granted the motion with respect to the relator's allegations based on illegal kickbacks. Moreover, the court dismissed the claims under five of the state FCA laws, as well as all claims that accrued before the enactment of two of the remaining state FCA laws.

First-to-File Bar

The defendant first argued that the relator's complaint was barred because a prior *qui tam* complaint, filed against the defendant by a different relator about a year before the present relator's complaint was filed, had alleged the same fraud scheme. The court did not state whether or not the prior complaint was still pending when the present suit was filed, but concluded that the prior suit alleged the elements of the present relator's kickback allegations. Consequently, the court held that the present relator was barred from pursuing his fraud claims based on the defendant's alleged illegal kickbacks to doctors. The court, though, held that the prior complaint did not reveal the off-label marketing scheme exposed by the present relator's suit. Thus, the court held that the off-label marketing allegation was not barred by the prior complaint.

Public Disclosure Bar

The defendant also moved to dismiss the relator's complaint for lack of subject-matter jurisdiction pursuant to the FCAs' public disclosure bar provisions. Although the

opinion does not specifically address the purported prior public disclosure(s) that the defendant alleged barred the relator's *qui tam* suit, the court noted that "[t]he parties agree that [the relator] must qualify as an original source in order to bring suit." The court then determined that the relator qualified as an original source, finding that he satisfied both elements for original source status—he voluntarily informed the government of the alleged fraud scheme before filing his *qui tam* complaint, and he had direct and independent knowledge of the facts upon which his fraud claims were based. First, the court agreed that the relator provided information regarding the defendant's alleged FCA violations to a United States Attorney's Office and to appropriate state officials before he filed his *qui tam* suit. The court then rejected the defendant's argument that the relator could not qualify as an original source unless he notified the government of the alleged fraud scheme before the public disclosure occurred; the court observed that, based on its plain language, the statute does not include such a requirement. Consequently, the court held that the relator satisfied the first element. Similarly, the court held that the relator demonstrated direct and independent knowledge of the defendant's alleged fraud scheme. In reaching that conclusion, the court rejected the defendant's argument that the relator must be able to show that he had direct and independent knowledge that false statements were submitted to the government. Instead, the court held that since the relator did not assert that the defendant submitted false claims to the government—but rather alleged that the defendant caused others to submit false claims—the relator was not required to have direct and independent knowledge of the submission of claims to the government. The court held that this knowledge was sufficient to meet the criteria for original source status, since the "centerpiece" of the relator's allegations was that the defendant engaged in an illegal off-label marketing scheme, not that the defendant submitted false claims to the government. The defendant's motion to dismiss for lack of subject-matter jurisdiction pursuant to the public disclosure bar was denied.

Failure to State a Claim/Plead Fraud with Particularity

Next, the court addressed the defendant's argument that the *qui tam* complaint failed to state a claim for relief under the FCAs. The court disagreed. First, the court held that the complaint adequately alleged that false claims for the defendant's drug were submitted to the government. The court found that the relator's complaint "plausibly suggests that at least some of the claims submitted to government healthcare programs [for prescriptions for the defendant's drug] were not reimbursable, because it also alleges that these programs do not pay for drugs that are not prescribed for a medically accepted indication." Next, the court held that the relator properly pled that the defendant caused the submission of false claims for its drug, holding that "causation exists for a FCA claim if a defendant's conduct is a 'substantial factor' behind the submission of a false claim to the government. The court held that the relator pled that the defendant's alleged marketing played a substantial and foreseeable role in physicians' submission of healthcare claims for the defendant's drug, and therefore, the

relator sufficiently pled causation. The court then held that the relator pled that the defendant's alleged false statements were material to the government's reimbursement decision. The court noted that the relator pled facts that suggested that the off-label use of the defendant's drug "is medically *risky*, not that it is medically necessary" (emphasis in original) and thus, claims for off-label uses of the drug were not reimbursable. These allegations were sufficient to plead the materiality element.

The court further determined that the relator's fraud claims were pled with particularity. The defendant argued that the relator failed to identify any allegedly false reimbursement claims to the government for its drug; any specific instances of off-label marketing to specific physicians; or how the alleged off-label marketing caused doctors to alter their medical judgment and prescribe the defendant's drug. The court held that the relator, at the pleading stage, was not required to identify specific false claims submitted by a third party. Instead, the court held that the relator satisfied the heightened pleading standard by "injecting precision" into his fraud allegations, as he pled detailed facts regarding the alleged marketing scheme, including how the defendant trained its personnel to engage in off-label promotion and equipped them with marketing materials, how it used medical experts for off-label promotion, and how the relator was reprimanded when he declined to engage in the scheme. The court further noted that the relator alleged that more than one million off-label prescriptions were written for the drug, and held that the totality of the relator's allegations was sufficient to put the defendant on notice of the relator's allegations, in accordance with the pleading requirements of Federal Rule of Civil Procedure 9(b).

State FCA Claims

Finally, the court considered the defendant's argument to dismiss the relator's state law claims. The court dismissed the claims filed on behalf of four jurisdictions, finding that those respective False Claims Act statutes required relators to file their claims in state court. In addition, the court dismissed the relator's claims under two additional state FCAs, to the extent that those claims were based on false statements that were submitted before those two laws were passed. Moreover, the court dismissed claims under the Nevada False Claims Act, finding that the Nevada law defined "original source" for public disclosure purposes as someone who provided the information that lead to the public disclosure. Since the relator could not allege that he caused the public disclosure at issue in the case, the court dismissed his claim under the Nevada statute for lack of subject-matter jurisdiction.

The court, though, dismissed the relator's conspiracy claim. Since the alleged conspiracy was based on the defendant's allegations of illegal kickbacks to physicians, but the court dismissed all claims based on the alleged kickbacks on first-to-file grounds, the court concluded that "complaint cannot support a conspiracy claim after the kickback scheme is removed."

Burke v. Record Press, Inc., 2013 WL 2631323 (D.D.C. June 12, 2013)

A relator brought a *qui tam* case alleging that a defendant violated the False Claims Act by charging the U.S. Government Printing Office (GPO) ten times more than it should have for printing materials during the course of a litigation proceeding. The United States declined to intervene in the relator's suit. The defendant answered the *qui tam* complaint and denied the fraud allegations. The defendant also filed a counterclaim against the relator for tortious interference with prospective economic advantage. The relator's fraud case proceeded to a bench trial, and that the close of the relator's case, the defendant moved for judgment under Federal Rule of Civil Procedure 52(c).

The U.S. District Court for the District of Columbia granted the defendant's motion. The court found that the relator could not support his overcharging allegation, which the court determined was primarily based on his subjective belief that the defendant's charges to the government in litigation he was involved in were "outrageous." The court determined that the rates the defendant charged to the government were in accordance with the defendant's contract with GPO, noting that the GPO official the relator called at trial testified that there was no fraud. Thus, the court granted the defendant's motion and granted judgment in the defendant's favor. The defendant then dismissed its counterclaim.

U.S. ex rel. Zeman v. USC Univ. Hosp., 2013 WL 2456863 (C.D. Cal. June 6, 2013)

A relator filed a *qui tam* suit against a university hospital, alleging violations of the False Claims Act. The relator underwent multiple surgeries at the hospital and alleged that the hospital knowingly submitted false Medicaid reimbursement claims for follow-up visits within 90 days of her surgeries. The defendant moved to dismiss the relator's complaint, arguing that the healthcare regulation the relator's fraud claims were based on only applies to reimbursements to surgeons—not payments to hospitals for outpatient services. The U.S. District Court for the Central District of California agreed with the defendant, and noted that the relator "implicitly concedes as much." As a result, the court dismissed the relator's complaint, but granted the relator leave to file an amended complaint.

U.S. ex rel. Sobek v. Education Mgmt., LLC, 2013 WL 2402082 (W.D. Pa. May 31, 2013)

A *qui tam* relator filed suit against her former employer—an education management company—as well as several of the company's online educational institutions, alleging that the defendants falsely certified their compliance with various applica-

ble federal student loan funding regulations in order to receive student loan financial assistance from the federal government. Specifically, the relator alleged that the defendants knowingly misrepresented the accreditation status of their nursing programs, knowingly provided false job placement statistics, and knowingly reported false Satisfactory Academic Progress statistics—all of which were measures upon which the defendants' eligibility for federal financial aid funding was based. The defendants moved to dismiss the relator's claims, arguing that the relator failed to state a claim under the False Claims. The defendants also contended that the court lacked subject-matter jurisdiction over the relator's claims, due to the FCA's public disclosure bar provision. The U.S. District Court for the Western District of Pennsylvania turned the parties' dispute over to a magistrate judge, whose report and recommendation determined that the defendants' motion should be denied. The defendant objected to the magistrate's report and recommendation.

Holding: The Western District of Pennsylvania overruled the defendants' objection and adopted the magistrate's report and recommendation. Consequently, the court denied the defendants' motion to dismiss.

Failure to State a Claim/Plead Fraud with Particularity

The defendants argued that the relator failed to state a claim for relief under the False Claims Act, because the relator merely alleged that the defendants improperly marketed their educational services. Such regulatory violations, the defendants argued, do not give rise to FCA liability, but rather can be corrected and/or can be addressed through administrative enforcement procedures. Moreover, the defendants argued that the alleged regulatory violations did not require the government to withhold financial aid funds, and thus, were not "material" to the government's funding decision. The court disagreed, finding that the relator properly pled a false certification theory of FCA liability, which involved the defendants' alleged submission of claims for student financial aid funds that failed to disclose the defendants' regulatory violations that would have affected their eligibility for payment. The court concluded that, it could not accept the defendants' contention that the regulatory violations alleged by the relator were not "core" or "material" to the government's funding decisions. While the court noted that the defendants "may be able to avoid liability by showing that the United States would not have refused payment even if it had known of [the defendants'] alleged violations of the regulations at issue," it ultimately held that, at the motion to dismiss stage, it would not reach such a fact-intensive question.

The court also rejected the defendants' contention that their alleged regulatory violations must be resolved by the U.S. Department of Education, through administrative procedures, and cannot serve as the basis for FCA liability. The court noted that "[t]he existence of an administrative enforcement mechanism does not preclude the possibility of an FCA claim," since the government may select from a variety of remedies to combat fraud. Again, the court held that the defendants' argument was

too fact-intensive to be resolved on a motion to dismiss. Therefore, the court denied the defendants' motion to dismiss for failure to state a claim.

Likewise, the court denied the defendants' motion to dismiss the relator's claims on the grounds that the claims were not pled with particularity, as required by Federal Rule of Civil Procedure 9(b). The court, adopting the magistrate's report and recommendation, held that the relator made "plausible and particularized factual allegations" and that his complaint was "quite detailed with regard to the nature of the alleged fraudulent scheme," and "provide[d] adequate notice to Defendants of the conduct Relator asserts constitutes FCA fraud."

Public Disclosure Bar

The defendants also argued that the court lacked subject-matter jurisdiction over the relator's claims, due to the FCA's public disclosure bar provision. The court, though, noted that the magistrate determined that this defense was vague and premature, as it involved unresolved questions of facts regarding the applicability of the public disclosure bar. The court chose not to decide the public disclosure issue, but requested that the parties submit case management proposals that would expedite discovery and resolution of this preliminary jurisdictional issue.

U.S. ex rel. Bahnsen v. Boston Scientific Neuromodulation Corp., 2013 WL 2404816 (D.N.J. May 31, 2013)

Two relators filed a *qui tam* complaint against a company that markets and sells an implanted spinal cord stimulation system that costs about $30,000. The relators—both of whom previously worked in the defendant's "Billings and Collections" department—alleged that the company violated the False Claims Act by submitting claims for the system to Medicare and Medicaid that were false because the claims did not include a physician's order indicating medical necessity for the system's external equipment (which included a remote, a charger, and an adhesive kit) and contained fabricated diagnosis codes. These false claims, the relators alleged, caused the government to approve and pay claims that should not have been paid. In addition, the relators alleged that the defendant concealed from the government various defects with the devices. Moreover, the relators claimed that the defendant promoted the device for non-approved uses and provided illegal kickbacks to doctors who prescribed the device for those uses, and thus, the reimbursement claims submitted to the government contained false certifications to the government that the defendant had complied with the Anti-Kickback Statute. Finally, the relators alleged that the defendant violated the False Claims Act by unlawfully retaliating against them when they reported the defendant's alleged fraud schemes internally. Both relators alleged that after they raised their concerns to their superiors, they were banned from the defendant's Billings and Collections meetings—one relator alleged that she was fired from her job when the

defendant learned that she intended to file a *qui tam* suit against the company; the other relator alleged that she was subjected to a hostile work environment and was cut off from computer access until she left the company. As a result, the relators filed *qui tam* claims on behalf of the United States and on behalf of 26 States and the District of Columbia. The government entities declined to intervene in the relators' suit. The defendant moved to dismiss the action, arguing that the relators' complaint failed to state a claim for relief.

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

Failure to State a Claim

The defendant argued that its actions were permissible under the applicable regulations and did not reflect fraud. Specifically, the defendant claimed that separate physicians' orders were not required to prove the medical necessity of the external equipment, since the initial physicians' orders for the implanted system sufficed. In addition, the defendant argued that its use of certain diagnosis codes was not improper, and that regardless, the diagnosis code used could not serve as a basis for FCA liability, since the codes were immaterial to the government's decision to pay or approve the Medicare/Medicaid claims. Furthermore, the defendant denied that it engaged in a scheme to provide illegal kickbacks to doctors and made corresponding false certifications to the government. The court disagreed with the defendant's contentions, and found that the relators' allegations were sufficient to support their FCA claims. Specifically, the court noted that the relators alleged that the defendant's claims lacked physician's order and/or diagnosis codes for some items, and that the defendant allegedly instructed the relators to "forget" to contact doctors for that information, so that they could instead submit inflated bills to the government. Additionally, the court determined that the relators adequately pled the defendant's alleged kickbacks scheme, noting that compliance with the Anti-Kickback Statute is material to the government's payment decisions under Medicare and Medicaid. As a result of these findings, the court denied the defendant's motion to dismiss the relator's fraud claims for failure to state a claim.

Retaliation

The defendant argued that the relator's retaliation claims should be dismissed because the relators failed to allege that they were engaged in protected activity under the FCA's anti-retaliation provision. The court noted that "protected activity" includes "investigation for, initiating of, testimony for, or assistance in an FCA suit." The court was further guided by the Third Circuit's determination that protected activity includes internal reporting of an employer's false or fraudulent claims. Accepting all of the relators' factual allegations as true, the court concluded that the relators properly pled that they were engaged in protected activity, as they alleged that they reported their concerns about Medicare/Medicaid billing fraud to their superiors, which led to adverse

employment actions against them. Thus, the court denied the defendant's motion to dismiss the relators' retaliation claim.

U.S. ex rel. Hood v. Satory Global, Inc., 2013 WL 2274798 (D.D.C. May 23, 2013)

Two relators filed a *qui tam* action against their former employer—an information technology support services company that had a contract with the U.S. Department of Justice (DOJ)—alleging that the defendant fraudulently billed DOJ for time spent on private corporate development work using DOJ's facilities, equipment and resources, and performed its work for DOJ in an inefficient, unethical manner that guaranteed the company future work. In addition, the relators claimed that the defendant treated a DOJ building as its own corporate headquarters, by installing a private internet wireless broadband network there and conducting its business there—including completing performance reviews and health insurance briefings and having outside vendors make presentations to its staff. Furthermore, they claimed that after they raised their concerns about the alleged misconduct to the defendant, they were instructed "not [to] worry about it" and subsequently were terminated and constructively discharged, respectively. As a result, the relators alleged that the defendants violated the False Claims Act by presenting false claims to the government, by making false statements material to the false claims, and by retaliating against them for engaging in protected whistleblower activity. The government declined to intervene in their suit.

The defendant moved to dismiss the relators' complaint on the grounds that it failed to state a claim and failed to plead the alleged fraud with particularity. Before the court considered the motion, one of the relators passed away. The court then directed that relator's counsel to brief whether or not his claims survived his death.

Holding: The U.S. District Court for the District of Columbia held that the deceased relator's FCA claims survived his death, and permitted his counsel to substitute a successor-in-interest. The court also denied the defendant's motion to dismiss.

Survivability of FCA Claims

Before deciding the defendant's motion to dismiss, the court determined that the deceased relator's claims survived his death. The court, citing Supreme Court precedent from 1884, recognized that when federal statutes—such as the False Claims Act—don't explicitly address survival rights, "the general rule under federal common law is that rights of action under federal statutes survive a plaintiff's death if the statute is remedial, not penal." Then the court, relying on Eleventh Circuit and Sixth Circuit caselaw and the "nearly unanimous" view of district courts, held that the underlying structure and policy of the False Claims Act's *qui tam* provisions are remedial, since the *qui tam* provisions provide for compensating relators who expose fraud on the

government and in no way penalize FCA defendants. Thus, the court held that FCA claims survive the death of a relator, and held that a personal representative of the deceased relator could be substituted and proceed with the case.

Failure to State a Claim/Plead Fraud with Particularity

The relators argued that the defendant presented claims—invoices—to the government that falsely certified that the billing conformed to the DOJ contract, when in fact the defendant was actually billing the government for non-DOJ work. The defendant argued that the relators failed to plead the fraud with particularity, since they did not identify any specific allegedly false claims presented to the government by including information such as the date, content, individuals involved, work billed for, or amounts of any particular invoice. The defendant contended that the relators merely alleged a violation of the DOJ contract, but not a viable FCA claim. The relators countered that they were IT workers who had no direct access to the defendant's bills to the government, and that since specific invoice numbers and invoice date information was within the defendant's exclusive control, they were not required to plead more details regarding the allegedly false claims submitted by the defendant. Still, the relators argued that their fraud claims were pled with particularity, since they described specific instances in which certain of the defendant's employees—identified by name—performed work unrelated to the DOJ contract, but billed 40 hour each week to DOJ. In addition, they noted that their complaint alleged the individuals employed by the defendant who submitted bi-weekly invoices to the government under the DOJ contract that included hours for named employees who had worked on non-DOJ projects. The court held that cases "in which a company bills for employee work that was not performed and overcharges for services provided . . . clearly fall within the scope of the FCA," under the "false certification" theory of FCA liability. Taking the relators' factual allegations as true, the court held that the *qui tam* complaint stated a claim for relief under the FCA by alleging that the defendant submitted claims to the government that falsely certified that the work being billed for complied with the terms of the DOJ contract. In addition, the court held that the relators pled their fraud allegations with particularity, as they alleged "factual content that allow[ed] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and put the defendant on notice of the fraud being alleged. As a result of these findings, the court denied the defendant's motion to dismiss the relators' allegations regarding the submission of false claims.

The court then turned to the relator's allegation that the defendant made false statements to the government in support of false claims. The defendant again argued that this claim was deficient and should be dismissed, since the relators did not allege the "time place, or contents of any purportedly false representations, nor [did] they link the scheme to claims for payment." The relators responded that their complaint sufficiently plead the defendant's allegedly false statements, since it included the names of employees who fraudulently billed their work to the DOJ contract, the names of

the managers who instructed them to do so, and the defendant's expressly false certifications of compliance with the DOJ contract. Consequently, the court denied the defendant's motion to dismiss the relators' allegations regarding the defendant's false statements to the government.

Retaliation

Finally, the relators alleged that the defendant retaliated against them because they engaged in lawful, protected whistleblower activity, which consisted of their investigations and reports to their superiors regarding the defendant's alleged fraudulent billing to the government. The defendant argued that the relators failed to state an FCA retaliation claim because they never raised concerns about fraudulent billing, but merely raised concerns that the defendant was impermissibly performing work in government facilities. The court held that the relators' retaliation claim was properly pled, and that their allegations of repeatedly complaining to their supervisors about the private work the defendant's employees were billing to the DOJ contract and the wasteful and unethical manner in which the DOJ work was being completed were sufficient to establish protected conduct under the FCA. The court rejected the defendant's argument as "nonsense." Moreover, the court held that the defendant was on notice of the relators' protected activity, since the relators complained directly to their supervisors, including the defendant's chief executive officer. Furthermore, the court held that the relator's adequately pled that the retaliation they claimed they experienced—termination and constructive discharge—was linked to their protected activity, as they alleged that they experienced adverse employment actions soon after they confronted the defendant about the allegedly fraudulent billings and notified the defendant about their plans to expose the billing to DOJ. As a result, the court denied the defendant's motion to dismiss the relators' FCA retaliation claims.

Maa v. Ostroff, 2013 WL 1703377 (N.D. Cal. Apr. 19, 2013)

A surgeon filed a *qui tam* complaint against several defendants, consisting of a university medical center and the university's school of medicine, as well as multiple individual defendants who had served as top employees of those entities. The relator alleged that the defendants violated the False Claims Act by presenting false claims to Medicare, Medi-Cal, and TRICARE. Specifically, the relator alleged that during his time at the medical center, patients often received endoscopic retrograde cholangiopancreatography (ERCP) procedures—which allow doctors to examine patients' livers, gallbladders, and pancreases through insertion of an endoscope into the patients' mouths. Patients are generally given sedatives when undergoing this procedure, and, pursuant to applicable regulations, anesthesiologist's assistants who perform anesthesia services must be "under the supervision of an anesthesiologist who is immediately available if needed." The relator alleged that the anesthesia services were performed by nurses, and not by anesthesiolo-

gist's assistants; moreover, he claims that the physicians at the medical did not supervise the ERCP, as required by applicable regulations, which ultimately led to the death of a Jane Doe patient. The relator alleged that following the patient's death, he (the relator) prepared a "quality improvement report" that concluded that the patient died as a result of errors by the medical center in administering the patient's drugs. The defendants moved to dismiss the relator's fraud claims, arguing that he failed to state a claim for relief under the False Claims Act and that his claims were not plead with particularity, as required by Federal Rule of Civil Procedure 9(b).

Holding: The U.S. District Court for the Northern District of California granted the defendants' motion to dismiss the relator's fraud claims, but also granted the relator leave to amend those claims.

Failure to State a Claim/Plead Fraud with Particularity

The court observed that the plaintiff's theory of liability was that the defendants falsely certified their compliance with applicable regulations when they submitted their claims to the government, and therefore, those claims were also false. According to the relator, the defendants certified compliance through periodic applications to participate in the Medicare program, through the Jane Doe doctor's periodic applications to renew his privileges at the university, and through the medical center's annual hospital cost reports. The court noted that "[t]he four requisite elements of a FCA claim based on the theory of false certification are: '(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due.'" The defendants argued that the relator failed to establish these. They claimed that any alleged regulatory violation only involved conditions of participation in the government healthcare programs, and that because the regulations at issue did not involve conditions of payment, any allegedly false certifications of compliance with those regulations would not trigger FCA liability. The court examined each of the elements of FCA liability in turn.

First, the court held that the alleged false certifications might show that the medical center certified its compliance with applicable laws and regulations, but they were insufficient to show that the individual defendants—including Jane Doe's doctor—made any such certifications or otherwise caused the medical center to do so. The court held that the relator would need to amend his complaint in this regard in order to state a claim under the FCA and to plead the alleged fraud with particularity. Next, the court considered the scienter element, noting that, pursuant to Rule 9(b), intent "may be alleged generally." The court held that the relator satisfied this element by alleging that the defendants intentionally made false certifications to the government, or acted in deliberate ignorance or reckless disregard of the truth or falsity of their healthcare claims.

The court then turned to the materiality element. The court noted that the relator's allegations focus on two regulations—a regulation that requires that anesthesia

services be performed by qualified personnel, and a regulation that requires the presence of supervising teaching physicians to oversee ERCP procedures. The court held that the first regulation did not expressly condition payment on compliance, which, while not dispositive, served as evidence of immateriality. The court further determined that the government had various non-payment administrative means available to ensure enforcement of this condition of payment. As a result, the court held that the defendants' alleged false certifications of compliance with regulations requiring that anesthesia services for ERCP procedures be performed by qualified anesthesiologist's assistants was not material to the government's payment decisions, and thus, could not form the basis of FCA liability. However, the court noted that the relator's claim would have been cognizable, had he alleged that the defendants billed for specific services that were improperly performed by unqualified personnel. The court granted the relator leave to amend his complaint to cure its deficiencies with respect to this issue. The court then considered the relator's second allegation—that the defendants certified compliance with the regulations requiring the presence of supervising teaching physicians during ERCP procedures. The court determined that this regulation did create a condition of payment, since it specifically tied payments to compliance. The court, though, held that the relator failed adequately to allege that the defendants' certifications with respect to these regulations were false. The court noted that the relator did not allege that no supervising physician was present during any particular ERCP procedure; rather, the relator argued that, due to the scheduling of multiple procedures in different rooms, it was not possible for the defendants to provide supervising physicians for every ERCP procedure. The court held that the relator's allegations did not establish regulatory violations. However, the court granted the relator leave to amend his complaint to re-state his claims in a more particularized fashion. Similarly, the court held that the relator's contention that the defendants performed unnecessary ERCP procedures—and that claims for those procedures were false—was unsupported by sufficient factual allegations. Again, the relator was granted leave to amend.

Finally, the court determined that the relator alleged sufficient facts to describe the alleged fraud scheme and provided reliable indicia that led to a strong inference that the defendants actually submitted claims to the government. The court noted that because the relator described the fraud scheme and provided representative examples of allegedly false claims, he was not required to allege, in every instance, who submitted false claims to the government or the dates of any such claims.

Although the relator's complaint suffered from various deficiencies, the relator was given thirty days to file an amended complaint.

U.S. ex rel. Yarberry v. Sears Holdings Corp., 2013 WL 1287058 (S.D. Ill. Mar. 28, 2013)

A relator filed a *qui tam* complaint alleging that two retail companies' pharmacies defrauded the federal government healthcare programs—Medicare, Medicaid, TRICARE, and CHAMPUS—by providing unreported kickbacks—in the form

of gift cards—to patients who filled prescriptions with them, in violation of the Anti-Kickback Act. The relator asserted claims on behalf of the United States and 13 states. According to the relator, claims for reimbursement under the federal healthcare programs that are based on the defendants' alleged underlying illegal kickbacks were necessarily false, making the defendants ineligible for payment. The defendants moved to dismiss the relator's complaint, arguing that the relator failed to state a claim for relief and failed to plead the alleged fraud with particularity. The defendants also argued that the relator's claims were barred by the False Claims Act's public disclosure provision.

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

Failure to State a Claim/Plead Fraud with Particularity

First, the defendants argued that the plaintiff's complaint was deficient because it did not identify any false statement they allegedly made. The court disagreed, finding that the *qui tam* complaint detailed "the 'who, what, when, where, and how' of the 'kickback.'" Although none of the alleged kickbacks was linked to specific healthcare claims, the court held that the plaintiff's "broad allegation that compliance with federal and state statutes prohibiting kickbacks is a material condition to payment under federal and state government healthcare programs" was sufficient to support his fraud claims. In addition, the court noted that in 2010, as part of the Patient Protection and Affordable Care Act, Congress confirmed what some courts had already recognized—that violations of the Anti-Kickback Act can form a predicate for False Claims Act liability. Thus, the court held that the plaintiff adequately pled the defendants' allegedly false statements.

Next, the defendants argued that the *qui tam* complaint should be dismissed for failing to allege that they submitted or caused to be presented to the government any facially false claims, statements, or records—the defendants argued that the relator's allegations only concern Anti-Kickback Act violations, not violations of the False Claims Act. The court, though, held that the relator's allegation that the defendants' eligibility to receive payments from the federal healthcare programs was conditioned on their compliance with the Anti-Kickback Act, "provide[d] the essential link between the AKA violation and the FCA claim," and "explain[ed] why the false statements would have 'caused the government to keep the funding spigot open." Based on that finding, the court held that the relator sufficiently alleged that the defendants submitted false claims to the government.

The defendants then argued that the relator's complaint failed to plead a violation of the Anti-Kickback Act, and that the alleged kickback allegations were not pled with enough specificity, since the relator did not plead the details of particular transactions. In addition, the defendants argued that the relator alleged nothing more than happenstance—that ineligible prescription customers received improper gift cards. The court, though, sided with the relator, who contended that the defendants "were merely like ostriches with their heads in the sand creating plausible deniability," noting that

the relator alleged that the defendants instructed pharmacists not to police whether ineligible patients received gift cards and that the defendants allegedly delayed implementing a computer program that would have prevented federal healthcare program patients from receiving the gift cards. The court held that, at the motion to dismiss stage, the relator's allegations were sufficient to plead the defendants knew that their gift card promotion was improperly inducing federal healthcare program customers to fill prescriptions with the defendants' pharmacies. The court further held that, contrary to the defendants' contention, the AKA does not include a safe harbor provision under which the defendants' $10 or less gift cards would be considered *de minimis*.

The court denied the defendants' motion to dismiss for failure to state a claim and for failure to plead fraud with particularity.

Public Disclosure Bar

Finally, the court addressed the defendants' public disclosure argument, in which they asserted that information on which the relator's fraud allegations were based had been publicly disclosed before the relator filed his *qui tam* complaint. The defendants contended that the public disclosure bar was triggered when allegations of a nationwide incentive program were announced in the media, and that the relator added little to what had already been made public. The court held that the fraud alleged by the relator was not publicly disclosed before the relator's *qui tam* suit was filed. The court observed that although the defendants' gift card promotions had been publicized, the alleged fraud could not be inferred from that information, and that "the addition of Relator's knowledge of the covert policy and practice of ignoring [the federal healthcare programs] members' ineligibility is the key ingredient in the fraud allegation." Thus, the court held that the public disclosure bar did not apply, as there was no public disclosure. Consequently, the court denied the defendants' motion to dismiss for lack of subject matter jurisdiction.

U.S. ex rel. Folliard v. Govplace, 2013 WL 1092859 (D.D.C. Mar. 18, 2013)

A relator filed a *qui tam* action against a government contractor, alleging that the defendant violated the False Claims Act by listing and selling four products to the United States that originated in non-designated countries, as defined by the Trade Agreements Act (TAA). After discovery, the defendant moved for summary judgment on the relator's claim, arguing that it justifiably relied on its distributor's confirmations that the products in question were TAA-compliant, and thus, could not have knowingly presented false claims to the government. The relator countered that the defendant had a non-delegable duty to verify that its products were TAA-compliant. In addition, the relator argued that the defendant possessed information that undermined the distributor's representations of TAA-compliance, and therefore, the defendant acted recklessly by relying solely on the distributor.

Holding: The U.S. District Court for the District of Columbia granted the defendant's motion and dismissed the relator's claims with prejudice.

The court determined that the relator's fraud claim included three elements: (1) the defendant presented a claim to the government for payment or approval; (2) the claim was false or fraudulent; and (3) the defendant had knowledge, as defined by the FCA, that the claims were false. The court considered each element in turn. First, the defendant did not dispute that it made sales to the government, and consequently, the court held that the first element was conceded. The court then turned to the "falsity" element. In support of his argument, the relator submitted a declaration from an expert witness. The court, though, observed that, pursuant to Federal Rule of Civil Procedure 56(c)(4), affidavits submitted in opposition to motions for summary judgment must be based on personal knowledge. The court expressed doubts that the affidavit prepared by the relator's expert witness could satisfy Rule 56's requirements and could be considered in opposition to the defendant's summary judgment motion. In addition, the court noted that the relator obtained the defendant's sales data through two Freedom of Information Act requests, and obtained country of origin data from its expert witness, who had conducted similar analysis during the course of a prior, different lawsuit. The court raised concerns that the relator's fraud allegations were based upon prior public disclosures, and therefore, the claims were subject to dismissal for lack of subject matter jurisdiction, since the relator was not an original source of either disclosure. The court did not decide whether or not the defendant's claims to the government were false, finding that dismissal of the *qui tam* action was warranted because the relator failed to offer evidence showing that the defendant acted knowingly.

With respect to the "knowing" element, the defendant contended that it reasonably relied on its distributor's country of origin representations, and therefore, did not knowingly sell products to the government that were not TAA-compliant. The relator responded that the defendant had access to inconsistent country of origin information it received from the products' manufacturer and from third parties. The relator contended that the defendant's failure to investigate the products' country of origin further satisfied the FCA's knowledge, since the defendant deliberately ignored or recklessly disregarded the truth. The court, though, held that "knowledge" for FCA purposes "must amount to gross negligence-plus." Ultimately, the court held that the defendant's conduct fell short of this standard, noting that while the defendant agreed to provide TAA-compliant products to the government, it did not affirmatively represent that it would verify the country of origin information provided by its distributor—and the court noted that it made no sense for the defendant to double-check each of the distributor's representations. Moreover, the court held that the defendant acted reasonably by not relying on country of origin information received from third parties—assuming that the defendant ever even read those materials, the defendant would likely not have relied on the information, since it included a broad disclaimer of reliability.

After drawing all reasonable inferences in favor of the relator, the court held that a reasonable jury could not conclude that the defendant knowingly submitted false claims to the government. Since the court concluded that there was no issue of material fact regarding the defendant's level of knowledge, it granted the defendant's summary judgment motion. The relator's claims were dismissed with prejudice.

