False Claims Act & Qui Tam

Quarterly Review

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

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

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

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TABLE OF CONTENTS

FROM THE EDITOR

"Someone must stand up to those who say, 'Here's the key, there's the Treasury, just take as many of those hard-earned tax dollars as you want.'"

– Ronald Reagan, 40th President of the United States

During this time of year, most of us are preoccupied with income tax. President Ronald Reagan, who signed the 1986 amendments to the False Claims Act—which made the Act more accessible to *qui tam* relators, and thus, more effective for us all—recognized long ago the need to protect our tax dollars from fraud and theft. Since the 1986 False Claims Act amendments were passed, the Act has returned nearly $25 billion dollars to the U.S. Treasury, thanks, in large part, to the efforts of whistleblowers.

However, the False Claims Act explicitly excludes tax fraud, leaving whistleblowers without a strong incentive to report tax fraud. That all changed in December 2006, when the IRS Whistleblower Office was created, marking the first substantive change in the IRS informant program in about 140 years. The IRS Whistleblower Office oversees the new IRS Whistleblower Program, which incentivizes whistleblowers to report significant tax noncompliance to the government, by offering a 15% to 30% share in any unpaid taxes, interest, penalties, and other amounts that the government collects as a result of the whistleblower's efforts. TAF has worked closely with the IRS Whistleblower Office to publicize these new regulations and to create the framework within which the regulations will work best. In fact, this past March, TAF and the IRS Whistleblower Office coordinated TAF's first "IRS Whistleblower Boot Camp"—a one-day event designed to help practitioners better understand how the IRS Whistleblower Program works, so that whistleblowers and their attorneys can bring appropriate information to the government's attention, through the proper channels, and best utilize the IRS's resources to prosecute those who cheat on their taxes. In addition, TAF member Michael A. Sullivan conducted a lengthy and comprehensive interview with Stephen A. Whitlock, Director of the IRS Whistleblower Office, and a transcript of that interview is included in the "Spotlight" section of this issue. I believe you will find the interview just as entertaining and educational as you (hopefully) find every other issue.

Every three months, I try to provide you with the best *False Claims Act & Qui Tam Quarterly Review* possible, but I am always open to suggestions, comments and ideas from you about ways to improve our publication. And of course, should you ever

wish to offer an article for publication in the Quarterly Review, please send me your submission to me by email or snail mail. I can be reached at:

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I look forward to hearing from you, and I hope you receive(d) a tax refund this year!
– Cleveland Lawrence III

ERRATUM:

In Eric M. Fraser, *Reducing Fraud against the Government: Using FOIA Disclosures in Qui Tam Litigation*, 9 False Claims Act & Qui Tam Q. Rev. 159 (2008), footnote 1 should have noted that the article originally appeared in *The University of Chicago Law Review* at 75 U. Chi. L. Rev. 497 (2008). It was reprinted with permission of the *Law Review*.

Recent False Claims Act & *Qui Tam* Decisions

JANUARY 1, 2009–MARCH 31, 2009

FALSE CLAIMS ACT LIABILITY

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

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

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

Heart Station Time as Remuneration

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

Standard of Intent

The defendants also challenged the court's earlier ruling on the requisite standard of intent under the Anti-Kickback Statute's willfulness standard. The government ar-

gued that all authorities support the court's holding and that the issue of intent was a jury question, regardless of the standard ultimately applied. The court agreed and concluded that an interlocutory appeal on the question of intent would only cause unnecessary delay because the requisite standard applied here did not control the outcome of the case.

Objective Reasonableness

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

B. What Constitutes a False Claim

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

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

Falsity

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

Materiality

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

Damages

The defendants then contended that even if the SYP was material to the government's decision to pay, the government did not suffer any damages, as evidenced by an

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

Statute of Limitations

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

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

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

Falsity of Claims

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

Knowledge of the Falsity of Claims

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

Materiality Requirement

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

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

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

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

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

The Court Denied Breathe Easy's Motion for Summary Judgment

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

The court rejected the first three arguments and denied Breathe Easy's motion for summary judgment with respect to the relator's claims under Section 3729(a)(1). The court found that there was ample evidence of false Medicare claims, as the relator produced unsigned Breathe Easy order forms and prescriptions for oximtery testing for over 100 individuals, as well as the corresponding Medicare payments for the unauthorized diagnostic exams. In response, Breathe Easy argued that it received verbal orders from physicians to conduct the diagnostic exams for some of the tests. The court disagreed and found that even if it had received verbal orders, Breathe Easy failed to properly document them under the applicable regulations. Accordingly, the court

found that Breathe Easy failed to comply with Medicare's requirement that a test be specifically ordered in writing. In effect, the court found that there was evidence of specific false claims. In addition, the court determined that there was evidence that Breathe Easy presented false claims to the government, finding that the relator's data from Florida's Medicare carrier was evidence of Medicare payments for unauthorized services. The court also concluded that Breathe Easy knowingly presented false claims, finding that Breathe Easy had reviewed the claims documents before submitting them to Medicare. Finally, the court found that Breathe Easy was liable under Section 3729(a)(2) as well. The court held that since Breathe Easy knew that its claims were contingent upon a written physician's authorization, there was evidence of a false statement linked to Medicare's decision to pay. The court accordingly denied Breathe Easy's motion for summary judgment as to the relator's Sections 3729(a)(1) and (2) claims.

The Court Held That There Was no Conspiracy

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

The Court Found That Lincare Was Not Liable under the FCA

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

Likewise, the court granted summary judgment in Lincare's favor on the Section 3729(a)(2) claim. The court found no evidence that Lincare was trying to defraud the

government or that Lincare made any false statement. Furthermore, even assuming that the order forms were the false statements, the court found the Lincare would not be liable, since Lincare did not create the forms or fraudulently enter any information into the forms. Accordingly, the court granted Lincare's motion for summary judgment.

See U.S. v. Menominee Tribal Enters., 2009 WL 122802 (E.D. Wis. Jan. 16, 2009) at page 32.

JURISDICTIONAL ISSUES

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

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

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

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

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

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

FCA's First-to-File Bar

The Fifth Circuit held that "the applicability of [the first-to-file rule] should be determined under an 'essential facts' or 'material elements' standard," and determined that the question to be decided is "whether Branch's complaint avoids the potential preclusive effect of *Rigsby* because it alleges different details, different geographic locations, and different wrongdoers." The Fifth Circuit recognized that simply pleading additional factual details and geographic locations is not sufficient to overcome the first-to-file bar. As a result, the court determined that Branch Consultants' claims against State Farm were properly dismissed, since the prior, *Rigsby* complaint pled identical facts against that defendant. The Fifth Circuit also affirmed the district court's dismissal of Branch Consultants' claims against Allstate. The circuit court noted that the *Rigsby* complaint raised "only skeletal allegations" against Allstate, and that those allegations may not meet rule 9(b)'s pleading standard, but the court stated that it would not opine on "the as-yet-unpresented question of whether a dismissal for lack of any factual basis or on Rule 9(b) grounds in the *Rigsby* case would then permit a suit by Branch or any other person with knowledge of facts" against Allstate. However, the appeals court held that the district court erred when it dismissed Branch Consultants' claims against the defendants that were not common to both complaints. The Fifth Circuit acknowledged that there might be instances in which allegations in a first-filed

complaint allege an industry-wide fraud and precludes subsequent allegations against previously unnamed defendants. The circuit court, though, determined that the *Rigsby* complaint was too narrow to allege industry-wide fraud, as it "tells us nothing about any parties not named therein." Since the *Rigsby* complaint could only implicate the four defendants it named, and since the Fifth Circuit determined that Branch Consultants' complaint "likely revealed instances of fraud that would have otherwise eluded the government," the court held that Branch Consultants' complaint was not barred by the first-to-file rule, with respect to the claims against the defendants that were not common to the *Rigsby* complaint.

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

See U.S. ex rel. Poteet v. Lenke, 2009 WL 724940 (D. Mass. Mar. 20, 2009) at page 15.

See U.S. ex rel. Poteet v. Medtronic, Inc., 2009 WL 77968 (6th Cir. Jan. 14, 2009) at page 24.

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

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

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

Public Disclosure Bar and the Original Source Exception

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

Failure to State a Claim

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

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

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

Public Disclosure and First-To-File Bar

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

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

After finding that the public disclosure bar applied in this case, the court then determined the original source exception did not apply. The relator did not even argue that she was an original source. Instead, her complaint named another relator, "John Doe," who was described as having independent knowledge of the allegations. The

court held that this anonymous broadside pleading could not form the basis for an original source exception. Hence the court granted the motion to dismiss.

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

Particularity Requirement

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

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

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

The relator appealed to the Tenth Circuit and argued that the public disclosure bar was not triggered, since his present *qui tam* complaint was not "based upon" the publicly disclosed information. He also challenged the district court's holding

that he was not an original source of the information that was publicly disclosed. However, the Tenth Circuit affirmed the district court's ruling, finding that the prior public disclosures put the government on notice of industry-wide fraud, and finding that the relator was not an original source of that information.

Public Disclosure Bar

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

Original Source Exception

The circuit court then addressed whether or not the relator was an original source of the allegations in his complaint. The court first addressed the original source requirement that the relator voluntarily disclose to the government the essential elements or information on which the *qui tam* action is based. The court, referencing its previous holding in *U.S. ex rel King v. Hillcrest Health Ctr., Inc.*, stated that "a relator could not qualify as an original source if he had withheld essential elements of the fraud transaction from his pre-filing disclosure and thus deprived the government of key facts necessary in its efforts to confirm, substantiate or evaluate the fraud allegations." Consequently, the court held that the relator's knowledge as an original source would be limited to the information that he voluntarily provided to the government

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

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

The relator brought a *qui tam* against a number of food service management companies, alleging that the defendants defrauded the government by failing to pass rebates, discounts and credits to various school food authorities under the National School Lunch Program and the School Breakfast Program. The relator also alleged that the defendants did not comply with federal procurement regulations under the same statutes, which resulted in the defendants causing the school food authorities to file claims falsely stating that they were in regulatory compliance. The government declined to intervene in the case. The defendants then moved to dismiss, arguing that the public disclosure bar applied, and that the relator failed to state a claim. The court granted the motion to dismiss, finding that the public disclosure bar applied, since the government had issued reports regarding the alleged fraud prior to the relator's action and finding that the procurement regulations relied on by the relator did not apply to the defendants.