U.S. ex rel. Marquis v. Northrop Grumman Corp., 2013 WL 951095 (N.D. Ill. Mar. 12, 2013)

A relator filed a *qui tam* action alleging that his former employer—a defense contractor—defrauded the United States Air Force, in violation of the False Claims Act. Specifically, the relator alleged that the defendant's contract with the Air Force included an exclusivity clause that required the defendant to have a director oversee the project. He further alleged that the defendant charged the government for work performed in violation of the contract. The relator's claims arose when he claimed that he had been employed by the defendant as the director charged with overseeing the Air Force project, but that after the defendant undertook a reorganization, his director position was demoted, which he believed violated the contract. He alleged that over the course of two years, he informed the defendant that he believed that the contract's exclusivity clause was being violated, but he was subsequently demoted again and was eventually terminated from his job. He added employment law claims to his *qui tam* allegations, including a claim under the False Claims Act's anti-retaliation provision. The United States declined to intervene in the relator's *qui tam* case. The defendant moved to dismiss all of the relator's claims.

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

Failure to State a Claim/Plead Fraud with Particularity

The defendant moved to dismiss the relator's fraud claim, arguing that the claims failed because the government had already been made aware of the alleged contractual violations by another employee, but continued to pay the defendant under the contract. The court first examined the contract—which had been attached to the relator's complaint—and concluded that the contract did not specify that the defendant's reorganization resulted in a breach. The court stated that the relator's "FCA claim would be weak regardless of whether the Government was made aware of the purported Contract violations." The court further found that the relator's own allegations indicated that he informed Air Force personnel of his concerns with the contract on more than one occasion, but that the government continued to pay the defendant under the contract. Since the relator did not specifically allege that the defendant's claims to the government for payment under the contract were submitted before the government was notified of the alleged breaches of the exclusivity clause, the court held that the relator's fraud allegations failed to state a claim under the False Claims Act.

The court further found that the fraud claim was not pled with particularity, as required by Federal Rule of Civil Procedure 9(b). The court noted that since the relator was the director in charge of the project at issue throughout the time the fraud allegedly occurred and asserted that he was privy to the details of the alleged fraud, Rule 9(b)'s heightened pleading standard would not be relaxed when applied to his fraud claims. The court then determined that while the relator "provided detailed allegations relating to his belief that [the defendant] violated the Contract," he did not "provide[] any specific allegations relating to any allegedly false claims presented to the Government," which the court held was fatal to the relator's claims. Thus, the relator's fraud claim was dismissed for lack of particularity as well.

Retaliation

The court then turned to the defendant's argument that the FCA retaliation claim should be dismissed, because the defendant had no knowledge of any protected conduct by the relator. The relator countered that he repeatedly reported to his superiors that he believed that the defendant was violating the Air Force contract. The court, though, determined that the relator failed to put the defendant on notice of any protected conduct under the False Claims Act, since he did not allege that he ever informed the defendant that he believed that a fraud against the government was occurring or that false claims were being submitted to the government; the court concluded that the relator failed to put the defendant on notice that "a potential lawsuit [was] brewing." Consequently, the court held that the relator failed to allege that the defendant had notice of protected activity, and dismissed the retaliation claim on that basis.

U.S. ex rel. Assocs. Against Outlier Fraud v. Huron Consulting Group, Inc., 2013 WL 856370 (S.D.N.Y. Mar. 5, 2013)

A relator filed a *qui tam* action against a group of affiliated healthcare consulting companies and two affiliated health insurance companies that served as Medicare intermediaries, alleging violations of the federal False Claims Act and the New York False Claims Act. The relator alleged that after the merger of a group of New York hospitals, the board of the new hospital entity retained a consulting firm to rectify its financial problems. The consulting firm convinced the hospital to adopt a 33% increase in its charges, as the entity had been losing money by charging for services at rates that were below its costs. The decision to increase charges resulted in the hospital receiving increased outlier reimbursements from Medicare. The hospital considered whether or not to report these increased reimbursements to Medicare, but concluded that it was not obligated to do so, since the payments resulted from appropriate price increases. The relator alleged that the consulting company defendants—who, according to the relator were responsible for the hospital's actions—knowingly submitted charges to Medicare that would "game the outlier system," by unilaterally increasing the hospital's charges and falsely certi-

fying the hospital's compliance with the applicable rule that such charges should only be increased in proportion to increases in costs. The relator further alleged that the Medicare intermediary defendants improperly and recklessly authorized payment of the hospital's claims, in contravention of their contractual obligations to the Medicare program. Both groups of defendants moved for summary judgment on the relator's claims.

The U.S. District Court for the Southern District of New York granted the defendants' motions. The court held that the relator could not provide legal support for his theory of False Claims Act liability, noting that the relator failed to cite any regulation that specified that outlier payments can only be made when increased charges are related to costs. Instead, the court noted that the applicable regulations created "an outlier reconciliation process empowering the government to claw back excessive outlier payments, plus interest, once cost reports are finalized." The relator's complaint was dismissed with prejudice.

U.S. ex rel. Upton v. Family Health Network, Inc., 2013 WL 791441 (N.D. Ill. Mar. 4, 2013)

Four relators brought a *qui tam* action on behalf of the United States and the State of Illinois, alleging that a healthcare company and two individuals submitted false Medicaid claims. The relators claimed that the defendant healthcare provider received a pre-determined Medicaid payment for each patient enrolled in its family health program. The relators alleged that the defendant's defrauded Medicaid because they failed to comply with their contractual requirement to accept every potential Medicaid enrollee who requested enrollment, regardless of medical history and current or future medical needs. The relators claimed that instead of complying with this requirement, the defendants cherry-picked patients and refused to enroll patients who appeared to have high-cost medical needs, thereby increasing their profits. The U.S. District Court for the Northern District of Illinois dismissed the relators' second amended complaint without prejudice, the relators filed a third amended complaint, and the defendants moved to dismiss that complaint for failure to state a claim and to plead fraud with particularity.

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

Failure to State a Claim/Plead Fraud with Particularity

The court noted that in their second amended complaint, the "Relators provided only conclusory allegations that the [defendants'] certifications in order to receive payments from the Governments," and failed to allege a fraudulent inducement theory of FCA liability—a prerequisite for maintaining their claim that the defendants' enrollment requirements constituted a condition of payment under Medicaid. The court

held that these deficiencies were cured in the third amended complaint, as the relators "added specific allegations outlining a fraudulent inducement theory," described multiple instances in which the defendants discriminated against patients based on health status and submitted Medicaid claims to the U.S. and to Illinois in which they certified that they would not engage in such behavior, and identified the statutory provisions with which the defendants failed to comply. The relators further alleged that the defendants' failure to comply with the enrollment requirements would have had a material effect on the federal and state government entities' decision to make Medicaid payments, had those entities known the truth. Consequently, the court held that the relators' third amended complaint stated a claim for relief under the FCA statutes and properly pled the fraud scheme alleged with particularity. The defendants' motion to dismiss was denied.

U.S. ex rel. Isley v. Lockheed Martin Corp., 2013 WL 772810 (N.D. Ga. Feb. 28, 2013)

Two relators filed a *qui tam* action against their former employer, a defense contractor, alleging that the defendant knowingly allowed its employees to manipulate the labor recording system used by hourly employees, which resulted in the government being billed for employees' sick leave and vacation time, Family Medical Leave Act days, and for "ghost overtime" hours—hours that were billed at the higher overtime rate for employees who had not worked a full 40-hour week. The relators, who had been tasked with reducing employment costs for the defendant, alleged that they reported their discovery to the defendant, and even created a PowerPoint presentation that outlined a way to fix the problem. The relators claimed that the defendant encouraged them to continue their work, until the relators informed the defendant that they believed that the deficiencies in the defendant's time recording system, coupled with the defendant's billing practices, resulted in substantial overbilling to the government—in fact, the relators alleged that the improper billing at three of the defendant's sites resulted in the government overpaying about $10 million to the defendant. The relators further alleged that once they began emphasizing the potential liability to the government, the defendant's attitude towards them began to change, resulting in one relator being terminated without reason, and the other being constructively discharged after she refused to assume another employee's duties without additional compensation. The relators brought claims alleging that the defendant violated both the anti-fraud and anti-retaliation provisions of the False Claims Act. The defendant moved to dismiss the relators' allegations, arguing that the relators failed to state a claim for relief and failed to plead their fraud claims with particularity.

Holding: The U.S. District Court for the Northern District of Georgia granted the defendant's motion to dismiss the fraud charges, granted the defendant's motion to dismiss the retaliation claim of the relator who claimed that she was con-

structively discharged, but denied the defendant's motion to dismiss the retaliation claim of the other relator, who was terminated from his job.

Failure to State a Claim/Plead Fraud with Particularity

The defendant contended that the relators failed to plead their fraud claims with particularity, saying that the relators did not describe how the defendant's alleged billing practices resulted in improper charges to the government, and that the relators did not identify which government contracts were affected by the defendant's alleged fraud scheme, and how those contracts were affected. The relators countered that their complaint described the types of improper charges the defendant billed to the government and detailed how the defendant's time recordation system failed to report accurately the number of labor hours the defendant's employees spent on projects for the government. The relators further asserted that the defendant's billing system violated the defendant's own policies, as well as the Federal Acquisition Regulations (FARs) and the Fair Labor Standards Act (FLSA).

The court agreed with the defendants that the relators' fraud allegations failed to state a claim. First, the court determined that the defendant had not violated its own time-keeping policies, noting that while the relators disagreed with the defendant's reading of the policy, they could not "provide a convincing alternative." In addition, the court held that the defendant's practices did not violate the FARs or the FLSA, observing for example, that the government calculates overtime in a manner similar to the defendant. The court concluded that the relators failed to explain why or how the defendant's alleged conduct—including billing overtime for employees who had not yet worked 40 hours in a week—was fraudulent under applicable regulations. The court, therefore, granted the defendant's motion to dismiss the relators' fraud allegations.

Retaliation

The court then turned to each relator's retaliation claim. The first relator alleged that he had previously been lauded by the defendant for discovering problems with the defendant's time-keeping system, but that after he began emphasizing that the defendant's billing practices were resulting in overpayments from the government, the defendant began investigating him for improprieties. Although the investigation yielded nothing, the first relator alleged that he was subsequently informed that his employment was being terminated—he claimed that the defendant offered no reason for the termination. The defendant argued that the first relator did not plead that he engaged in protected conduct under the False Claims Act or that he was fired in retaliation for any such conduct, and thus, failed to state a claim under the FCA's anti-retaliation provision. The court disagreed, finding that the first relator pled sufficient facts to show that he engaged in protected conduct, as he alleged that he informed management within the defendant corporation on multiple occasions that the billing scheme at issue led to excessive charges on government contracts. In addition, the court determined that the relator pled sufficient facts to show a causal connection between

his protected conduct and his termination. The court based its conclusion on the fact that the relator stated that after he expressed his concerns about overbilling the government to the defendant, the defendant initiated an investigation regarding whether or not he was "fit for duty"—the first such investigation he ever experienced—and that when he was exonerated, he was told that the defendant's human resources vice president would be disappointed. Moreover, the court observed that the first relator was never given a reason for his termination, that he had recently received awards from the defendant for his work, and that his staff disagreed with the defendant's decision. Based on these findings, the court held that the first relator pled adequate facts to state a retaliation claim under the False Claims Act. The defendant's motion to dismiss the first relator's retaliation claim was denied.

The second relator alleged that about a month after the *qui tam* complaint was unsealed, she was informed by the defendant that she would need to assume the job duties of another employee who was leaving the company, with no additional compensation. She alleged that she had previously performed those job duties and had made it clear to her superiors that she was not interested in re-assuming that work. She stated that her attorney informed the defendant that her new assignment amounted to a constructive discharge, and that when the defendant failed to respond to the attorney's letter, she tendered her resignation. The defendant argued that the second relator was not constructively discharged and that her reassignment did not amount to an adverse employment action. The court agreed with the defendant that the second relator did not allege sufficient facts to show that her reassignment was an objectively adverse action, since she could not show that the reassignment "altered the compensation, terms, conditions, or privileges of her employment," or would make her workload unmanageable. The court concluded that "a reasonable employee in [the second relator]'s circumstances would not have found the reassignment of duties adverse, especially considering the outgoing employee's resignation and [the second relator]'s prior experience with the specific duties. Consequently, the court granted the defendant's motion to dismiss the second relator's retaliation claim.

U.S. ex rel. McLain v. KBR, Inc., 2013 WL 710900 (E.D. Va. Feb. 27, 2013)

A relator brought an action under the False Claims Act against his former employer—the United States Army's largest contractor—alleging that the company defrauded the government on a contract to provide combat support and combat service support in Iraq. The defendant hired the relator to work as an electrician, and he alleged that when he arrived to the work site, he noticed that there was no equipment available to perform necessary testing in accordance with the terms of the defendant's contract with the Army. He further claimed that although he made the defendant aware of the problem, nothing was done to fix it for the two-year period he was at the site. Instead, the relator alleged, the defendant began producing documents that falsely indicated that the defendant had implemented a

new testing program, although the defendant had not performed any such testing and did not have the equipment to do so. Subsequently, the defendant conducted an internal assessment in preparation for a government audit, and the assessment revealed multiple deficiencies, which caused the defendant to develop a corrective measures plan. In response to the announcement of the defendant's new plan, the relator alleged that he notified his supervisors of the history of other deficiencies. Soon after, the relator was terminated from his job. Afterwards, he alleged that he learned about other failures by the defendant to comply with the requirements of its government contract, including unresolved testing problems at another work site in Iraq. The relator then filed his *qui tam* suit. The defendant moved to dismiss the action, arguing that the relator failed to state a claim under the False Claims Act and failed to plead his fraud allegations with particularity, as required by Federal Rule of Civil Procedure 9(b).

Holding: The U.S. District Court for the Eastern District of Virginia granted the defendant's motion to dismiss, on both grounds.

Failure to State a Claim

First, the court considered the defendant's argument that the relator's allegations failed to state a claim under the FCA. The court observed that, in order to maintain a fraud claim under the False Claims Act, plaintiffs must demonstrate four elements: (1) that there was a false statement or a fraudulent course of conduct; (2) that the false statement or misconduct was carried out with the requisite scienter; (3) the false statement or misconduct was material to the government's payment decision; and (4) the false statement or fraudulent conduct caused the government to pay out money or to forfeit money it was due. The court further noted that the relator's claim could only fall into one of two categories—the claim was either based on a fraudulent inducement theory of liability or it was based on a false certification theory of liability. The court noted that the four elements described above apply to both theories.

The court determined that the relator's allegations did not state a claim under the fraudulent inducement theory, because he failed to allege that the defendant submitted a false claim for payment to the government, which the court stated is "the central question in an FCA case." While the court noted that the relator alleged that the defendant falsified reports to show that certain had testing occurred when it had not, that allegation was not sufficient to overcome the defendant's motion to dismiss, since the relator did not link the allegation to the submission of an actual claim to the government. The court further determined that the relator's allegations could not support a claim under the false certification theory either, noting that the relator failed to allege that payments to the defendant were conditioned upon the defendant's certifications of compliance with various testing requirements. The court observed that the relator conceded that the defendant's allegedly false testing reports only went to the defendant's internal quality control officials and never made it to the government officials who processed the defendant's claims for payment. In addition, the court noted that,

unlike some other circuit courts, the Fourth Circuit does not recognize an "implied false certification" theory of FCA liability, which could have subjected the defendant to liability for merely accepting payment from the government that it knew it was not eligible to receive. Moreover, the court held that the relator's allegations did not state an FCA claim because the relator could not show that any of the defendant's alleged false representations were material to the government's payment decisions, since the relator could not demonstrate that the defendant's alleged false statements regarding testing ever made it to the government.

The court granted the defendant's motion to dismiss the relator's complaint for failure to state a claim.

Failure to Plead Fraud with Particularity

The court then turned to the defendant's argument that the relator's allegations did not plead the alleged fraud scheme with particularity. The court agreed, again noting that the relator failed to allege the existence of a false claim submitted by the defendants. The relator, relying on caselaw from outside the Fourth Circuit, argued for a relaxed pleading standard in that regard, but the court rejected that argument, stating that "the Complaint's deficiency is not a failure to produce invoices but rather a failure to plead any specific payments or claims by [the defendant] or even sufficient facts to infer the existence of such a scheme." As the court held that the relator's only substantive allegation is that the defendant falsified test reports—not that the defendant submitted false claims to the government for payment that were based on falsified test reports—the court held that the relator's complaint failed to satisfy Rule 9(b)'s pleading requirements. Consequently, the court granted the defendant's motion to dismiss the relator's complaint for failure to plead fraud with particularity.

U.S. ex rel. Zeman v. USC Univ. Hosp., 2013 WL 603920 (C.D. Cal. Feb. 19, 2013)

A Medicare patient filed a *qui tam* complaint in which she alleged that a hospital submitted false Medicare claims. More specifically, the relator alleged that she underwent a series of foot surgeries at the hospital and subsequently received bills for post-operative visits within 90 days of a surgery and for medical services that were not provided at a hospital facility—both of which the relator alleged violated Medicare regulations. The hospital moved to dismiss the relator's complaint, arguing that the relator did not state a claim for relief under the False Claims Act.

Holding: The U.S. District Court for the Central District of California granted the defendant's motion and dismissed the relator's complaint. The court, however, granted the relator leave to amend the complaint.

The court stated that "[i]t is a fairly obvious notion that a False Claims Act suit

requires a false claim," and held that the relator's complaint failed to state a claim because it "[did] not allege that the Hospital submitted any claims to the United States." The court noted that the fact that the relator was a Medicare patient and received bills from the hospital "[did] not necessarily establish that the service was covered by Medicare in the first instance or indicate that the Hospital submitted any claims, let alone false or fraudulent claims, to the United States."

U.S. ex rel. Dunn v. North Memorial Health Care, 2012 WL 6552791 (D. Minn. Dec. 14, 2012)

A relator filed a *qui tam* suit against affiliated health care companies, alleging violations of the False Claims Act in connection with alleged Medicare billing fraud. Specifically, the relator alleged that the defendants submitted claims for Medicare reimbursement that falsely stated that the defendants provided the requisite physician supervision of their rehabilitation programs; in fact, the relator alleged that the defendants arbitrarily selected physicians' names to include on the required Medicare forms and assured the respective physicians that they would not be held personally liable for this alleged fraud scheme. In addition, the relator alleged that the defendants systematically falsely certified that their physicians had seen various patients, when, in fact, the physicians had not personally seen those patients. The relator had been employed by the defendants as an administrator during the time of the alleged fraud and asserted that his allegations were based on his own observations. The United States declined to intervene in the relator's lawsuit and the defendants moved to dismiss the relator's complaint for failure to state a claim and for failure to plead the alleged fraud with particularity.

The defendants argued that the relator's complaint should be dismissed because it failed to allege a regulatory violation that would give rise to False Claims Act liability. The court agreed, noting that the regulations relied on by the defendants were implemented *after* the fraud was alleged to have begun and did not reference the types of rehabilitation programs operated by the defendants. Moreover, the court noted that the applicable regulations presumed that the direct supervision requirement was satisfied when the rehabilitation services were provided in a hospital setting, since "staff physicians would always be nearby within the hospital." Since the defendants' services were performed in a hospital, the court held that there was a presumption of compliance with the applicable regulations. Since the relator did not plead any facts to rebut that presumption, the U.S. District Court for the District of Minnesota granted the defendants' motion to dismiss and dismissed the relator's fraud claims with prejudice.

U.S. ex rel. Davis v. U.S. Training Center Inc., 2012 WL 6052051 (4th Cir. Dec. 6, 2012)

Two relators filed a *qui tam* suit alleging that a group of contractors violated the False Claims Act by overbilling the federal government in connection with two contracts the defendants entered into with the U.S. Department of Homeland Security and the U.S. Department of State to provide security services in Iraq and Afghanistan and in the aftermath of Hurricane Katrina. With respect to the Iraq/Afghanistan contract, the relators alleged that the defendants submitted false "muster sheets" in order to receive compensation for work that was never performed and submitted false travel records in order to receive additional improper compensation. The relators further alleged that the defendants provided "worthless services" to the government under the Hurricane Katrina contract, by not managing their personnel, monitoring the distribution of weapons, or ensuring that weapons were not given to felons or guards who were otherwise disqualified from carrying firearms. The U.S. District Court for the Eastern District of Virginia granted summary judgment in favor of the defendants on the relators' claims with respect to the Hurricane Katrina contract. After a jury trial, a verdict was returned in favor of the defendants on the remaining claims. The relators appealed the summary judgment ruling and the jury verdict to the U.S. Court of Appeals for the Fourth Circuit. The relators also appealed the district court's denial of their motion for a new trial, arguing that one of the defense witnesses committed perjury.

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

The circuit court held that the district court did not err when it granted summary judgment in favor of the defendants on the relators' Hurricane Katrina claims. The circuit court determined that the contract at issue did not require the defendants to manage personnel, monitor the distribution of weapons, or ensure that weapons were not given to disqualified individuals—with respect to the third allegation, the court noted that the government retained the function of performing criminal background checks on the defendants' security guards, and thus, the defendants were not responsible for determining whether or not weapons were being given to disqualified persons. The appeals court further rejected the relators' additional argument that the district court's summary judgment ruling was erroneous because a genuine issue of material fact existed regarding whether or not the defendants falsely certified to the government that it was providing contractually-conforming services. The Fourth Circuit held that the relators did not make any such allegation in their complaint and could not raise this issue for the first time on appeal.

The appellate court also denied the relators' motion for a new trial, applying an abuse of discretion standard and giving "substantial deference" to the district

court's judgment. Consequently, the circuit court refused to overturn the district court's rulings excluding certain evidence the relators sought to introduce, either as hearsay, as lacking probative value, as unduly prejudicial, as improper evidence of prior bad acts, or as evidence from an expert who had not been designated under Federal Rule of Civil Procedure 26. The Fourth Circuit also affirmed the district court's ruling that the relators' contention that one of the defense witnesses committed perjury did not entitle them to a new trial. The court observed that the relators' sought a new trial based on a sworn declaration of another witness that directly contradicted the defense witness' testimony, but held that the competing testimony did not necessarily establish perjury, but rather simply showed that the two witnesses had different recollections.

As a result of these findings, the Fourth Circuit affirmed the district court's judgments.

U.S. ex rel. Stone v. Omnicare, Inc., 2012 WL 5877544 (N.D. Ill. Nov. 20, 2012)

A relator filed a *qui tam* action alleging that a healthcare company violated the False Claims Act by knowingly submitting reimbursement claims for pharmaceuticals to the government without possessing the necessary supporting documentation. The government declined to intervene in the case. Subsequently, the relator's original complaint and his first amended complaint were dismissed for failing to state a claim, as the U.S. District Court for the Northern District of Illinois held that the relator failed to adequately allege that the defendant falsely certified to the government that it had complied with the regulations regarding the document retention requirements, and failed to allege that the defendant had the requisite mental state to violate the FCA. The relator was granted leave to file a second amended complaint, and the defendant again moved to dismiss the complaint for failure to state a claim. This time, the United States filed a statement of interest in the case and joined the relator's argument—which the court called "new and relatively novel"—that defendants need not always make an express false certification of compliance to the government, but may still be subject to FCA liability for making an *implied* false certification of compliance with applicable regulations.

The court observed that several circuit courts and even some of the district courts within its own circuit have recognized the implied certification theory of FCA liability. The court, though, also noted that the Seventh Circuit had not yet done so. Ultimately, the court declined to reach the question of the validity of the relator's theory of liability, as the court determined that the relator's second amended complaint still failed properly to allege the defendant's scienter, as the complaint only provided "anecdotal accounts given by unidentified" witnesses, and not the required "individualized transaction level" allegations—the court noted that the

complaint could have identified specific supervisors who instructed the defendant's employees to submit false claims to the government, or it could have referenced specific instances in which such false claims were submitted and the defendant's supervisors were notified, but it did not.

Consequently, the court granted the defendant's motion to dismiss the second amended complaint. The court stated that it "did not know what Plaintiff or any other interested party could say to improve the complaint," and therefore dismissed the complaint with prejudice.

U.S. ex rel. Hepburn v. Northrop Grumman Sys. Corp., 2012 WL 5877545 (M.D. Fla. Nov. 20, 2012)

A relator filed a *qui tam* action against his former employer—a defense contractor—alleging that the company knowingly shipped weapons to the government that had failed testing and did not comply with contract specifications. The defendant moved to dismiss the relator's complaint, arguing that the relator failed to state a claim under the False Claims Act since he failed to allege that the government contract at issue required the defendant to meet the standards that the relator alleged. Moreover, the defendant argued that, at most the relator's claims amounted to a breach of contract, not a False Claims Act violation.

The U.S. District Court Court for the Middle District of Florida granted the defendant's motion, holding that the contract specifications relied on by the relator did not require the defendant's weapons to pass the tests alleged by the relator; in addition, the relator did not allege that the defendant's weapons failed any of the tests that were included in the contract. The court dismissed the relator's complaint, stating that the realtor was "in essence asking the Court to imply contractual terms and specifications that do not exist."

U.S. ex rel. Polansky v. Pfizer, Inc., 2012 WL 5595933 (E.D.N.Y. Nov. 15, 2012)

A relator filed a *qui tam* complaint alleging that a pharmaceuticals company violated the False Claims Act by engaging in an illegal marketing campaign for one of its drugs. Specifically, the relator alleged that the defendant misrepresented to doctors the types of patients the drug should be prescribed to and encouraged doctors to prescribe the drug to patients who did not need it, pursuant to a national set of guidelines. The relator argued that the defendant improperly induced doctors to prescribe the drug to Medicare and Medicaid patients for non-approved, off-label uses, resulting in a fraud when the government was asked to provide reimbursements for those prescriptions. The defendant moved to dismiss the relator's fifth amended complaint, arguing that the guidelines relied on by the relator were

non-compulsory and, therefore, their recommendations that doctors prescribe the drug outside the guidelines did not amount to "off-label marketing" for FCA purposes. The court also noted that the Food and Drug Administration did not condition approval for reimbursement from the government on compliance with the guidelines. Consequently, the court dismissed the relator's complaint.

U.S. ex rel. Walker v. Corporate Mgmt., Inc., 2012 WL 5287065 (S.D. Miss. Oct. 24, 2012)

Two relators filed a *qui tam* suit alleging that the hospital and an affiliated health center they previously worked for violated the False Claims Act by causing false claims to be submitted to the federal government for healthcare services. The relators alleged claims under the FCA for fraud and for conspiracy. The hospital defendant moved to dismiss the relators' claims, arguing that the relators could not have witnessed the fraud they alleged, because that defendant did not even exist at the time of the relators' alleged employment.

Holding: The U.S. District Court for the Southern District of Mississippi granted the defendant's motion to dismiss in part and denied it in part—the relators were allowed to maintain their fraud claims, but their conspiracy claim was dismissed.

The court noted that the relators' complaint alleged that the fraud occurred both before and after the hospital was incorporated, and held that "although [the relators] provided no specific details of fraudulent activity after [the date the hospital was incorporated], the Court believes that the details of fraudulent activity prior to Defendant's incorporation are sufficient indicia of reliability for Relators' claim that the fraudulent activity continued." The court further noted that the relators are not required to present evidence of the alleged fraud at the pleading stage, and held that the relators alleged sufficient facts to withstand the defendant's motion to dismiss the fraud claims. The court, though, did dismiss the relators' conspiracy claim, finding that the relators failed to plead specific facts showing an agreement among the defendants to defraud the government.

U.S. ex rel. Watson v. King-Vassel, 2012 WL 5272486 (E.D. Wis. Oct. 23, 2012)

A doctor filed a *qui tam* action alleging that another doctor violated the federal and Wisconsin False Claims Act statutes by prescribing medications to a Medicaid patient over a four-year period for reasons that were not medically necessary. The government entities declined to intervene in the suit. The defendant moved for summary judgment, arguing that the *qui tam* action was barred by the FCA statutes' public disclosure bar provisions and that the relator who filed the case failed to offer an expert witness who could establish that the medications at issue were

prescribed for off-label uses or that claims for the corresponding prescriptions were ever submitted to Medicaid and/or that Medicaid ever paid any such claims.

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

Public Disclosure Bar

The defendant argued that the relator's fraud allegations had been previously publicly disclosed through news accounts of Medicaid fraud and other, similar lawsuits across the country. The court rejected this contention, noting that none of these purported public disclosures referenced the facts of the case at hand, as they did not discuss the defendant, her practice, or even her geographic region. Consequently, the court held that the relator provided information that the government entities otherwise would not have been aware of and stated that the public disclosures "could not have formed the basis of this lawsuit, and therefore lack the particulars that the Court must look for to find the public disclosure bar triggered." As a result of these findings, the court denied the defendant's motion for summary judgment for lack of subject matter jurisdiction due to the public disclosure bar.

Failure to State a Claim

The defendant next argued that the relator failed to provide expert witness testimony to establish that process by which the defendant allegedly submitted Medicaid reimbursement claims for the drugs in question, whether any such claims were paid, and whether or not the drugs were prescribed for non-approved, off-label uses. The court determined that in order to maintain his fraud claims, the relator must satisfy the FCA statutes' scienter element, by showing that the defendant knew that Medicaid claims for the prescriptions at issue were false <u>and</u> knowingly caused such claims to be submitted to Medicaid. The court held that the relator failed to establish these elements, as he conceded that he did not know whether or not the defendant received Medicaid reimbursements for the claims at issue or would be entitled to any such reimbursements; the court noted that the relator could not even establish the defendant's knowledge that Medicaid claims would be submitted for the patient in question or that Medicaid would be responsible for covering the costs of the patient's prescriptions. As a result, the court held that the relator's lack of expert testimony was "fatal to his case."

The court further held that the relator could not show that the defendant caused false Medicaid claims to be submitted, without expert testimony, noting that the defendant's "mere prescription of . . . medications would not, in and of itself, *cause* the submission of a false claim." (emphasis in original) The court noted that several additional steps were required before any such claim would have been submitted to Medicaid, including having the patient submit the claim to a pharmacy and claim entitlement to Medicaid; and then having the pharmacist check the patient's Medicaid coverage, ensure the validity of the prescription, fill the prescription, and submit the

claim to Medicaid for reimbursement. The court stated that "[w]ithout an expert to testify, there is a grand mystery between the time of the prescription and the claim being made to Medicaid." Consequently, the court held that the relator could not establish that the defendant caused false Medicaid claims to be submitted, and granted the defendant's summary judgment motion on that basis.

The court also held that summary judgment in favor of the defendant was appropriate, since the relator could not establish that the drugs in question were prescribed for off-label uses, without expert testimony, stating that "medical documents typically are not readily understandable by the general public and would require an expert to explain their application to a particular set of circumstances."

U.S. ex rel. Williams v. Renal Care Group, Inc., 2012 WL 4748104 (6th Cir. Oct. 5, 2012)

Two relators brought a *qui tam* case against a dialysis provider, its wholly-owned subsidiary, and its successor, arguing that the defendants violated the False Claims Act. The federal government intervened in the relator's suit. Specifically, the plaintiffs alleged that the subsidiary company—which supplied home dialysis equipment—was created solely for the purpose of exploiting loopholes in the Medicare regulatory scheme that allowed the defendants to bill for the subsidiary's home dialysis supplies services at higher reimbursement rates, since the subsidiary purportedly was not also a provider or dialysis services and purportedly was not under the direct supervision of such a provider. The plaintiffs alleged that the subsidiary was not eligible for these higher reimbursements, since it was not separate from its parent company—which did provide dialysis services. They argued that the parent company's employees, officers, and directors held key roles in the subsidiary company's corporate structure; that the companies shared office space, payroll, insurance benefits, contracts, and human resources services; that the subsidiaries funds were transferred to the parent company's account on a nightly basis and that the parent company paid the subsidiary company's vendors; and that all of the subsidiary company's employees were managed or directed by employees of the parent company.

The government's complaint-in-intervention included, among other things, four counts alleging FCA violations. Two of those counts were at issue in these proceedings: (1) the plaintiffs' allegation that the defendants submitted Medicare claims while knowing that the subsidiary company was a sham created solely to increase Medicare reimbursements; and (2) the plaintiffs' allegation that the defendants submitted Medicare claims while knowing that the subsidiary company was not in compliance with Medicare rules.

After a COO for one of the parent company's division's left the company amid disagreements over the legality of the use of the subsidiary company, outside counsel

for the parent company began researching the issue and even sent a letter to a federal government official with the Health Care Financing Administration, seeking clarification. The letter also referenced a conversation the outside counsel claimed to have with the HCFA official, in which the government official supposedly confirmed that the defendants' use of the subsidiary company was allowable under the law. The outside counsel received no response to her letter. Moreover, the subsidiary company subsequently underwent a Medicare site investigation, during which the company disclosed that it was owned by the parent company, with whom it shared personnel, contracts, and insurance policies. During discovery, the defendants sought evidence regarding the government's knowledge of the subsidiary company's relationship with the parent company, including any evidence regarding the government's consideration of the letter sent by the subsidiary company's outside counsel, requesting guidance from the government.

The government initially responded that it never received the letter and that the conversation between the subsidiary company's outside counsel and the HCFA official never occurred. About six months later, the government confirmed that it had indeed received the letter, but that it had been inadvertently archived. The government refused to produce some of the evidence in its possession regarding its consideration of the letter, citing attorney-client privilege and "deliberative process" protections. The defendants moved the U.S. District Court for the Middle District of Tennessee to compel the government to produce the documents in question and to issue sanctions against the government. The district court denied both motions without explanation.