Public Disclosure Bar

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

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

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

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

Failure to State a Claim

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

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

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

Public Disclosure Bar and Its Original Source Exception

The Fourth Circuit determined that the district court did not err when it dismissed the relator's claims, finding that, in the face of the defendants' motion to dismiss, the relator bore the burden of proving that the district court had subject matter juris-

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

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

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

Prevailing Party's Fees

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

Dissenting Opinion

The Fourth Circuit's ruling was not unanimous, however, as one of the circuit court judges dissented, stating that it appeared that the district court conducted a facial, as opposed to factual, review of the defendants' subject matter jurisdiction challenge, and

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

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

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

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

The relator filed a *qui tam* action against two hospital operating companies alleging violations of the FCA, the Stark law, and the Anti-Kickback Statute, as well as retaliatory discharge and state law claims. Specifically, he alleged that the defendants entered into below-market leases with doctors in exchange for referrals to the defendants' hospitals. The government did not intervene. Both defendants moved to dismiss. The United States District Court for the Southern District of Texas granted their motions. Although the court found that the relator's claims

were not barred by a previous public disclosure that did not mention fraud or disclose the material elements of this FCA claim, it ultimately held that the relator failed to allege either a false claim for payment or a false certification with particularity. Finally, the court found that the relator's retaliatory discharge claim was barred by the statute of limitations. The relator voluntarily dismissed the remainder of his claims. The court then granted him leave to amend.

The Public Disclosure Bar Did Not Apply

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

The Relator Failed to Plead His Claims with Particularity

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

The Retaliatory Discharge Claim Was Barred by the Statute of Limitations

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

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

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

The Public Disclosure Provision Barred Relator's FCA Claims

The Sixth Circuit noted that prior to both relators' suits, another former employee of Medtronic filed a wrongful termination (not a *qui tam*) suit against the company, alleging that he was fired from his job for refusing to participate in the kickback scheme alleged in the two *qui tam* suits—the circuit court found that the relator's suit alleged the same basic scheme of fraud as was alleged in the wrongful termination suit. Conse-

quently, the Sixth Circuit determined that this wrongful termination suit was a public disclosure of the alleged fraud and that the complaint was "based upon" the information contained in the wrongful termination complaint. In addition, the circuit court concluded that the relator did not qualify as an "original source" for the allegations contained in her complaint, since she did not share those allegations with the government before filing her FCA case. Thus, the circuit court agreed that the complaint was barred by the public disclosure rule and was properly dismissed.

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

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

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

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

C. Dismissal Issues

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

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

FALSE CLAIMS ACT RETALIATION CLAIMS

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

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

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

The plaintiff brought an action against her former employer—a city—and its officers, alleging retaliation under the FCA and other state law claims. In particular, she alleged that the defendants fired her for reporting, among other things, unpaid federal taxes. The defendants moved to dismiss the retaliation claim for lack of subject matter jurisdiction and failure to state a claim, asserting that the court lacked subject matter jurisdiction over the plaintiff's claims because the plaintiff failed to follow the required *qui tam* procedure, as she had not filed a *qui tam* action. However, the United States District Court for the Northern District of California found that filing of a *qui tam* action is not a pre-requisite for asserting a retaliation claim. The defendants then contended that the plaintiff failed to sufficiently plead the defendants' knowledge of her engagement in protected activity. The court found

that the knowledge element was effectively alleged in the complaint. However, the court found that, although the plaintiff's complaint included an allegation that the defendants knew that she was engaged in protected activity, she failed to reference that allegation in her response to the defendants' motion. The court stated that it was "unsure whether to infer from this omission that Plaintiff overlooked this allegation in her pleading, or that she does not believe that it pertains to her [retaliation] claim." Consequently, the court was forced to hold that the plaintiff failed to sufficiently allege the defendants' knowledge of her engagement in protected activity. Thus, the court dismissed her complaint, but without prejudice.

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

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

Since the court found that the relator failed to amend his complaint before the limitations period had run, the only way his retaliation claim could survive is if it related back to the date his original complaint was filed. However, the court held that the relator's retaliation claim did not meet the relation back standard, since the retaliation claim did not arise from the same conduct, transaction or occurrence as his fraud allegations. The court stated that "[h]is retaliation claim concerns not whether [the defendant] had been committing fraud, but rather whether he complained to [the defendant's] supervisors 'in furtherance of' an FCA action, whether [the defendant] was aware that an FCA action was a reasonable possibility, and whether [the defendant]discharged him because of his complaints." Consequently, the court held that

the limitations period on the relator's retaliation claim had passed, relation back did not apply, and his retaliation claim should be dismissed as time-barred.

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

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

Statute of Limitations

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

Instead, given the wide scope of the FCA's anti-retaliation provision, the court declared that a uniform statute of limitations should apply to all FCA retaliation claims, since a uniform limitations period would result in certainty and would minimize liti-

gation. The court concluded that Pennsylvania's residual statute of limitations for personal injury actions is the most closely analogous statute of limitations because it is broad enough to apply to a wide spectrum of FCA retaliatory discharge claims. After adopting this statute of limitations, the court found that the plaintiff's complaint was within the limitations period.

Failure to State a Claim

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

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

***See U.S. ex rel. Sharp v. E. Okla. Orthopedic Ct.*, 2009 WL 499375 (N.D. Okla. Feb. 27, 2009) at page 39.**

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

***See U.S. ex rel. Howard v. USA Envtl., Inc.*, 2009 WL 113444 (M.D. Fla. Jan. 19, 2009) at page 41.**

COMMON DEFENSES TO FCA ALLEGATIONS

A. Noerr-Pennington Immunity

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

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

B. Not a Condition of Payment

***See U.S. ex rel. Wilson v. Maxxam, Inc.*, 2009 WL 691224 (N.D. Cal. Mar. 10, 2009) at page 31.**

C. Not a "Person"

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

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

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

The Tribe Is Not a Person under the FCA

The court held that the tribe was not a "person" under the FCA. It found that there was no case on point. Instead, it parsed the meaning of two Supreme Court cases, *U.S. ex rel. Chandler v. Cook County, Ill.*, 538 U.S. 119 (2003) (which held that municipalities are persons under the FCA) and *Vermont Agency of Natural Resources v. U.S. ex*

rel. Stevens, 529 U.S. 765 (2000) (which held that states are not persons under the FCA). The court then analyzed whether Indian tribes have more in common with municipalities or with states.

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

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

The Tribal Employees Are Persons under the FCA

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

The Court Denied the Employees' Motion for Summary Judgment

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

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

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

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

The Court Denied the Government's Motion for Summary Judgment

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

D. Government Knowledge Inference

See U.S. v. Menominee Tribal Enters., 2009 WL 122802 (E.D. Wis. Jan. 16, 2009) at page 32.

E. Relator Released Defendant from FCA Claims

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

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

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

Enforceability of Releases

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

discovery, and Lockheed's time and other resources in preparing its summary judgment motion would have been wasted.

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

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

Costs

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

Concurring/Dissenting Opinion

One of the circuit court judges filed a separate opinion, concurring and dissenting. This opinion disagrees with the majority's view that the releases Ritchie signed barred her *qui tam* suit, since all FCA claims ultimately belong to the United States and not

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

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

The relator brought a *qui tam* action against her former employer, an orthopedic center. She alleged that the defendant violated the FCA. She specifically alleged that the defendant (1) altered diagnosis codes after Medicare denied payments and then resubmitted false claims to Medicare; (2) billed existing patients as new patients; (3) upcoded pre-operation visits that lasted less than five minutes; (4) submitted fraudulent claims in conjunction with a clinical study; (5) delivered durable medical equipment to patients without maintaining written records of delivery; (6) failed to disclose the existence of primary payers on Medicare claims and then retained overpayments by Medicare that should have been refunded after the primary payer paid; and (7) waived Medicare co-insurance and/or deductible requirements for certain patients, resulting in (a) claims containing misstated amounts actually charged to the Medicare patient and (b) violations of Medicare's

anti-kickback provisions. She also alleged that after reporting the fraud to her employers, she was terminated, and consequently, her complaint included a claim for retaliatory discharge as well. The government declined to intervene. The defendant moved to dismiss for lack of subject matter jurisdiction, failure to state a claim, and failure to plead fraud with particularity. The United States District Court for the Northern District of Oklahoma granted the motion to dismiss in part. It held that it had subject matter jurisdiction because the relator's allegations were based on information obtained during her employment with the defendant. The court also held that most of the claims were properly pled. However, the court dismissed some of the false certification, anti-kickback, and fraudulent billing claims.

Subject Matter Jurisdiction

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

Failure to State a Claim and Particularity Requirement

The court then addressed the relator's allegations of fraud in light of the defendant's motion to dismiss for failure to state a claim and failure to plead fraud with particularity. In deciding whether fraud had been pled with particularity under Federal Rule of Civil Procedure 9(b), the court relied on the list of factors announced by the Tenth Circuit in *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702 (10th Cir. 2006), which held that a fraud claim must state at least some of the following details: (1) the dates of the false claims, (2) the content and identification numbers of the forms or the bills submitted, (3) the fees charged to the government, (4) the goods and services for which the government was billed, (5) the persons involved in the billing, and (6) the length of time between the alleged fraudulent practices and the submission of the claims based on those practices. The court held that the relator properly pled claims regarding the defendant's alleged alteration of diagnosis codes, alleged upcoding for pre-operation visits, alleged submission of false claims in connection with a clinical study, and alleged failure to disclose primary payers, as each of those claims included specific relevant date, patient identification, claim number, and billing information. The court also allowed the relator to maintain one of her claims alleging fraudulent waiver of co-insurance and deductible requirements for certain patients, including the defendant's employees and their families. The court only allowed the claim that was based on supporting information, but dismissed similar claims regarding thirteen other patients, since no supporting information was pled. In addition, the

court dismissed the relator's claims alleging that the defendant billed existing patients as new patients and delivered durable medical equipment without maintaining proper records, finding that those claims were too general and speculative to be maintained.

Anti-Kickback Claim

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

Retaliation Claim

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

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

The relator brought a *qui tam* action against two related pharmaceutical companies, alleging that the defendants misrepresented the relative potency of Oxycontin, which resulted in overpayments of federal reimbursements. Earlier in the litigation, the court dismissed the relator's complaint, finding that the relator failed to plead fraud with particularity. After giving the relator leave to amend, the court then dismissed the relator's fourth amended complaint, for the same reason. In particular, the court found that the only specific allegations of a fraudulent claim for payment occurred outside the statute of limitations. The court also found that the alleged misrepresentations during a sales call to a VA hospital and a call between the defendant and unnamed state Medicaid officials were insufficient to plead fraud. Accordingly, the court dismissed the action with prejudice.

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

The relator brought a *qui tam* action against a company that contracted with the Army to destroy unexploded weaponry in Iraq. She alleged that the company failed to provide proper personnel safety equipment and then submitted false claims to

the government for payment. She also alleged a claim for retaliatory discharge under the FCA and state law. The government did not intervene. The United States District Court for the Middle District of Florida adopting much of the report and recommendations of the appointed magistrate judge, dismissed the relator's claims, finding that the relator's fraud claims failed to allege that the defendant actually submitted any false claims and finding that the relator's retaliation claim did not allege that she engaged in any protected activity. Although the relator's fraud claims were dismissed with prejudice, the court allowed her to amend her FCA retaliatory discharge claims.

The Relator Failed to Allege Fraud with Particularity

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

The Relator Failed to Allege Retaliatory Discharge

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

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

The relator brought a *qui tam* action against Haliburton and related entities, alleging that the defendants failed to test and provide potable water in Iraq military bases under a government contract. The relator alleged that after being assigned to a military base, he discovered that none of the water in the base was chlorinated. He then allegedly learned that the base's water had never been treated or tested. Moreover, he further alleged that the defendants failed to test and treat water at all U.S. military bases in Iraq as required under their contract. The case was originally brought in the U.S. District court for the Central District of California,

but the defendant then moved to either dismiss or transfer venue. The California district court transferred the case to the United States District Court for the Eastern District of Virginia. After allowing supplemental briefing on the motion to dismiss, the court dismissed the complaint, finding that it did contain the necessary facts to support the allegations of fraud.

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

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

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

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

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

***See U.S. ex rel. Pritsker v. Sodexho, Inc.*, 2009 WL 579380 (E.D. Pa. Mar. 6, 2009) at page 18.**

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

LITIGATION DEVELOPMENTS

A. Calculating Damages and Civil Penalties

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

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

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

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

***See U.S. v. Dolphin Mortg. Corp.*, 2009 WL 153190 (N.D. Ill. Jan. 22, 2009) at page 52.**

B. Costs and Attorney's Fees

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

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

Clearly Frivolous

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

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

Clearly Vexatious

The magistrate judge also found that the plaintiffs' allegations were not clearly vexatious, noting that there was no evidence of a desire for revenge against the defendants because the plaintiffs had no heightened personal stake in the litigation. Second, the magistrate found that the plaintiffs did not deliberately delay the case. Third, the judge

held that even though this case was the third case between the parties, a finding that the case was clearly vexatious would be inappropriate, since each case raised distinct issues. Finally, the judge found that though the claims were inarticulately pled, the basic allegations were consistent throughout the litigation. Hence, the court found that the action was not clearly vexatious and denied the defendants' motion for fees.

***See U.S. ex rel. Ritchie v. Lockheed Martin Corp.*, 2009 WL 565517 (10th Cir. Mar. 6, 2009) at page 35.**

***See U.S. ex rel. Vuyyuru v. Jadhav*, 2009 WL 331967 (4th Cir. Feb. 12, 2009) at page 20.**

C. Government Intervention

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

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

D. *Res Judicata* and Collateral Estoppel

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

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

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

Claim Preclusion

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

In response, the relators argued that since the government assigned its interest to the relators prior to filing of the declaratory action, the government could no longer give away the relators' interest in the matter. The court, however, noted that the government only gave away a partial assignment of the claim and retained the unilateral power to dismiss a *qui tam* action. The court further held that since the government

may be bound by *res judicata* by a relator, it followed that the relationship between the two is close enough so that the government's actions will bind the relator.

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

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

A relator brought the present *qui tam* action against TMI Integrated Services, alleging violations of the False Claims Act in connection with the defendant's conduct as a government subcontractor that sold tools to Lockheed-Martin Company. Six months later, another relator filed a *qui tam* suit against Lockheed, also alleging violations of the FCA. The two cases were consolidated and additional, defendants were added. The government then elected to intervene against TMI, Lockheed, and two individual defendants (Todd Loftis, TMI's President & CEO and Linda Loehr, whom the government asserted was an officer, director, and beneficial owner of TMI). However, the government only alleged common law claims against Loehr, and no FCA claims. The District Court for the Northern District of Texas dismissed the claims against Loehr with prejudice, finding that even if the court had personal jurisdiction over her (a question the court did not address), the government failed to state a claim against her, since it could not demonstrate that the corporate veil should be pierced and since it could not demonstrate that she owed a duty to the government that was breached.

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

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

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

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

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

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

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

As a threshold matter, the court determined that although Tamira's guilty plea was made in a criminal proceeding and involved the same transactions, the defendant in this case was not a "defendant" in the criminal case, under FCA section 3731(d), since

it was not part of the underlying criminal trial. As a result, the court held that the defendant was not collaterally estopped from challenging the government's allegations of fraud.

Tamira's Actions Did Violate the FCA

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

The Defendant Was Vicariously Liable for Tamira's Actions

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

The Damages Award Did Not Violate the Eighth Amendment

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

E. Identifying Federal Government Funds

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

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

Judgments & Settlements

JANUARY 1, 2009–MARCH 31, 2009

Leo Burnett Company, Inc.: *U.S. ex rel. Hamilton & Casey v. Leo Burnett, USA, Inc.* Civil Action No. 04-C-3897 (N.D. Ill. January 6, 2009)

Leo Burnett Company, Inc. (henceforth referred to as LBUSA) will pay the United States $15.5 million to resolve allegations of defrauding the U.S. Army and False Claims Act violations. LBUSA is one of the world's largest advertising agencies with major clients such as Disney, McDonald's, and Nintendo. From June of 2000 through December of 2005, LBUSA held an advertising contract with the United States Army's advertising program and the "Army of One" campaign. Under the contract terms, LBUSA would be directly reimbursed by the U.S. Army for third-party subcontracted services. The civil complaint alleged that LBUSA frequently billed the U.S. Army for work done by third-party subcontractors when it was, in actuality, done by LBUSA—subcontractor charges are distinctly higher than work done by LBUSA. Furthermore, LBUSA allegedly established a scheme improperly titled a "blended rate" by which copywriters were billed to the government at the same hourly rate as executives. Lastly, the complaint asserted that LBUSA conveniently excluded less expensive billing rates from its calculations, resulting in grossly inflated charges to the U.S. Army. In total, the complaint estimated that the inflated charges and overbilling by LBUSA cost the United States Army an additional $20 million. The two realtors, Greg Hamilton and Michele Casey, were both employed as Vice Presidents of LBUSA when they witnessed the allegedly fraudulent activities. Out of the $15.5 million settlement, they will receive $2.79 million as their share. Hamilton and Casey were represented by Michael Behn and Steven Cohen, two members of Taxpayers Against Fraud.

Eli Lilly and Company: *United States ex rel. Rudolf, et al., v. Eli Lilly and Company*, Civil Action No. 03-943 (E.D. Pa.); *United States ex rel. Faltaous v. Eli Lilly and Company*, Civil Action No. 06-2909 (E.D. Pa.); *United States ex rel. Woodward v. Dr. George B. Jerusalem, et al.*, Civil Action No. 06-5526 (E.D. Pa.); and *United States ex rel. Vicente v. Eli Lilly and Company*, Civil Action No. 07-1791 (E.D. Pa. January 15, 2009)

Eli Lilly and Co. has entered into an agreement to pay the United States and a multitude of States roughly $800 million to settle charges of off-label marketing its drug Zyprexa. Additionally, Eli Lilly agreed to pay $515 million in criminal fines and $100 million in forfeited assets, totaling roughly $1.415 billion. The $515 million criminal fine is the highest fine ever paid by an individual corporation in the United States on criminal charges. According to the Food, Drug, and Cosmetic Act (FDCA), any company intending to seek approval of a new drug must identify specific intended uses of the drug in its initial application to the Food and Drug Administration (FDA). During the approval process, the FDA may or may not approve the drug for some or all of the

uses specified in the application. Based on these approvals, pharmaceutical drug companies must limit their marketing of the drug for only those uses explicitly approved by the FDA. Conversely, it is illegal and often a False Claims Act violation, to market the approved pharmaceutical drugs to physicians and other parties for uses other than those approved. The FDA had limited Zyprexa's approved usages to include treating manifestations of psychotic disorders, short term treatment of schizophrenia and acute manic episodes relating to Bipolar I Disorder, and treating schizophrenic after eight weeks of stability. Each of these approved treatments was approved for use with adults. The host of allegations brought in four separate *qui tam* complaints included, but were not limited to: marketing Zyprexa for use treating children, marketing the drug for treatment for the elderly experiencing Alzheimer's and dementia, marketing for dosages higher than approved, and marketing for treatment of anxiety, depression, nausea, and generalized sleep disorder. Additionally, it was alleged that large sums of monetary incentives were paid to physicians for recommending Zyprexa for non-approved uses to their patients in violation of the Anti-Kickback Statute. The four *qui tam* complaints, which were all filed by former Eli Lilly sales representatives, noted egregious disregard for the approved uses of Zyprexa with marketing schemes being implemented with primary-care physicians, pediatricians, and in elderly care facilities—markets that have little or no relation to Zyprexa's approved uses. The federal government will receive $438 million and the states that joined the litigation will share $362 million. The eight relators will receive $78,870,877 as their share of the $800 million settlement sum. Brian Kenney, a longtime Taxpayers Against Fraud member, and his litigation team played a critical role in initiating the allegations against Eli Lilly and ultimately settling the charges.