In the interim, the government moved for partial summary judgment on the issues of falsity and materiality, with respect to its first FCA count—that the defendants submitted Medicare claims for the subsidiary company while knowing that the company was created as a sham corporation for the sole purpose of increasing Medicare reimbursements. The defendants moved for summary judgment on all counts. The district court granted the government's motion and denied the defendants' motion, finding that the defendants acted with "reckless disregard" of relevant Medicare regulations and statutes. The court adopted the government's damages calculation, declared that it was "unnecessary to consider the United States' other claims," and ultimately awarded the government judgment on its other claims. The defendants appealed the district court's order to the U.S. Court of Appeals for the Sixth Circuit.

Holding: The Sixth Circuit reversed the district court's judgments with respect to counts one and two and granted the defendants' motion for summary judgment with respect to those two counts. The circuit court reversed and remanded the district court's rulings with respect to the government's remaining counts, alleging additional FCA violations as well as common law violations.

Count One—Submitting False Medicare Claims for a Sham Corporation

The defendants argued that count one was based on the government's erroneous interpretations of the applicable federal laws and regulations. They argued that their Medicare claims were not in fact false, and therefore, they did not violate the FCA. They further argued that even if their Medicare claims were deemed technically false, the relevant statutory guidance was ambiguous and thus, they did not have the requisite knowledge to be held liable under the FCA. The circuit court addressed each argument in turn. First, the appeals court noted that while the district court held that the subsidiary company was created and operated so that the defendants could receive increased Medicare reimbursements. However, the circuit court also noted that the district court failed to determine whether or not the subsidiary company did anything improper, regardless of the defendants' motives. The circuit court stated: "Why a business ought to be punished solely for seeking to maximize profits escapes us." Since the government was unable to demonstrate how the defendants had violated the applicable Medicare regulations—or even the purposes of those regulations—it held that the government could not maintain its alter ego theory. As a result, the circuit court held that the district erred when it granted the government's motion for summary judgment on the issue of falsity with respect to count one.

The circuit court then turned to the district court's grant of summary judgment on the issue of the defendant's knowledge that its claims for the subsidiary company were false—the appellate court observed that although the government moved for summary judgment on the issues of falsity and materiality, the district court specifically found that the defendants satisfied the FCA's scienter requirement, as the district court held that the defendants acted with "reckless disregard" for the relevant Medicare statutes and regulations. The Sixth Circuit reversed this district court ruling also, as it held that the government failed to allege that the defendants actually knew that the subsidiary company's Medicare claims ran afoul of applicable regulations, nor could the government show that the defendants acted with "reckless disregard" for those regulations, since: the defendants consulted outside counsel regarding the issue; the outside counsel sought clarification on the applicable rules from appropriate federal government officials, both in a conversation and in a letter; the defendants were aware of other large dialysis providers that had created similar wholly-owned subsidiaries to receive Medicare reimbursements and industry publications encouraged the practice to maximize profits; the subsidiary company had its own Medicare supplier number under which to submit claims; and responsible federal government officials were aware of the defendants' corporate structure.

As a result of these findings, the circuit court held that "[t]he defendants did not act with reckless disregard of the alleged falsity of their submissions to Medicare. And given that there is no evidence in the record that they acted with actual knowledge, or in deliberate ignorance of the truth, they are therefore not liable under Count One of the complaint for False Claims Act liability." The district court's judgment on count one was reversed.

Count Two—Submitting Medicare Claims for a Non-Medicare Compliant Company

The Sixth Circuit then addressed the district court's rulings on the government's remaining counts. The circuit court noted that the district court awarded judgment in favor of the government on these counts, but with little explanation, and held that it was "unable to review substantively the district court's judgments as to the majority of those claims." The appeals court, though, was able to reach some conclusions with respect to the district court's analysis of count two of the government's complaint – that the subsidiary was not in compliance with various regulatory standards for durable medical equipment suppliers. The defendants argued that irrespective of whether or not the subsidiary company violated any of these regulatory standards, their Medicare claims would not have been materially false and thus, not subject to the FCA. The circuit court agreed, noting that the applicable Medicare regulations provide the government's remedy for non-compliance with the standards at issue—namely, that the supplier's Medicare billing privileges could be revoked. The circuit court held that "[t]he False Claims Act is not a vehicle to police technical compliance with complex federal regulations," and concluded that the regulations cited by the government were "conditions of participation, the violation of which do not lead to False Claims Act liability." The circuit court reversed the district court's ruling with respect to count two and granted the defendants' motion for summary judgment.

The court held that there was insufficient evidence in the record to evaluate the government's remaining counts, and consequently reversed and remanded the district court's rulings with respect to those counts for further proceedings.

U.S. ex rel. Wall v. Circle C Constr., LLC, 2012 WL 4477367 (6th Cir. Oct. 1, 2012)

A relator filed a *qui tam* suit against the prime government contractor company that hired him, alleging violations of the False Claims Act. Specifically, the relator alleged that the prime contractor was hired by the Army to construct buildings on a military base and that the agreement between the two sides included determinations of hourly wages for electrical workers and required the defendant to submit complete and accurate payroll certifications to the government in order to be paid. Notably, the relators contended that the defendant was required to submit payroll certifications for all employees on the project, including subcontractors.

The relator argued that the company he worked for was hired by the defendant as a subcontractor for at least 98% of the electrical work on the project, but did not sign a written contract with the defendant. The relator further contended that the defendant did not monitor the subcontractors' work and did not take measures to ensure that those employees were paid proper wages. The defendant also did not include the subcontractors in its payroll certifications to the government. The re-

lator alleged that the defendant's payroll certifications to the government—upon which payment under the contract with the Army were based—were false, since the defendant failed to disclose the subcontractors who worked on the project and since the certifications falsely stated that the defendant was paying proper wages to electrical workers, when it was not. The United States intervened in the relator's suit and added common law claims.

The defendant and the plaintiffs filed cross-motions for summary judgment, with the defendant arguing that the U.S. Department of Labor—not the district court—has primary jurisdiction over the plaintiffs' claims. The defendant also moved to dismiss the plaintiffs' claims for failure to state a claim and for failure to plead the alleged fraud with particularity.

The U.S. District Court for the Middle District of Tennessee granted the plaintiffs' summary judgment motion and awarded a judgment against the defendant in the amount of $1.6 million—this figure represented three times the government's actual damages, as determined by the district court, based on the court's calculation of "the difference between what the government actually paid out by reason of the false claim over and above what it would have paid had the government known the true facts." The court declined to impose civil penalties against the defendant. The court denied the defendant's motions as moot, and denied the defendant's later motion to alter or amend the judgment. The defendant appealed the district court's rulings to the U.S. Court of Appeals for the Sixth Circuit.

Holding: The Sixth Circuit affirmed the district court's ruling with respect to the defendant's liability, but reversed and remanded the district court's ruling on damages.

Primary Jurisdiction

The circuit court first addressed the defendant's argument that the Department of Labor had primary jurisdiction over the plaintiffs' claims regarding the wages paid to the defendant's electrical workers. The district court summarily rejected that argument, and held that where the issue is the amount of wages paid, Department of Labor laws and regulations, such as the Davis-Bacon Act, do not preclude FCA remedies. The circuit court agreed, and held that "[t]he injuries and remedies under the FCA and Davis-Bacon are separate and distinct," and observed that "courts have drawn a dichotomy between a contractor's misrepresentation of wages and its misclassification of workers." The circuit court concluded that the district correctly held that the core dispute between the defendant and the plaintiffs "involves misrepresentation, not misclassification," and therefore, the plaintiffs' FCA claims were not precluded by the doctrine of primary jurisdiction. The circuit court noted that the government did not deliberately bypass administrative procedures and only actually became aware of the fraud when the relator's *qui tam* complaint was filed. Moreover, the determination of

whether or not the defendant acted with the requisite scienter did not require any technical expertise that would necessitate agency involvement. Finally, the court noted that the applicable regulations explicitly provide that falsification of payroll certifications could subject a contractor to FCA liability.

Failure to State a Claim

The defendant argued that the district court erred in holding that the plaintiffs sufficiently demonstrated the essential elements of FCA liability: falsity, knowledge, and materiality. The circuit court disagreed, finding that the defendant had contracted with the government over a period of 20 years and was well aware of the applicable wage requirements for electrical workers, and that the defendant knew that it was required to submit payroll certifications for all employees on the project but failed to submit certifications for the relator's company, while doing so for other subcontractors. The circuit court held that the district court properly held that the defendant's payroll certifications were false, since the defendant claimed that the certifications were complete even though they failed to include the relator's company, and since the certifications falsely represented that proper wages were paid to the defendant's subcontractor employees, when they were not—and the defendant had not properly monitored the wages that it represented to the government were being paid, and therefore acted with reckless disregard for the truth or falsity of its certifications. The district court's ruling on FCA liability was affirmed.

Damages

The defendant argued that the district court's damages calculation was based on the speculative testimony of the government official responsible for administering the contract at issue between the defendant and the government. The defendant argued that the damages calculation was not based on actual amount paid to the relator's subcontractor employer—about $125,000—but was based on erroneous assumptions made by the government witness based on the total value of the contract, the approximate percentage of the contract attributable to electrical work, and the idea that the subcontractor performed 98% of that electrical work. The defendant further argued that a portion of the damages calculation was erroneously based on work performed at a different location from the location alleged in the plaintiffs' complaint. Moreover, the defendant argued that the government witness' testimony that the government would have withheld more than $500,000 from the defendant, had it discovered that problems with the defendant's payroll certifications. The circuit court agreed with the defendant that "there are deficiencies in the district court's calculation of damages that require a remand for recalculation."

U.S. ex rel. Lusby v. Rolls-Royce Corp., 2012 WL 4357438 (S.D. Ind. Sept. 24, 2012)

A relator filed a *qui tam* action against his former employer—a company that manufactured aircraft engine parts for sale to the U.S. government. The relator, who held a senior engineer position with the defendant, alleged that he was familiar with all stages of the manufacturing and inspection processes relating to the engine parts at issue and that, over a period of years, he cautioned the defendant that its manufacturing processes could not ensure conforming parts with repeatability. He alleged that the defendant ignored his complaints that it was supplying nonconforming parts to the U.S. government. Moreover, the relator alleged that, pursuant to at least some its contracts with the government, the defendant submitted certificates of conformance to the government regarding its parts. The defendant alleged that these certifications were false, and subjected the defendant to liability under the False Claims Act. The relator's initial complaint was unsealed, but after the relator's counsel withdrew, the relator filed a *pro se* amended complaint. He later retained new counsel, and again amended his complaint. The defendant successfully moved for judgment on the pleadings, and the U.S. District Court for the Southern District of Indiana denied the relator's motion for leave to file another amended complaint, ruling that his claims were barred by *res judicata* and that his fraud claims were not pled with the requisite particularity. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Seventh Circuit, which remanded the case in part, with instructions to the district court to rule on the merits of the relator's claim that the defendant presented false claims to the U.S. government. The relator then filed an amended complaint and the defendant moved for summary judgment.

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

Statute of Limitations

The defendant first argued that since the government did not intervene in the relator's *qui tam* suit, his complaint was subject to the FCA's six-year statute of limitations and therefore, all of the relator's allegations regarding claims the defendant submitted to the government more than six years before the complaint was filed were time-barred. The relator did not dispute the defendant's analysis, and neither did the court. Thus, all allegations based on claims that occurred more than six years before the relator's complaint was filed were dismissed. The court then addressed the relator's remaining allegations.

Failure to State a Claim

The relator argued that in order to get paid by the government, the defendant regularly falsely certified that the parts it delivered to the government conformed to contractual

requirements and had passed all required inspections. However, the court determined that the relator was unable to present any evidence of any knowingly false claim that the defendant actually submitted to the government for non-conforming parts. The court found that the "[r]elator concedes that he has no individualized knowledge that a particular part that failed to meet contract specifications was ever sold to the government. Thus, he has no proof of there ever having been a false claim for payment made by [the defendant] to the Government." The court held that it would not simply assume that nonconforming parts and corresponding false certifications of compliance must have been delivered to the government during the limitations period, particularly since certificates of compliance were not always required. The court rejected the relator's argument that he should not be required to show that the defendant actually submitted false claims for specific non-conforming parts because the defendant's parts are not serialized or assigned tracking numbers. The relator argued that the burden should shift to the defendant to prove that its actions were legal. The court, however, determined that this argument was not supported by caselaw and granted the defendant's motion for summary judgment with respect to the relator's remaining claims.

State of Nevada ex rel. Bates v. Mortgage Elec. Registration Sys., Inc., 2012 WL 4058052 (9th Cir. Sept. 17, 2012)

The relator from the case above also filed a *qui tam* suit under the Nevada False Claims Act (NFCA), alleging that the same defendants committed mortgage recordation fee fraud. Again, the defendants successfully removed the relator's action to federal court on diversity jurisdiction grounds, and defeated the relator's subsequent motion for remand to state court. The U.S. District Court for the District of Nevada dismissed the relator's complaint for failure to state a claim. The relator appealed that ruling to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the district court's ruling, as it found that the complaint failed to allege sufficient facts to support its claim that the defendants violated the NFCA by knowingly using false records to avoid obligations to pay mortgage recording fees to counties in Nevada. Specifically, the appeals court found that the relator failed to allege that the defendants had an "obligation" to the counties to remit the fees at issue—and that he could not do so, since no such obligation existed under Nevada law.

U.S. ex rel. Phillips v. L-3 Comm. Integrated, Sys L.P., 2012 WL 3649699 (N.D. Tex. Aug. 24, 2012)

A relator filed a *qui tam* suit, alleging that his employer—a company that specializes in the modernization and maintenance of aircraft—violated the False Claims Act by knowingly selling aircraft to the United States that contained parts that did not conform to Federal Aviation Administration standards and/or were defective. He further alleged that when he reported these issues to his superiors, he

was threatened and eventually resigned from his job as a team leader under pressure from the defendant. The United States declined to intervene in the relator's suit. The defendant moved to dismiss his amended complaint, for failure to state a claim and failure to plead fraud with particularity.

Holding: The U.S. District Court for the Northern District of Texas granted the defendant's motion and dismissed the relator's complaint with prejudice.

Failure to State a Claim

The defendant argued that the relator failed to state a claim under the FCA because the relator failed to allege the existence of a false statement or claim submitted to the government. The relator countered that his complaint did properly state a claim, since he referenced specific defects in the defendant's aircraft and alleged that the defendant knowingly delivered such aircraft to the government while representing that the aircraft were airworthy, as required by the defendant's contract with the government. The court, though, noted that the relator's complaint assumed that defective aircraft were delivered to the government—the court determined that the relator did not know whether any of the allegedly defective aircraft were actually sold to the government, because he resigned from his job before any such sale took place. In addition, the court observed that the relator was not privy to the defendant's statements to the government, mentioning that the defendant could have informed the government of any defects in the aircraft at the time of delivery. The court held that the relator's "allegations fall short of showing that [the relator] is entitled to relief." In addition, the court determined that the relator failed to establish that the alleged defects were material, such that the defendant's failure to alert the government to them would constitute fraud for FCA purposes. Thus, the court dismissed the relator's fraud claims for failure to state a claim for relief under the FCA.

Failure to Plead Fraud with Particularity

The court extended its reasoning to the defendant's argument that the relator failed to plead the alleged fraud with particularity. Since the court concluded that the relator only assumed that defective aircraft were sold to the government, he could not plead any details of any alleged fraudulent sale, such as "the time, place, or manner of delivery . . . what was stated to the government regarding the alleged defects." The relator argued that his allegations were sufficient to create a reasonable inference that the defendant provided defective goods to the government, and therefore, his complaint was sufficient under Rule 9(b)'s pleading standard. The court, though disagreed that the relator's complaint could create an inference that FCA violations occurred, since the "[r]elator does not allege who represented that the planes satisfied FAA guidelines, when such representation occurred, and how [the defendant]'s failure to comply with the FAA standards would have affected the government's payment decision. The court dismissed the fraud claims for this additional reason.

Moreover, the court dismissed the relator's conspiracy claim, since that claim was based on the relator's deficient fraud claims.

Retaliation

The court dismissed the relator's retaliation claim, finding that the relator failed to plead the necessary elements for maintaining such a claim. Specifically, the court held that the relator failed to establish that he engaged in any protected activity, and therefore, he could not establish that any retaliation he may have suffered was due to such activity. The court observed that the relator raised concerns about the defendant's aircraft. However, the court noted that the relator never alleged that he informed the defendant that he believed the defendant was defrauding the government. In addition, the court found that the relator failed even to respond to the defendant's motion to dismiss the retaliation claim.

Leave to Amend Complaint

The court dismissed the relator's claims with prejudice, concluding that he "has stated his best case." The court noted that the relator had already been given opportunities to cure deficiencies in his complaint, and refused to offer another opportunity to do so, since the relator could not apprise the court of what allegations he would assert in an amended pleading that would overcome a motion to dismiss.

Gonzalez v. Fresenius Med. Care North America, 2012 WL 3065314 (5th Cir. July 30, 2012)

A relator filed a *qui tam* complaint against her former employer—a healthcare service provider—as well as several of the company's affiliates and two individuals, alleging that the defendants performed various tasks and made patient-care decisions in violation of federal and state regulations, and that the defendants violated the federal anti-kickback law by allowing one of their doctors –also named as a defendant—to improperly bill Medicare for work performed by his assistants in exchange for patient referrals. In addition, the relator filed a separate complaint alleging that the corporate defendants and another individual defendant—her former supervisor—harassed and threatened her, and eventually forced her to resign from her job, in violation of the False Claims Act's anti-retaliation provision. The relator's two complaints were consolidated and the defendants moved to dismiss portions of those complaints.

The United States District Court for the Western District of Texas granted those motions, leaving the relator with the following counts under the False Claims Act, among other non-FCA claims: (1) a claim against the corporate defendants and the doctor for knowingly presenting false claims to the government; (2) a claim against those same defendants for knowingly making false records or statements

in support of false claims to the government; (3) a claim against those defendants for conspiring to submit false claims to the government; and (4) claims against her former employer and her former supervisor for retaliation and retaliatory constructive discharge. The parties all moved for summary judgment on these claims and after the relator presented her case-in-chief at trial, the district court granted the defendants' motions for judgment as a matter of law in part, dismissing the relator's claim against the corporate defendants for presenting false claims to the government, and dismissing her retaliation claims against all the defendants. The relator was only allowed to proceed at trial with her counts alleging that the corporate defendants and the doctor made false statements to the government in support of false claims, that those defendants conspired to submit false claims to the government, and that the doctor presented false claims to the government. The jury returned verdicts in favor of the defendants on all three counts. The defendants then moved to recover their attorneys' fees—with the corporate defendants requesting their attorneys' fees for the relator's retaliation claims, while the individual defendant sought to recover his attorneys' fees for the entire lawsuit. The district court awarded the corporate defendants their attorneys' fees against the relator's counsel, pursuant to the sanctions provisions of 28 U.S.C.§ 1927—not pursuant to the False Claims Act's fee-shifting provision—upon its finding that the relator's counsel unreasonably and vexatiously multiplied proceedings with respect to the retaliation suit. The relator appealed the district court's judgment on her claims, while her counsel appealed the district court's award of attorneys' fees. The U.S. Court of Appeals for the Fifth Circuit consolidated both appeals.

Holding: The Fifth Circuit affirmed all of the district court's rulings.

Failure to State a Fraud Claim

The circuit court first considered the relator's appeal of the district court's ruling granting the corporate defendants' motion for judgment as a matter of law on her claims for knowingly presenting false claims to the government. She argued that the district court erred because she established that the corporate defendants' annual cost reports included false certifications of the defendants' compliance with the anti-kickback law and other applicable healthcare statutes and regulations, and that the corporate defendants assisted with the presentment of fraudulent healthcare claims to the government. The circuit court noted that while evidenced adduced at trial showed that the submission of accurate cost reports is a condition of participation under Medicare, the trial evidence did not establish that such submissions are a condition of payment. But the court determined that it did not need to address this question, since it agreed with the district court that the relator failed to show that the corporate defendants entered into an illegal kickback agreement with one of their doctors whereby the doctor would be allowed to bill the government for work performed by assistants in exchange for referring patients to the corporate defendants—the appellate court found that the relator did not produce any evidence showing that the defendants had the intent to

induce illegal referrals, nor did she offer evidence that showed that the doctor's volume of referrals remained constant regardless of whether or not he had an assistant working for him. The court also rejected the relator's argument that the corporate defendants' healthcare claims to the government were "tainted" even if those defendants did not certify statutory compliance; in essence, she argued that the corporate defendants caused the individual defendant to submit false claims. Instead, the Fifth Circuit noted that the relator was allowed to maintain at trial her claims against the corporate defendants for making false statements to the government and for conspiring to defraud the government but concluded that the relator was not entitled to maintain her claim against those defendants for presenting false claims to the government, since she failed to "adduce[] evidence on the basis of which a reasonable jury could conclude that [the corporate defendants] in any way participated in the scheme and the scheme produced any potentially false claims." The circuit court affirmed the district court's ruling on the relator's fraud claims.

Retaliation

Next, the Fifth Circuit turned to the relator's appeal of the district court's dismissal of her retaliation claim. The district court held that this claim failed because the relator failed to show that the defendants involved knew that she was engaged in protected conduct under the False Claims Act, and therefore, she failed to show a nexus between her whistleblowing activity and any alleged retaliation she suffered. The circuit court found that, on appeal, the relator again, without supporting authority, "offer[ed] a bald assertion that management knew of the [*qui tam*] lawsuit and argue[d] in the alternative that we should presume knowledge because her FCA complaint was unsealed prior to her termination." The appeals court also noted that the defendants offered a non-retaliatory reason for taking disciplinary action against the relator, including that she violated their theft policies and that she claimed hourly wages while on workers' compensation. As a result, the Fifth Circuit held that the retaliation claims were without merit and were properly dismissed by the district court.

Attorneys' Fees

Finally, the court considered the relator's counsel's appeal of the district court's award of section 1927 sanctions in connection with the relator's retaliation claim. The circuit court reviewed the district court's award of sanction for abuse of discretion and concluded that the district court was within its authority to order the relators' counsel to cover the retaliation defendants' attorneys' fees. The circuit court noted that the relator gave inconsistent statements regarding whether or not she had refused participate in and/or to cover up the alleged fraud—she initially referenced a letter to her former supervisor in which she claimed that she refused to take part in the defendants' alleged fraudulent billing and that she would not return to work under those conditions, but later changed her testimony during discovery and again changed her story when her counsel submitted a post-deposition errata sheet containing 101 corrections to her

testimony. At that time, the defendants' moved to strike the errata sheet and to re-depose the relator. They also requested sanctions. The magistrate judge assigned to resolve the discovery dispute decided that the errata sheet need not be stricken from the record, but ordered that the relator be re-deposed at no cost to the defendants. The appeals court further noted that during her second deposition, the relator maintained her original claim that she sent a letter to her supervisor, refusing to take part in the alleged fraud. However, at trial, her testimony changed again, and she asserted that the defendants never asked her to lie, that the answers she provided during her first deposition were accurate, and that her attorney provided some of the corrections on the errata sheet and had helped her write the letter to her supervisor. The district court awarded sanctions against the relator's counsel, inferring bad faith on their part and concluding that they helped the relator bring a meritless claim to trial. The circuit court held that the district court did not abuse its discretion in imposing sanctions against the relator's counsel, as the evidence supported the district court's conclusion that counsel pushed the relator's retaliation claim to trial, notwithstanding the fact that the relator did not adhere to the allegations counsel made on her behalf.

U.S. ex rel. Folliard w. Government Acquisitions, Inc., 2012 WL 3089872 (D.D.C. July 27, 2012)

A relator brought a *qui tam* action alleging that a group of eight defendants violated the False Claims Act by knowingly submitting claims for payment to the federal government for various technology products that were sold to the government, even though the defendants knew that the products originated in non-designated countries, as defined by the Trade Agreements Act (TAA), and thus, the government was prohibited from purchasing them. The defendants moved to dismiss the relator's claims, and the U.S. District Court for the District of Columbia granted the motions of six of the eight defendants. The remaining two defendants—GAI and GP—moved for summary judgment on the relator's claims against them. The relator moved for additional discovery.

Holding: The D.C. District Court granted summary judgment in favor of GAI, while GP's summary judgment motion was granted in part and denied in part. The relator's motion for additional discovery was denied.

Failure to State a Claim

The court began by analyzing the claims against defendant GAI, which the relator alleged made six specific sales to the United States of products that originated in non-designated countries. The court limited the relator only to those six transactions and denied the relator's motion for expanded discovery regarding possible additional transactions. The court noted that pre-discovery motions for summary judgment are usually premature, but determined that the relator was provided with at least some

discovery regarding GAI's transactions with the government. The court rejected the relator's argument that he did not receive any discovery from GAI, since GAI made "boilerplate" objections to his interrogatories. The court stated: "Just because plaintiff's interrogatories were not answered in the manner he would prefer, it does not logically follow that they were not answered at all . . . The court is unable to find caselaw supporting plaintiff's apparent contention that 'boilerplate' objections are equivalent to not answering the interrogatories at all, and thereby preclusive of summary judgment."

Since each of the six transactions alleged by the relator occurred before the False Claims Act was amended by the Fraud Enforcement and Recovery Act of 2009 (FERA), the court held that the pre-FERA version of the FCA applied to the relator's claims against GAI. GAI conceded that it sold the products at issue to the government, but disagreed with the relator's characterization of those products and instead asserted that the products originated in Mexico—an approved country—and the sales did not violate the TAA. On that basis, GAI moved for summary judgment. The relator argued that summary judgment was not proper, since material disputes of fact existed regarding the products it sold to the government and since GAI refused to provide sufficient discovery regarding those sales. The court, though, held that the relator had also been entitled to enough discovery regarding GAI's sales to the government claims, and that his presumption that the GAI's products originated in non-designated countries was insufficient to create a dispute of material fact, as GAI produced emails, declarations, purchase orders and serial numbers as evidence showing that it never sold the improper products as the relator alleged. Since the court determined that the relator was unable to explain, in detail, any additional facts regarding the alleged sales at issue that would be revealed through further discovery, or that these unidentified facts were even actually discoverable, it held that summary judgment on the relator's claims against GAI was proper. After evaluating the existing evidence that had been presented, the court determined that the relator had failed to establish that GAI actually sold any improper products. Since the relator was unable to create a genuine issue of fact regarding that allegation, and the only evidence before the court suggested that GAI had not sold the products in question to the government, the court granted GAI's motion for summary judgment.

Next, the court considered defendant GP's summary judgment motion. Again, the court noted that all ten of GP's specific transactions alleged by the relator occurred before the FERA amendments to the FCA, and thus, the pre-FERA version of the FCA applied to the relator's claims against GP. The relator also sought expanded discovery regarding its claims against GP and GP's defenses to those claims. The court determined that GP's arguments fell into four distinct categories, and evaluated each of those in turn.

First, the relator alleged that GP made two fraudulent sales to the government under a FirstSource contract. GP moved for summary judgment on claims based on those transactions, arguing that FirstSource contracts are set aside for small business, and as such, they are exempt from the TAA. The relator did not dispute GP's asser-

tions, and instead sought discovery regarding the contract and how the transactions in question were exempt from the TAA. But the court observed that GP produced the contract as an exhibit to its summary judgment motion, and concluded that there were no remaining issues of fact—the only remaining issue was the legal question of whether the contract was exempt from the TAA. Since the relator failed to specify what facts he intended expanded discovery would produce and how those facts were necessary to the litigation, the court denied the relator's discovery motion. Since the relator offered no evidence refuting GP's contention that its FirstSource contract was exempt from the TAA, the court granted GP's motion for summary judgment with respect to those transactions.

Next, GP argued that summary judgment regarding *qui tam* claims based on a group of different sales to the government was warranted, because GP relied on the certifications of its distributor that the products included in those sales were TAA-compliant. Thus, GP argued, it did not have the requisite scienter to submit fraudulent claims to the government with respect to those sales, in violation of the FCA. Notably, GP did not dispute that it sold the products to the government or that the products were from non-TAA compliant countries. The relator sought additional discovery regarding GP's reliance on its distributor's representations, and the court granted that request, noting that the FCA defines "knowing" to include "reckless disregard of the truth," and finding that the relator demonstrated that additional discovery regarding GP's knowledge of the falsity of its claims was relevant to the litigation and that the information he sought was actually discoverable. Consequently, the court denied GP's motion for summary judgment with regard to these fives transactions and granted the relator's request for additional discovery regarding GP's reliance on its distributor.

Third, GP contended that summary judgment was proper regarding the relator's fraud claim regarding another sale, because the product involved was not listed on the government's schedule contract and was sold on the "open market." In addition, GP argued that the sale was for less than the applicable TAA threshold, and thus, the TAA did not apply. The relator did not refute GP's arguments, and instead sought additional discovery from GP regarding its "open market" sales. The court observed that GP produced its contracts for the product at issue as exhibits to its summary judgment motion, and again concluded that the parties' only dispute was the legal question of whether or not the sales violated the TAA. The court granted GP's motion for summary judgment and denied the relator's discovery motion.

Finally, GP argued that it was entitled to summary judgment on fraud claims regarding another sale, since the product at issue was sold by a third party, not GP, and the third party made all the relevant representations about the product. Again, the contract in question was produced as part of GP's summary judgment motion. The court observed that the relator did not seek any specific additional discovery regarding this transaction—instead, he sought information regarding "all other claims for exemptions from TAA requirements—nor did he demonstrate how any specific facts to be discovered would be relevant to the litigation of this particular claim. As a result, the court denied the relator's request for additional discovery regarding this final

transaction. Since the relator failed to refute GP's argument for summary judgment on this *qui tam* claim, the court granted the defendant's motion.

U.S. ex rel. Osheroff v. Tenet Healthcare Corp., 2012 WL 2871264 (S.D. Fla. July 12, 2012)

A group of healthcare company defendants moved to dismiss a relator's *qui tam* complaint that alleged that the defendants violated the False Claims Act and defrauded the United States and the States of Florida, Georgia, Texas, Tennessee, and California by submitting claims for Medicare and Medicaid reimbursement that were based on the defendants' illegal financial relationships with one another. The relator alleged that the defendants owned and leased numerous medical office buildings near their hospitals and illegally leased office space to physicians at improper rates, in exchange for referrals of business. The relator alleged that these arrangements violated the Stark law and the Anti-Kickback Statute and that all of the defendants' Medicare/Medicaid claims that were based on any such illegal arrangements were false. The defendants moved to dismiss the relator's claims, arguing that the court did not have subject matter jurisdiction over the relator's complaint, due to the FCA's public disclosure provision; that the relator failed to state a claim for relief under the FCA; and that the relator failed to plead the alleged fraud scheme with particularity.

Holding: The U.S. District Court for the Southern District of Florida rejected the defendants' public disclosure argument, but granted their motion to dismiss for failure to state a claim. The relator's complaint was dismissed without prejudice.

Public Disclosure Bar

The defendants contended that an informational website containing leasing information about 34 of the defendants' medical office buildings—buildings and corresponding leasing terms that were at the heart of the relator's Stark law and Anti-Kickback Statute allegations—constituted a public disclosure for FCA purposes. The court disagreed with the defendants' characterization. The court determined that even if the webpage was deemed "news media" for public disclosure purposes, the relator's fraud allegations were not "based upon" any of that information, but instead "involves in depth allegations that Defendants are providing illegal perks and financial benefits to physicians in exchange for referral business." The court held that the relator's claims were "based upon an alleged fraud that was first discerned through Relator's synthesis and analysis of otherwise apparently innocuous, garden-variety real estate/financial information." The court made clear that, in the Eleventh Circuit, "the public disclosure of allegations that the defendant 'actually engaged in wrongdoing' is necessary before invoking the public disclosure bar." Since the publicly disclosed information did not allege any wrongdoing by the defendants, the court held that it was insufficient to

bar the relator's claims. The defendants' motion to dismiss for lack of subject matter jurisdiction was denied.

Failure to State a Claim

The defendants offered four arguments for why the relator's allegations failed to plead a fraud claim under the FCA. First, they asserted that the relator failed to identify any specific claim to the government that was allegedly false. They argued that the relator could not maintain his fraud allegations without including information about the precise false statements contained in their claims to the government, as well as the time and place such statements were made, the person responsible for making any such statements, and the manner in which the statements misled the government. They stated that the relator's purported evidence of fraud—a sample of thousands of the defendants' Medicaid claims taken from public filings—was insufficient to meet this criteria and moreover, that the sample size was too small to support the relator's allegations of a fraud scheme involving hundreds of physicians under hundreds of leases across the country. The court acknowledged that FCA liability stems from the submission of false claims to the government, but ultimately held that the relator's allegations and evidence of the defendants' Medicare/Medicaid revenues provided a sufficient factual basis that the defendants submitted claims to the federal government.