SouthernCare Incorporated: *U.S. ex rel. Rice v. SouthernCare Inc. et al.; Romeo ex rel. SouthernCare, Inc.* (N.D. Ala. January 15, 2009)

SouthernCare Inc. recently resolved allegations of Medicare/Medicaid fraud and False Claims Act violations by agreeing to pay the United States $24.7 million. This settlement resolves two *qui tam* cases which were originally brought by *qui tam* relators Tonja Rice and Nancy Romeo, two registered nurses who were respectively employed as the Clinical Director and Regional Clinical Coordinator in SouthernCare hospices. SouthernCare Inc. is a regional hospice provider which owns and operates approximately 99 hospices in fifteen states. Hospices provide treatment to patients who choose to focus on lessening the intensity of terminal illness as opposed to curative treatments. Patients who are Medicare beneficiaries are eligible for hospice care, including pain relief, comfort, and spiritual support, among other services, if they are deemed to have a life expectancy of six months or fewer. SouthernCare Inc. hospices allegedly defrauded the government by systematically qualifying patients for hospice care who did not fit within these guidelines. The civil complaint alleged that SouthernCare commonly billed Medicare and Medicaid for hospice patients who were in the process of chemotherapy, which is a curative treatment. The complaint asserted

that evidence of SouthernCare's knowledge of this fraud was demonstrated by the nature of the company's aggressive marketing techniques to patients and its insistence that nurses enroll at least twenty patients per month. Romeo and Rice will receive a cumulative $4.9 million as their share of the settlement sum. SouthernCare Inc. has also entered into a corporate integrity agreement with the Office of Inspector General, Department of Health and Human Services.

Barrday Inc.: (D.DC. January 23, 2009)

Barrday Inc. has agreed to pay the United States in excess of $1 million to resolve claims that it played a role in defectively manufacturing bullet-proof vests that included Zylon material. Zylon bullet-proof vests have been regularly purchased by United States law enforcement agencies at every governmental level. To date, there has been a multitude of cases alleging that these Zylon vests quickly lost their capabilities and particularly so when exposed to heat. Barrday Inc. weaved the Zylon fabric in bullet-proof vests which were then sold to three separate companies that distributed the final product to law enforcement agencies. The civil complaint alleged that Barrday Inc. possessed knowledge of the allegedly flawed composition of these vests in late 2001, but continued to weave the fabric and distribute the vests until 2003. The government currently has three pending lawsuits against companies that played a role in the manufacturing and distribution process of the vests, and four lawsuits against executives from these companies. Additionally, the United States has already recovered $46 million from the body armor industry for allegations relating to the alleged defectiveness of Zylon material. In 2003, Barrday was the first Zylon weaving company to terminate its role and contracts.

AT&T Technical Services Corp.: (S.D. Ind. February 2, 2009)

AT&T Technical Services Corporation (AT&T-TSCO) settled allegations of False Claims Act violations by agreeing to pay the United States a total of $8,266,414.33. AT&T-TSCO held a number of contracts with the Federal Communication Commission's E-Rate program. The E-Rate program was established in 1996 to address communication opportunities and deficiencies in underfunded and needy schools and libraries. Specifically, the Telecommunications Act of 1996 created the E-Rate program to provide funds to these schools and libraries to pay for the connecting and hardware fees required for the institutions to have access to the internet. AT&T-TSCO allegedly defrauded the E-Rate program, a function of the FCC, in a number of ways. It was alleged that AT&T-TSCO submitted claims and obtained funds for services and products that did not fall under the E-Rate program. Additionally, the civil complaint stated that AT&T-TSCO inflated charges to the E-Rate program and participated in illegal bidding practices for E-Rate contracts. The investigation, which is on-going, has been undertaken by the U.S. Attorney's Office for the Southern District of Indiana, the FCC Office of the Inspector General, and the United States Department of Justice, Civil Division.

APL Ltd.: *U.S. ex rel. Brown v. APL, Ltd., NOL Group, et al.* (N.D. Cal. February 13, 2009)

APL Limited and Neptune Orient Lines Limited (referred to collectively as "APL") have agreed to pay the United States government $26.3 million to settle allegations of inflating bills for services provided to the Department of Defense (DOD) and the Surface Distribution Deployment Command (SDDC). The United States and relator Jerry Brown claimed that APL knowingly submitted incorrect and overstated claims to the United States government for services not rendered, relating to a contract APL held with the DOD for shipping cargo to support United States forces in Iraq and Afghanistan. The complaint alleged that the overbilling and double billing were carried out through a variety of methods. APL allegedly billed at rates in excess of what was paid for electricity used in refrigerating goods in transit, billed DOD for services already paid by APL's subcontractor, and billed for services on dates that were incorrect or when goods were in transit already. Furthermore, it was alleged that APL billed the United States for non-reimbursable storage delay charges caused by forces outside of the control of the United States government. Relator Jerry Brown, who was represented by Taxpayers Against Fraud member Paul Scott, filed the initial complaint while employed as a Rate Clerk with APL's Customer Service Center in Denver, Colorado. As his share of the settlement sum, Brown will receive roughly $5.2 million—approximately 19% of the total settlement awarded.

Galichia Medical Group: (D. Kan. March 3, 2009)

Joseph Galichia, a cardiologist based out of Wichita, Kansas, and the Galichia Medical group (collectively "Galichia") have entered into a settlement agreement with the United States to settle allegations of False Claims Act violations and Medicare fraud. The settlement sum totals $1.3 million to be paid to the United States for alleged fraud that occurred between 2001 and 2006. According to the civil complaint, Galichia submitted claims for Medicare reimbursement for services that were not provided to patients, as well as for reimbursement claims that were made without the necessary and proper documentation. The alleged failure to provide documented services and improperly documenting services rendered to Medicare patients allegedly resulted in excessive reimbursements made to Galichia and thus, violations of the False Claims Act. Similar Medicare allegations against Galichia, including allegations of up-coding and double billing, were settled in 2000 for approximately $1.5 million. Consequently, an additional stipulation of the present settlement agreement required Galichia to sign a corporate integrity agreement.

Weill Medical College: *U.S. ex rel. Resnick v. Weill Medical College of Cornell University* Civil Action No. 04-C-3088 (S.D.N.Y. March 5, 2009)

Weill Medical College of Cornell University resolved allegations of grant fraud and False Claims Act violations by agreeing to pay the United States roughly $2.6 million. Weill Medical College, a division of Cornell University, located in New York City, serves as both a degree-granting medical college as well as a medical research institution. The civil complaint alleged that between 1991 and 2007, one of the primary medical researchers of Weill Medical College withheld critical information when applying for a multitude of grants from the National Institute of Health (NIH) and the Pentagon (DOD grants). Specifically, this individual allegedly failed to disclose the degree and number of her other ongoing research grant projects while applying for these NIH and DOD grants. The alleged failure to disclose this information rendered her ineligible for many of the $14 million in grants that she ultimately obtained during this time span. The allegedly improperly obtained grants dealt with the development of new drugs to combat various forms of cancer. The relator in this case, Taryn Resnick, was an administrative assistant in Weill Medical College who initially noticed and exposed the alleged eleven improper grant applications. As part of the settlement agreement, Weill Medical College admitted no wrongdoing. Timothy McInnis, a member of Taxpayers Against Fraud, represented the relator and successfully negotiated the ultimate settlement agreement.

Victory Memorial Hospital: *U.S. ex rel. Lee v. Victory Mem. Hosp.* Civil Action No. 04-C-3234 (E.D.N.Y. March 7, 2009)

Victory Memorial Hospital recently agreed to pay the United States government at least $2.3 million and potentially upwards of $2.8 million to settle allegations of Medicare fraud and False Claims Act violations. Victory Memorial is a private, non-profit hospital located in Brooklyn, New York and regularly provides healthcare to patients qualifying under the Medicare Program. The civil complaint, originally initiated by relator Joseph Lee, claimed that in 1996 and 1997 Victory Memorial Hospital submitted cost reports which understated various revenues or "charges" regarding treatment of Medicare eligible patients. The result was a disproportionately high Medicare reimbursement which stemmed from an incorrectly elevated Cost to Charge Ratio for those two years. The complaint alleged that the overpayments made to Victory Memorial totaled $2.6 million. Lee uncovered the charges during his tenure as Manager of Reimbursement and Budget as well as Controller. The complaint further alleged that Lee reported the cost report understatements to higher level hospital officials but that his information was met with inaction. Furthermore, it was alleged that Empire Medicare Services, Victory Memorial's contracted auditing agency, overlooked these errors. Attorneys Timothy McInnis and Ken Nolan, both of whom are members of Taxpayers Against Fraud, represented the relator and played an instrumental role in reaching the ultimate settlement.

Cornerstone Hospital: *U.S. ex rel. Dick & Bragg v. Cornerstone Health Mgmt Co. et al.* (S.D. W. Va. March 11, 2009)

Cornerstone Hospital, located in Huntington, West Virginia, has resolved False Claims Act allegations that it knowingly submitted fraudulent, inflated claims to the federal government for services not rendered or rendered at a lower cost than claimed. Jesse Dick Jr. and Tamela Bragg, the two relators in the case, were both employed with Cornerstone Hospital and allegedly witnessed improper Medicare billing practices on a routine basis during each of their respective employment tenures with the hospital. Dick supposedly witnessed frequent billing without doctors' orders and the absence of action by nurses after being given a doctor's order, in an effort to improperly recover Medicare funds. Bragg allegedly witnessed similar types of fraud, which included inflated billing, and claims made for unnecessary laboratory tests and durable medical equipment. Both relators purportedly reported their concerns to higher level officials in Cornerstone but received either indifferent responses to the alleged fraud or overt orders to continue the fraudulent practices. To settle these allegations, Cornerstone has agreed to pay the United States a sum of $690,000 while not admitting any liability for the allegations put forth in the civil complaint. Bragg and Dick will receive $138,000, which is 20% of the total settlement sum.

San Mateo County Medical Center: *U.S. and the State of California ex rel. Davis v. San Mateo County Med. Ctr.* (N.D. Cal. March 12, 2009)

San Mateo County Medical Center and San Mateo County recently agreed to pay the United States government and the State of California a settlement sum of $6,800,000 to resolve allegations that they submitted false claims and the omitted valid claims, in violation of the False Claims Act. San Mateo County, located in the Northern District of California, manages and owns the San Mateo County Medical Center (SMMC), a regional medical center. The SMMC is comprised of a public hospital, mental health center, and a mental disease treatment facility. The civil complaint, filed in August of 2006 by relator Ronald Davis, alleged that SMMC knowingly engaged in two primary methods of fraud at the expense of the federal government and the State of California. SMMC receives yearly Disproportionate Share Hospital (DSH) payments, based in part on the available bed count within the medical center. Davis, a compliance officer with SMMC from 2000 until 2005, alleged that SMMC improperly inflated the bed count in order to receive a higher rate of payment for their DSH. Additionally, he alleged that SMMC purposefully neglected to report certain mental health services to the California State Department of Mental Health, which resulted in the federal government paying for ineligible services. As part of the settlement, SMMC and San Mateo County agreed to sign corporate integrity agreements, in an effort to ensure future compliance with federal law and Medicare reimbursement provisions.

Diabetes Treatment Center of America: *U.S. ex rel. Pogue v. Diabetes Treatment Ctrs of America, et al.* (D.DC. March 25, 2009)

Diabetes Treatment Centers of America, a subsidiary of Healthways Inc. (collectively referred to as "DTCA"), recently settled claims of False Claims Act, Anti-Kickback Statute, and Stark Law violations totaling $40 million. This sum includes a $28 million total to settle the claims themselves, as well as approximately $12 million for attorneys' fees and related expenses. The allegations stemmed from purported kickbacks paid to physicians referring patients to various DTCA centers within hospitals from roughly 1984 until 1996. DTCA held contracts with approximately 120 hospitals to house diabetes treatment centers that were overseen by at least one, and frequently, multiple medical directors. The medical directors served simultaneously as physicians. The complaint alleged that these medical directors were provided with monetary incentives by DTCA to refer their regular patients to the DTCA treatment centers. The alleged kickbacks and submissions of false claims took place from 1984 until 1996 and violated Medicare and Medicaid provisions. The complaint was originally filed in the Eastern District of Tennessee in 1994, and included eight defendants in total. After roughly fourteen years of litigation, the case was due to go to trial, but the settlement agreement was reached. Only one of the defendants—DTCA—was included in the settlement. A multitude of Taxpayer Against Fraud members played roles in the litigation and ultimate settlement including Jim Helmer, Paul Martins, Jennifer Verkamp, Rick Morgan, Jamie Moncus, and Robert Rice. The relator, A. Scott Pogue, will receive $8.12 million as his share of the settlement.

Sikorsky Aircraft Company: (D. Conn. March 25, 2009)

Sikorsky Aircraft Company recently entered into a settlement agreement with the United States, stipulating that it would pay approximately $2.9 million to settle allegations of fraud and False Claims Act violations. Sikorsky, a subsidiary of United Technologies Corporation based in Stratford, Connecticut, held a contract with the United States Army for the manufacture of Black Hawk helicopters. Additionally, Sikorsky held various other contracts with the other military branches for Black Hawk helicopters or helicopters with similar features. Sikorsky, according to the contract terms, was to install armored plates in two separate locations on each helicopter that it manufactured. These plates were to undergo specific ballistic tests to ensure their maintenance and the pilots' safety during combat. The civil complaint alleged that Sikorsky installed these armor plates without the required ballistic tests, breaking the contract terms and endangering members of the United States military engaged in combat. The plates were purchased by Sikorsky from Ceradyne Corporation, supposedly without the necessary tests. The alleged fraud occurred for fifteen years, between 1991 and 2006. The coordinated investigation effort was carried out by the Army Criminal Investigative Division, the Defense Contract Management Agency, the Defense Contract Audit Agency, and the U.S. Attorney's Office for the District of Connecticut.

The Methodist Hospital (S.D. Tex. March 26, 2009)

The Methodist Hospital, located in Houston, TX, recently settled allegations of Medicare fraud, by agreeing to pay the federal government a $9.9 million settlement. The False Claims Act violations were alleged to have taken place between January 2001 and August 2003 and involved alleged inflated billing by improperly claiming outlier payments. When Medicare beneficiary treatment and care costs are unusually high, the typical Medicare reimbursement to the care provider can be supplemented by outlier payments. This category of payments was established to ensure that care providers would treat still Medicare patients with exorbitantly high care costs. The complaint alleged that Methodist Hospital knowingly and erroneously elevated charges for Medicare patients, often for services that were not rendered, resulting in higher reimbursement rates from the federal government. The Methodist Hospital admitted no liability when entering into the settlement agreement. The joint investigation was undertaken by the Department of Health and Human Services, Office of Inspector General and Office of Counsel to the Inspector General as well as the Centers for Medicare and Medicaid Services, the Justice Department's Commercial Litigation Branch in the Civil Division, and the U.S. Attorney's Office for the Southern District of Texas, Affirmative Civil Enforcement Unit.

Legal Analysis

How Best to Get Paid After a Successful *Qui Tam* Case

A Survey of Recent Case Law Involving Attorney Fees Awards in False Claims Act Cases
OR

HOW BEST TO GET PAID AFTER A SUCCESSFUL *QUI TAM* CASE

By Marc S. Raspanti, Esquire[1] *and Martha S. Helmreich, Esquire*[2]

GENERAL PARAMETERS OF A *QUI TAM* FEE REQUEST

Like many other federal statutes providing for private rights of action, the False Claims Act ("FCA") provides for recovery of attorneys' fees and costs by successful relators. Under limited circumstances, it even provides for recovery by successful defendants, if they can prove the underlying action was "clearly frivolous, clearly vexatious or, brought primarily for purposes of harassment." 31 U.S.C. § 3730(d)(1)(2)(4).[3] This article, however, will focus on how successful relators' counsel can get paid after they have resolved a *qui tam* action. To do so, they must show that the requested fees are "reasonable" and also that they, whether acting alone or with the government, achieved some relief on the merits by way of a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 31 U.S.C. § 3730(d)(1)(2); *Sole v. Florida Department of Environmental Protection*, 551 U.S. 74, 127 S. Ct. 2188, 2194 (2007). Under the false claims act, fee awards to successful relators are mandatory, not discretionary. 31 U.S.C. § 3730(d)(1)(2).

The Traditional Lodestar Method

The predominant method of calculating fee awards in FCA cases, as in other fee-shifting cases, is through use of the "lodestar," which in essence is the product of rates times hours. Although the lodestar amount is "presumptively reasonable," *see Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 555, 106 S. Ct. 3088 (1986), courts differ in the scrutiny they will give to the petitioners' rates and

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3. False Claims Act whistleblowers are also able to recover attorneys' fees and costs as part of their damages under § 3730(h).

hours as submitted, as well as what rates and hours are allowable in a particular jurisdiction. Therefore, before undertaking representation in a *qui tam* case, counsel are encouraged to become familiar with the law of the circuit in which the case is brought. Questions as to what hours and rates are "reasonable" as well as to what adjustments in the lodestar are appropriate in the circumstances of a particular case are the primary engenderers of fee litigation in *qui tam* cases.[4]

With respect to the issue of allowable rates, courts refer to "market rates" or the "rates prevailing in the community." The question then becomes "what market" or "what community" should be considered. Alternatives can be the community or market where the case is brought, the community or market in which counsel generally practices, the market for *qui tam* or FCA litigation, in particular, or the market for complex civil litigation, or just civil litigation in general.[5] Related to the "what market" issue is the issue of whether and when counsel's regular billing rates or the rates at which he or she billed the client constitute the rates to be used. Should an appropriate rate be determined through use of a generally applicable matrix or grid, as occurs often in the D.C. Circuit, or through an extensive survey of prevailing rates in the "community" or through the more informal use of affidavits from fellow practitioners? Most courts will also include in the lodestar a factor to compensate counsel for delay in payment, whether by use of current rates or through the award of interest, assuming the fees would normally be paid as billed, added to a lodestar calculated on the basis of historic rates.

When it comes to the issue of compensable hours or time, the submission of detailed, contemporaneous time or billing records is a must—absent some very cogent reason as to why these were not kept. Most courts do not view "block billing" with favor, but some are much more resistant to this practice than others. Most of the time the judge that hears the fee petition is the judge that was assigned to the underlying fraud case, so he or she will have his or her own view as to whether the hours submitted are "reasonable," helpful or excessive. *See Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933 (1983). Counsel should expect close scrutiny by the court, or in the first instance their adversary. Careful review will always be given to potential duplication of legal effort, the practice of having senior partners do the work of junior associates, the spending of time on related litigation that does not advance the *qui tam* case or on matters personal to the relator and not the case.

Since time spent by a relator preparing and litigating a fee petition is generally compensable, it pays to take special care in the presentation of the petition and supporting evidentiary materials. However, most courts also decry the prospect of litigation over fees becoming as time-consuming and complex as the underlying case. Counsel are therefore generally well-advised to prune out questionable aspects of a fee

4. A relator seeking fees has the initial burden of proof as to the reasonableness of the hours and rates claimed. Thereafter the burden of challenging the fee request shifts to the challenging defendant.

5. *See, e.g., United States ex rel. Poulton v. Anesthesia Assocs. of Burlington, Inc.*, 87 F.Supp.2d 351, 356-57 (D. Vt. 2000) (holding that under Second Circuit precedent, absent extraordinary circumstances, "prevailing community" for purposes of setting the lodestar is the district where the court sits, even where out-of-state counsel involved).

request before the initial submission is submitted to defense counsel, and, if no resolution is reached, to the court.