Second, the defendants argued that the relator failed to adequately allege how any of their Medicare/Medicaid claims were actually false. The court observed that the relator's theory of FCA liability was that <u>all</u> of the defendants' claims were false, since the defendants were in violation of the Stark law and the Anti-Kickback Statute. However, the court also observed that the relator failed to allege that the defendants ever certified to the government that they had complied with the Stark law or the Anti-Kickback Statute, or that such certifications were a prerequisite for payment under the federal government healthcare programs. The relator first argued this "false certification" theory after the United States submitted a Statement of Interest in the case that raised this argument. Without reaching the question of whether or not violations of the Stark law and/or the Anti-Kickback Statute—without corresponding false certifications of compliance—are sufficient to create FCA liability, the court granted the relator leave to amend his compliant to explicitly include a theory of liability based on alleged false certifications of compliance. The court cautioned that the relator would still need to plead these underlying violations with particularity, noting that his present complaint did not meet that standard.

Third, the defendants contended that the relator failed to show that they <u>knowingly</u> presented any false claims to the government. The court quickly addressed this claim, noting that the relator had sufficiently alleged that the defendants had actual knowledge of the requirements of the Stark law and the Anti-Kickback Statute, and that "[t]o the extent Relator can properly plead violations of AKS and/or Stark in its amended complaint together with Defendants' certifications of compliance with AKS and Stark, such allegations would suggest knowledge of a false certification under the FCA."

Finally, the defendants asserted that the relator did not adequately allege a claim for conspiracy under the FCA. The court held that FCA conspiracy claims are subject to Rule 9(b)'s particularity requirements, and concluded that the relator's allegations were deficient, as he did not specifically allege that the defendants entered into any agreement to conspire to defraud the government, nor did he identify any members of the alleged conspiracy. The court dismissed the conspiracy claim, but granted the relator leave to amend that claim.

See *U.S. ex rel. Paulos v. Stryker Corp.*, 2013 WL 2666346 (W.D. Mo. June 12, 2013), at page 37.

See *U.S. ex rel. Spay v. CVS Caremark Corp.*, 2012 WL 6645537 (E.D. Pa. Dec. 20, 2012), at page 11.

See *U.S. ex rel. Daugherty v. Bostwick Labs.*, 2012 6593804 (S.D. Ohio Dec. 18, 2012), at page 6.

See *U.S. ex rel. Miller v. Weston Educ., Inc.*, 2012 WL 6190307 (W.D. Mo. Dec. 12, 2012), at page 277.

See *U.S. ex rel. Ge v. Takeda Pharm. Co. Ltd.*, 2012 WL 5398564 (D. Mass. Nov. 1, 2012), at page 279.

See *Malhotra v. Steinberg*, 2012 WL 5342509 (W.D. Wash. Oct. 29, 2012), at page 137.

See *U.S. ex rel. Rostholder v. Omnicare, Inc.*, 2012 WL 3399789 (D. Md. Aug. 14, 2012), at page 70.

See *U.S. v. BNP Paribas SA*, 2012 WL 3234233 (S.D. Tex. Aug. 6, 2012), at page 141.

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

U.S. ex rel. Sanders v. Allison Engine Co., Inc., 2012 WL (6th Cir. Nov. 2, 2012)

Two relators filed a *qui tam* suit in the U.S. District Court for the Southern District of Ohio, alleging that several defense contractors and subcontractors defrauded the U.S. Navy. Among the issues decided by the court was whether the relators were required to plead that false claims were presented to the government to maintain their claim under the False Claims Act alleging that the defendant made or used false statements. The issue was appealed to the U.S. Court of Appeals for the Sixth Circuit, and eventually was decided by the U.S. Supreme Court, which remanded the matter and held that FCA liability required the presentment of a claim to the government.

Concurrent with the Supreme Court's ruling, Congress enacted the Fraud Enforcement and Recovery Act of 2009 (FERA) which included an amendment to the FCA that made clear that presentment was not an element of liability for making or using false statements in violation of the FCA. The amendment included a retroactivity provision that stated that the amendment "shall take effect as if enacted [two days before the Supreme Court issued its opinion], and apply to all claims under the False Claims Act . . . that are pending on or after that date."

The defendants moved the district court to preclude retroactive application of the amendment or to declare the amendment unconstitutional, arguing that the amendment only applied to "claims" submitted to the government that were pending at the time the Supreme Court issued its opinion or to future claims submitted to the government—but not to claims (including their own) that were submitted to the government and were no longer still pending. They further argued that retroactive application of the amendment would amount to an unconstitutional violation of their Fifth Amendment due process rights and the *Ex Post Facto* Clause.

The relators argued that the amendment's use of the word "claims" refers to causes of action filed under the False Claims Act, and thus, applied to the present case. They further argued that the amendments were constitutional, and the United States filed a statement of interest in support of the relators' positions. The district court, noting that FERA amended other sections of the False Claims Act and specifically used the word "cases" in the applicable retroactivity provision, granted the defendants' motion to preclude retroactive application of the FERA amend-

ment. The question was subsequently certified to the Sixth Circuit for interlocutory appeal. The United States also moved to intervene in the action.

Holding: The Sixth Circuit reversed and remanded the district court decision, finding that the FERA amendment regarding the FCA's presentment requirement applies retroactively to FCA *cases* that were pending at the time the Supreme Court issued its decision, or to cases that were filed since that time.

The circuit court considered the district court's ruling and noted that although the FERA amendments to the FCA include retroactivity provisions that reference pending "claims" as well as pending "cases," the use of "claims" is not dispositive, since the amendment that referenced "claims" was drafted by a Senate committee, while the amendment that referenced "cases" was drafted by a House committee. The circuit court also rejected the contention that since the FCA defines the word "claim," then the FCA's definition of claim—a request or demand for government money or property—must have been intended when the retroactivity provision to the presentment amendment was drafted. Instead, the court agreed with the relators and the government that since the retroactivity provision referred to "claims under the False Claims Act," the FCA's definition of claim could not have been intended, since demands for payment are not made "under the False Claims Act."

The court also observed that on multiple occasions, the FCA itself generically uses the word "claim" to mean a civil action. Moreover, the court found that the rulings of the other circuit courts that have addressed the retroactivity question were of limited assistance, as the Second and Seventh Circuits held that "claims" means causes of action; the Ninth and Eleventh Circuits held that "claims" means demands for payment; and the Fifth Circuit "appears to have taken both positions." Similarly, the legislative history used "claims" to refer to demands for payment as well as to causes of action, which offered the circuit court little guidance. Ultimately, the Sixth Circuit held that "claim," as used in the retroactivity provision at issue, refers to a civil action.

The circuit court then considered the defendants' argument that retroactive application of the FERA amendment would be unconstitutional. The court first declared that "[t]he *Ex Post Facto* Clause is only implicated by criminal statutes or acts intended to punish." Next, the court concluded that the FCA is not intended to impose punishment, observing that the statute makes references to "civil penalties" and "civil actions" that are subject to the Federal Rules of Civil Procedure, and includes a preponderance of the evidence burden of proof standard, and that the legislative history reveals Congress' intent to use the FCA to make the government whole for fraud losses. The court continued its analysis by determining whether the FCA is punitive in purpose or effect. The court applied the non-exhaustive factors announced by the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) and stated that "some aspects of the FCA weigh in favor of finding a

punitive purpose or effect, while others weigh in favor of finding a civil purpose or effect," but "viewed as a whole, the *Mendoza-Martinez* factors fail to demonstrate a sufficiently punitive purpose or effect" to make the *Ex Post Facto* Clause applicable. In addition, the court found that retroactive application of the FERA amendment would not violate the defendants' due process rights, since such application is justified by a rational legislative purpose, namely, correcting what Congress believed were erroneous interpretations of the FCA.

Based on its findings, the Sixth Circuit reversed the district court's judgment and remanded the matter for further proceedings

B. Bankruptcy Proceedings

See *U.S. ex rel. Bibby v. Wells Fargo Bank, N.A.*, 2012 WL 5866137 (N.D. Ga. Nov. 19, 2012), at page 185.

See *Malthotra v. Steinberg*, 2012 WL 5497978 (W.D. Wash. Nov. 13, 2012), at page 66.

C. Calculating Damages and Civil Penalties

United States v. Anchor Mortgage Corp., 2013 WL 1150213 (7th Cir. Mar. 21, 2013)

The United States alleged that a mortgage company and its CEO violated the False Claims Act by fraudulently applying for federal loan guarantees. Following a bench trial, the U.S. District Court for the Northern District of Illinois found the defendants liable and ordered them to pay the government about $2.7 million in treble damages and civil penalties. The defendants appealed the district court's decision to the U.S. Court of Appeals for the Seventh Circuit, arguing that they did not possess the state of mind required for FCA liability. They contended that the district court inferred their knowledge of the alleged fraud, and that the district court's finding was clearly erroneous. The defendants also argued that the district court erred by calculating treble damages using a gross approach.

Holding: The Seventh Circuit affirmed the district court's finding of liability, but reversed and remanded the district court's damages calculation and instructed the district court to apply net trebling.

With respect to the defendants' FCA liability, the circuit court determined that the defendants submitted two types of false statements to the government—false certifications that borrowers' relatives had supplied down payments, as well as misrepresentations regarding the fact that the mortgage company had paid for client referrals. The defendants argued that the CEO has no knowledge of the allegedly false certifications, and therefore, they were not subject to FCA liability. The circuit court, though, agreed with the district court's finding that since the head of one of the mortgage company's branches was made aware of the alleged fraud as part of his job duties—this employee was alleged to have submitted at least some of the false certifications in question to the government—his knowledge of the alleged fraud could be imputed to the company, to establish FCA liability. Similarly, the appeals court rejected the defendants' argument that the company's CEO did not knowingly misrepresent improper referral fees. The CEO asserted that he believed that the referral payments were proper under applicable federal regulations that allow for compensation of certain joint ventures, called "controlled business arrangements," but the circuit court affirmed the district court's holding that the CEO actually knew that no such business relationship had been established, since the final paperwork had never been signed. Moreover, the circuit court agreed with the district court that even if a controlled business arrangement existed, the referral fees at issue were still improper, since those payments were made to a different entity than the purported joint venture. Consequently, the Seventh Circuit affirmed the district court's finding of liability.

The circuit court then turned to the district court's damages assessment. The defendants first claimed that the CEO reported some of the mortgage company's false submissions, and therefore argued that any FCA liability should be limited to double damages, pursuant to the FCA's provision that reduces liability when a fraud is self-disclosed. They argued that the district court erred when it imposes treble damages. The circuit court affirmed the district court's ruling, stating that the FCA "does not cap damages for *every* violation just because *any* violation has been reported." (emphasis in original) In addition, the court determined that the United States gave the defendants credit for self-reporting some of the false claims, by not seeking any civil penalty for those false claims. The Seventh Circuit therefore held that the district court did not err when it imposed treble damages with respect to the false claims that the defendants did not self-report. The defendants then argued that the district court erred by trebling the government's gross damages, as opposed to the government's net damages. They claimed that the real estate mortgaged as security for the loans in question was sold, resulting in recoveries for the government, and that the district court should have subtracted the amounts the United States realized from the sale of that collateral before—not after—trebling the government's damages. The circuit court ultimately agreed with the defendants regarding this point, noting that the False Claims Act does not specify either a gross trebling or net trebling approach, but that net trebling is the norm when calculating damages, as it recognizes the "almost universal" doctrine on mitigation of damages. Consequently, the Seventh Circuit remanded the damages calculation issue to the district court, with instructions "to recalculate the award under the net trebling approach."

U.S. ex rel. Freedman v. Suarez-Hoyos, MD, 2012 WL 4344199 (M.D. Fla. Sept. 21, 2012)

A relator and the United States government sued a dermatologist and his company, as well as a clinical lab and its owner, alleging violations of the False Claims Act. Specifically, the plaintiffs alleged that the defendants engaged in an illegal kickback scheme in which the dermatology defendants sent biopsy specimens to the laboratory defendants for the preparation and review of slides and the preparation of corresponding reports. In exchange for this business, the plaintiffs alleged that the laboratory defendants agreed to allow the dermatology defendants to bill Medicare for preparing and reviewing the slides—services the dermatology defendants did not perform—while the laboratory would only bill Medicare for preparing the slides. The plaintiffs alleged that since the dermatology defendants did not review the slides at issue or prepare the corresponding reports, its Medicare claims were false. They further alleged that because of the kickback arrangement, the dermatology defendants began performing unnecessary biopsies in order to increase their numbers, engaged in upcoding for other services, and billed the government for services that were not performed. In addition, the plain-

tiffs alleged that since the laboratory defendants' Medicare claims were tainted by the defendants' illegal kickback arrangement, those claims were also false, as they were not eligible for reimbursement. The government moved for summary judgment with respect to its claim that, as a result of the alleged illegal kickback scheme, the dermatology defendants knowingly presented false claims in violation of the False Claims Act. The dermatology defendants also moved for summary judgment on the government's claim.

Holding: The U.S. District Court for the Middle District of Florida granted the government's motion in part and denied it in part. The court denied the dermatology defendants' motion.

As an initial matter, the court noted that the issue of whether or not the defendants were engaged in an illegal kickback scheme was still in dispute, and thus, summary judgment on the government's presentment claim was not proper. However, the court held that it could rule on one sub-issue: the calculation of the government's damages in the event that the government could prove that the kickback arrangement existed and that the defendants submitted claims based on that arrangement to the government. The government argued that, should the illegal kickback scheme be proven true, its damages should be equal to the full amount Medicare paid on the defendants' claims, since the claims were not reimbursable. The defendants countered that the government did not suffer any damages as a result of the alleged kickback arrangement, since all the services for which Medicare was billed were actually performed, and the value of those services equaled the amounts for which the government was billed. The court noted that there was sparse caselaw regarding the appropriate damages calculation when Medicare claims are tainted by a kickback arrangement, but agreed with the government that *U.S. v. Rogan* was most on point. In that case, the U.S. Court of Appeals for the Seventh Circuit held that the government's damages in such cases are the entire value of the claim, since through Medicare, "[t]he government offers a subsidy (from the patients' perspective, a form of insurance), with conditions. When the conditions are not satisfied, nothing is due." Following the same rationale, the Florida district court held that the government's damages equaled the full amount that Medicare paid on the claims at issue—assuming that the government could prove that the kickback scheme existed and that Medicare would not have paid any claims tainted by the alleged scheme.

Consequently, the court granted the government's motion for summary judgment with respect to sub-issue of damages calculation. The government's summary judgment motion regarding the dermatology defendants' liability was denied. The dermatology defendants' motion for summary judgment was also denied.

See *U.S. ex rel. Wall v. Circle C Constr., LLC*, 2012 WL 4477367 (6th Cir. Oct. 1, 2012), at page 237.

D. Civil Investigative Demands

U.S. v. Kernan Hosp., 2012 WL 5879133 (D. Md. Nov. 20, 2012)

The United States filed an action under the False Claims Act, alleging that a hospital knowingly defrauded the Medicare, Medicaid, and Tricare programs by systematically "upcoding" reimbursement claims. The hospital successfully moved to dismiss the government's complaint for failure to plead the alleged fraud with particularity, as required by Rule (b) of the Federal Rules of Civil Procedure. The government then issued a civil investigative demand (CID) to the hospital pursuant to the False Claims Act, contending that the demand was necessary to cure the deficiencies in its complaint.

The defendant hospital moved to set aside the government's civil investigative demand. The hospital noted that before filing its lawsuit, the government conducted a three-year investigation, which included subpoenas and other requests by the government for the production of the defendant's documents and a CID to depose one of the defendant's directors. The defendant argued that the government's present CID should be set aside, since it seeks the same information that was included in the government's earlier subpoena and CID. In addition, the defendant argued that the False Claims Act only authorizes the government to issue CIDs "before commencing a civil proceeding," and that the government's second CID improperly related to a proceeding that had already been commenced. The government countered that the False Claims Act only deprives the government from issuing a CID in a pending suit, and since the government's original complaint was dismissed, the parties were in the same position they were in before the suit and the government therefore had the authority to issue a new CID in pursuit of evidence to overcome its earlier pleading deficiencies.

Holding: The U.S. District Court for the District of Maryland granted the defendant's motion and set aside the government's civil investigative demand.

Civil Investigative Demands

The court found that the D.C. circuit court had previously held that the filing of a *qui tam* case did not preclude the government from issuing a CID to the defendant. But the court could find no authority with respect to the government's ability to issue a CID after having already initiated an investigation into potential FCA violations, filing a lawsuit under the FCA on the basis of that investigation, and having that lawsuit dismissed without prejudice. Ultimately, the court rejected the government's argument, finding that the plain language of the FCA—while not dispositive—weighed against the government's view. In addition, the court noted that the legislative history of the FCA's CID provision references the government's "inadequate investigative tools" and the need for CIDs to uncover "information that might have turned up through pre-

suit investigation if the tools were available." The court concluded that "when Congress circumscribed the period during which the Government could issue a civil investigative demand to the prefiling stage, it did not mean to provide the Government with that power any time a suit was not pending. At the prefiling stage, the Government is able to gather the information it needs 'to determine whether enough evidence existed to warrant the expense of filing suit.' After the suit has been filed, the civil investigative demand no longer serves this purpose." The court noted that before deciding to file its lawsuit, the government conducted a lengthy investigation, targeting specifically-identified medical records and resulting in the production of more than 19,000 documents from the defendant. The court held that the government had a sufficient opportunity to gather information to support its allegations and was granted leave to amend its complaint to satisfy Rule 9(b)'s requirements. Moreover, the court noted that the government could file a breach of contract action if its information could not support a fraud claim. But the court refused to allow the government to issue another CID to the defendant regarding claims that had already been filed and dismissed, and granted the defendant's motion to set aside the government's CID.

E. Costs and Attorney's Fees

U.S. ex rel. DePace v. Cooper Health Sys., 2013 WL 1707952 (D.N.J. Apr. 22, 2013)

A *qui tam* relator filed suit against a group of healthcare companies, alleging that the defendants violated the federal False Claims Act and the New Jersey False Claims Act by submitting Medicare and Medicaid reimbursement claims that for services that were the product of illegal kickback arrangements with physicians. The government entities intervened in the relator's suit for the purposes of settling and dismissing the case. The relator received awards from both governments, amounting to about $2.4 million. The relator had retained a law firm to represent him during the *qui tam* litigation, and the relator's personal attorney served as local counsel in the case. The law firm entered into a contingency fee agreement with the relator, and pursuant to that agreement, the relator was to pay the firm forty percent of the gross recovery. In addition, the agreement specified that the contingency fee would be paid in addition to any statutory attorneys' fees the firm received from the defendants, pursuant to the FCAs' fee-shifting provisions. The relator's personal attorney assisted the relator in negotiating the terms of the contingency fee agreement with the law firm—an agreement that also required the law firm to share twenty-five percent of its contingency fee with the relator's personal attorney.

After the case was settled, the law firm instructed the federal and state governments to deposit the relator's awards into the firm's trust account and sent the relator a memo outlining the distribution of those funds—the firm would provide sixty percent of the fund to the relator, would pay ten percent of the remaining funds to the relator's personal attorney, and would keep the remaining thirty percent of the funds. The relator's personal attorney refused payment, however, and so the firm delivered the personal attorney's fee to the relator. By this time, the relator had retained a new personal attorney, and this lawyer took issue with the terms of the contingency fee agreement, claiming that it might be unenforceable. Based on that belief, the relator and his counsel declined to participate in alternate dispute resolution, as mandated by the contingency fee agreement. The law firm then filed a state court petition to compel arbitration. The relator then sought to enjoin the state court proceedings, arguing that the contingency fee agreement was unreasonable or disallowed under the False Claims Act, or alternatively, that the contingency fee agreement was superseded by the settlement agreement that resolved the *qui tam* suit and provided for the payment of the law firm's hourly fees by the defendant. The law firm agreed not to pursue its state law proceedings until the federal district court resolved the relator's motion.

Holding: The U.S. District Court for the District of New Jersey denied the relator's request for relief, finding that the law firm was entitled to enforce the contingency fee agreement.

Costs and Attorneys' Fees

The district court determined that it had jurisdiction to re-open the case, as its dismissal order specifically provided that the court would retain jurisdiction over disputes regarding the settlement agreement—the agreement the relator argued superseded his contingency fee agreement with the law firm—and based on its holding that it retained ancillary jurisdiction over disputes regarding fees and costs, particularly since the law firm's contingent fee could not be calculated until after the *qui tam* litigation ended. The court then held that the settlement agreement did not supersede the contingency fee agreement, notwithstanding the fact that the settlement provided that the defendant's payment of the law firm's expenses, fees, and costs was a "full payment." The court noted that the two agreements did not cover the "same topic," and made clear that, in an effort to enable relators to secure competent counsel, the False Claims Act permits relators' counsel to receive contingency fees from their clients, plus payments from defendants to cover their actual attorneys' fees and costs. The court held that this rule applies regardless of whether or not the government intervenes in the *qui tam* suit, and reduces the risks to relators' counsel, who must depend on various actions by the government, in cases that often take many years to resolve. Thus, the court held, the phrase "full payment," as used in the settlement agreement, only addressed the defendants' obligations, not the relator's.

After holding that the law firm was entitled to both a contingency fee from the relator and a statutory fee from the defendants, the court evaluated whether the terms of the contingency fee agreement were reasonable, pursuant to the applicable rules of professional conduct. The court held that the contingent fee was reasonable, since the case was "not one where the additional contingency fee sought by the law firm is so large that the firm's total fees dwarf the plaintiff's recovery, or even exceed the Plaintiff's [sic] recovery." In fact, the court observed that the law firm's combined contingency and statutory fees only amounted to forty one percent of the firm's and the relator's combined recovery—a figure the court held was "perfectly in line with the fees received by lawyers in *qui tam* cases across the country."

The relief sought by the relator was denied.

U.S. ex rel. Perez v. Williams, 2013 WL 1181487 (N.D. Ill. Mar. 19, 2013)

A *qui tam* relator filed suit against her landlord, alleging that the defendant collected excess security deposit and rent amounts in violation of the False Claims Act, a city ordinance, and state law. The United States declined to intervene in the relator's suit. The relator then tried unsuccessfully to serve her complaint on the defendant multiple times. Eventually, the U.S. District Court for the Northern District of Illinois entered a default judgment against the defendant and determined that the defendant committed 26 violations of the False Claims Act, among other violations. The relator was awarded more than $90,000—representing 30%

of the civil penalties and damages awarded to the United States pursuant to the FCA claim. The relator then timely filed a petition seeking attorneys' fees and costs, pursuant to the FCA's fee-shifting provision. The defendant did not object to the relator's fee petition. The court then considered the petition.

The relator's fee petition sought attorneys' fees for three attorneys, totaling nearly $37,000. The court applied the lodestar method to determine whether the attorneys' fees were reasonable, based on the attorneys' respective hourly rates and the number of hours they expended. The court held that each attorneys' hourly fee was reasonable, based on the attorneys' experience levels and the prevailing market rate in their community—Chicago. However, the court determined that the senior-most attorney on the relator's team—a lawyer who had more than 28 years of experience while working on the relator's case—claimed fees for several tasks that are usually performed by attorneys with less experience and skill, or by non-attorneys. These tasks included handling mail, uploading materials, scanning and preparing exhibits, and downloading time records and case management notes. The court reduced this attorney's total hours by 5.2 hours to account for these tasks. In addition, the court reduced that attorney's hours by another 1.3 hours, to account for time spent drafting duplicative motions. The court accepted the hourly rates and number of hours submitted by the relator's other two attorneys without any adjustment.

The court also granted the request for more than $1000 in costs, to cover court costs and expenses the relator incurred while trying to serve her complaint on the defendant.

U.S. ex rel. Hobbs v. Medquest Assoc., Inc., 2012 WL 3561792 (M.D. Tenn. Aug. 16, 2012)

A relator brought a *qui tam* suit against a healthcare company and its affiliates, alleging Medicare fraud. The United States joined the suit and the U.S. District Court for the Middle District of Tennessee granted the plaintiffs' motions for summary judgment on most of their False Claims Act claims and awarded judgment totaling more than $11 million. The relator then moved for her attorneys' fees, pursuant to the FCA's fee-shifting provision for successful relators. The defendants opposed the relator's motion on several grounds, arguing that: (1) the motion was untimely; (2) the motion should be denied with respect to expenses associated with certain claims under a state False Claims Act, as those claims were voluntarily dismissed by the relator and were not joined by the federal government; (3) the relator claimed impermissible fees for expenses for her counsel's research and communications with the state attorney general; (4) requested fees for discovery expenses were invalid with respect to the relator's discovery requests that were duplicative of the government's; and (5) the relator's motion violated

the "3% rule" under Sixth Circuit precedent. The relator agreed with the last of these arguments and agreed to reduce her attorneys' fees to 3% of the total fees, as mandated by Sixth Circuit precedent in *Gonter v. Hunt Valve Co., Inc.*

The court began its evaluation of the relator's motion by making some general observations regarding the FCA's fee-shifting provision, noting that the FCA entitles successful relators to recover from defendants "reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs." The court furthered noted that the "lodestar" method is used when courts must determine whether claimed expenses are "reasonable." The lodestar method multiplies a reasonable hourly rate for the attorney by a reasonable number of hours expended. The court found that a "national market" rate may be used when dealing with specialized areas of law.

The court then concluded that the relator's attorneys qualified for a national market hourly rate, since they were experienced, successful FCA litigators who operated a multistate business. Consequently, the court accepted the attorneys' respective hourly rates as reasonable. Next, the court examined the claimed attorneys' hours expended. The court first denied claims for hours expended on the relator's retaliation claim—a claim the court dismissed. The court also agreed with the defendants that certain expenses for hours expended working on the relator's state FCA claims were invalid, since those claims were voluntarily dismissed and were beyond the scope of the federal FCA claims that the government joined. Moreover, the court denied a group of time entries for work that was deemed duplicative of the government's efforts; the court concluded that the government did the lion's share of the work in the case, based on the plaintiffs' respective filings and pleadings.

The relator responded to the defendants' argument that her motion was untimely, stating that her motion was not filed late, since the court did not set a deadline for such motions and since the defendant improperly included Saturdays and Sundays when calculating the due date. The court did not specifically address this issue, but apparently agreed with the relator, since the court reduced the relator's claim in the manner described above, then further reduced the total to the 3% maximum and granted the relator's motion.

See *Gonzalez v. Fresenius Med. Care North America*, 2012 WL 3065314 (5th Cir. July 30, 2012), at page 243.

F. Default Judgment

U.S. ex rel. Becker v. Tools & Metals, Inc., 2012 WL 3290405 (N.D. Tex. Aug. 13, 2012)

The United States intervened in various claims alleged in two consolidated *qui tam* actions against a group of corporate and individual defendants. The plaintiffs alleged that the defendants violated the False Claims Act in connection with sales of tools to be used on U.S. aerospace products. One of the individual defendants -- the former president of one of the corporate defendants—pled guilty to related charges of conspiracy to defraud the United States and was serving 7.5 years in prison. That defendant never entered an appearance in the present civil action and the United States alleged that he never attempted to contact counsel to represent him. Consequently, the plaintiffs jointly moved for a default judgment against him as to his FCA liability, and the U.S. District Court for the Northern District of Texas granted the motion. The plaintiffs later sought damages against that defendant. Based on an affidavit from a U.S. Attorney Office auditor, the government's actual damages totaled nearly $19 million. After that amount was trebled, pursuant to the FCA, the government was entitled to recover more than $56 million from the defendants. One of the corporate defendants settled with the government for nearly $16 million, leaving about $40 million in trebled damages to be collected. The court granted the plaintiffs' motion for final default judgment against the individual defendant, and awarded the government more than $40 million, plus post-judgment interest. The court acknowledged that the judgment would be offset by any recoveries from remaining defendants.

G. False Certifications of Compliance

U.S. ex rel. Badr v. Triple Canopy, Inc., 2013 WL 3120204 (E.D. Va. June 19, 2013)

A relator brought a *qui tam* suit against a government contractor, alleging violations of the False Claims Act. The relator alleged that the defendant was contracted to provide security and training services to the U.S. Department of Defense at various overseas military installations, including at multiple bases in Iraq. The relator further alleged that the defendant's contracts required compliance with several terms and conditions, including weapons qualification and personnel reporting provisions. The relator claimed that the defendant failed to comply with these contractual terms from the outset, but continued to submit fraudulent bills to the government seeking payment under the contract, thereby submitting false claims to the government. The United States intervened in some of the relator's claims—the claim regarding one of five contracts—and brought additional claims of its own, including a claim under the FCA for making false statements/records in support of false claims, and common law claims. The defendant separately moved to dismiss both plaintiffs' complaints. With respect to the FCA claims, the defendant argued that the plaintiffs failed to state a claim under the False Claims Act and failed to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Eastern District of Virginia granted the defendant's motions, finding that the government failed to state a claim under the False Claims Act and that the relator failed to plead his additional claims with particularity.

Failure to State a Claim/Plead Fraud with Particularity

The court determined that the plaintiffs did not sufficiently allege that the defendant presented false statements or made false certifications to the government in support of its claims for payment under the government contracts. The court noted that "on their face, the [defendant's] invoices did not contain factually false statements," since those bills accurately identified the supplies and services for which the defendant was billing the government. In addition, the court observed that the defendant's invoices to the government were objectively true, since they properly stated the number of personnel used and the costs for their services. The court even mentioned that "the Government does not allege that [the defendant] billed for anything other than what [it] delivered." The plaintiffs argued that the defendant submitted "material inspection and receiving reports" (form DD-250) that misrepresented to the government that the goods and services provided by the defendant conformed to the contract terms. According to the plaintiffs, these forms constituted false claims to the government, for FCA purposes. The court rejected that theory, holding that form DD-250 can only be considered a claim when it is submitted to the government as the invoice itself. Moreover, the court

held that even if the form could be deemed a claim under the FCA, the defendant's forms were not factually false, and thus, were not actionable. The court noted that, pursuant to the contracts at issue, the defendant's forms DD-250 were completed by government-appointed contracting officer representatives charged with overseeing the defendant's performance. Thus, the court reasoned, any false certifications of the defendant's compliance with contractual terms was made by a third party, and not be the defendant. The court then considered the plaintiffs' contention that by billing the government for "guards" the defendant implicitly certified that the personnel being billed for had met certain qualifications, arguing that the term "guard" included various weapons qualifications, as defined in the defendant's contract with the government. The court, though, rejected that argument, finding that the defendant's contracts did not define or even reference the term "guard." In addition, the court declined to adopt the plaintiffs' argument that if the defendant's guards were not properly qualified, then their services were not accurately described, and thus, the defendant's claims for the guards' services were false under the FCA. Instead, the court suggested that the defendant's claims would not be false as long as the guards showed up and provided some service—even if they were not properly qualified. The court declared: "[t]here may be some inherent value retained in a service that is provided by an unqualified employee compared to a complete inability to use a product that is rendered defective."

Likewise, the court held that the plaintiffs failed to provide sufficient factual support for their "worthless services" theory of FCA liability, as the court found that the defendant's guards "provided a service, although perhaps not to the satisfaction of the Government or in full compliance with terms of the contract." The court held that, in order to state a claim under this theory, the plaintiffs would have to allege that "the guards' services were entirely devoid of value or that noncompliance with the weapons qualification requirement caused any injury to the Government such that the guards effectively provided no service at all." (emphasis added) Since the plaintiffs did not allege that the guards "failed to perform their duties in a manner that would equate to no performance at all," the court concluded that the guards services were not "worthless," and was not persuaded by the plaintiffs' argument to the contrary. The court also refused to recognize the plaintiffs' "implied false certification" theory of FCA liability, determining that the theory has not been embraced by the courts within the Fourth Circuit. In addition, the court held that the plaintiffs' allegations failed to state a claim under that theory. The court determined that "the viability of a claim premised on certification by silence requires a showing that certification was a prerequisite to payment," and held that the plaintiffs' allegations were deficient because the plaintiffs failed to connect the defendant's alleged false statements to any precondition for payment.

As a result of these findings, the court dismissed the fraud claims brought by both the relator and the government, alleging that the defendant submitted false claims with respect to one of the five contracts.

The court then turned to the relator's additional FCA claims, alleging that the defendant submitted false claims for payment under four other government contracts. The court held that these claims were not pled with particularity. Specifically, the court

held that the relator did not plead the particulars of the defendant's allegedly false claims. While the court acknowledged that the relator could plead his fraud claims with particularity without having seen the claims, it maintained that "there must be at least some circumstantial evidence to raise a distinct possibility of a viable FCA action even where an employee does not have access or has not actually viewed the contractual documents." The court held that the relator's allegations did not raise sufficient circumstantial evidence to support his claims, noting that the relator did not claim to have personal knowledge of the requirements of the contracts and did not allege that he witnessed the defendant's alleged contractual breaches at the sites covered by the contracts. Consequently, the court dismissed the relator's additional claims.

Finally, the court considered the government's additional FCA claim, alleging that the defendant falsified weapons training records in support of its false claims. The court first reiterated its previous finding that the government failed to demonstrate that the defendant submitted false claims. The court continued, however, and also held that this claim was not pled with particularity. The court stated that FCA liability for submitting false records attaches when a: (1) "defendant made a false statement or engaged in a fraudulent course of conduct; (2) that such statement or conduct was made or carried out with the requisite scienter; (3) that the statement or conduct was material; and (4) that the statement or conduct caused the government to pay out money or to forfeit money due." After applying those factors, the court determined that the government failed to establish that the defendant's allegedly falsified weapons training records were material to the government's decisions to pay the defendant under the contract. Notwithstanding the government's allegations that the defendant's records were "routinely" reviewed by appropriate government officials, and thus, were material, the court held that the government did not make any specific allegations, such as "the date of any such viewing, and whether those who viewed the records actually relied on" them. As the court was unable to accept the premise that the records were reviewed prior to payments being made, the court held that they could not have been material to the government. As a result, the court dismissed the relator's claims for failure to plead the alleged fraud with particularity.