II. RECENT FEE DECISIONS

A. The 2008 Mega-Fee Case

Perhaps the "largest" *qui tam* fee case in 2008, both in length of the opinion and size of the award, was *Miller v. Holzmann*, 575 F.Supp.2d 2 (D. D.C. 2008) (Lamberth, J.). The underlying suit involved an alleged conspiracy in the awarding of and fees charged for public works contracts in Egypt, which were funded by the United States. Total liability, after a jury trial, was fixed at $90,438,087.66, which included trebled damages and civil penalties, although not all the defendants were found equally liable, and some settled before trial. *See Miller v. Holzmann*, 563 F.Supp.2d 54, 73-74, 144 (D. D.C. 2008). The relator had filed his original complaint in 1993; the case was unsealed in 2001 but pre-trial proceedings apparently did not get underway until late 2005. *Miller*, 563 F.Supp.2d at 74, note 1.

Surprisingly, Miller's counsel throughout was a traditional, well-regarded, "white shoe" powerhouse defense firm, Wilmer Cutler Pickering Hall & Dorr, LLP ("Wilmer, Cutler"). As a "prevailing party" Miller originally sought $9,945,765.25 in fees and $511,723.06 in costs and expenses, plus a 100% enhancement of his fees for "exceptional quality of representation." *Miller*, 575 F.Supp.2d at 4. The ultimate award was $7,245,169.07 in fees and $287,025.52 in expenses. 575 F.Supp.2d at 59.[6] This was approximately 73% of the requested base fees—without enhancements—and 53% of the requested base costs. *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 2009 U. S. Dist. LEXIS 14927, *5 (D. D.C. 2009).

1. The Court Endorses Use of Counsels' "Standard" "Mega-Firm" Billing Rates

Judge Lamberth's reasoning is set out in a fascinating 58-page opinion, plus appendices, which addresses various components of the lodestar. With respect to a "reasonable rate", the court noted that in the D. C. Circuit, an attorney's usual billing rate is "presumptively the reasonable rate," providing it is in line with prevailing rates in the community for attorneys of comparable skill, experience and reputation. The court rejected defendants' contention that rates charged by relators' counsel in other *qui tam* litigation constituted a benchmark against which Wilmer Hale's rates should be measured. The court also rejected the argument that Wilmer Hale had little prior experience with *qui tam* litigation[7] and charged, according to defendants, "mega-law firm rates." The court

6. The court refused to find liability for fees on the part of a defendant where the court had dismissed the relator's claims against him as time-barred even though the government prevailed on its claim against the same defendant.

7. Defendants contended that the appropriate rates should be those charged by highly regarded Helmer, Martins, Rice & Popham, a Cincinnati firm with extensive *qui tam* experience. Their rates, according to defendants, also conformed to

held that Wilmer Hale's rates reflected "counsel's 'mega-law firm' quality representation." The court used Wilmer Hale's current billing rates to compensate for delay in payment rather than historical rates, plus interest, as defendants argued.

2. The Court Deletes Hours Unrelated to *Qui Tam* Case

With respect to the hours includable in the lodestar, Judge Lamberth deleted hours spent on some tasks which he found did not advance the successful resolution of the false claims case, including time related to Miller's on-going employment at one of the corporate defendants; time spent pursuing Miller's relator's share (citing to a 6th Cir. case, *United States ex rel. Taxpayers Against Fraud v. GE*, 41 F.3d 1032 (6th Cir. 1994)); and time spent on "purely" clerical work—with an across-the-board discount of 0.5% for attorney time and 5% for paralegal time to account for such tasks—following D. C. Circuit precedent.[8] However, Judge Lamberth did allow most of the hours Miller's counsel spent in connection with a criminal antitrust case against one of the defendants while the civil case was pending and hours spent on determining how to protect documents covered by the attorney-client privilege, which had been disclosed to the government. The court also allowed time spent on obtaining attorneys' fees from settling co-defendants, on the theory that fee liability under the FCA is joint and several; time spent on settlement efforts; travel time, but at one-half counsel's "standard billing" rate; as well as time spent on non-prevailing claims because the claims were not "truly fractionable."

3. Counsel Chastised for Time-Keeping Practices

If Judge Lamberth's opinion had stopped at this juncture, any reader would assume that relator's counsel would receive most of the fees they sought. But it is in the next part of Judge Lamberth's opinion, labeled "Broader Defects", that the major carve-outs occur, accompanied by decidedly caustic judicial language. These carve-outs are based on what the court finds to be "vague descriptions" of work done, which it otherwise characterizes as "counsel's impenetrable narratives", and the related use of block billing, which, in the court's view, significantly hinders judicial review. For each of these defects the court made a separate 10% across-the-board reduction in the tentative lodestar, again citing to D. C. Circuit precedent. It made another across-the-board reduction of 5% for "inefficiencies", primarily in the form of too many lawyers working on certain tasks.[9]

The court's final lodestar calculations, after these reductions, was $6,874,509.79 for Wilmer Hale and $370,059.28 for Wiley Rein, which initially represented rela-

those in the *Laffey (v. Northwest Airlines*, 746 F. 2d 4 (D. C. Cir. 1984)) matrix, often relied on on in *Miller* to supply the rates for a second firm which also represented the relator, from 1995 to 1999.

8. The court noted that a different conclusion with respect to such deductions was reached by the district court in *United States ex rel. LeFan v. Gen. Elec. Co.*, 2008 U. S. Dist. LEXIS 3020 (W.D. Ky. 2008), a case discussed below.

9. The court did not make some cuts urged by defendants' counsel. It refused to cut some of the hours spent by relator's counsel after the government intervened, holding that much of the work objected to was authorized by the court or the government.

tor Miller. The court refused to enhance this amount by any adjustments potentially sanctioned under the Supreme Court's fee-shifting jurisprudence, finding that the case was not the "exceedingly rare" case counsel must have believed it to be to justify an "eye-watering request" of *double* the lodestar amount.[10] Neither the fact that the jury handed down a $34.4 million verdict, "one of the three largest jury verdicts in the almost 200 year history of the FCA", according to counsel—which was about half the amount sought—nor the alleged existence of certain "unaccounted-for efficiencies", nor any "quality of representation" arguments, nor one based on the FCA's "statutory purpose" carried any weight with the court.

The court's total award of fees and expenses[11] was $7,532,194.59, compared to an initial demand of $10,457,488.31 in fees and expenses, enhanced to $20,403,253.56. Although the court made significant cuts in relator's fee request, the cuts were not as great as those made by the D. C. Circuit in *Role Models America v. Brownlee*, 353 F.3d 962 (D. C. Cir. 2004), a case cited by Judge Lamberth, where plaintiff sought fees under the Equal Access to Justice Act for successfully bringing an appeal to obtain a permanent injunction against the Army. In *Role Models*, the circuit court made an across-the-board reduction of 50% in the hours requested on the grounds of inadequate documentation, including the use of block billing, failure to justify the number of hours, and inconsistencies, and also reduced expenses it found were improperly billed.

4. The Fees-on-Fees Follow-Up Request in Miller

In a February 2009 fee decision, not the last according to the court, Judge Lamberth considered, and granted in part, Miller's supplemental motion for attorneys' fees, which included fees for work on post-trial motions and on the original fee petition. *Bill Harbert Int'l Constr., Inc.*, 2009 U. S. Dist. LEXIS, 14927, 2009 WL 481644. In this petition, counsel sought a total of $478,198.50 in fees and $30,194.06 in costs and expenses for post-trial merits work and $636,537.92 in fees and $119,105.84 in costs and expenses in conjunction with their initial fee request. The total award requested was $1,264,036.32; the total amount awarded was $732,678.74.

Judge Lamberth made reductions to Wilmer Hale's supplemental fee requests on many of the same grounds as he reduced their initial fee request, and again applied a percentage reduction approach to achieve most of these cuts. He used the rates charged by Wilmer Hale in each of 2007 and 2008, the years covered by the petition,[12]

10. On April 6, 2009, the Supreme Court granted a petition for certiorari in *Perdue v. Kenny A.* (No. 08-970) on the question of whether "a reasonable attorney's fee award under a federal fee-shifting statute [can] ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation." According to the petition for certiorari, the Eleventh Circuit's decision in *Kenny A.* (532 F.3d 1209, *reh. den.* 547 F.3d 1319 (11th Cir. 2008)), affirming the award of an enhanced fee, conflicted with Supreme Court decisions regarding the application of fee-shifting statutes and reflected disagreement among the courts of appeals as to how the Court's decisions should be interpreted.

11. The court applied a 40% across-the-board reduction to relator's claimed expenses on the ground of vagueness, as well as eliminating other, non-compensable charges.

12. Notably, these rates, for 2008, included $695 and $700 an hour for partners and $250 and $215 an hour for paralegals.

rejecting relator's request to use 2008 rates throughout "as a means of approximating the value of the historic rates they had been paid when the services were actually rendered," based on his findings that there was no "substantial delay" in payment and that counsels' rates increased by a factor greater than inflation or the "'time value of money.'" For merits-related work, hours were reduced by 10% for vague time entries, 10% for block billing and 5%/0.5% respectively for "clerical work" done by paralegals and by attorneys. Commenting that relators' counsel were charging over $4,000 per page for merits briefs, and finding inefficiencies in staffing as well as work on issues that were never addressed, Judge Lamberth made a further across-the-board reduction in hours of 5% for post-trial motions work.

Turning to fee-related work, Judge Lamberth voiced his agreement with the defendants "that fee petitions in FCA cases are routine, not novel, and the law regarding permissible recovery is well-established: 1,326 hours for preparing the fee petition in this case is *per se* unreasonable." 2009 U. S. Dist. LEXIS 14927, *26. He found the use of senior attorneys to prepare the fee petition "disproportionate and excessive," commenting that "[t]he Court is wary of allowing this case to become a cash cow for the relator's attorneys," with defendant ultimately footing the bill. Reductions were also warranted because of Wilmer Hale's failure to prevail on some aspects of their original fee petition, including their argument for enhancement. In all, Judge Lamberth made across-the-board reductions for fee-related work of 25% for excessiveness, 10% for vague time entries, 10% for block billing and 5%/0.5% for clerical work.

The total reductions in counsel's fee request made by Judge Lamberth amounted to 25.5% for attorneys' fees and 30% for paralegals for merits-based work and 45.5% and 50% respectively for fees-based work. Consistent with his prior rulings on costs and expenses, Judge Lamberth reduced merits-based expenses by 40%, and fee-related expenses, the bulk of which were for experts, by 40% for non-expert costs and expenses and by 15% for experts, to reflect vague time entries and failure to prevail on a "substantial portion" of the original fee petition.

B. Other Recent FCA Prevailing Plaintiff Fee Cases

1. *United States ex rel. Nichols v. Omni H. C., Inc.*, 2009 U. S. Dist. LEXIS 9474, 2009 WL 365615 (M.D. Ga. 2009)

This case was resolved, on the merits, by a settlement between the United States, which had intervened as to some claims, and the defendants. Although relator had initially continued to pursue claims as to which the government had declined intervention as well as a claim for retaliatory discharge, those claims were dismissed. The United States proposed to pay relator's counsel's fees out of the settlement proceeds but it objected to the amount of fees sought, and the parties were unable to amicably resolve this issue. The district court, agreeing with some of the government's contentions, reduced the hours included in the lodestar for time spent on unsuccessful claims and for "overstaffing" by about 25%. The government had sought a reduction of approximately

70%. The United States did accept plaintiff's claimed hourly rate of $250.00, although it had initially contended there was insufficient evidence on the record to support it.

The court used across-the-board percentage cuts to account for time spent on unsuccessful claims in the absence of detailed information from plaintiff which would facilitate such a determination. Since it appears that plaintiff's counsel had to reconstruct or estimate his billing records for purposes of his fee application, the court might have been justified in making more severe cuts.

2. *United States ex rel. Marchese v. Cell Therapeutics*, 2008 WL 4950938, 2008 U.S. Dist. LEXIS 97163 (W.D. Wash. 2008)

On the motion for attorneys' fees brought by the prevailing relator in a case involving the off-label use of a drug, which was settled for $10.5 million, the court awarded fees based on the hourly rate charged in Seattle, the forum location, rather than in New York or New Jersey, where lead counsel had their law offices. The court struck from the lodestar calculation hours spent on the relator's share hearing, on the prosecution of other defendants, and on the relator's employment claims against CT, as well as time spent by relator's original counsel in obtaining co-counsel. The court also reduced counsels' fees on fees request from $219,916 to an amount to be calculated pursuant to guidelines set by the court, the court commenting that the original amount requested "shocks the court", included an excessive amount of time and vague time entries, and was not based on forum rates.

3. *United States ex rel. LeFan v. General Electric*, 2008 U. S. Dist. LEXIS 3020, 2008 WL 152091 (W.D. Ky. 2008), *app. filed*, see 2008 U. S. Dist. LEXIS 25191

The relators in this case were seven production employees at a General Electric aircraft engine plant in Kentucky, who were represented by three different law firms over the course of this litigation. The original complaint was filed in 2000, the United States intervened in 2006, and the case settled shortly thereafter for $11.5 million. At issue in the relators' request for attorneys' fees was the appropriate hourly rate, a potential reduction in hours for vagueness, duplicate work, administrative work and the like, and a potential fee enhancement. The court reduced most of the requested hourly rates to rates comparable to those of attorneys in Louisville, where the court sat, rather than the Cincinnati rates charged by lead counsel, but rejected defendants' argued-for reductions in hours. It found no justification for a fee enhancement. It followed *Gonter v. Hunt Valve*, 510 F.3d 610 (6th Cir. 2007) in awarding fees for fees, limited to 3% of the hours spent on the main case.

Subsequent to making its statutory fee award, the court granted a motion for acceptance of supplemental jurisdiction to determine distribution of the contingent fee due to counsel under their several fee agreements. 2008 U. S. Dist. LEXIS 61025 (August

8, 2008). Total statutory fees and expenses awarded were $2,186,696; the total contingent fee, based on realtors' share of the recovery of $2,357,500, was $517,500.

4. *United States ex rel. N.Y. ATC Distrib. Group, Inc. v. Ready-Built Transmissions, Inc.*, 2007 U. S. Dist. LEXIS 65963, 2007 WL 2522688 (S.D. N.Y. 2007)

In this case, which settled for $160,000.00 after the government intervened, relator sought $140,134 for fees, expenses, and prejudgment interest. The court awarded a total of $103,159.15. It refused to make any award for time spent by relator's in-house counsel for lack of contemporaneous time records, although it cited to cases holding such time was generally compensable. To make up for the delay in payment, where the client had paid on an on-going basis, the court awarded interest, running from the date the invoices were paid, at a rate set by 28 U.S.C. § 1961.

5. *United States ex rel. Ferrara v. Rosin*, 2009 U.S. Dist. LEXIS 21252, 2009 WL 580321 (M.D. Fla. 2009).

This case, in which the United States intervened and settled for over $10 million, involved Medicare billing practices. Relator's counsel filed a fee request, asking for $69,090.00 in fees and $5,971.87 in costs. The court allowed counsel's claimed hourly rate of $350.00, but reduced the lodestar hours for excessiveness, finding that the hours claimed included secretarial-type work, hours spent reviewing various media articles and engaging in media strategy. The court also refused to include "unidentified charges" in the costs award, which turned out to be the bulk of the costs requested. The total amount ultimately awarded, to be paid by defendants, was $60,572.00 in fees and $763.15 in costs.

C. Recent Prevailing Defendant Cases

1. *United States ex rel. Rafizadeh v. Cont'l Common, Inc.*, 553 F.3d 869 (5th Cir. 2008)

This case was before the Fifth Circuit on cross-appeals, the plaintiff appealing the district court's dismissal for failure to state a claim and to comply with Rule 9(b), and the defendant denial of its motion for attorney's fees. The appeals court affirmed both rulings. With respect to the denial of fees, the district court concluded that the plaintiff had a "good-faith argument" as to why he was correct on the law and so his claim was not frivolous. Nor was his complaint "clearly vexatious" or brought primarily for purposes of harassment, a "rare and special circumstance." Reviewing for an abuse of discretion, the circuit panel found none.

2. *United States ex rel. Haight v. Catholic Healthcare West*, 2008 U.S. Dist. LEXIS 19790, 2008 WL 607150 (D. Ariz. 2008)

In this case, the court refused to award any fees under 31 U. S. C. § 3730(d)(4), although it ultimately granted the defendants' motion to dismiss. It rejected defendants' contention that they were entitled to fees because the plaintiffs had an "improper motive" and were acting to advance their own social agenda of stopping the use of animals for medical research, finding that although plaintiffs did act to advance this agenda, their claims were not frivolous and defendants did not show that plaintiffs' claims "were brought primarily for purposes of harassment." *See United States ex rel. J. Cooper & Assocs., Inc. v. Bernard Hodes Group, Inc.*, 422 F.Supp.2d 225, 238 (D.D.C. 2006) (standard for awarding fees to prevailing defendant under § 3730(d)(4) analogous to that under 42 U.S.C. § 1988; court can only award fees and expenses " 'upon a finding that plaintiff's action was frivolous, unreasonable, or without foundation,' " or that plaintiff continued to litigate after it clearly became so); *U. S. ex rel. Mikes v. Straus*, 98 F.Supp.2d 517 (S.D. N.Y. 2000), *aff'd*. 274 F.3d 687 (2d Cir. 2001) (standard for fee award under (d)(4) extremely high).

3. *Pugach v. M&T Mortgage Co.*, 564 F.Supp.2d 153 (E.D. N.Y., June 5, 2008)

By prior order, the district court in this case, in which the government had not intervened, dismissed plaintiffs' claims and held that a fee award under § 3730(d)(4) was appropriate because plaintiffs' action was both frivolous and vexatious. Although defendant submitted a fee request of $244,408.02, including costs, the court awarded a total of $81,305.83 in fees and $5,536.62 in costs.

In calculating the lodestar, and reducing the requested fee amount, the court determined that the rates sought were "somewhat excessive," the issues involved being neither novel nor complex and the rates themselves being "somewhat higher than rates typically used by other courts . . . even in cases involving complex litigation and where parties are represented by large or specialty New York-based law firms." [The attorney rates sought ranged from $587.70 an hour (representing a 19% discount from counsel's standard billing rate) to $267.30 an hour (also discounted).] The court also found the hours claimed were excessive in that some of the work was not or may not have been necessary to the defense of this particular case, the use of block billing made it difficult to determine if reported hours were duplicative or unnecessary, and on its face the amount of time claimed was excessive in light of the "tasks at hand."

For purposes of its lodestar calculation, the court used $250.00 as a "reasonable hourly rate" and made an across-the-board reduction of 30% in hours billed by partners as well as some further downward adjustments for "unrelated" work. It also reduced by 25% the charges for computerized research included in defendants' request.

Although noting that it had the discretion to do so, the court made no downward adjustment in the lodestar based on plaintiff's financial circumstances or ability

to pay, finding that plaintiffs had not made any showing sufficient to justify such an adjustment.

4. *United States v. Medica Rents Co. Ltd.*, 2008 U.S. App. LEXIS 17946 (5th Cir., August 19, 2008)

In this case, which involved alleged overbilling for special mattress overlays, an item of DME, defendants were successful in obtaining summary judgment in their favor on the FCA claims against them. Although the district court awarded over $4.8 million in attorneys' fees to the prevailing defendants, pursuant to 28 U.S.C. § 2412(b), a Fifth Circuit panel reversed, finding, on review of the record, that the government's claims were not wholly without evidentiary support or could not have been "easily dispatched by cursory review of the evidence." According to the panel, there was "legitimate confusion" about the proper billing code to use and which entities had authority to issue guidance as to the proper codes.