Siebert v. Gene Security Network, Inc., 2013 WL 3052882 (N.D. Cal. June 17, 2013)

A relator filed a *qui tam* action against a biotechnology company that received research grant funds from the National Institutes of Health. The relator alleged that the defendant violated the False Claims Act by making false statements in its grant applications; the relator claimed that the defendant falsely certified to the government that it was in complying with mandatory financial monitoring provisions, including tracking employees' time and expenditures spent on specific projects. The defendant moved to dismiss the relator's complaint, arguing that the relator failed to state a claim and failed to plead the alleged fraud with particularity.

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

First, the court considered the defendant's argument that the *qui tam* complaint failed to state a claim under the False Claims Act. The defendant contended that the relator failed to plead that an actual false statement or certification was made in the grant applications. The court, though, held that the relator properly alleged that the defendant certified in its grant applications (and in subsequent re-certifications) that it would abide by all the terms and conditions included in the applications—including various financial monitoring requirements—and that those certifications were knowingly false. The court also noted the relator's allegation that the defendant again falsely re-affirmed its compliance with the financial monitoring requirements each time it accepted funds from the NIH, since each grant payment included a notice of award letter that conditioned the payment on compliance with the aforementioned requirements. The court also held that the defendant's alleged false certifications were material to the government's funding decisions, rejecting the defendant's contention that compliance with the financial monitoring requirements was merely a condition of continued participation in the NIH program, but not a condition of payment under the grant program. For purposes of the defendant's motion to dismiss, the court accepted as true the plaintiff's allegation that the government would not have approved the defendant's grant applications without the defendant's certification of compliance with the monitoring requirements. Finally, the court held that the relator properly pled that the defendant acted knowingly, by alleging that the defendant knew that its certifications of compliance were false. The court declared; "Plaintiff is not required to allege anything more in order to survive a motion to dismiss.

As a result of these findings, the court denied the defendant's motion to dismiss.

U.S. v. Jurik, 2013 WL 1881318 (E.D.N.C. May 3, 2013)

The United States filed an action under the False Claims Act alleging that an individual defendant and her company defrauded a Department of Veterans Affairs program that provided funds to defray the cost of structural modifications to homes to accommodate veterans' wheelchairs or other special needs. Specifically, the government alleged that the individual defendant was the president of the corporate defendant—a company that performed home structural modifications work—and that both defendants, in violation of applicable rules, submitted false invoices to the government and created false records for work that had not been completed—including work that would never be completed due to the veteran's death or declination of the modifications. The defendants moved to dismiss the government's FCA claims, arguing that the government failed to state the elements necessary to maintain those claims and failed to plead the alleged fraud scheme with particularity.

The U.S. District Court for the Eastern District of North Carolina granted the defendants' motion, but dismissed the government's fraud claims without prejudice. The court determined that the government's theory of FCA liability was that the defendants' invoices included a false certification that the work for which the government was being charged had actually been completed. The court held that in order "[t]o establish liability under a false certification theory, a plaintiff must show that a government contract or program required compliance with certain conditions as a prerequisite to a government benefit, payment or program; the defendant failed to comply with those conditions; and the defendant falsely certified that it had complied with the conditions in order to induce the government benefit." The court expressed concerns with the government's false certification theory. First, the court observed that the government appeared to concede that no affirmative or expressly false certification had been made by the defendants; instead, the government argued—without citation—that an actual false certification is not necessary to establish a cause of action, and that "impliedly" false certifications can give to FCA liability. The court, though, held that the government "fail[ed] to argue adequately that such an implied theory should be adopted in the Fourth Circuit." Second, the court noted that the government failed to establish that any particular government contract or program required the defendants' compliance with the certification requirements as a prerequisite to payment. Consequently, the court held that the government's fraud claims should be dismissed. The court dismissed those claims without prejudice, though, and allowed the government to file an amended complaint if it chose to do so.

U.S. ex rel. Capriola v. Brightstar Educ. Group, Inc., 2013 WL 1499319 (E.D. Cal. Apr. 11, 2013)

A group of five relators filed a *qui tam* complaint against an education group and a technology institute, as well as numerous unidentified defendants, alleging violations of the False Claims Act. The relators—all of whom were employed by the technology institute—alleged that the defendants submitted false claims to the U.S. Department of Education for federal student financial aid funds. Specifically, the relators claimed that the defendants entered into program participation agreements (PPAs) with the Dept. of Education in which they agreed to comply with applicable regulations by providing recent, truthful job placement rate information to prospective students and by not compensating employees based on their success in securing student enrollments or financial aid benefits for students. The relators alleged that the defendants knowingly failed to abide by these terms, and that their requests for Dept. of Education Funds were therefore based on false statements. The United States declined to intervene in the relators' suit. The defendants moved to dismiss the relators' complaint, arguing that the relators failed to state a claim for relief.

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

Failure to State a Claim/Plead Fraud with Particularity

The relators alleged two causes of action under the False Claims Act: that the defendants knowingly presented false claims to the government, and that they knowingly used false records that were material to false claims. The defendants argued that these allegations failed to state a claim under the FCA, as required by Federal Rule of Civil Procedure 12(b)(6), and were not pled with particularity, as required by Rule 9(b). The relators alleged that the defendants violated the terms of the PPAs by advertising false job placement information to prospective students and by awarding various prizes to employees based on their student enrollment and financial aid numbers. They further claimed that the defendants' applications to the Department of Education for Pell Grant funds and their requests for government-insured loans constituted false claims, supported by false statements—the defendants' alleged expressed and implied false certifications of compliance with the terms of the PPAs and applicable federal regulations.

The court examined whether these allegations satisfied the elements of FCA liability. First, the court held that the relators' assertions, in which they "specifie[d] with particularity numerous ways in which [the defendants] recorded false statistics," and which "named specific officers of [the defendants] who instructed Relators to implement the fraudulent [compensation] policies in question, described the types of fraud carried out and gave examples to support their assertions," were sufficient to establish, at the motion to dismiss stage, that the defendants made false statements and submitted false claims.

The court further determined that the relators properly asserted that the defendants had knowledge of the allegedly false claims and false statements, noting that the relators alleged that the defendants' managerial staff and high-ranking officials oversaw the alleged fraud. The court held that the "[r]elators' allegation that Defendants acted with knowledge and intent to deceive is sufficient to meet Rule 9(b)'s requirement since scienter may be alleged generally. In addition, the court held that the relators adequately established that the alleged false statements in question were material to the government's funding decisions, as the court determined that the PPAs explicitly stated that the execution of the agreements was a prerequisite to eligibility and continued participation in the government programs. Thus, the court reasoned, "the asserted compliance with the requirements of the PPA was relevant to the government's decision to pay out money." In addition, the court held that the defendants' additional allegedly false representations, made as part of annual compliance audits, were material, since the defendants would become ineligible to receive federal funds without repeating the allegedly false statements in the audits.

Finally, the court held that the relators properly pled that the defendants submitted "claims" to the government. First, the court found that the defendants submitted requests for Pell Grant funds directly to the Secretary of Education, and that these

"claims" for federal money impliedly certified that the defendants had complied with the terms of the PPAs and applicable federal regulations. Second, the court held that the defendant submitted requests for government-insured loans either directly to the Dept. of Education or to private lenders, and that these "claims" expressly certified that students are eligible for the loans under federal law. The court rejected the defendants' argument that the loans requests were not "claims" for FCA purposes unless and until they went into default and the government was forced to guarantee the loan because the student could not pay. Instead, the court noted that the FCA imposes liability against those "who submit[] a false claim for payment . . . even if it did not actually induce the government to pay out funds or suffer any loss." Moreover, the court observed that the government does pay out funds, since it pays all interest on these loans while the students are enrolled in classes; therefore, the government pays out money even before any such loans might go into default.

The court then considered the defendants' arguments regarding the scope of the alleged fraud. First, the defendants argued that although the relators alleged fraud over a seven-year period, none of the relators worked for the technology institute defendant outside a two-year period. The defendants contended that the relators could not make particularized allegations of fraud outside that two-year period. The court agreed, noting that the relators generally "make no mention of specific facts" outside that timeframe. Consequently, the court dismissed the relators' allegations to the extent that they alleged fraud outside the two-year period during which they worked for the technology institute. The court, though, granted the relators leave to amend their complaint to provide more specific factual allegations. The court then considered the education group defendant's argument that the relators improperly engaged in group pleading and did not specify any FCA violations on their part. Again, the court agreed, finding that the relators' allegations "do not clearly support a conclusion that [the education group] either presented or caused to be presented a false or fraudulent claim or knowingly made, used, or caused to be made or used a false record or statement." As a result, the court dismissed all claims against that defendant. Once again, though, the court granted the relators leave to amend their complaint to cure these deficiencies.

U.S. ex rel. Hobbs v. Medquest Assocs., Inc., 2013 WL 1285590 (5th Cir. Apr. 1, 2013)

A diagnostic testing company and three of its subsidiaries were sued in a *qui tam* action in which they were accused of defrauding Medicare by using non-approved supervising physicians at testing facilities and by failing to re-register a newly-acquired facility and instead using the former owner's payee ID number. The United States intervened in the relator's suit and the U.S. District Court for the Middle District of Tennessee entered judgment against the defendants, who were ordered to pay over $11 million—reflecting treble damages and civil penalties for over 1200 false claims. The defendants appealed the district court's ruling to the U.S. Court of Appeals for the Sixth Circuit, arguing that the relator did not state a claim

for relief under the False Claims Act because he only alleged violations of various Medicare conditions of participation, and not conditions of payment. They also argued that the judgment constituted an unconstitutionally excessive fine.

Holding: The Sixth Circuit reversed the district court's judgment and held that that the plaintiffs failed to state a claim under the FCA.

False Certifications of Compliance

With respect to the allegation that the defendants submitted false claims for testing that was not supervised by approved physicians, the circuit court observed that the government "alternatively use[d] the express and implied false-certification theories to allege FCA liability." According to the plaintiffs' theory, the defendants' Medicare claims contained their certifications of compliance with applicable laws and regulations—including the supervising-physician requirements—and that those certifications were false because the defendants knowingly violated multiple Medicare regulations. The appellate court considered each theory in turn. The court rejected the express false certification theory, finding that the plaintiffs "cannot point to an express certification made by [the defendant] that it was in compliance with the supervising-physician requirements." The court further noted that although the defendants agreed to "abide by the Medicare laws, regulations and program instructions" when they enrolled in the program, that statement could not form the basis for an express false certification because: (1) the plaintiffs did not provide evidence showing that the defendants intended to violate Medicare regulations at the time they enrolled in the program and made the statement; and (2) the defendants' Medicare reimbursement payments were not conditioned on the statement. In addition, the circuit court determined that although the defendants' claim forms contained an express certification of compliance, that certification only stated that the defendants were only billing for medically necessary services—and the plaintiffs did not dispute the medical necessity of the services, so there was no allegation that the certifications made by the defendants on their reimbursement claim forms were false. The Sixth Circuit reversed the district court's judgment with respect to the plaintiffs' claims based on alleged express false certifications of compliance with the supervising-physician requirements.

Similarly, the circuit court rejected the plaintiffs' theory that the defendants implicitly falsely certified their compliance with the supervising-physician requirements each time they submitted a claim for Medicare reimbursement. But contrary to the plaintiffs' assertion, the court determined that compliance with the supervising-physician requirements was not a condition of payment under the Medicare program, which was fatal to the plaintiffs' implied false certification theory. The Sixth Circuit held that the plaintiffs could not "cut-and-paste" multiple "isolated phrases from several sections in the complex scheme of Medicare regulations" to create a condition of payment—the court stated that it would be unreasonable to expect Medicare providers to take the same approach when interpreting those regulations. After determining that the plaintiffs could not link the defendants' alleged false certifications to any

condition of payment, the appellate court dismissed the plaintiffs' claims based on the implied false certification theory. The court concluded that the defendants' alleged implied false statement was not material, since it did not have the natural tendency to influence the government's payment decision. Moreover, the court stated that it was following the lead of other circuit courts in rejecting FCA claims based on technical non-compliance "with complex federal regulations." The court observed that "[s]uch compliance may of course be enforced administratively through suspension, disqualification, or other remedy." Consequently, the Sixth Circuit reversed the district court's judgment with respect to the plaintiffs' claims based on alleged implied false certifications of compliance with the supervising-physician requirements.

The circuit court then addressed the district court's judgment with respect to the relator's allegation that the defendants falsely submitted claims that included the billing number for the provider whose facility the defendants acquired. The plaintiffs argued that the defendants were required to re-enroll the newly-acquired facility after taking ownership and that their Medicare reimbursement claims implicitly certified that they had done so and were using their own provider billing number. Although the plaintiffs alleged that this implied certification was a condition of payment under the Medicare program, the Sixth Circuit disagreed, finding that the district court's ruling was "based on a combination of laws not in effect at the time," and that the "Government does not contest that the [new] facility used the same or similar personnel to provide the same or similar services with the same facilities, supplies and assets—one of which was a billing number." Ultimately, the circuit court concluded that the plaintiffs' allegations "at most, represent[] a failure to update enrollment information, which we have held is not a violation of a condition of payment." Since the plaintiffs could not establish that the defendants knowingly violated a condition of payment with respect to their use of the prior provider's billing number, the circuit court reversed the district court's judgment regarding that claim.

As the district court's entire judgment was reversed, the circuit court did not address the defendants' Excessive Fines argument.

U.S. ex rel. Osheroff v. Tenet Healthcare Corp., 2013 WL 1289260 (S.D. Fla. Mar. 27, 2013)

A relator filed a *qui tam* complaint alleging that a healthcare company violated the Anti-Kickback Statute and the Stark Law, which in turn resulted in the submission of false Medicare and Medicaid claims. Specifically, the relator alleged that the in addition to providing healthcare services, the defendant leased space to physicians in several of its medical office buildings. The relator claimed that the defendant offered different leases to doctors, based on whether the doctors referred patients to the defendant—doctors who provided referrals were offered leases at rates below fair market value. The relator alleged that the defendant's leasing practices violated the Anti-Kickback Statute and the Stark law, and that all the defendant's Medicare and Medicaid claims that stemmed from those viola-

tions were false, for False Claims Act purposes. The defendant moved to dismiss the relators' claims, arguing that the relator failed to state a claim under the FCA, since: (1) his allegations of Stark and Anti-Kickback Act violations alone did not establish that they knowingly defrauded Medicare and Medicaid; (2) he did not allege a benchmark of fair market value for the defendant's rental space; and (3) he did not adequately plead that the defendant attempted to induce its physician-tenants to refer Medicare and Medicaid patients back to the defendant.

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

False Certifications of Compliance

The relator argued that the defendant's healthcare claims to the government were false because they included the defendant's false certification of compliance with the Anti-Kickback Statute and the Stark law. The relator alleged that the defendant falsely certified compliance in three ways: (1) in past corporate integrity agreements with the U.S. government; (2) in the defendant's provider agreement and application for enrollment in the Medicare program; and (3) in annual hospital cost reports. The court held that the relator's claims based on the defendant's alleged misrepresentations in its provider application and agreement and in its cost reports were sufficient to state a claim for relief under the FCA.

With respect to the provider application and agreement, the court, relying on Eleventh Circuit precedent, explained that "[t]he language contained in the Provider Agreement makes readily apparent that the federal Medicare program will not pay claims if the underlying transaction that gave rise to the claim violated the Anti-Kickback Statute or Stark. Thus, if a healthcare provider requests payment from Medicare notwithstanding the fact that the transactions underlying the claims were in violation of the Anti-Kickback Statute and Stark, the healthcare provider has committed a fraud against the government." The defendant argued that its provider application and agreement amounted to nothing more than promises of future compliance, and that it could not be held liable under the FCA on that basis. But the court noted that the defendant's promise not only allowed the defendant to participate in Medicare—it also was "a prerequisite and the *sine qua non* of federal funding." Thus, the court held that the defendant's representations in its provider application and agreement could serve as the basis for FCA liability. The relator also argued that the defendant falsely certified its compliance with all applicable healthcare laws and regulations when it submitted annual hospital cost reports to the government. The defendant argued that the wording contained in its cost reports was too broadly worded to constitute a certification of compliance with any particular law or regulation, and that allowing such a broad certification to serve as a basis of FCA liability would subject all providers who submit cost reports to FCA liability each time they violate any healthcare law or regulation. The court rejected the defendant's argument, noting that the FCA only imposes liability for <u>materially</u> false statements. The court then held that, at the motion

to dismiss stage, it could not determine whether or not the defendant's alleged misrepresentations to the government were material—"*i.e.*, capable of influencing Medicare's decision to pay the claim"—but would draw all reasonable inferences in favor of the relator and accept that the defendant's cost report representations were material to the government and could serve as the basis of FCA liability.

Violations of the Anti-Kickback Statute and the Stark Law

The court then turned to the defendant's argument that the relator could not establish their alleged Anti-Kickback and Stark law violations, because he did not plead with particularity a benchmark fair market value with which the defendant's leases could be compared. The court, though, held that the relator's complaint included enough facts to lead one to reasonably infer that the defendant entered into below-market-rate leases with referring physicians. In fact, the court observed that the relator provided specific examples of the defendant misrepresenting the square footage of the office space it leased to referring physicians, so as to reduce the price per square foot those tenants paid. In addition, the relator based his claims on empirical analysis he undertook, which indicated that in various U.S. markets, the defendant charged its referring physician-tenants far less than the average prices in those markets. Ultimately, the court held that the relator may, at some point, be required to plead a benchmark fair market value in order to prove his claims. But at the motion to dismiss stage, the court stated that it was not its role to "weigh the merits of Relator's and [the defendant]'s respective positions." Thus, the court accepted the relator's allegations as true, for purposes of the defendant's motion to dismiss.

The court then held that the relator adequately pled that the defendants knowingly engaged in its alleged illegal leasing practices in order to induce physician-tenants to refer Medicare and Medicaid patients to the defendant, and that physicians actually were induced to refer such patients to the defendant. First, the court declared that the relator was not required to allege that the defendant's physician-tenants were induced to refer patients to the defendant; rather, the relator was only required to allege that the defendant knowingly offered tenant below-market rates as an inducement to make improper referrals. The court determined that the relator satisfied that requirement by alleging that the defendant engaged in its leasing practices, at least in part, to induce physicians to make patient referrals, and that the relator made specific allegations that non-referring physicians were required to pay a higher price per square foot than referring-physicians. The court determined that these allegations were sufficient to support the relator's claim that the defendant violated the Anti-Kickback and Stark Laws, since it was reasonable to infer "that a landlord would not enter into a lease agreement for a price that fell below the fair market rate if some other consideration were not involved."

The defendant's motion to dismiss was denied.

U.S. ex rel. Miller v. Weston Educ., Inc., 2012 WL 6190307 (W.D. Mo. Dec. 12, 2012)

Two relators brought a *qui tam* action against an educational institution, alleging that the defendant made fraudulent representations to the government regarding its compliance with various statutes and regulations in order to receive financial aid funds. In addition, the relators each filed claims against the defendant under the False Claims Act's anti-retaliation provision, in addition to state law employment claims. The defendant moved to dismiss all of the relators' claims, arguing that the relators failed to state a claim under the False Claims Act and failed to plead their claims in accordance with the Federal Rules of Civil Procedure.

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

Fraud Claims

The defendant argued that the relators' fraud claims should be dismissed because the regulatory violations alleged by the relators cannot give rise to FCA liability. The court declared that "regulatory noncompliance may give rise to FCA liability, but only if the noncompliance at issue was material to the government's payment decision." The court then considered each of the relators' contentions regarding the defendant's alleged regulatory non-compliance.

First, the court examined the relators' claim that the defendant falsely certified to the government that it was eligible to receive federal financial aid funds. The relators argued that eligibility is based on accreditation or state authorization, and that since the defendant knew that it did not meet the criteria for accreditation or state authorization, its representation to the federal government that it was eligible to receive funds was false. The court rejected this theory of liability, noting that the relators never alleged that the defendant lost its accreditation or state authorization. Since the relators failed to demonstrate that the defendant was not eligible to receive federal financial aid funds—regardless of whether or not the defendant should have been eligible—the defendant's certifications of eligibility were not false. The court then considered the relators' second theory of liability, namely, that when the defendant entered into its agreement with the government to participate in the financial aid program, it knew that it had no intention of complying with the terms of the agreement. Thus, the relators' argued, the defendant's promise to perform its end of the agreement was a false statement for FCA purposes. The court agreed that this allegation stated a claim under the False Claims Act, noting that the relators alleged that the defendant's misconduct predated the execution of the agreement, which supported the relators' contention that the defendant did not intend to comply with the agreement.

The court then turned to the relators' third argument—that the defendant's alleged false statements contained in the participation agreement were material to the

government, since the defendant would not have been eligible to receive any federal government funds unless it entered into the participation agreement. The court agreed, and observed that execution of the participation agreement was not merely a condition of participation in the government program, but was also a condition of payment, stating that "execution of the [agreement] would be a meaningless gesture if compliance with its terms was never material to the government's payment decision." The court also rejected the defendant's argument that it was not liable under the False Claims Act because it never certified its compliance with the terms of the participation agreement when it made specific requests for federal funds, and thus, it did not submit false claims. The court observed that the participation agreement governed every request for funds made by the defendant and that the defendant's express promise to comply with applicable statutes and regulations was "an absolute prerequisite to initial or continued participation" in the program. The court also noted that eligibility for the federal funds at issue automatically terminates upon expiration of the agreement. As a result, the court held that "it is reasonable to infer that the government paid [the defendant] based on the assumption that [the defendant] was fulfilling, or at least not intentionally violating, the promises made in the [agreement]." The court ultimately held that the relators alleged an "implied false certification" theory of liability—whereby "a party agreed to comply with a statute or regulation and that obligation is implicated when the party submits a claim for payment, even though the express certification of compliance is not required for each individual claim"—stated a claim under the FCA.

The court also held that the relators pled their fraud claims with particularity, as required by Rule 9(b) of the Federal Rules of Civil Procedure. The court noted that the complaint provided a "detailed account" of how the fraud scheme was alleged to have been executed, including specific allegations about the defendant's manipulation and falsification of records and discussions of this and other improper practices by high-ranking administrators. Although the defendants tried to introduce facts to dispute the relators' allegations, the court held that it was premature to consider such information on a motion to dismiss. The court also made clear that, since the relators' fraud allegations were based on the defendant's alleged false statements in executing the participation agreement and the government's reliance on those statements when disbursing financial aid funds, the relators were not required to identify specific false claims for payment that the defendant submitted to the government. Consequently, the court held that the relators' fraud allegations satisfied Rule 9(b).

Retaliation Claims

The court rejected the defendant's argument that the relators' retaliation claims did not satisfy Rule 8's pleading requirements. The defendant contended that the relator's retaliation claims amounted to nothing more than complaints about being criticized and feeling stressed. The court found that while the relators did allege these things, their complaint also included allegations that, after trying to expose and prevent the defendant's fraud, they were excluded from meetings that had previously been man-

datory, had their work transferred to others, and were denied promotions, forced to resign, and terminated. In addition, the complaint identified specific individuals who were involved in the alleged retaliation. The court held that the relator's allegations of retaliation satisfied Rule 8's notice pleading requirement.

The court also held that the relators could maintain their state law employment claims, finding that those claims were not preempted by the federal claims. The court held that the two statutory schemes "seek to vindicate fundamentally different rights," noting that the state law claims are not premised on alleged FCA violations, but extend to the relators' efforts to prevent other violations of federal and state law as well. The court also stated that public policy weighed in favor of allowing the relators to maintain both federal and state employment claims.

The defendant's motion to dismiss was denied.

U.S. ex rel. Ge v. Takeda Pharm. Co. Ltd., 2012 WL 5398564 (D. Mass. Nov. 1, 2012)

A relator filed two *qui tam* actions alleging that a group of affiliated pharmaceutical companies failed to report adverse events associated with several of its drugs to the Food and Drug Administration, as required by law. The actions were brought under the federal False Claims Act and twenty four state false claims act laws, and alleged frauds against Medicare, Medicaid, Tricare, and other federally-funded government healthcare programs. The defendants moved to dismiss the relator's complaints for failure to state a claim and for failure to plead the alleged fraud with particularity.

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

The court determined that while the relator alleged facts that would demonstrate that the defendants committed a "fraud-on-the-FDA" by intentionally failing to report adverse events as required, she failed to describe any specific false claims to the government that arose from the defendants' alleged conduct. The court noted that the relator provided aggregate federal expenditures regarding one of the drugs at issue, but held that this information was insufficient to cure the pleading deficiencies, since the relator failed to include any information regarding the payees for these expenditures. Moreover, the relator did not detail the time periods during which the alleged fraud occurred, failed to describe the locations and amounts of any allegedly false claims, and did not specify which government programs were implicated by any such claims—notably, the relator did not describe any allegedly false claims paid by state government programs. The relator contended that all claims during the relevant years that were submitted to the government for the drugs at issue were false, since the defendants failed to properly report adverse events associated with the drugs. The court rejected that argument, since the relator failed to show that the FDA would have withdrawn its approval for the drugs if the defendants had prop-

erly reported the adverse events, and since the relator could not show that claims filed before adverse events were discovered were false. Consequently, the court held that the relators' complaints failed to plead the alleged fraud with particularity, and would be dismissed pursuant to Federal Rule of Civil Procedure 9(b).

In addition, the court held that the relator's complaints failed to state a claim under the false claims act laws. According to the court, the relator argued that the defendants caused claims for its drugs to be submitted to federal and state healthcare programs, and that those claims were impliedly false because the defendants' compliance with the FDA's reporting requirements was an implied condition of continued FDA approval for the defendants' drugs—since the defendants failed to satisfy this condition, its drugs would not have received continuing FDA approval, and therefore, claims submitted to the government for those drugs were false. The court, though, found that the relator could not support her assertion that compliance with the FDA reporting requirements was a "material precondition of payment under the healthcare programs. Instead, the court concluded that the FDA is afforded wide discretion when dealing with drug manufacturers that fail to comply with reporting requirements, and that withdrawing drug approval is the harshest of possible sanctions. Since the relator could not establish that compliance with the reporting requirements was a condition of payment for any allegedly false claims, the court dismissed her complaints for failure to state a claim.

The court further determined that the state false claims act laws at issue did not differ in any material respect from the federal statute, and held that since the relator failed to state a claim under the federal law, she also failed to state a claim under any of the state laws. As a result, all of the relator's claims brought under state false claims act statutes were dismissed. The court noted that even if a state healthcare regime provided that compliance with the FDA reporting requirements was a condition of payment, the relator's complaints would still be deficient, as they failed to adequately allege the fraud with particularity.

U.S. ex rel. Onnen v. Sioux Falls Indep. School Dist. No. 49-5, 2012 WL 3206223 (8th Cir. Aug. 9, 2012)

A relator filed suit alleging that the public post-secondary technical school he previously worked for, as well as the school district that funded the school, the district's superintendent, and its board members violated the False Claims Act by submitting claims to the federal government for student grant funds and loan guarantees that falsely certified the school's compliance with various program requirements and Higher Education Act (HEA) regulations, and included falsified information. The U.S. District Court for the District of South Dakota granted summary judgment in favor of the defendants and the relator appealed that ruling to the U.S. Court of Appeals for the Eighth Circuit. The defendants filed a cross-appeal, challenging the district court's denial of their motion for attorneys' fees.

The Eighth Circuit affirmed the district court's summary judgment ruling. The relator argued that the defendants failed to make necessary disclosures and deprived the district court of a sufficient opportunity to make an appropriate decision the summary judgment motion. But the circuit court held that the relator's argument was untimely, as it was not presented to the district court. The appellate court also held that the district court erred when it decided that FCA claims based on violations of the HEA are inconsistent with the administrative remedies and sanctions available to the government under that Act. Instead, the Eighth Circuit agreed with the government—which filed an *amicus curiae* brief on the issue—that the FCA was intended by Congress to allow the government to choose among a variety of available remedies—both statutory and administrative.

Finally, the court considered the defendants' cross-appeal of the district court's denial of their motion for attorneys' fees. The circuit court affirmed that ruling, as it concluded that the relator's suit was not clearly frivolous, vexatious, or harassing. While the circuit court acknowledged that "the record contains indications that [the relator's] unsupported claims were asserted primarily for vengeful harassment," and stated that it would have also affirmed an award by the district court of the defendants' attorneys' fees, it ultimately held that the district court did not abuse its discretion, as the relator's complaint had survived a motion to dismiss and discovery had uncovered factual support for some of his allegations.

See *U.S. ex rel. Schubert v. All Children's Health Syst., Inc.*, 2013 WL 1651811 (M.D. Fla. Apr. 16, 2013), at page 3.

See *Glynn v. EDO Corp.*, 2013 WL 1150523 (4th Cir. Mar. 21, 2013), at page 83.

See *U.S. ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 2013 WL 1149255 (M.D. Fla. Mar. 19, 2013), at page 158.

See *Winston v. Academi Training Ctr., Inc.*, 2013 WL 989999 (E.D. Va. Mar. 13, 2013), at page 87.

See *U.S. ex rel. Lisitza v. Par Pharm. Cos., Inc.*, 2013 WL 870623 (N.D. Ill. Mar. 7, 2013), at page 162.

See *U.S. ex rel. Pecanic v. Sumitomo Elec. Interconnect Prods., Inc.*, 2013 WL 774177 (S.D. Cal. Feb. 28, 2013), at page 167.

See *U.S. ex rel. McLain v. KBR, Inc.*, 2013 WL 710900 (E.D. Va. Feb. 27, 2013), at page 225.

See *U.S. ex rel. Lockey v. City of Dallas, TX*, 2013 WL 268371 (N.D. Tex. Jan. 23, 2013), at page 58.

See *U.S. ex rel. Long v. GSD & M Idea City LLC*, 2013 WL 214590 (N.D. Tex. Jan 18, 2013), at page 174.

See *U.S. ex rel. Dennis v. Health Mgmt. Assocs., Inc.*, 2013 WL 146048 (M.D. Tenn. Jan. 14, 2013), at page 176.

See *U.S. ex rel. Daugherty v. Bostwick Labs.*, 2012 6593804 (S.D. Ohio Dec. 18, 2012), at page 6.

See *U.S. ex rel. Stone v. Omnicare, Inc.*, 2012 WL 5877544 (N.D. Ill. Nov. 20, 2012), at page 230.

See *U.S. ex rel. Bibby v. Wells Fargo Bank, N.A.*, 2012 WL 5866137 (N.D. Ga. Nov. 19, 2012), at page 185.

See *Jallali v. Nova Southeastern Univ., Inc.*, 2012 WL 3234278 (11th Cir. Aug. 9, 2012), at page 197.

See *Gonzalez v. Fresenius Med. Care North America*, 2012 WL 3065314 (5th Cir. July 30, 2012), at page 243.

See *U.S. ex rel. Newell v. City of St. Paul, Minn.*, 2012 WL 2979061 (D. Minn. July 20, 2012), at page 72.

See *U.S. ex rel. Osheroff v. Tenet Healthcare Corp.*, 2012 WL 2871264 (S.D. Fla. July 12, 2012), at page 249.

See *U.S. ex rel. Powell v. American Intercontinental Univ., Inc.*, 2012 WL 2885356 (N.D. Ga. July 12, 2012), at page 30.

H. FCA Seal/Service Issues

U.S. ex rel. Odoms v. YWCA of Bucks County, 2013 WL 3213355 (E.D. Pa. June 25, 2013)

A plaintiff filed suit against her former employer, a local branch of the YWCA, alleging various employment law violations, including a claim under the False Claims Act's anti-retaliation provision. Specifically, the plaintiff alleged that during her seven-month term as the defendant's chief executive officer, she discovered that the defendant was illegally misappropriating federal funds. She claimed that she reported her findings to the defendant and its board of directors multiple times, but was reprimanded by the defendant, lost her privileges to speak with her superiors, and was accused of trying to destroy the company. The plaintiff eventually contacted appropriate government officials regarding her concerns. Three days after informing the defendant of her report to the government, the plaintiff was suspended and eventually terminated from her job. According to the defendant, the plaintiff was fired due to poor performance. The plaintiff, though, alleged that she was terminated in retaliation for reporting the defendant's misconduct to the government. The defendant moved to dismiss the plaintiff's claim under the False Claims Act, arguing that the plaintiff failed to satisfy the FCA's procedural requirements for filing a claim, and failed to state a claim.

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

First, the court considered the defendant's procedural argument, in which the defendant claimed—without precedential support—that the plaintiff failed to file her FCA claim under seal. The court rejected that argument, and held that the FCA's seal provision only applies to *qui tam* claims, wherein a relator can only proceed through counsel and which alleges a fraud claim on behalf of the government. The court determined that the seal provision does not apply to claims under the FCA's anti-retaliation provision, which allows plaintiff's to sue on their own behalf, with or without an attorney.

Next, the court held that the plaintiff properly stated a claim under the FCA's anti-retaliation provision. First, the court considered the defendant's argument that the plaintiff's alleged reports did not qualify as protected conduct, since the plaintiff served as the defendant's chief executive officer and thus, her reports were included in her job duties and thus, did not put the defendant on notice that a *qui tam* suit was a distinct possibility. The court observed that "in order to prove that the conduct engaged in was 'protected' Plaintiff must establish she went beyond her role in representing the company to file an action adverse to the employer." The court held that the plaintiff met protected conduct standard, since she took actions that were adverse to her former employer, by persisting in her reports to

the defendant even after being reprimanded, by notifying the defendant's board of directors, and by contacting appropriate government officials. The court further held that the plaintiff properly pled that the defendant retaliated against her in response to her protected conduct, noting that the plaintiff alleged that she was terminated from her job soon after telling the defendant that she had shared her concerns with the government.

U.S. ex rel. Gale v. Omnicare, Inc., 2013 WL 2476853 (N.D. Ohio June 7, 2013)

A *qui tam* relator alleged that a prescription drug supply company violated the False Claims Act by providing illegal kickbacks to long-term healthcare facilities in exchange for referrals of patients with reimbursable drug costs. The relator claimed that the defendant's conduct violated the Anti-Kickback Statute, and in turn rendered false any Medicare claims tainted by the kickback arrangements. The defendant moved to disqualify the relator, arguing that by discussing the then-sealed *qui tam* complaint with his wife and two former colleagues from the defendant's company, he violated procedural requirements of the False Claims Act that warranted his dismissal from the suit.

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

FCA Seal

The court first noted that the relator properly filed his *qui tam* complaint under seal and served it on the United States. The court then turned to the defendant's argument that the FCA required the relator not to discuss the existence of his *qui tam* suit with anyone but the government, or face dismissal of the suit. The court distinguished the Sixth Circuit opinion relied on by the defendant, noting that in that case, the relator failed to file her *qui tam* complaint under seal. Instead, the court relied on opinions from the Fourth and Ninth Circuits and held that "the False Claims Act's seal requirements prevent the relator from publicly discussing the filing of the *qui tam* complaint, but not the nature and existence of the fraud." The court held that the relator's alleged conduct did not violate the FCA's seal requirement. The court determined that the relator's comments to his wife did not publicly disclose the existence of his lawsuit. Moreover, the court concluded that the relator's conversations with his former colleagues from the defendant's company while his complaint was under seal, did not prejudice the government's investigation of the defendant's alleged fraud, because the relator did not reveal the fact that he had filed a *qui tam* lawsuit during those conversations.

In addition, the court held that the defendant's request to disqualify the relator was untimely, and therefore, waived. The court found that the defendant engaged in undue delay by waiting almost three years after learning of the relator's conduct to

bring its motion. The court rejected the defendant's argument that the FCA's seal requirement is jurisdictional and can be brought up at any time. While the court "assume[d] without deciding that the under-seal requirements are procedural and not jurisdictional," it noted that FCA Congress could have—but did not—insert language addressing jurisdiction into the FCA's seal provision, and that if the seal requirement were jurisdictional, then a relator's violation of that provision would unfairly require dismissal of the relator's suit "with prejudice to both the relator and the United States, thus depriving the United States of its right to pursue the litigation if it so chose."

U.S. ex rel. Raggio v. Jacintoport Int'l, LLC, 2013 WL 2462109 (D.D.C. June 7, 2013)

A *qui tam* relator filed suit against a group of corporate defendants, alleging violations of the False Claims Act. The United States elected to intervene in the relator's claims. A few months after the government intervened in the *qui tam* suit, the relator filed a first amended complaint, which the court said "mirror[ed] the claims asserted by the Government in its Complaint in Intervention." When the relator moved to serve the amended complaint, one of the defendants moved to dismiss it, arguing that it had no continuing validity in light of the government's intervention in the suit; the defendant claimed that the relator's amended complaint was duplicative. The relator countered that pursuant to Federal Rule of Civil Procedure 15(a), he had the right to amend his *qui tam* complaint.

The U.S. District Court for the District of Columbia granted the defendant's motion to dismiss the amended complaint, as it determined that the relator's amended claims were "identical" to the government's complaint. In reaching its decision, the court declared: "[b]ecause of the similarity between the two complaints, the Court agrees that permitting the Relator['']s unrestricted participation in the litigation would cause [the defendant]'undue burden or unnecessary expense.'"

U.S. ex rel. Eberhard v. Angiodynamics, Inc., 2013 WL 2155327 (E.D. Tenn. May 17, 2013)

A *qui tam* relator alleged that a medical device manufacturer and distributor improperly induced customers to use its products and promoted the devices to doctors for off-label uses, resulting in violations of Medicare and the equivalent laws of twenty seven states and the District of Columbia, as well as the submission of false claims to the government. The government entities declined to intervene in the relator's suit. Subsequently, the relator moved for voluntary dismissal of the suit. He also moved for the permanent sealing of the case.

The U.S. District Court for the Eastern District of Tennessee granted the relator's motion to dismiss the *qui tam* action, noting that the government entities

consented to the dismissal. The court, though, refused to grant the relator's request permanently to seal the case or to redact his name. The relator argued that his identity should remain secret because, even though he was not employed by the defendant, he was employed in the medical device industry and he feared economic retaliation and problems obtaining future employment—particularly if the defendant contacted his current employer or his employer's customers. The government opposed the relator's motion, arguing that sealing the case was unnecessary and was contrary to the public's right to have access to records of judicial proceedings. As the court stated, "the government argue[d] that the perceived risk of economic harm or career damage is insufficient to serve as a basis for maintaining a seal." The court agreed and noted that when the relator filed his *qui tam* complaint, he took the risk that the government would intervene in the suit and that his identity would be revealed. The court also mentioned that the relator had not submitted any evidence demonstrating that the defendant might retaliate against him by contacting his employer and/or customers. The court held that "the mere possibility, or even plausibility, of some form of economic harm is inadequate to depart form the rule favoring public access, particularly in the absence of any concerns involving national security, trade secrets or personal safety." Thus, the court denied the relator's motion to seal the dismissed suit.

U.S. ex rel. Griffith v. Conn, 2013 WL 620259 (E.D. Ky. Feb. 19, 2013)

Two relators brought a *qui tam* action against an administrative law judge for the Social Security Administration and an attorney, alleging that the defendants conducted sham proceedings for the attorney's clients—resulting in the clients receiving benefits to which they were not entitled—and then the attorney collected attorney's fees for the claims. After receiving five extensions of the seal on the relators' complaint, the United States declined to intervene in the relators' suit. The government then moved for a 60-day stay of the proceedings.

Holding: The U.S. District Court for the Eastern District of Kentucky denied the government's motion for a stay of the proceedings.

The court held that, under the False Claims Act, once the United States declines to intervene in a *qui tam* suit, the relator takes over the case; the United States is not a party to a *qui tam* suit unless it intervenes. The court further held that although the False Claims Act grants the United States some rights even when it declines to intervene in a *qui tam* suit, the statute does not grant the government the right to seek a stay of an entire *qui tam* action. The government argued that the court need not look to the False Claims Act, and instead has inherent authority to stay any litigation on its docket. The court, though, held that the United States is not authorized to ask the court for a stay. Consequently, the court denied the government's request.

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

In re Pharmaceutical Indus. Average Wholesale Price Litig., 2012 WL 3263922 (D. Mass. Aug. 7, 2012)

Two relators filed a *qui tam* action against a healthcare company, alleging that the company violated the False Claims Act by inflating the prices of drugs on reimbursements claims to Medicare and Medicaid. The defendant moved for partial summary judgment on the relators' claims and the U.S. District Court for the District of Massachusetts granted the motion. The court determined that the relators' FCA claims on behalf of the government had been released as part of a broad settlement agreement between the defendant, a different relator from a prior *qui tam*, and the government. The relators moved for reconsideration of the court's dismissal of their claims, arguing that they should have been allowed to challenge the settlement agreement in a fairness hearing. In addition, they sought a share of the proceeds of the settlement, pursuant to the FCA's "alternate remedies" provision.

Holding: The court denied the relators' motion without prejudice.

Relators' Share

The relators argued that they were entitled to a share of the government's settlement proceeds pursuant to the False Claims Act's "alternate remedies" provision, which preserves relators' right to a share of the government's recovery even if the government chooses to pursue an alternate remedy that resolves *qui tam* claims. They asserted that the prior *qui tam* action did not encompass their claims, but since the settlement agreement was so broad, it had the effect of waiving their claims without their consent. Relying on precedent from other circuits, the court concluded that the alternate remedies provision applies when the government pursues an alternative to intervening in the relator's *qui tam* case. The government claimed that it did not intend to settle the present relators' claims when it resolved the prior relator's suit, but the court noted that the government did not withdraw its consent to the settlement either. Consequently, the court held that the government's settlement of the present relators' claims was an alternate remedy under the FCA.

Fairness Hearing

The relators argued that since their claims were dismissed as a result of the government's settlement with the defendant, they were entitled to a hearing regarding the settlement, as the False Claims Act relators have a right to have a court examine the government's attempt to settle their claims, and to determine whether "the proposed settlement is fair, adequate, and reasonable under all the circumstances." The court agreed. The court noted that "it would have been preferable" if the relators had requested the hearing before their claims were dismissed on summary judgment—the

relators had received actual notice of the settlement—but concluded that the relators were unaware of the court's interpretation of the settlement until the court ruled on the summary judgment and did not believe that the settlement applied to their claims. In addition, the court held that relators are entitled to a fairness hearing even if the government's proposed settlement does not resolve the relator's entire action, but only some of his/her claims, stating that "such a limitation would be inconsistent with" congressional intent.

Ultimately, the court still denied the relators' motion for reconsideration. Rather than reconsider its summary judgment ruling, the court suggested that, pursuant to Federal Rule of Civil Procedure 60(b)(6), the relators move to re-open the judgment in the prior *qui tam* action and obtain the fairness hearing they were entitled to with respect to that settlement. The court further noted that the prior relator's argument that the present relators' action was barred by the FCA's first-to-file rule would be also addressed at that time.

J. Leave to Amend *Qui Tam* Complaint

U.S. ex rel. Sharp v. Eastern Okla. Orthopedic Ctr., 2013 WL 766183 (N.D. Okla. Feb. 28, 2013)

A relator filed a *qui tam* suit alleging that a medical facility violated the False Claims Act by presenting false claims to the government, using false records to get false claims paid by the government, using false records to conceal its obligations to the government, and discharging her from her job in retaliation for her whistleblowing activity. The relator later moved for leave to amend her complaint, to add more FCA violations stemming from the defendant's alleged failure to include appropriate code information when submitting Medicare claims to the government. In the alternative, the relator moved the court to conform her complaint to include the additional claim, arguing that the defendant had impliedly consented to the inclusion of that claim.

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

The court noted that, pursuant to Federal Rule of Civil Procedure 15(a)(2), courts should freely grant parties leave to amend when justice requires. However, the court also noted that motions for leave to amend pleadings should be denied upon a "showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." The court examined these elements and then denied the relator's motion to amend. The court found that the relator's motion for leave to amend was filed "nearly seventeen months after the deadline for amendments to the pleadings and six months after the deadline for discovery." The court held that the relator's delay in filing her motion was "undue," since the relator failed to explain her untimeliness, and even conceded that her new allegation was not based on recently discovered evidence, but rather, on information that she'd possessed for at least two years.

In addition, the court denied the relator's attempt to amend her complaint through a motion to conform the complaint to the evidence. In denying this request, the court noted that Federal Rule of Civil Procedure 15(b)(2) provides two mechanisms by which plaintiffs may amend a complaint to conform to the evidence: (1) when "an issue not raised by the pleadings is tried by the parties' express or implied consent;" and (2) when "the non-moving party cannot demonstrate that it will be prejudiced by the amendment." The court considered each basis in turn.

First, the court rejected the relator's argument that the defendant had impliedly consented to the inclusion of the additional claim. The relator contended that the defendant consented to the additional claim because it conducted discovery regarding the coding allegations at issue and moved for summary judgment on that

claim. However, the defendant countered that the relator never asserted a separate claim based on the defendant's allegedly missing codes until she included the claim in her motion for summary judgment, and that throughout the litigation, the relator had insisted that the coding issues were encompassed in the claims that she had previously brought. The court agreed with the defendant, finding that the defendant had routinely objected to the introduction of a separate claim based on the code, that the defendant questioned the relator and other deponents about the relevance of the coding issue, and that the relator testified that she was not asserting a separate claim based on the missing code information. The court determined that the defendant did not have a fair opportunity to gather evidence and defend itself against the new allegation, and thus, did not consent to the inclusion of the additional claim.

Next, the court held that allowing the relator to amend her complaint would prejudice the defendant, stating that "[i]f Relator desired to change her strategy, she should have requested amendment much sooner," but instead waited for more than two years to do so. The court held that the fact that the defendant questioned the relator regarding the missing codes did not demonstrate a lack of prejudice to the defendant, since those questions were asked in the context of the relator's existing claims, due to the relator's insistence that the allegedly missing codes did not give rise to a separate claim. Consequently, the court denied the relator's request.

U.S. ex rel. Kirk v. Schindler Elevator Corp., 2013 WL 655080 (S.D.N.Y. Feb. 22, 2013)

A relator brought a *qui tam* action in the U.S. District Court for the Southern District of New York, alleging that an elevator company violated the False Claims Act by knowingly filing false reports with the U.S. Department of Labor regarding its eligibility for government contract opportunities reserved for companies that employed certain required numbers of Vietnam War veterans. The relator had previously alleged that the defendant not only filed false reports, but had also failed to file reports altogether—although the reports were required—for various years. The relator's failure-to-file allegations were ultimately dismissed, however, after the district court determined that those claims were precluded by the False Claims Act's public disclosure bar provision, namely, the relator's FOIA requests to the Labor Department. The U.S. Court of Appeals for the Second Circuit vacated the district court's order, but the U.S. Supreme Court agreed with the district court and the claims were dismissed. The case was remanded to the district court for resolution of the relator's allegations that the defendant filed false labor reports. The relator then moved to amend his complaint to provide additional specificity and evidence demonstrating why the defendant's reports were false, and to restate some of his prior failure-to-file claims to reflect newly discovered evidence that for some of those years the defendant actually filed false reports as well. The defen-

dant opposed the relator's motion for leave to amend his complaint, arguing that the relator was acting in bad faith, that the amendments were being offered after an unreasonable delay that resulted in undue prejudice to the defendant, and that the amendments were futile because the relator's current complaint was subject to dismissal for failing to state a claim.

Holding: The U.S. District Court for the Southern District of New York granted the relator's motion for leave to amend his complaint.

Leave to Amend

The defendant had argued that the proposed amendments were offered in bad faith, claiming that the relator failed to make use of documents already in his possession that contradicted his assertions regarding the manner in which the defendant acquired and submitted information regarding employees' veteran status. The court rejected that argument, finding that the relator was not bound by the defendant's characterization of the documents, since at the motion to dismiss stage all reasonable inferences must be made in the relator's favor. In addition, the court held that relator's delay in moving to amend his complaint was not undue and did not unduly prejudice the defendant either. The court noted that although four and one half years passed between the filing of the relator' operative complaint and his motion to amend it, the delay was not unreasonable, since the relator's action was moving through the circuit and Supreme Court stages, and then back to the district court—and discovery had been stayed that entire time, resulting in the relator not receiving documents on which his new claims were based. Similarly, since the defendant had not yet provided any discovery to the relator, the court held that the defendant was not unduly prejudiced by the relator's motion.

The court then turned to the defendant's argument that the relator's proposed amendments were not futile. The defendant's futility argument was based on its claims that: (1) the relator's new allegations did not relate back to the relator's earlier pleadings, and thus, were untimely; (2) all of the relator's claims were preempted because the U.S. Department of Labor had primary jurisdiction over the defendant's alleged non-compliance with applicable regulations, and that the Labor Department had already investigated the relator's claims in an administrative proceeding; (3) all of the relator's claims were implausible on their face and subject to dismissal as a matter of law; and (4) none of the relator's claims were pled with particularity.

First, the court held that the relator's new claims did relate back to his earlier pleadings, holding that the new claims did not constitute a new, distinct set of facts as the defendant had argued; instead, the court found that the "general fact situation alleged in the original pleading certainly provided [the defendant] with adequate notice of the matters raised" in the proposed amended complaint. Thus, the court held that the relator's new claims were timely. Next, the court held that the Department of Labor did not have primary jurisdiction over the defendant's alleged noncompliance with labor regulations. The court, though, concluded that the question at issue was whether or not the defendant was so far out of compliance with applicable regulations

that its claims for payment under government programs were false—and noted that courts routinely adjudicate such issues. The court held that the primary jurisdiction doctrine was inapplicable, finding that courts have generally declined to invoke the doctrine in the context of False Claims Act cases, even when resolving an FCA case might require interpretation of a regulatory scheme that is governed by an administrative agency. The court further found that the relator was estopped from bringing his claims merely because he made a prior complaint to the Labor Department that resulted in an investigation. The court held that the agency's investigation could not estop the relator since it did not amount to an "adjudication," as "there was no hearing, no testimony, no subpoenaed evidence, no argument, [and] no opportunity to test any contention by confrontation."

The court then held that the relator's claims were plausible, again referencing the defendant's argument that certain documents in the relator's possession undermined his claims that the defendant knowingly submitted false reports to the government—the defendant argued that the relator's allegation that it failed to implement a system to track the number of veterans it employed resulted in the defendant failing to report veterans that it did employ, which the defendant argued was inconsistent with the relator's allegations. The court held that the documents relied on by the defendant did not render the relator's claims implausible, noting that the relator presented other evidence in support of his claims and claimed to have personal knowledge that contradicted the defendant's characterization of the documents at issue. Lastly, the court held that the relator's claims had been pled with particularity, observing that the relator pled sufficient facts to support his allegation that the defendant's reports to the government were contrived and that the defendant recklessly disregarded or deliberately ignored the truth or falsity of its reports—which could have resulted in the defendant actually under-reporting the number of veterans it employed—because the defendant wanted to save the money required to devise and implement a mechanism for accurately counting and reporting veterans.

As a result of these findings, the court granted the relator's motion for leave to amend his complaint to add new claims.

K. Relators' Share Issues

U.S. ex rel. Smart v. Christus Health, 2013 WL 2289883 (S.D. Tex. May 22, 2013)

A relator filed a *qui tam* action in the U.S. District Court for the Southern District of Texas, alleging that a group of affiliated healthcare companies violated the False Claims Act by providing illegal kickbacks to physicians (in the form of discounted rental rates for office space) in order to induce the physicians to refer patients to the defendants' hospitals. The relator alleged that claims to the federal healthcare programs that arose from these improper financial relationships were false. The relator's suit was settled for more than $2 million dollars and dismissed and the relator received 30% of the government's recovery. Months later, the relator moved to modify or vacate the dismissal of his *qui tam* case, as he sought a share of a $4 million-plus administrative recovery the Office of Inspector General for the Department of Health and Human Services (OIG-HHS) obtained from the defendant as a result of the same misconduct. The government consented to reopening the case and agreed to pay the relator an additional reward. The court then dismissed the relator's case with prejudice as to the relator.

However, years before the relator's suit was settled and the OIG-HHS proceeding was resolved, a different *qui tam* relator filed a separate suit against the defendants, alleging that the defendants violated the FCA by knowingly billing outpatient services as if they were more expensive inpatient services, in order to received increased reimbursements from Medicare and Medicaid. This second *qui tam* suit was settled weeks after the court entered the order dismissing the relator's case with prejudice, resulting in the defendant making another $5 million payment to the government, of which the second relator was awarded a 20% share. Despite the court's previous dismissal with prejudice, the first relator again sought to reopen his case, seeking a share of the government's recovery that resulted from the second relator's suit. The relator argued that the second relator's suit was derivative of his prior suit, theorizing that the doctors who received the kickbacks from the defendant repaid those bribes by signing off on the improper billing identified in the second relator's suit. He asserted that when the federal government investigated his claims, it became aware of the facts that were included in the second *qui tam* suit.

The court denied the first relator's request to reopen his case for a second time, finding that the claims he raised did not overlap with the second relator's claims, since his complaint focused on office leases and physicians' improper financial relationships with the defendants—all of which involved violations of the Stark Law and the Anti-Kickback Statute—while the second relator's complaint focused on the defendants' improper billing for unnecessary inpatient admissions. Thus, the court denied the relator's motion, stating that he "cannot recover for misconduct by [the defendants] about which he knew nothing and played no role in uncovering."

U.S. ex rel. Schroeder v. CH2M Hill, 2013 WL 1982330 (E.D. Wa. May 13, 2013)

A *qui tam* relator filed an action under the False Claims Act, alleging that the company he worked for engaged in time card fraud that resulted in the submission of false claims to the government. The United States moved to dismiss the relator, arguing that the relator was not entitled to a share of the government's recovery because he had been criminally convicted for conduct arising from his own role in the fraud—he had pled guilty to charges of conspiring to defraud the government in connection with the alleged fraud scheme. The U.S. District Court for the Eastern District of Washington recognized that courts have consistently interpreted section 3730(d)(3) of the False Claims Act to mean what it says; the court could find no decision wherein a share of the government's proceeds was awarded to a relator who had been convicted of criminal conduct arising from his/her role in the fraud. Since the relator voluntarily pled guilty to such criminal conduct, after being advised of his *Miranda* rights and after consulting with his own counsel—and reached a favorable plea deal in doing so—the court granted the government's motion and dismissed the relator from the action. In doing so, the court explicitly stated that the relator "shall not receive any share of the proceeds of this action."

U.S. ex rel. Roberts v. Accenture, LLP, 2013 WL 764734 (8th Cir. Mar. 1, 2013)

Two relators filed a *qui tam* action against a group of technology companies, alleging that the defendants engaged in two fraudulent schemes with respect to the sale of computer equipment to the United States, namely a defective pricing scheme and an illegal kickbacks scheme. They alleged that these frauds cost the government hundreds of millions of dollars. The United States intervened in the relators' suit and reached a $55 million settlement with one of the defendants. Of the settlement amount, $9 million was attributed to the kickbacks scheme, and $46 million was allocated to the defective pricing scheme. Following the settlement, the relators sought a share of the government's recovery and the U.S. District Court for the Eastern District of Arkansas awarded the relators a 21% share of the kickback settlement and a 15% share of the defective pricing settlement. The United States appealed the district court's award with respect to the defective pricing claim, arguing that the relators' defective pricing allegations were not pled with particularity, as required by Federal Rule of Civil Procedure 9(b), and therefore could not serve as a basis for rewarding the relators. In addition, the government contended that the settlement did not resolve the relators' defective pricing claim, but rather, resolved different claims that only arose after the settling defendant made a voluntary self-disclosure to the government and the government conducted its own separate investigation.

Holding: In a 2-1 decision, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's ruling.

Relators' Share

The circuit court found that the defendant who self-disclosed defective pricing fraud to the government only conducted its internal audit after learning of the relators' *qui tam* allegations and responding to extensive subpoenas the relators drafted at the government's request. Consequently, the appeals court determined that the settling defendant's self-disclosure was not purely voluntary and that he government's attempt to minimize the relators' role in uncovering the fraud was unwarranted. Addressing the government's Rule 9(b) argument, the appellate court stated:

> We reject the contention that Rule 9(b) plays a part in determining whether a relator is entitled to share in the settlement proceeds resulting from a *qui tam* action in which the government elects to intervene. Rule 9(b)'s standards are meant to test the sufficiency of a complaint at its outset. If a defendant challenges the sufficiency of a complaint's allegations at the outset of a case, a plaintiff still has the opportunity to cure the deficiency. In contrast, section 3730(d) [the FCA's section that provides for relators' shares] only comes into play at the conclusion of a case, after the action has already proceeded to a judgment or settlement. If the government is allowed to contend at the conclusion of a case that a relator's initial allegations were insufficient, even though the government implicitly acknowledged the legal sufficiency of the pleadings by choosing to intervene, the relator no longer has the opportunity to cure the deficiency. We find nothing in the FCA's statutory text to support this type of *post hoc* use of Rule 9(b) to deny a relator the right to a share of the settlement proceeds in an action in which the government intervenes.

In addition, the Eighth Circuit affirmed the district court's holding that the pricing scheme alleged by the relators was the same as that settled by the government, noting that the fact that the claim was more fully developed after the government intervened in the relators' suit was not sufficient to deprive the relators of a share of the government's recovery. The court further noted that the government had not commenced an investigation into the settling defendant's pricing scheme; the government chose to intervene in the relator's suit; there was a temporal connection between the relators' subpoenas and the settling defendant's internal investigation; and the settlement was reached in the relators' action. As a result of these findings, the court reasoned that the relators' *qui tam* suit served its intended purpose, as it provided the government with sufficient information to pursue an investigation into allegedly fraudulent practices. The Eighth Circuit affirmed the district court's award to the relators.

U.S. ex rel. Saidiani v. Next Care, Inc., 2013 WL 431828 (W.D.N.C. Feb. 4, 2013)

Relator 1 filed a *qui tam* suit on behalf of the United States, alleging that a healthcare company and several of its affiliates violated the False Claims Act by billing the federal healthcare programs for unnecessary medical tests. The federal government investigated the relator's claims and began settlement discussions with the defendants. Relator 1 eventually filed an amended complaint to add causes of action under multiple state false claims act statutes. On the same day that Relator 1's amended complaint was filed, Relator 2 filed a *qui tam* complaint against the same defendants, on behalf of the United States and on behalf of several states—including the states represented in Relator 1's suit. The United States, the state attorneys general involved and the defendants entered in settlement talks to resolve the federal and state claims. The two relators participated in those discussions, and after a settlement was reached, the United States intervened in and dismissed Relator 1's suit. Since Relator 1's *qui tam* action was filed first, Relator 1 was awarded a share of the governments' $10 million recovery. In addition, the defendants paid Relator 1's costs and attorneys' fees, pursuant to the statutes' fee-shifting provisions. The United States also intervened in Relator 2's suit for the purpose of dismissing the action, given the settlement. Relator 2 then moved for his attorneys' fees and costs.

The U.S. District Court for the Western District of North Carolina denied Relator 2's request, finding that the federal and state false claims act statutes only allow relators who have obtained a relator's share following a court award or settlement to collect attorneys' fees and costs from a defendant. Since Relator 2 was not awarded a share of the governments' recovery, the court held that he was not entitled to recover his attorneys' fees and costs. Relator 2 argued that he should be entitled to recover his attorneys' fees and costs because he did share in the governments' recovery, as he and Relator 1 reached a separate agreement between themselves to share any proceeds from the litigation—thus, Relator 2 received a percentage of Relator 1's award. The court rejected that argument, which was not supported by caselaw, and held that Relator 2 "is not a successful Relator who has secured a Relator's share through the Settlement Agreements entered into with the federal and state governments. The fact that he may have received a share of the proceeds through a separate private agreement with [Relator 1] does not change this conclusion."

U.S. ex rel. Babalola v. Sharma, 2013 WL 431821 (S.D. Tex. Feb. 1, 2013)

Two relators brought a *qui tam* suit on behalf of the United States and the State of Texas, alleging that two physicians and several healthcare facilities they operated

fraudulently billed Medicare and Medicaid for patient visits and medical services that never occurred, and for medically unnecessary tests. Both relators previously worked for the two physicians. Nine months before the relators filed their suit, the United States obtained an indictment against the two physicians, both of whom pleaded guilty to conspiracy and healthcare fraud charges. The physicians were ordered to pay criminal restitution, but the district court's order was vacated by the circuit court and the matter was remanded for a re-calculation of the restitution amount. The United States declined to intervene in the relator's suit and moved for a summary judgment determination that the relators were not entitled to a share of the physicians' criminal restitution payment, and were restricted to any recovery they might receive in their *qui tam* action. The relators opposed the government's motion, arguing that they were entitled to a share of the criminal restitution payment, pursuant to the False Claims Act's "alternate remedy" provision.

Holding: The U.S. District Court for the Southern District of Texas granted the government's summary judgment motion and held that the relators were not entitled to a share of the criminal restitution payment.

Alternate Remedies

The False Claims Act's "alternate remedy" provision—31 USC § 3730(c)(5)—recognizes the government's ability to "pursue its claim through any alternate remedy available to the Government, including an administrative proceeding to determine a civil money penalty." However, should the government resolve *qui tam* claims through an alternate means, then the relator who filed the *qui tam* case "shall have the same rights in such proceeding as such person would have had" if the *qui tam* action would have continued. The government urged the district court not to address the question of whether criminal actions are "alternate remedies" for purposes of the False Claims Act, arguing that such an analysis was unnecessary. Instead, the government argued that the alternate remedy provision was not implicated in this case, and contended that the government could not have "pursue[d] its claim through any alternate remedy," in lieu of joining the relators' *qui tam* suit, because the *qui tam* complaint was not filed until November 2011 (note that the court's opinion includes a typographical error and incorrectly states that the *qui tam* complaint was filed in 2001, not 2011), well after the physicians were criminally convicted (2010) and ordered to pay restitution (February 2011). The relators countered that criminal proceedings are indeed alternate remedies under the FCA, and further asserted that the alternate remedy provision was triggered in their suit, since their *qui tam* complaint was filed before the government's judgment in the criminal proceeding became final—they argued that the judgment was not final because the proper restitution amount had not yet been determined.

The district court agreed with the relators that the judgment in the physicians' criminal case was not yet final, but held that this was not a determinative factor, since application of the FCA's alternate remedy provision "does not depend on whether a judgment is final but on the sequence of the *qui tam* complaint and the United States'

election to pursue a non-FCA remedy." After analyzing the plain language of the alternate remedy provision, the court concluded that § 3730(c)(5) establishes a "required sequence of actions," which begins with the filing of a *qui tam* suit, followed by the government seeking to pursue its claim through some other means "notwithstanding" the *qui tam* action. Moreover, the court noted that under the alternate remedy provision, relators retain the same rights in alternate proceedings that they would have had if their *qui tam* actions had resolved the claims, and held that the relators had no rights to retain in the criminal proceeding, since they had not yet filed their *qui tam* suit. Thus, the court held that the alternate remedy provision is only triggered when the United States chooses an alternative to joining a *qui tam* suit, stating that "the filing of a valid *qui tam* action is a prerequisite to the operation of the 'alternate remedy' provision." The court stated that while its ruling was in line with decisions from multiple other circuit courts—even though the Fifth Circuit has not yet addressed the issue—the relators did not cite to any caselaw in support of their argument that that relators are entitled to a share of the government's recovery in non-FCA proceedings that occurred before the relators' *qui tam* suits were filed.

As a result of these findings, the court granted the government's motion for summary judgment and ruled that the relators were not entitled to a share of the government's criminal restitution recovery.

U.S. ex rel. Johnson v. Universal Health Servs., Inc., 2012 WL 3847276 (W.D. Va. Sept. 5, 2012)

The United States and the Commonwealth of Virginia intervened in a *qui tam* case filed by three relators alleging Medicaid fraud against a group of healthcare defendants. The governments and the defendants eventually settled the case. Subsequently, a dispute arose between the government and the relators over the proper percentage of the settlement amount to be paid to the relators as their reward. Since the government entities intervened in the relators' suit, pursuant to both the federal False Claims Act and the Virginia Fraud Against Taxpayers Act, the relators were entitled to an award of between 15% and 25% of the settlement proceeds.

The relators contended that they should receive a 24% award, arguing that they provided the government with critical information about the fraud in pre-filing disclosures and in interviews—information the governments would not have had but for the relators. In addition, the relators claimed that they were active participants in the litigation, as they attended nearly all of the depositions and hearings in the case; consistently conferred with counsel for the government; submitted briefs in support of the government; secured the participation of an important expert whose information substantially increased the defendants' potential liability and encouraged them to settle the case more quickly; and agreed to make substantial sacrifices in support of the governments' claim, which included agreeing to reduce their claimed damages with respect to their individual claims against the

defendants in order to facilitate a global settlement and waiving their right to receive their attorneys' fees. The governments countered that a 17% award was warranted, arguing that the relators' information only covered a subset of the fraud, and that the governments' own investigation uncovered additional fraud; that the relators lacked specific information regarding the defendants' Medicaid claims and had no information tying one of the defendants—the defendant that was the primary source of the governments' recovery—to the fraud; that the primary responsibility for conducting discovery fell on the government; and that a 17% award was sufficient to protect Congress' intent to incentivize relators to report frauds against the government.

The U.S. District Court for the Western District of Virginia first noted that the minimum 15% award specified in both FCA statutes is essentially a "finder's fee" to which relators are entitled even if they do nothing more than file a successful *qui tam* suit. Aside from that, the court said, the FCA statutes don't provide much guidance to court regarding the 15% to 25% range for relators' awards. So next, the court looked to the legislative history of the federal FCA for assistance and found that one of the sponsors of the 1986 amendments to the False Claims Act—which first established the 15% to 25% range—stated that "[i]n those cases where the person carefully develops all the facts and supporting documentation necessary to make the case and presents it in a thorough and detailed fashion . . . and where that person continues to play an active and constructive role . . . the Court should award a percentage substantially above 15% and up to 25%." In addition, the court observed three relators' award factors identified by the Senate Judiciary Committee when enacting the 1986 amendments, which the court characterized as: "(1) the significance of the information provided to the government, (2) the contribution of the person who brought the action and the results obtained, and (3) whether the information which formed the basis of the suit was known to the government before the suit was filed." After considering the legislative history, the court held that the relators were entitled to an award above the 15% minimum, since the governments had no knowledge of the fraud before it was exposed by the relators; the information the relators provided was significant and included first-hand information; and the relators suggested using an important expert whose information may have assisted in motivating the defendants to reach a settlement. The court, though, balanced these factors against factors that weighed against a higher award to the relators, including its finding that the relators' personal sacrifices were exaggerated since the relator did receive some satisfaction of their personal claims against the defendant as part of the global settlement; the fact that even though the relators gave up their right to statutory attorneys' fees, their attorneys' "substantial" contingent fee may have been reduced as a counterbalance; and the fact that the relators did not provide any information regarding one of the defendants' involvement in the fraud, which forced the governments to conduct their own extensive investigation into that defendant's misconduct.

In addition, the court noted that the Department of Justice created its internal, non-binding "DOJ Guidelines" which courts have looked to for assistance in determining the appropriate award to relators. These guidelines include 14 factors that weigh in favor of larger awards as well as 11 factors that weigh in favor of reduced awards, and the court determined that the guidelines are well known throughout the FCA community and are apparently consulted by the government and by relators when negotiating relators' awards. The court applied the DOJ Guidelines and determined that the factors ultimately weighed in favor of a higher award. As a result, the court held that the relators were entitled to a 20% share of the governments' recovery, as that amount "adequately recognizes [the relators'] contribution to the government's case, while also appropriately limits their recovery in light of the particular circumstances of this case."

Alderson v. United States, 2012 WL 2913861 (9th Cir. July 18, 2012)

A relator filed a *qui tam* suit, alleging that a hospital management company and several related entities committed Medicare fraud. The United States intervened in the suit and settled the case for $631 million dollars, and the relator received a 16% share of the government's recovery. The relator—who had already given portions of his potential relator's award to various family members through a family partnership he created—and his family members filed income tax returns for the year in which the relator's award was paid and reported the award as ordinary income. They later amended their tax returns and characterized the award as a capital gain, and sought refunds of about $5 million. The Internal Revenue Service denied the refund claims and the taxpayers filed suit against the United States in the U.S. District Court for the Central District of California. The court granted summary judgment in favor of the United States and held that the relator's award was ordinary income. The taxpayers appealed that ruling to the U.S. Court of Appeals for the Ninth Circuit.

Holding: The Ninth Circuit affirmed the district court's ruling that relators' awards under the False Claims Act are ordinary income, for federal income tax purposes.

Relators' Awards

The circuit court noted that the question of "[w]hether a relator's share under the FCA is ordinary income or capital gain is a question of first impression," and that neither party provided any caselaw supporting its characterization of the award for tax purposes. The court looked to the IRS' definition of "capital gain" for guidance, and determined that "[c]apital gains treatment only applies to 'a gain from [a] sale or exchange.'" The appellants argued that the relator sold and exchanged "his documents, information and know-how" for cash, and thus, his award should be treated as a capital gain. The circuit court rejected that argument, and concluded that the

relator did not sell or exchange his information; instead, his right to receive an award was conferred by the FCA, which required him to provide such materials to the government in order to pursue his *qui tam* claims. The court noted that the government almost certainly would have rejected any offer by the relator to sell or exchange his information for a sum of money—and even if the government had agreed to such an arrangement, it could not have done so under the FCA, but could only do so based on some other authority.

The appellate court also held that neither the relator's information, nor his relator's award qualified as a "capital asset," rejecting two additional arguments by the appellants. The court held that the information the relator provided to the government was not his "property"—a requirement for capital asset treatment—because he had no legal right to exclude others from using the information. The court further held that the relator's award was not a capital asset. Although the circuit court recognized that even potential relators' awards can be characterized as "property" for some purposes, it concluded that they do not satisfy the "capital asset" definition, since they are not based on an "underlying investment of capital." The appellants argued that the relator incurred expenses in uncovering the fraud and acquiring confidential documents and information that he provided to the government, but the court noted that "taxpayers routinely incur expenses in the production of ordinary income," and thus, held that the fact that the relator incurred expenses in connection with his *qui tam* case was not dispositive. The court recognized that the relator's award increased in value during the ten-year period between the filing and settlement of his case. However, the court reasoned that this increase was not the sort of accretion that would characterize a capital gain, since the relator was not an investor who bought and held an asset for that ten-year period, but instead worked intensively to increase the likelihood that his suit would succeed.

As a result of these findings, the Ninth Circuit affirmed the district court's ruling that the government was entitled to summary judgment on the appellants' claims, since relators' awards under the FCA are ordinary income for federal tax purposes.

See *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 2012 WL 3263922 (D. Mass. Aug. 7, 2012), at page 287.

L. Settlement Issues

U.S. ex rel. Saidiani v. NextCare, Inc., 2013 WL 1891155 (W.D.N.C. May 6, 2013)

A relator filed a *qui tam* suit against a group of affiliated healthcare companies and the companies' former CEO, alleging that the defendants violated the federal False Claims Act and five state FCAs by billing government healthcare programs for unnecessary tests performed at their facilities. More than a year before the relator filed his suit, a different relator filed a *qui tam* complaint, alleging that the corporate defendants violated the federal False Claims Act by engaging in the same improper billing scheme. This other complaint did not name the individual defendant and did not plead claims under the state FCAs—although it was eventually amended to include claims under four of the same five state FCAs. The federal government and the four state governments investigated the allegations made in the first-filed *qui tam* complaint and eventually reached a settlement with the corporate defendants, resulting in a $10 million payment. While the settlement agreement released the corporate defendants from any further civil liability with respect to the fraud scheme, it specifically noted that since the governments did not intervene in the second-filed complaints claims against the individual defendants, any such claims were reserved and not being released. The individual defendant, though, still moved to dismiss the claims against him. He argued that the corporate defendants agreed that he was legally entitled to indemnification, pursuant to an agreement executed upon his resignation as CEO, and therefore, the settlement agreement bars the second-filed complaint's allegations against him.

The U.S. District Court for the Western District of North Carolina converted the individual defendant's motion to dismiss into a motion for summary judgment, noting that the defendant introduced materials—namely, the prior settlement agreement—outside the scope of the *qui tam* complaint. The court further noted that the present relator raised several issues regarding the purported indemnification, including an argument that indemnification for allegedly fraudulent conduct was prohibited under state law, and that the indemnification agreement was void for lack of consideration. As a result, the court held that a summary judgment finding was inappropriate and denied the individual defendant's motion.

M. Vicarious Liability

See *U.S. ex rel. Daugherty v. Bostwick Labs.*, 2012 6593804 (S.D. Ohio Dec. 18, 2012), at page 6.

See *U.S. ex rel. Klein v. Omeros Corp.*, 2012 WL 4874031 (W.D. Wash. Oct. 15, 2012), at page 138.

Judgments & Settlements

JULY 1, 2012–JUNE 30, 2013

General Electric Aviation Systems (S.D. Ohio June 26, 2013)

General Electric Aviation Systems (GEAS) agreed to pay $6.58 million to resolve allegations of submitting false claims to the government regarding Department of Defense contracts. From June 2005 through February 2008, GEAS was contracted by the U.S. Navy to provide external fuel tanks (EFTs) for F/A-18 strike fighter jets. In 2008, one of those EFTs failed government testing, resulting in an investigation by multiple government agencies. Based on the investigation, the government alleged that GEAS knowingly failed to comply with contract specifications and failed to undertake proper quality control measures while manufacturing EFTs. The settlement also resolves allegations that from June 2010 to June 2011, GEAS falsely claimed it had performed a complete inspection of drag beams for Army UH-60 Blackhawk helicopters. The agreement settles claims brought in a *qui tam* lawsuit by Jeffrey Adler, a former GEAS employee. Adler was represented by TAFEF members James Helmer, Paul Martins, and Erin Campbell of Helmer, Martins, Rice & Popham.

Alfred H. Chan, M.D. (W.D. Wash. June 20, 2013)

A Washington oncologist, Alfred H. Chan, M.D.; his wife and receptionist, Judy Chan; and their children agreed to pay the government $3.1 million to settle allegations that Dr. Chan overbilled Medicare and other government programs. The government contended that Dr. Chan reported more chemotherapy treatments than had actually been provided and falsified patient records to correspond to the false claims. These allegations arose in a *qui tam* lawsuit filed by Ruth Ruckman, a former receptionist at Chan's medical practice. Ruckman claimed that Chan routinely shredded treatment orders and overstated the amount of chemotherapy provided. Ruckman, who will receive $620,000 as her share of the government's recovery, was represented by TAFEF member Michael Hirst of Hirst Law Group, P.C. The settlement also resolves claims that the Chans fraudulently transferred assets to their children before fleeing to Taiwan.

Science Applications International Corp. (D.N.M. June 13, 2013)

Science Applications International Corp. agreed to pay $11.75 million to settle fraud allegations. SAIC received subgrants from the New Mexico Institute of Mining and Technology, which had received federal grants for training first responders on preventing and responding to terrorist attacks. Allegedly, SAIC's proposals indicated higher personnel costs than it intended or used. The settlement resolves a *qui tam* lawsuit filed by Richard Priem, a former SAIC project manager. Priem, who will receive $1.8 million of the government's recovery, was represented by TAFEF members Peter Chatfield and Tim McCormack at Phillips & Cohen LLP.

TesTech, Inc. and CESO (S.D. Ohio June 6, 2013)

Dayton-based TesTech, Inc. and CESO agreed to pay $2,883,947 to settle allegations that the companies and their owners falsely claimed disadvantaged business status on federally-funded transportation projects under the Department of Transportation's Disadvantaged Business Enterprise (DBE) program. Specifically, the lawsuit alleges that TesTech, Inc. claimed DBE status on multiple federal transportation projects even though it was owned and controlled by CESO, a non-DBE firm. The allegations against TesTech, CESO, and their respective owners originated in a *qui tam* lawsuit filed by Ryan Parker, a former TesTech employee who will receive $562,370 from the government's recovery. Parker was represented by TAFEF members Jennifer Verkamp and Frederick Morgan of Morgan Verkamp LLC.

Gary F. Anusavice (Conn. Super. Ct. June 3, 2013)

Gary F. Anusavice and six of his management companies have agreed to pay $9.9 million to settle claims that he violated the Connecticut False Claims Act and Connecticut Unfair Trade Practices Act by conducting an illegal Medicaid billing scheme. Due to a prior conviction for health care fraud, Anusavice was banned from participating in Medicare and state health programs after April 1998. The State of Connecticut alleged that Anusavice violated those terms by opening multiple dental practices and obscuring his management role and ownership interests in the clinics. Anusavice also pled guilty to federal criminal charges stemming from the same fraudulent billing activity.

Dallas County Hospital District d/b/a Parkland Health and Hospital System (N.D. Tex. May 31, 2013)

Parkland Memorial Hospital agreed to pay $1.4 million to settle allegations that the Dallas-based hospital violated the False Claims Act and the Texas Medicaid Fraud Prevention Act. Parkland allegedly allowed the submission of fraudulent claims for physical medicine and rehabilitation consultations to Medicare and Texas Medicaid, including claims for consultations that were not requested and up-coded claims for certain services. The allegations arose in a whistleblower lawsuit brought by Lien Kyri, a former resident at UT Southwestern Medical Center at Dallas, which is affiliated with Parkland. In addition to paying the settlement, Parkland agreed to enter into a five-year corporate integrity agreement that requires the company to report its compliance with billing rules to the Office of the Inspector General.

American Commercial Colleges Inc. (N.D. Tex. May 31, 2013)

American Commercial Colleges Inc. (ACC) has agreed to pay the United States up to $2.5 million to settle a False Claims Act lawsuit alleging that the organization falsely certified its compliance with certain eligibility requirements of federal student aid programs. The federal government alleged that ACC orchestrated short-term private student loans to create the appearance that it had sufficient funding under the 90/10 Rule, which requires for-profit colleges to receive at least 10% of their funding from private sources. ACC then allegedly repaid the short-term loans with federal Title IV funds. ACC has agreed to pay $1 million plus interest, and may be obligated to pay up to an additional $1.5 million. The allegations originated in a *qui tam* lawsuit brought by Shawn Clark and Juan Delgado, former directors of ACC campuses in Odessa and Abilene, Texas. Clark and Delgado will receive $170,000 of the government's recovery, and could receive an additional reward, should ACC become obligated to pay any of the contingent portion of the settlement.

Greater Lawrence Community Action Council (D. Mass. May 24, 2013)

The Greater Lawrence Community Action Center (GLCAC), a Massachusetts-based anti-poverty organization, agreed to pay the United States $80,282 to settle allegations that GLCAC received federal grant money for work that was never done. GLCAC requested funding for a full-time program director and program case manager despite the fact that both individuals held positions at other organizations during GLCAC working hours. GLCAC also filed claims for the indirect costs of employing a full-time facilities manager—although that employee spent one or more afternoons per week golfing during office hours. Additionally, GLCAC submitted claims for the former executive director's salary, even though the director only worked approximately 50 percent of the time claimed. The settlement resolves a *qui tam* lawsuit brought by a former GLCAC employee, Ruth Tarbox, who will receive $11,500 from the government's recovery. Tarbox was represented by TAFEF member Robert Autieri.

Agave BioSystems Inc. (N.D.N.Y. May 22, 2013)

Agave BioSystems Inc., a defense contractor based in Ithaca, NY, agreed to pay $300,000 to resolve allegations that the company and its president, Noe Salazer, sought payment from the United States Department of Defense for labor that was not performed. Salazar allegedly created and submitted time cards to the Department of Defense that falsely claimed that his daughter had worked on government contracts. The government investigation into Agave began with a *qui tam* lawsuit filed by Rafik Tawadrous, a former Agave employee, who will receive $54,000 from the settlement. Tawadrous was represented by TAFEF member David A. Koenigsberg of Menz Bonner Komar & Koenigsberg, LLP.

ISTA Pharmaceuticals Inc. (W.D.N.Y. May 22, 2013)

ISTA Pharmaceuticals has entered into a settlement agreement to resolve allegations that its marketing of Xibrom for non-FDA approved uses caused false claims to be submitted to government health care programs. ISTA also allegedly violated the Anti-Kickbback Statute, resulting in additional false claims. Under the agreement, ISTA will pay approximately $15 million. Medicaid participating states will receive $309,254.84 as their share of the recovery and the federal government will receive the remaining $14,609,746.16. The settlement resolves two *qui tam* lawsuits filed in the Western District of New York. ISTA Pharmaceuticals also pled guilty to conspiracy to introduce a misbranded drug into interstate commerce, and conspiracy to pay illegal remuneration in violation of the Federal Anti-Kickback Statute. ISTA will pay an additional $18.5 million in criminal fines and asset forfeiture.

U.S. Renal Care (D. Md. May 20, 2013)

U.S. Renal Care has agreed to pay $7.3 million to resolve allegations that from January 2004 through May 2011 Dialysis Corporation of America (DCA)—which U.S. Renal Care acquired in June 2010—submitted false claims to the government with respect to its use of the drug Epogen. The United States alleged that DCA facilities submitted claims to Medicare for overfill amounts of the medication that its standard syringes would not have been able to withdraw and administer. The settlement resolves a *qui tam* lawsuit filed by Laura Davis, who will receive $1,314,000 as her share of the recovery. Davis was represented by TAFEF member Stephen Hasegawa of Phillips & Cohen, LLP.

C. R. Bard Inc. (N.D. Ga. May 13, 2013)

C.R. Bard Inc., a New Jersey based corporation, has agreed to pay the United States $48.26 million to resolve allegations of causing false claims to be submitted to Medicare. According to the Department of Justice, Bard provided illegal kickbacks to customers and physicians between 1998 and 2006 to induce them to purchase Bard's brachytherapy seeds, a form of radiation therapy for prostate cancer. Consequently, the government alleged that Bard violated the False Claims Act because bills submitted to Medicare for these seeds were rendered false by the illegal remuneration. Julie Darity, a former Bard manager for brachytherapy contracts administration, filed a *qui tam* lawsuit against the company, alleging these FCA violations on behalf of the United States. Bard was represented by TAFEF members Peter Chatfield and Marlan Wilbanks, as well as Charles E. Cox. She will receive $10,134,600 as her share of the settlement. Bard has also agreed to pay an additional $2.2 million and to take steps to improve its corporate compliance program.

Ranbaxy USA Inc. (D. Md. May 9, 2013)

Ranbaxy USA Inc., a subsidiary of Indian generic pharmaceutical manufacturer Ranbaxy Laboratories Limited, agreed to pay $350 million to the federal government and certain states to settle a False Claims Act *qui tam* lawsuit that contended that Ranbaxy manufactured medications at its Paonta Sahib and Dewas facilities in India that differed from the drugs' specifications and FDA-approved formulation. The suit further alleged that as a result of selling these drugs, Ranbaxy knowingly caused false claims to be submitted to multiple government health care programs between 2003 and 2010. The *qui tam* lawsuit was brought by Dinesh Thakur, a former Ranbaxy executive. Thakur, who was represented by TAFEF member Andy Beato of Stein, Mitchell, Muse & Cipollone, LLP, will receive $48.6 million as his share of the government's recovery. Ranbaxy also pleaded guilty to felony charges relating to the manufacture and distribution of adulterated drugs, and agreed to pay a criminal fine and forfeiture totaling $150 million.

Adventist Health System/West and White Memorial Medical Center (E.D. Cal. May 3, 2013)

Adventist Health System/West, d/b/a Adventist Health, and its affiliated hospital White Memorial Medical Center, have entered into a settlement agreement under which they will pay $14.1 million to the United States and California. The federal government will receive approximately $11.5 million, while California's Department of Health Care Services will receive the remaining $2.6 million. The settlement will resolve allegations that Adventist Health transferred assets at less than fair market value in order to illicitly compensate physicians who referred patients to White Memorial. In exchange, White Memorial, a teaching hospital in Los Angeles, allegedly paid physicians above market value for their teaching services. The allegations arose from a *qui tam* lawsuit filed by two Los Angeles physicians, Hector Luque and Alejandro Gonzalez, who were represented by TAFEF members Erin Havian of Phillips & Cohen, LLP, and Michael Hirst of the Hirst Law Group; the relators will receive $2,839,219 of the recovery.

St. Vincent Healthcare and Holy Rosary Healthcare (April 30, 2013)

Two Montana hospitals, St. Vincent Healthcare and Holy Rosary Healthcare, have agreed to pay $3.95 million to resolve allegations that they provided improper incentive pay to physicians who referred patients, in violation of the Stark Law and the False Claims Act. The hospitals allegedly paid several referring physicians in a manner that illegally accounted for the value or volume of their referrals. The hospitals disclosed these practices to the government after an internal review.

Amgen Inc. (D.S.C. April 16, 2013)

California-based biotechnology company Amgen Inc. will pay $24.9 million to settle allegations that the company paid illegal kickbacks to induce three long-term care pharmacy providers to recommend the use of Amgen's anti-anemia drug Aranesp. These alleged kickbacks included rebates tied to market-share or volume thresholds, as well as grants, honoraria, speaker fees, dinners, and travel. In return for kickbacks, the pharmacies allegedly orchestrated a "therapeutic interchange" program to switch patients from competitors' medications to Aranesp. The government also claimed that Amgen encouraged pharmacists to recommend the drug to patients who did not suffer from anemia associated with chronic renal failure. The settlement will resolve a *qui tam* lawsuit brought under the False Claims Act by Frank Kurnik, a long-time Amgen employee.

Intermountain Health Care Inc. (April 3, 2013)

Intermountain Health Care Inc., which operates Utah's largest health system, agreed to pay $25.5 million to settle allegations that it violated the Stark Statute and the False Claims Act by entering into employment agreements that, among other things, improperly compensated for patient referrals. Intermountain disclosed these practices to the government following a year-long review of its employment contracts and procedures.

Fluor Hanford LLC (E.D. Wash. April 2, 2013)

Fluor Hanford LLC has agreed to pay the federal government $1.1 million dollars to settle allegations that the company used federal funds for lobbying in violation of the Byrd Amendment. From 2005-2009, Fluor Hanford operated the Hazardous Materials Management and Emergency Response (HAMMER) Center under a contract with the Department of Energy. The government alleged that Fluor received reimbursement from DOE for expenses incurred while lobbying federal officials for increased HAMMER Center funding. This settlement resolves a *qui tam* lawsuit brought by Loydene Rambo, a former Fluor employee. Rambo will receive a $200,000 share of the government's recovery.

CDW-Government LLC (S.D. Ill. Mar. 29, 2013)

CDW-Government LLC, a reseller of information technology and office supplies and equipment, agreed to pay the United States $5.66 million to settle allegations that it submitted false claims with respect to a U.S. General Services Administration contract from 1999 to 2011. According to the settlement, CDW sold products to the United States that were manufactured in countries prohibited by the Trade Agreements Act, underreported sales in order to avoid paying a GSA administrative fee, and improperly charged government purchasers for shipping. The settlement resolves a

lawsuit filed by former CDW sales representative John Liotine, who will receive $1.56 million as a whistleblower award. Liotine was represented by TAFEF members Dale Aschemann and Tim Keller of Aschemann Keller, LLC, as well as Jim Helmer, Paul Martins and Robert Rice of Helmer, Martins, Rice & Popham Co., LPA.

California Board of Regents (C.D. Cal. Mar. 27, 2013)

California Board of Regents has agreed to pay the United States $1.2 million to settle allegations that the University of California-Irvine (UCI) performed anesthesia services in a manner inconsistent with federal healthcare program documentation requirements. Allegedly, anesthesia was routinely administered at UCI by Certified Registered Nurse Anesthetists or residents, but without a required supervisory anesthesiologist present or available—in some instances, the supervisor was alleged to have been in a different building during the procedures, and anesthesia records were completed in advance to make it appear as though the supervisor was present. In addition, post-operative evaluations were allegedly routinely performed by unsupervised or unlicensed residents, in violation of federal regulations. The settlement resolved a *qui tam* suit was filed by UCI Professor and Anesthesiologist Dr. Dennis O'Connor, who will receive $120,000 for his role in the proceedings in securing the government's recovery. O'Connor was represented by TAFEF members Louis Cohen, of Louis J. Cohen, PC; Mark Simpson of the Simpson Law Firm, LLC; and Michael Sullivan of Finch McCranie LLP.

Caddell Construction (M.D. Ala. Mar. 25, 2013)

Alabama-based Caddell Construction agreed to pay the United States $1,150,000 to resolve claims that it violated the False Claims Act by falsely reporting to the Army Corps of Engineers that it had hired a Native American-owned company to work on construction projects contracted with the Army Corps between 2003 and 2005. As part of these contracts, Caddell represented that it would hire and mentor Mountain Chief Management Service, a Native American-owned company, under the Department of Defense's Mentor-Protégé and Indian Incentive Programs, which reimburse companies for the time and cost of mentoring disadvantaged businesses. During this time period, Caddell allegedly falsely represented in its invoices and other documents that it was mentoring Mountain Chief, when in reality Mountain Chief was a pass-through entity used by Caddell to claim false payments, while no Mountain Chief employees actually worked on the projects.

Hospice of Arizona L.C., American Hospice Management LLC, and American Hospice Management Holdings LLC (D. Md. Mar. 20, 2013)

Hospice of Arizona L.C., related entity American Hospice Management LLC, and their parent corporation American Hospice Management Holdings LLC agreed to pay the federal government $12 million to resolve allegations that they violated the False Claims Act by submitting false claims to Medicare for ineligible hospice services between September 2002 and December 2010. Allegedly, Hospice of Arizona submitted false Medicare claims for patients who did not need end-of-life care, for whom the hospice company billed at a higher reimbursement rate than was lawful. In addition, Hospice of Arizona and its related entities allegedly pressured staff to find patients eligible for Medicare and discouraged discharging ineligible patients in order to inflate bills to the government. The settlement resolved a lawsuit filed by whistleblower Ellen Momeyer, a former Hospice of Arizona, L.C. employee. Momeyer, who was represented by TAFEF member Andy Stone of Stone Law Firm LLC, will receive a $1.8 million reward.

Techota, LLC (M.D. Ala. Mar. 13, 2013)

Techota, LLC, a home healthcare company, has agreed to pay the United States $150,000 to resolve allegations that it violated the False Claims Act by making false claims for payment to Medicare. Techota allegedly billed Medicare for home health services that were not eligible for reimbursement, not medically reasonable, or not necessary. Under the terms of the settlement, Techota will also enter into a Corporate Integrity Agreement with the Office of Inspector General of the Department of Health and Human Services. The case against Techota was initially filed by whistleblower Veronica McDonald, a former Techota employee who will receive $22,500 as her share of the government's recovery. McDonald was represented by TAFEF member Jim Barger of Frosin and Barger.

American Systems Corporation, Anixter International Inc. and Corning Cable Systems LLC (E.D. Va. Mar. 7, 2013)

American Systems Corporation, Anixter International Inc. and Corning Cable Systems LLC—all CIA contractors—agreed to pay the United States $3 million to settle allegations that they violated the False Claims Act and the Anti-Kickback Act by bidding on a CIA contract that was awarded to American Systems in 2009; American Systems allegedly teamed with Anixter to bid on the contract, while using Corning as a supplier. Allegedly, the three contractors provided meals, entertainment, and gifts to CIA employees in order to influence contract specifications in their favor. The lawsuit against the companies was initiated by a former Anixter sales representative, William Jones, who will receive an $585,000 reward for his role as whistleblower. Jones was represented by TAFEF members Stephen Hasegawa and Colette Matzzie of Phillips & Cohen LLP.

Mohanbhai Ramchandani and Mohan's Custom Tailors (S.D.N.Y. Mar. 5, 2013)

Mohanbhai Ramchandani, a tailor commonly known as "Mohan," of Mohan's Custom Tailors, has agreed to pay $5.5 million in back taxes and penalties to settle allegations that he knowingly failed to pay at least $1.7 million in state and local sales taxes that he nevertheless charged to customers since 2002. In addition, from 2007 to 2009, Mohan allegedly knowingly failed to pay at least $256,000 in state and local personal income taxes as well. The suit was brought by a whistleblower who was represented by TAFEF members Stephen Weiss and Asa Danes of Seeger Weiss, and who will receive a $1.1 million reward. The settlement marks the first time that the New York State False Claims Act has been used to resolve a tax case.

Par Pharmaceutical Companies, Inc. (D.N.J. Mar. 5, 2013)

Par Pharmaceutical Companies, Inc. pled guilty in federal court and agreed to pay $45 million to resolve its criminal and civil liability regarding its promotion of prescription drug Megace ES for uses that were not covered by the federal health care programs nor approved as safe and effective by the Food and Drug Administration. The settlement resolves allegations that Par caused false claims to be submitted to federal healthcare programs by promoting the sale of Megace ES for unapproved uses and improperly targeting sales to elderly nursing home residents with the knowledge that harmful side effects would be increased in an elderly population. Par was fined $18 million and ordered to pay $4.5 million in a criminal forfeiture. The company will also pay $22.5 million to the federal government and various states to resolve its civil liability stemming from false claims act violations. In addition to civil and criminal resolutions, Par will enter into a five-year corporate integrity agreement with the Office of the Inspector General of the Department of Health and Human Services. Michael McKeen and Courtney Combs, former Par sales representatives, were the relators in the *qui tam* suit filed against Par, and they will jointly receive an award of $4.4 million. Combs was represented by TAFEF members Brian Kenney and Tavy Deming of Kenney & McCafferty, LLP.

CH2M Hill Hanford Group Inc. (E.D. Wash. Feb. 28, 2013)

CH2M Hill Hanford Group Inc. has entered into a settlement and non-prosecution agreement with the federal government. Between 1999 and 2008, the company had a contract with the Department of Energy to manage 177 underground storage facilities containing radioactive and hazardous waste, and allegedly allowed hourly employees at the facilities regularly to overstate the hours they worked, which caused the government to overpay on the contract when CH2M management at the facilities submitted claims to the Department of Energy that contained the fraudulently inflated hours. Pursuant to the settlement agreement, the company will pay a total of $18.5 million, commit an additional $500,000 toward accountability systems, consent to a corporate monitor, and continue cooperating with the government's ongoing fraud investigation. The agreement resolves claims initially brought by relator Carl Schroeder, a former employee of CH2M Hill, who was barred from receiving a whistleblower reward because he was criminally convicted as a result of his participation in the fraud.

Fairfax Nursing Center (E.D. Va. Feb. 13, 2013)

Fairfax Nursing Center (FNC), a Virginia-based skilled nursing facility, has agreed to pay $700,000 to resolve allegations that it violated the False Claims Act by submitting false claims to Medicare for non-reimbursable rehabilitation therapy services from January 2007 to December 2010. The company allegedly performed therapy services that were excessive, duplicative, or performed without clear goals or direction in order to capture higher reimbursement rates. The allegations arose from a lawsuit filed by three therapists, Christine Ribik, Nadine Kelly and Stephanie Beauregard, who will collectively receive $122,500 as their share of the government's recovery. The relators were represented by TAFEF member Jim Barger of Frohsin & Barger, LLC.

Steven J. Wasserman (M.D. Fla. Feb. 12, 2013)

Steven J. Wasserman, a dermatologist from Florida, agreed to pay $26.1 million to settle claims that he violated the False Claims Act by accepting illegal kickbacks from Tampa Pathology Laboratory (TPL), and billed Medicare for medically unnecessary services. Starting in 1997, Wasserman allegedly sent biopsy specimens for Medicare patients to TPL for testing, and in exchange, TPL would provide him with a pathology report that made it seem to Medicare that he—not TPL—had performed the work. Wasserman then allegedly billed Medicare for the laboratory's work, and received more than $6 million in Medicare payments until 2005. He also allegedly increased the number of unnecessary skin biopsies and skin surgeries he performed on Medicare patients in order improperly to obtain Medicare reimbursements for them. The False Claims Act suit against Wasserman was filed by whistleblower Alan Freedman, who worked as a pathologist at TPL. Freedman will receive a $4 million reward for his role in reaching the settlement agreement.

St. Luke's-Roosevelt Hospital Center, Continuum Health Partners, Inc. and SLR Psychiatric Associates (S.D.N.Y. Feb. 7, 2013)

St. Luke's-Roosevelt Hospital Center, Continuum Health Partners, Inc., and SLR Psychiatric Associates (collectively, "St. Luke's") agreed to pay the federal government and the State of New York a total of $2.3 million to settle claims that they violated the False Claims Act by improperly billing Medicare and Medicaid for outpatient services at their mental health clinics from 1998 to 2010. During that period, St. Luke's allegedly received reimbursement from Medicare for non-reimbursable costs relating to outpatient psychiatric visits, and improperly billed out-patient psychiatric services to Medicaid. The relator who filed the *qui tam* suit alleging St. Luke's fraud, Lois Dorman, was represented by TAFEF member David Koenigsberg, of Menz Bonner Komar & Koenigsberg LLP.

Catholic Health Initiatives (D. Md. Feb. 7, 2013)

Catholic Health Initiatives, a hospital which has since been sold to the University of Maryland Medical System, has agreed to pay $4.9 million to the federal government and the State of Maryland for overbilling Medicare and Medicaid by keeping patients in the hospital longer than necessary. The alleged overbillings were discovered by a routine audit conducted by the hospital's new ownership, which did not take on the Catholic Health's liabilities when it purchased the hospital in December 2012. Under the terms of the settlement, the federal government will receive $4.75 million and the state of Maryland will be paid $152,406.

Cooper Health System (D.N.J. Jan. 24, 2013)

Cooper Health System has agreed to pay a total of $12.6 million to the United States and the State of New Jersey to settle allegations that it violated the federal False Claims Act and the New Jersey False Claims Act by making improper payments to physicians from October 2004 through December 2010. Cooper was alleged to have recruited outside physicians to serve on the Cooper Heart Institute Advisory Board (CHIAB)—the doctors were paid upwards of $18,000 a year to watch four annual lectures that consisted of pro-Cooper marketing. Allegedly, the payments were designed to induce the physicians to refer patients to Cooper, resulting in violations of federal and state anti-kickback and self-referral laws, and in turn, violations of the false claims act laws. The settlement resolves a *qui tam* suit brought by Nicolas L. DePace, a cardiologist who had been recruited to take part in CHIAB. DePace was represented by TAFEF members Marc Raspanti, Michael Morse, and Pamela Brecht, of Pietragallo Gordon Alfano Bosick & Raspanti, LLP.

Pfizer, Inc. and Endo Pharmaceuticals (W.D. Tex. Jan. 4, 2013)

Pfizer, Inc. and Endo Pharmaceuticals agreed to pay $18.17 million each—a total of $36.34 million—to the State of Texas to settle claims that they defrauded Medicaid by misreporting the price of generic drugs. Under state law, drug manufacturers must file reports with Medicaid that disclose the prices they charge pharmacies or other distributors for their products. Allegedly, Pfizer and Endo Pharmaceuticals improperly reported inflated market prices for their drugs, which caused Medicaid to reimburse pharmacies at vastly inflated rates, thereby unlawfully encouraging pharmacies to purchase Pfizer and Endo products. The alleged improper price reporting was first identified by Ven-A-Care of Florida Keys, Inc., a pharmacy that filed a whistleblower lawsuit against the companies under the Texas Medicaid Fraud Prevention Act. Ven-A-Care of Florida Keys, Inc. was represented by TAFEF member James Breen of the Breen Law Firm.

Victory Pharma (S.D. Cal. Dec. 27, 2012)

Victory Pharma, a specialty pharmaceutical company headquartered in San Diego, executed a deferred prosecution agreement and paid a criminal forfeiture of $1.4 million to resolve allegations of federal Anti-Kickback Statute violations. In addition, the company paid $9,938,310 to resolve False Claims Act allegations, bringing the total payment to $11.4 million. Victory Pharma was alleged to have paid kickbacks to physicians to induce them to write prescriptions—including prescriptions for patients covered by Medicare and other federal health programs—for Victory Pharma drugs Naprelan, Xodol, Fexmid, and Dolgic. The alleged kickbacks included dinners, entertainment tickets, paid vacations, assistance with personal expenses including home payments, and spa outings. Chad Miller, the whistleblower who brought the FCA suit, was a former sales representative for Victory Pharma and will receive $1.7 million for his role in the government's recovery.

Education Holdings 1 (S.D.N.Y. Dec. 20, 2012)

Education Holdings 1, which had been doing business as The Princeton Review until May 2012, has agreed to pay the federal government up to $10 million in damages and penalties under the False Claims Act. While doing business as The Princeton Review, Education Holdings 1 fabricated student attendance records in order to bill the government for tutoring services that were never provided. According to the settlement, from 2002 to 2010, Education Holdings 1 participated in a federally-funded program to provide after-school tutoring to underperforming schools in New York City. During this time, the company was paid a fixed amount per hour for each student tutored. Site managers at these after-school programs falsified entries on student attendance forms and made it appear as if more students had attended the class. The *qui tam* suit was filed by relator Dana Smith, who was represented by TAFEF member Tim McInnis of McInnis Law.

Crown Roofing Services (S.D. Tex. Dec. 21, 2012)

Crown Roofing Services will pay $3 million to settle allegations that it made improper kickback payments to National Aeronautics and Space Administration (NASA) contracting officers in order to secure roofing contracts at NASA's Johnson Space Center in 2005. Specifically, in order to obtain these contracts, Crown Roofing subcontracted part of the work to an engineering firm owned by one of the NASA subcontractors. The whistleblowers, Bobby Garrison and Rudolfo Goana, were ex-employees of Crown Roofing and will jointly receive $540,000 of the government's recovery. Garrison and Goana were represented by TAFEF members Vincent McKnight and Altomease Kennedy of McKnight & Kennedy, LLC.

Sanofi-Aventis US Inc. and Sanofi-Aventis U.S. LLC (D. Mass. Dec. 19, 2012)

Sanofi-Aventis U.S. Inc. and Sanofi-Aventis U.S. LLC, subsidiaries of France-based drug manufacturer Sanofi, have agreed to pay $109 million to settle claims that they violated the False Claims Act by providing kickbacks in the form of free units of the knee-injection drug Hyalgan in order to induce physicians to purchase and prescribe the product instead of a lower-priced competitor drug. The companies also allegedly violated the False Claims Act by knowingly submitting false average sales price reports for Hyalgan that failed to account for free units that had been distributed. These reports were used to set reimbursement rates and allegedly caused government programs to pay inflated amounts for Hyalgan and other drugs. The settlement resolves a lawsuit filed by whistleblower Mark Giddarie, a former Sanofi sales representative. Giddarie will receive a reward of $18.5 million of the government's recovery.

Toyo Ink SC Holdings Co. Ltd. (W.D.N.C. Dec. 19, 2012)

Japan-based Toyo Ink SC Holdings Co. Ltd. agreed to pay the federal government $45 million to resolve allegations that it violated the False Claims Act by falsifying documents presented to the US Customs and Border Protection and by knowingly misrepresenting the country of origin when importing the violet colorant CVP-23 in order to avoid paying applicable import duties. Although the imports originated in China and India—countries that are subject to antidumping and countervailing duties—Toyo Ink falsely represented Mexico and Japan as the countries of origin to avoid paying those duties. The settlement resolves allegations brought in a whistleblower lawsuit filed by John Dickson, the president of a domestic producer of CVP-23. Mr. Dickson will receive more than $7,875,000 as his share of the government's recovery.

Structured Employment Economic Development Corporation (S.D.N.Y. Dec. 19, 2012)

The Structured Employment Economic Development Corporation (SEEDCO) will pay $1.7 million to the federal government for falsely claiming to place 1,400 New York City residents in jobs, while receiving millions of dollars in federal grants. SEEDCO allegedly claimed credit for job placements that never existed and submitted false reports of each placement to New York City. After receiving federal funds for each of the fraudulent job placements, SEEDCO then used its falsified reports to renew its contracts with New York City. As part of the settlement agreement, SEEDCO must implement a compliance plan with the purpose of preventing fraud, a new Code of Conduct, and a Whistleblower Policy. The allegations against the company were brought by whistleblower Bill Harper, who was the former Deputy Director of one of SEEDCO's centers. Harper was represented by TAFEF members Robert Sadowski and Raphael Katz of Diamond McCarthy, LLP.

Amgen (E.D.N.Y. Dec. 19, 2012)

Biotech company Amgen has agreed to pay a combined $618 million to resolve allegations that it submitted false claims to Medicare, Medicaid, and other government insurance programs by promoting the drugs Aranesp, Enbrel, Neulasta for off-label uses and dosages not approved by the FDA. Allegedly, Amgen also offered kickbacks to a variety of individuals to attempt to influence health care providers to choose its products, and engaged in false price reporting for several of its drugs. $587.2 million of the settlement proceeds will go to the United States, while $24.8 million will go to state governments. Former Amgen employee Kassie Westmoreland was the relator in the False Claims Act suit that this settlement resolved. She was represented by TAFEF members Bob Thomas of Thomas & Associates and Suzanne Durrell of the Durrell Law Office. Another whistleblower in the suit, Jill Osiecki, was a former marketing representative for the company. She was represented by TAFEF members Brian Kenney and Tavy Deming of Kenney & McCafferty, P.C.

Pfizer, Inc. (D. Mass. Dec. 12, 2012)

Pfizer, Inc. has agreed to pay the federal government $55 million to resolve claims that its subsidiary, Wyeth, which Pfizer bought in 2009, introduced and promoted the gastroesophegeal reflex disease drug Protonix for unapproved uses from 2000 to 2001. Pfizer has also agreed to pay a total of $49.2 to 33 states to settle allegations that it used deceptive practices in the marketing of two other drugs: Lyrica, a neuropathic pain treatment which Pfizer unlawfully marketed as a treatment for migraines and chronic pain; and Zyvox, an antibiotic.

APTx Vehicle Systems (D. Mass. Dec. 10, 2012)

APTx Vehicle Systems, a British contractor, pled guilty to conspiracy to defraud the United States, and entered into a settlement agreement with the federal government that includes a payment of a $1 million criminal fine and an additional $2 million to settle civil claims that the company submitted documents verifying shipments of 51 vehicles for the Iraqi Police Authority, when in fact none of the vehicles had been built, were in the process of being transported to Iraq, or were even owned by APTx. The False Claims Act suit was filed by whistleblower Ian Rycroft, who had been retained by another contractor in the case to oversee the transport of the vehicles. Rycroft, who will receive $540,000 as his share of the government's recovery, was represented by TAFEF member Victor Kubli of the Grayson Law Center, P.C.

Healthpoint, Ltd. (D. Mass. Dec. 6, 2012)

Healthpoint, Ltd., a subsidiary of DFB Pharmaceuticals, has agreed to pay up to $48 million to settle claims brought in a *qui tam* suit that alleged that the company submitted false claims to Medicare and Medicaid for Xenaderm, a drug created to treat nursing home patients' bed sores, but which had not received FDA approval and thus, was ineligible for reimbursement from either healthcare program. The United States intervened in the whistleblower case and filed its own complaint. Under the terms of the settlement agreement, Healthpoint will pay $28 million to the federal government, plus an additional $20 million if there is a change in ownership in either Healthpoint or DTB Pharmaceuticals in the next three years. The relator in the case, Constance Conrad, was represented by TAFEF members Kenneth Nolan, Marcella Auerbach, and Joseph "Jeb" White of Nolan & Auerbach, P.A.

Metro North Newspapers, Inc. and Mile High Newspapers (D. Colo. Dec. 3, 2012)

Colorado-based Metro North Newspapers, Inc. and Mile High Newspapers agreed to pay $81,400 to the federal government to settle allegations that they violated the False Claims Act by knowingly submitting false information to the United States Postal Service (USPS) in order to obtain reduced mailing rates. Under USPS regulations, publications are only eligible for reduced "periodical rates" if they have at least 50% of their distribution to paid subscribers. The newspapers took advantage of these reduced rates and paid less than first-class mailing rates, even though the majority of their recipients were allegedly unpaid subscribers. These allegations were included in a *qui tam* lawsuit filed by whistleblower Tom Lucas, a former Mile High employee. Lucas was represented by TAFEF members Monica Navarro of Vezina Law, PLC and Mercedes Varasteh Dordeski of Frank Haron Weiner.

Baylor University Medical Center, Baylor Health Care System, and HealthTexas Provider Network (N.D. Tex. Nov. 27, 2012)

Baylor University Medical Center, Baylor Health Care System, and HealthTexas Provider Network have agreed to jointly pay the United States over $900,000 to settle allegations that they submitted false claims to Medicare, TRICARE, and the Federal Employees Health Benefit Program for radiation oncology services from 2006 through 2010. During that time, the companies allegedly double-billed Medicare for a variety of procedures affiliated with radiation treatment plans and billed for high reimbursement oncology services when a less expensive service should have been billed instead. The whistleblowers who brought the *qui tam* lawsuit against the companies, Dr. Brian Berger and Janice Delp, were former employees of Baylor University Medical Center. Berger and Delp were represented by TAFEF members Sarah Frazier, Rachel L. Grier, Stephanie A. Gutheinz, and Joe Androphy, of Berg & Androphy.

Harmony Hospice Care, Inc. (D.S.C. Nov. 20, 2012)

Harmony Hospice Care, Inc. and its chief executive officer Daniel J. Burton have agreed to pay the United States $1.286 million to resolve claims that the company submitted false claims to Medicare for patients who were not eligible for hospice care at its hospice facilities, usually because the patients had been given a terminal prognosis of more than six months. Under the settlement, Burton is individually responsible for $200,000 of the $1.286 million. Harmony Hospice Care and Burton also agreed to enter into a corporate integrity agreement with the Office of Inspector General, Department of Health and Human Services. This settlement resolves a *qui tam* suit that was originally filed by two former Harmony employees, Mona Singletary and Lynda Fulton. These relators will jointly receive a $244,000 share of the government's recovery.

Technological Research and Development Authority of Florida and the Melbourne Airport Authority (S.D. Miss. Nov. 20, 2012)

The Technological Research and Development Authority (TRDA) of Florida agreed to pay $15 million to the federal government to resolve allegations that it violated the False Claims Act in connection with the use of grants from both NASA and the Economic Development Administration (EDA) of the Department of Commerce. TRDA owns and operates facilities meant to help small businesses by providing low-rent office space and development assistance. However, TRDA allegedly used grant funds to construct an office building at the Melbourne Airport for use as its own headquarters, which was outside the scope of the NASA and EDA grants awarded to both TRDA and the Melbourne Airport Authority. The Melbourne Airport Authority has also agreed to pay the United States $4 million to resolve its alleged False Claims Act liability based on the same events.

Five Banks: Countrywide Home Loans, Inc.; PNC Bank; First Tennessee Bank; SunTrust Mortgage; and CitiMortgage (N.D. Ga. Nov. 19, 2012)

A group of five banks agreed to pay the United States a combined $161.7 million to settle allegations that they violated the False Claims Act by illegally charging hidden fees on Veterans Administration-backed refinanced home loans to veterans. Pursuant to the settlement agreement, Countrywide Home Loans, Inc. will pay $45 million, PNC Bank will pay $38 million, First Tennessee Bank will pay $16 million, SunTrust Mortgage will pay $10.2 million, and CitiMortgage will pay $7.5 million. The relators in the case, Victor Bibby and Brian Donnelly, were represented by James E. Butler, Jr. of Butler Wooten & Fryhofer, LLP; TAFEF members Marlan Wilbanks of Wilbanks & Bridges LLP; and a team of TAFEF members from Phillips & Cohen LLP. Mortgage Investors Corporation and Wells Fargo still remain as defendants in the relators' *qui tam* case.

Donald Hallmark, Sr., Donald Hallmark, Jr., and Hallmark Meat Packing Co. (E.D. Cal. Nov. 16, 2012)

Donald Hallmark, Sr. and Donald Hallmark, Jr., two of the owners of the now-defunct Hallmark Meat Packing Co., have agreed to pay the federal government over $300,000 over five years to settle a lawsuit brought by the Humane Society of the United States that alleged fraud against the government. In 2008, the Human Society recorded an undercover video showing Hallmark workers using electric cattle prods, fork lifts, and high-pressure water hoses to move cattle, resulting in a recall of 143 million pounds of beef. Because a third of that beef had gone to United States public schools, the recall cost the government an estimated $150 million, and violated a requirement that school lunch contractors with the federal government treat animals humanely. The Hallmarks also agreed to a symbolic final judgment of $497 million, as their company declared bankruptcy after the 2008 recall.

Freeman Health System (W.D. Mo. Nov. 5, 2012)

Freeman Health System, a Joplin, Missouri healthcare provider and hospital system, agreed to pay the United States $9.3 million to settle allegations that it violated the False Claims Act and the Stark Law by knowingly billing Medicare for services referred by physicians who had a financial relationship with the hospital. Allegedly, Freeman Health System provided incentive pay to 70 different physicians employed at its clinics, based on the revenue generated by the physicians' referrals for specific types of diagnostic testing and other services performed at each clinic. According to the United States, this financial arrangement created an incentive to the physicians to refer patients to the clinics. Freeman Health System stated that a 2009 internal review revealed that the hospital system had inadvertently made errors in the way it structured its physician-compensation agreements and voluntarily disclosed its noncompliance with the law.

Orthofix International NV and Blackstone Medical, Inc. (D. Mass. Nov. 2, 2012)

Orthofix International NV has agreed to pay the government $30 million to settle claims that its subsidiary, Blackstone Medical, Inc., violated the False Claims Act by paying illegal kickbacks, including sham research grants, travel, and entertainment, to spinal surgeons in order to persuade them to use the company's spinal implants and other surgery products. The suit was originally filed by whistleblower Susan Hutcheson, who will receive $8 million as her share of the government's recovery. Hutcheson was represented by TAFEF members Jennifer Vekamp and Rick Morgan of Morgan Verkamp LLC. As part of the settlement, Orthofix also agreed to enter into a corporate integrity agreement with the Office of Inspector General of the Department of Health and Human Services.

Novartis (W.D. Tex. Oct. 30, 2012)

Novartis has agreed to pay a total of $19.9 million to resolve allegations that it violated the federal False Claims Act and the equivalent Texas state law by marketing its topical skin cream product—which had known harmful side effects—for off-label uses. Allegedly, Novartis attempted to induce physicians to prescribe the drug, Elidel, to children under two years of age for purposes that had not been approved by the FDA, which caused the Texas Medicaid program to overpay for Elidel prescriptions. Under the terms of the settlement agreement, the State of Texas will receive $6,638,250. The whistleblower who first brought these FCA claims, Donald Galmines, was represented by TAFEF members Jennifer Verkamp and Rick Morgan of Morgan Verkamp LLC.

Boehringer Ingelheim Pharmaceuticals (D. Md. Oct. 25, 2012)

Boehringer Ingelheim Pharmaceuticals agreed to pay the federal government $95 million to settle allegations that it improperly promoted the stroke-prevention drug, Aggrenox; the chronic pulmonary disease drugs, Atrovent and Combivent; and the hypertension drug, Micardis. Besides promoting these drugs to treat diseases other than those for which the drugs were designed, Boehringer also allegedly promoted the sale of Atrovent and Combivent at doses that exceeded those covered by federal health care programs; knowingly made unsubstantiated claims concerning the drugs' efficacy; and paid kickbacks to healthcare professionals in return for prescribing the drugs. Pursuant to the settlement agreement, the federal government will receive $78,455,048, and state Medicaid programs will receive $16,544,952. Boehringer will also enter into a corporate integrity agreement as part of the settlement. The *qui tam* lawsuit against Boehringer was filed by relator Robert Heiden, who will receive more than $17 million as his reward. Heiden was represented by TAFEF members Colette Matzzie and Peter Chatfield of Phillips & Cohen LLP.

Westchester County Health Corporation (S.D.N.Y. Oct. 24, 2012)

Westchester County Health Corporation, doing business under the name Westchester Medical Center (WMC), will pay the government $7 million in civil damages for violating the False Claims Act. WMC, a large public hospital in New York, allegedly repeatedly and knowingly billed Medicaid for outpatient mental health services from August 2001 until June 2010 without having the supporting documentation required by the Medicaid regulations. The case also concerned claims that WMC did not return millions of dollars it received from the Medicaid program, despite knowing that it had been substantially overpaid for years. As part of the settlement, WMC also agreed to pay the State of New York for its share in providing care to Medicaid recipients. The settlement resolves claims brought in a *qui tam* lawsuit filed by a "John Doe" relator, who was represented by TAFEF member Tim McInnis, of McInnis Law.

Weill Cornell Medical College (S.D.N.Y. Oct. 19, 2012)

Weill Cornell Medical College, at Cornell University, agreed to pay the government $1.6 million to settle claims that the school misused federal funds it received from three National Institutes of Health grants for HIV/AIDS research from 2001 to 2003. According to whistleblower Dr. Daniel Feldman, a former Cornell research fellow, the grants provided that a majority of clinical work would be with HIV-positive persons, but in reality, only 3 of the college's 163 patients were in fact HIV-positive.

RxAmerica, LLC (E.D.N.Y. Oct. 15, 2012)

RxAmerica, LLC, a subsidiary of CVS Caremark Corporation, has agreed to pay $5.25 million to the federal government to settle allegations that it made false claims to the Centers for Medicare and Medicaid (CMS). From January 2007 until December 2008, RxAmerica allegedly made false submissions to CMS regarding the pricing data of certain generic prescription drugs, resulting in the company receiving payments for these drugs at significantly higher prices than it should have received. The whistleblowers who brought the claims against the company, Max and Jan Hauser, will receive a reward of nearly almost $1 million. The Hausers were represented by TAFEF member Chet Rabon of Rabon Law Firm, PLLC.

Lucent Technologies World Services, Inc. (W.D. Wash. Sept. 21, 2012)

Lucent Technologies World Services, Inc. ("Lucent") a subsidiary of global communications provider Alcatel-Lucent, agreed to pay the United States $4.2 million to settle allegations that it violated the False Claims Act by submitting misleading test certifications to the United States Army concerning the design and construction of an emergency communications system in Iraq. Lucent had been awarded a $250 million U.S. Army contract to build the emergency system for Baghdad and 15 other cities in 2004 and allegedly falsely attested that certain testing had been completed in order to secure payment from the United States more quickly. The settlement resolves a 2008 *qui tam* lawsuit filed under the False Claims Act by whistleblower Geoffrey Willson, a former Lucent contract manager, who will receive a $758,000 reward for his role in the proceedings.

Georgia Cancer Specialists, I, PC (N.D. Ga. Sept. 19, 2012)

Georgia Cancer Specialists, I, PC, one of the largest private oncology practices in the United States, agreed to pay $4.1 million to resolve allegations that it repeatedly violated the False Claims Act by knowingly billing Medicare for various services that were not permitted by applicable Medicare rules.

HCA Inc. and Parkridge Medical Center (W.D. Tenn. Sept. 19, 2012)

HCA Inc., one of the largest private hospital chains in the United States, agreed to pay $16.5 million to settle claims of violations of the False Claims Act and several other federal and state laws and regulations in connection with the alleged actions of the Chattanooga-based Parkridge Medical Center—a subsidiary of HCA. The settlement resolves allegations that HCA, Inc. entered into a series of transactions with physician group Diagnostic Associates of Chattanooga in 2007, wherein HCA Inc. provided monetary and financial benefits intended to encourage the physician members of Diagnostic to refer patients to HCA facilities. From 2007 to 2011, HCA Inc. allegedly submitted claims to Medicare, TRICARE, and TennCare/Medicaid for outpatient services arranged by Diagnostic members who had benefitted from the relationship between HCA Inc. and Diagnostic Associates of Chattanooga. The settlement came as a result of a *qui tam* lawsuit filed in 2008 by relator Thomas Bingham, who was represented by TAFEF member Phillip Benson, of the Warren Benson Law Group. Pursuant to the settlement agreement, HCA Inc. will pay $15.69 million to the federal government and $807,000 to Tennessee, while Parkridge Medical Center will enter into a comprehensive five-year corporate integrity agreement with the Office of Inspector General of the U.S. Department of Health and Human Services.

Compass Group USA (N.D.N.Y. Sept. 19, 2012)

Compass Group USA, a food management services provider, agreed to pay the state of New York $18 million to resolve allegations that it overcharged 39 New York state schools and school districts from 2003 to 2010. Allegedly, Compass received numerous discounts from food vendors and suppliers, but did not pass on the savings to New York State's schools as was required by law. In addition to the monetary settlement, Compass agreed to a nutritional code of conduct, requiring that it work to comply with the enhanced nutritional standards of the Healthy, Hunger-Free Kids Act passed by Congress in January 2012.

Pinnacle Medical Solutions (N.D. Ala. Sept. 5, 2012)

Pinnacle Medical Solutions, a Southhaven, Mississippi-based medical equipment company, has agreed to pay close to $1.8 million in order to settle a lawsuit which claimed that the company violated the False Claims Act from September 2006 until May 2009 by submitting false claims to both Medicare and the Federal Employees Health Benefits Program for blood glucose monitoring strips and lancets. The settlement comes as a result of a whistleblower lawsuit filed in 2009 by two former employees of the company. After one of the whistleblowers reported problems to the U.S. Department of Health and Human Services, Pinnacle made a voluntary repayment of $236,204. Under the terms of this settlement agreement, the company will re-pay an additional $1,771,522. And as a condition of the settlement agreement, Pinnacle is also required to enter into a five-year Corporate Integrity Agreement with the Department of Health and Human Services Office of Inspector General. One of the whistleblowers, Wendy Horne, was represented by TAFEF member Jim Barger, of Froshin & Barger, LLC.

New York Downtown Hospital (E.D.N.Y. Sept. 5, 2012)

New York Downtown Hospital agreed to pay $13.4 million to the United States and the State of New York to settle allegations that the company operated a drug and alcohol detoxification clinic that provided medical stabilization to inpatients without the necessary certification required by the New York State Office of Alcoholism and Substance Abuse Services, and engaged in an illegal scheme to pay for the referral of Medicaid and Medicare patients to their facility. These allegations were raised by two whistleblowers—Mathew Gelfand, M.D., who was represented by TAFEF member David A. Koenigsberg of Menz Bonner Komar & Koenigsberg LLP, and Enrico Montaperto—who filed *qui tam* lawsuits under the False Claims Act in 2002 and 2005, respectively. The two whistleblowers will share 18% of the settlement amount as their reward.

Johnson & Johnson (Aug. 30, 2012)

Johnson & Johnson ("J&J") reached an "agreement in principle" with the United States to pay $2.2 billion—which reportedly includes a $400 million criminal fine—to resolve an investigation of Medicaid claims for several J&J drugs. The company allegedly illegally marketed the heart medicine, Natrecor, and the anti-psychotic drug, Invega, and paid illegal kickbacks to pharmacy operator Omnicare, Inc. in order to boost prescriptions for another anti-psychotic drug, Risperdal.

J&J also reached an agreement with 36 States and the District of Columbia to pay $181 million to resolve consumer protection-related claims that its subsidiary, Janssen, improperly advertised Risperdal and Invega for non-approved uses from 1998 through 2004. According to New York Attorney General Eric Schneiderman, this agreement is the largest multi-state consumer protection-based pharmaceutical settlement ever. As part of the agreement, J&J agreed not to make false claims about these drugs or to promote them for off-label uses.

AstraZeneca PLC (D.S.C. Aug. 24, 2012)

AstraZeneca PLC has agreed to pay the state of South Carolina $26 million to settle claims of misleading consumers about the risks associated with Seroquel, an anti-psychotic drug. In addition, in March 2011, AstraZeneca agreed to a $68.5 million settlement with 37 other states, and in 2010, the company reached a $520 million agreement with the United States Department of Justice—all stemming from the off-label marketing of Seroquel. Neither South Carolina nor six other states joined that settlement and continued to pursue their own claims. Since then, six of those states have reached settlement agreements.

Bechtel Jacobs Company LLC (W.D. Ky. Aug. 25, 2012)

The Bechtel Jacobs Company agreed to pay the United States $230,000 to settle claims brought in a *qui tam* complaint alleging that, from 1998 to 2002, the company billed the United States for services in connection with the removal of hazardous wastes that were improperly listed as "nonhazardous;" improperly stored non-radioactive waste at a plant in Paducah, Kentucky and disposed of it at an unnecessarily expensive site for radioactive wastes; and improperly disposed of wastes at a sanitary landfill site. The settlement comes as a result of a *qui tam* action filed by whistleblower Gary S. Vander Boegh, former Lockheed Martin project manager for landfill operations at the Paducah, Kentucky plant.

Los Angeles Doctors Hospital, Inc. (C.D. Cal. Aug. 24, 2012)

Los Angeles Doctors Hospital Inc., a subsidiary of Pacific Health Corp., will pay $16.5 million to settle allegations that from 2004 to 2007 the corporation's facilities improperly recruited and treated homeless people—even if they did not require treatment—in order to defraud the federal and California Medicare and Medi-Cal programs. The hospitals included in the settlement are Los Angeles Metropolitan Medical Center; Newport Specialty Hospital; and Anaheim General Hospital.

SCAN Health Plan, Senior Care Action Network, and Scan Group (C.D. Cal. Aug. 23, 2012)

SCAN Health Plan, Senior Care Action Network, and Scan Group, collectively known as SCAN, will pay $323.67 million to settle allegations that the company violated the False Claims Act by failing to provide contractually-required financial information to the California Department of Health Care Services, thereby impairing the department from revising capitation rates for SCAN. More than $318 million of the settlement will resolve allegations related to the California state Medicaid program, while the remainder will resolve Medicare allegations raised in a 2009 whistleblower lawsuit filed by James M. Swoben, who worked for SCAN from 2004 to 2006. Swoben was represented by TAFEF member William Hanagami of the Hanagami Law Firm.

CareAll Management LLC (M.D. Tenn. Aug. 13, 2012)

CareAll Management LLC, a Tennessee-based home healthcare provider, agreed to pay $9.375 million to the federal government to resolve a lawsuit filed in 2009 alleging that the company violated the False Claims Act by submitting fraudulent reports to Medicare between 1999 and 2001. Allegedly, the reports hid the relationship between home health agencies and the management company—a relationship that would have reduced the Medicare reimbursements for company's management services. The relationship between the company and the home health agencies was improper because the company was owned by James W. Carell, who facilitated his friend Robert Vinning's purchase of the home health agencies as a "sham" owner and then loaned and transferred money back and forth from each company. The scheme allowed Carell to profit greatly, rewarded Vinning for his participation, and cost Medicare millions of dollars.

The Mayo Clinic (D. Minn. Aug. 2, 2012)

The Mayo Clinic has agreed to pay $1.26 million to settle a federal lawsuit which alleged that, over an eight-year period, it falsely billed the federal government for thousands of lab tests that never occurred. The suit will resolve claims that the Mayo Clinic knowingly submitted false claims for an estimated 10,000 pathology tests—costing $100 apiece—from 1999 to 2007. When the allegations first came to light in 2007, the clinic voluntarily repaid $263,000; under the settlement, the clinic will pay an additional $1 million. The allegations were raised 5 years ago by whistleblower David Ketroser, an attorney and physician who discovered billing errors while investigating possible malpractice cases on behalf of several Mayo patients. For his part in assisting the federal government, Ketroser will split $230,000 with the families of three patients who joined him in the suit.

McKesson Corp. (N.D. Cal. July 30, 2012)

McKesson Corp., which paid $190 million to the federal government to settle a False Claims Act case alleging that the company inflated prescription-drug price information to a publisher of drug market pricing, has agreed to pay an additional $151 million to 29 States and the District of Columbia to settle related claims. Allegedly, McKesson deliberately drove up the prices of around 1,400 brand-name drugs from 2001 until 2009, causing prices for many widely-used drugs such as Lipitor or Prozac to rise by as much as 25%. Representing the relators in this case were TAFEF members Eric Jaso of Seeger Weiss LLP, and David Stone and Bob Magnanini of Stone & Magnanini LLP.

District Council 1707, Local 95 Head Start Employees Welfare Fund (S.D.N.Y. July 26, 2012)

District Council 1707, Local 95 Head Start Employees Welfare Fund agreed to pay approximately $5 million to the federal government for allegedly violating the False Claims Act by overcharging a Head Start grantee for insurance premiums. The Employees Welfare Fund administers hospitalization insurance for employees that work for delegate agencies that carry out Head Start programs funded by the New York City Administration for Children's Services (ACS). Prior to 2008, the Employees Welfare Fund allegedly submitted invoices to the ACS for amounts higher than it actually paid the insurance provider, causing ACS to pay the Employee Welfare Fund approximately $3 million more than necessary.

Dartmouth-Hitchcock Clinic (D. Vt. July 24, 2012)

Dartmouth-Hitchcock Clinic has agreed to pay over $550,000 to the federal government to settle claims that it violated the False Claims Act by overbilling both Medicare and Medicaid. The government began an investigation into the fraudulent billing after Dartmouth-Hitchcock self-disclosed that a physician in its neurology department had billed the federal government improperly. After investigating this claim, the U.S. Attorney's Office for the District of Vermont discovered that from 2004 until 2008, five other physicians in the department had engaged in improper billing as well. The federal government received $500,000 from the settlement, while Vermont received $21,789 and New Hampshire received $8,242.

Louis Dreyfus Energy Services (D. Colo. July 3, 2012)

Louis Dreyfus Energy Services, a Connecticut-based energy company, agreed to pay the United States $4,084,000 to settle allegations that it violated the False Claims Act by failing to pay money owed on natural gas that had been acquired from the Department of the Interior. The company's contract with the government discounted the price the company would pay to the government when the natural gas pipeline was constrained and the company could not transport natural gas. The company allegedly claimed the discount on days when the pipeline was not constrained and natural gas could be transported, thereby defrauding the government.

DaVita, Inc. (E.D. Tex. July 3, 2012)

Davita, Inc. agreed to pay the United States $55 million to settle claims of improperly boosting profits by using more Epogen than was medically necessary and then double-billing the government for leftover vials of the drug. These allegations were raised in 2002 in a False Claims Act lawsuit by whistleblower Ivey Woodard, a former employee of a company that makes Epogen. Woodard was represented by TAFEF members Scott Shepherd of Shepherd, Finkelman, Miller & Shah, LLP and David Burkhalter of Burkhalter, Rayson & Associates, P.C.

NextCare Inc. (W.D.N.C. July 3, 2012)

NextCare Inc. has agreed to pay the United States $10 million to resolve federal and state allegations that it submitted false claims for unnecessary testing and inflated billing to Medicare, TRICARE, the Federal Employees Health Benefits Program, and the Medicaid programs of Colorado, Virginia, Texas, North Carolina, and Arizona. The settlement resolves a lawsuit filed under the False Claims Act by former NextCare employee, Lorin Cohen and Antonio Saidiani. Cohen was represented by TAFEF member Chet Rabon of The Rabon Law Firm PLLC, while Saidiani was represented by TAFEF member Daniel Miller of Berger & Montague, P.C.

GlaxoSmithKline Inc. (D. Mass. July 2, 2012)

GlaxoSmithKline Inc. (GSK) agreed to plead guilty to two counts of introducing misbranded drugs into interstate commerce and one count of failing to report safety data to the Food and Drug Administration and to pay $3 billion to resolve criminal and civil liability stemming from its unlawful promotion of prescription drugs Paxil, Wellbutrin and Avandia, and its false price reporting practices. Under the terms of the agreement, GSK will pay a total of $1 billion—consisting of a criminal fine of $956,814,400 and forfeiture of $43,185,600. GSK will pay an additional $2 billion to resolve civil liabilities to the federal government and to the States under False Claims Act laws. According to the Department of Justice, this settlement is the largest healthcare fraud settlement in U.S. history, and the largest penalty ever paid by a drug company. In addition to the civil and criminal resolutions, GSK agreed to a five-year Corporate Integrity Agreement with the Department of Health and Human Services Office of Inspector General. The settlement resolves claims brought in *qui tam* suits by six different whistleblowers—all of whom previously worked for GSK. This group of whistleblowers consisted of Blair Hamrick and Greg Thorpe, who were represented TAFEF members Brian Kenney and Tavi Deming of Kenney & McCafferty; Thomas Gerahty and Matthew Burke, who were represented by TAFEF

Member Erika Kelton of Phillips and Cohen; and Lois Graydon and Michael LaFauci, who were represented by Reuben Guttman of Grant & Einsenhofer, and TAFEF member David Stone of Stone & Magnanini, respectively.