5. *United States ex rel. Woodruff v. Hawaii Pacific Health*, 2009 WL 734057 (D. Haw. 2009)

The plaintiffs in this case, two physicians, alleged that the defendants, a hospital and other medical providers, made false claims for payment to Medicare and Medicaid and used false records to support those claims, and also retaliated against them by firing them. The United States declined intervention, and all the counts of the complaint were eventually dismissed under Rule 12(b) or Rule 56. Following entry of judgment in their favor, the defendants filed a motion for fees under 31 U.S.C. § 3730(d)(4), asserting that the action was "clearly frivolous" because plaintiffs brought it without investigating or being able to articulate the basis for their allegations, and "vexatious" because it appeared that suit was brought to revenge plaintiffs' termination by the defendants.

In response, plaintiffs argued that defendants were not entitled to fees because the court had initially ruled that they had stated a *prima facie* case for facially false claims, the claims had factual support, and defendants had chosen a "high-priced Washington, D.C. law firm" (Patton Boggs) to represent them, evidencing their belief the claims were not frivolous.

The district court agreed that the case was not the "rare and exceptional case" in which a defendants' fee award was justified. Citing to *Warren v. City of Carlsbad*, 58 F.3d 439 (9th Cir. 1995), a Title VII case, the court agreed that a finding that the plaintiff had stated a *prima facie* case weighed strongly against a finding that the case was clearly frivolous. The court also cited to *United States ex rel. Rafizaden v. Cont'l Common, Inc.*, (5th Cir. 2008) (discussed above) for the proposition that even though some of plaintiffs' claims were dismissed for failure to plead fraud with particularity that did not mean the claims were frivolous, and distinguished *U. S. ex rel. Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001) on the ground that in that case the plaintiff's allegations had no objective support and "'clearly had no chance of success.'"

Citing to *Pfingston v. Roman Eng'g Co.*, 284 F.3d 999 (9th Cir. 2002), the court further concluded that plaintiffs' action did not meet the "clearly vexatious" or "brought primarily for purposes of harassment" standard because there was little or no evidence that plaintiffs' primary purpose in bringing suit was a desire for revenge, and other lawsuits involving the same parties had not raised the same issues.

The total amount of fees sought was $1,267,452.55. None were awarded.

D. Miscellaneous Fee Cases

1. *United States ex rel. Bogart v. King Pharms.*, 493 F.3d 323 (3d Cir. 2007)

This *qui tam* case involved allegations of misrepresentation in pricing information defendants supplied to federal and state governments as a condition of their participation in various Medicaid programs. The relator brought claims on behalf of the United States and 10 states and the District of Columbia with statutes similar to FCA. Ultimately, settlements were reached with King, which included the original plaintiffs as well as states without *qui tam* statues. Following the settlements' being entered into, in most of which relator did not participate, relator filed fee petitions in which he sought not only statutory fees under § 3730(d)(1), which defendants agreed to pay, but also fees from the share of the settlements paid to non-*qui tam* states under a "common fund" theory of recovery, in an amount up to one-third of the settlement amounts. The district court denied this request, a ruling affirmed by the Third Circuit on the grounds that the court did not have jurisdiction over non-*qui tam* states or control over the purported "common fund" and that relator's litigation did not create a "common fund" within the accepted or classic usage of that term. Indeed, both the district court and the appeals panel saw the request as an attempt by relator's counsel to enrich themselves without a viable theory to support their claim.

III. CONCLUSION

Once a relator settles a case with the defendant or defendants, or wins at trial, the first and over arching task is negotiating a fair relator share with the government. A close second is obtaining all of relator's counsels' fees and costs for prosecuting the action. Time spent at the outset of the case making sure a fee petition is sound will assist the overall resolution at the end of the case. A review of the significant case law will also assist counsel in avoiding traps, which may lead to costly or at least highly time-consuming litigation. Most fee disputes resolve themselves amicably. Few result in litigation. Prudent time spent on reviewing and editing a fee petition before the defense or court reviews it will almost always assist in avoiding litigation.

Spotlight

Best Practices in Pursuing IRS Whistleblower Claims: An Interview with IRS Whistleblower Office Director Stephen A. Whitlock

Best Practices in Pursuing IRS Whistleblower Claims:

An Interview with IRS Whistleblower Office Director Stephen A. Whitlock

The Director of the new IRS Whistleblower Office, Stephen A. Whitlock,[1] *sat down with TAF Member Michael A. Sullivan*[2] *during the TAF Conference and TAF's recent "IRS Whistleblower Boot Camp." For this interview, they discussed the progress of the IRS Whistleblower Office since it was established in early 2007, how the IRS process differs from pursuing qui tam cases under the False Claims Act, and the "best practices" for attorneys who pursue IRS Whistleblower claims.*

Michael Sullivan: Steve Whitlock, thank you for agreeing to speak with me for the *TAF Quarterly* to discuss the "Best Practices for Lawyers in Pursuing IRS Whistleblower Claims."

For lawyers who are used to handling *qui tam* cases, how does the IRS Whistleblower claims process differ?

Steve Whitlock: The biggest difference is that in the False Claims Act, you are filing the action on behalf of the government in court, under seal, and there is a relationship, which you guys understand pretty well, with the Justice Department.

When you bring a case to the IRS, for most purposes, we are not at liberty to work with you or share information with you. It's a closed process.

We do not have a court determining whether the taxpayer is liable; we have the IRS trying to make that determination through a civil process in most cases.

So, you have a situation where, on the False Claims Act side, you file the Complaint, and the Complaint is adjudicated by a judge. The IRS has a process that is largely administrative. It has its own administrative appeals process, as well as several different judicial appeals avenues. The decision whether to proceed with the case against the taxpayer is made in a closed process, which the whistleblower does not have a vote in.

Michael Sullivan: If the IRS decides not to pursue the investigation, that's the end of the matter?

Steve Whitlock: That's the end of the matter. It's not a determination by the Whistleblower Office to proceed, or not proceed. It's a determination by the IRS Operating Division, such as LMSB—Large and Mid-Size Business, or Small Business/

1. Stephen A. Whitlock has been the Director of the new IRS Whistleblower Office since February 2, 2007. During his 29-year government career, Mr. Whitlock has led the IRS Office of Professional Responsibility and has helped run anti-fraud and abuse programs at the Defense Department. In particular, he directed the operations of the Defense Hotline, which served as the model for Inspector General fraud, waste and abuse hotlines throughout the Executive branch. Mr. Whitlock earned a Bachelor of Arts degree in Political Science from Auburn University, a Juris Doctor degree from Catholic University and a Masters in Business Administration degree from George Mason University.

2. Michael A. Sullivan, a partner with Finch McCranie, LLP in Atlanta, has represented tax whistleblowers since the inception of the new IRS Whistleblower Program, including clients in the hedge fund industry, real estate, other financial services, manufacturing, and other industries. At the request of Georgia legislators, Mr. Sullivan also helped draft Georgia's State False Medicaid Claims Act.

Self-Employed. Typically, they will decide whether to do an audit. The Criminal Investigation Division will decide whether to do a criminal investigation. If they decide not to do it, that's the end of the matter from a tax perspective.

Michael Sullivan: So there is no mechanism for the whistleblower to pursue the IRS claim on his own, in a *qui tam* fashion?

Steve Whitlock: That is correct.

Michael Sullivan: In *qui tam* cases, "fraud" or something close to it is typically involved. Is it correct that IRS Whistleblower claims can involve not only tax fraud, but also many other types of violations?

Steve Whitlock: The relevant statute talks about "detecting underpayments of tax, or detecting and bringing to trial and punishment persons guilty of violating the Internal Revenue laws or conniving of the same."

Taxpayers underpay their taxes for a lot of reasons. Sometimes it is because they mean to underpay. Sometimes it is because they do not understand the tax law. Sometimes it is because their accounting records are incomplete or their accountant made a mistake. They may think they are entitled to a credit, and the Service concludes that they are not. This statute allows us to pay an award for information that leads to the collection of an underpayment of tax, regardless of what the motive was on the part of the taxpayer in underpaying the tax in the first place.

Michael Sullivan: So, a good IRS claim could involve negligence or even unknowing violations of the tax laws?

Steve Whitlock: Could very well, yes.

Michael Sullivan: For lawyers screening cases, are there particular types of cases that the IRS is interested in, or particular industries that are more attractive to the IRS?

Steve Whitlock: The IRS puts out an annual plan and has a strategic plan that reaches out five years, which is posted on *www.irs.gov*. We describe our enforcement priorities. We try to touch a little bit of everything in different ways because the tax system is that complex. We try to have some presence in every aspect of the tax law.

The largest corporations tend to be under audit nearly continuously. Issues on international tax noncompliance are getting more attention in recent years because of globalization of the economy. There have been some congressional hearings recently about those kinds of questions where large corporations –multinationals–have the ability to take advantage of the tax code and their business structure to reduce their tax liability. Sometimes that is permitted by the tax code, and sometimes it is not. That is an area of focus—to identify those areas where it is not permitted, but somebody is pushing the envelope.

Someone who is not filing and paying—that is always of interest to us. High-income non-filers are especially interesting to us. Define "high income" how you want to, but we generally look at six figures, $200,000, $250,000 in gross income.

We have concerns in the areas of "trust funds," where a taxpayer is an employer and is withholding from their employees, in order to cover the employees' personal tax liability. When you have someone who is acting in effect as a trustee for the federal government by withholding tax from employee wages, but then says "You know, I'm having a little trouble with the business. I'm going to pay my bills before I pay the tax bill." That's an area that has been an enforcement priority for many years.

We have a whole series of abusive transactions that are identified in our enforcement priorities. CI, on their part of the website, will identify the "Dirty Dozen." Some of those are at the retail level, and some of them are not. Some of them involve fairly sophisticated schemes. So, the Service is interested in a lot of different areas.

Fundamentally if there is serious tax noncompliance, if there's evidence that there is real money involved in it, the Service is going to be interested. If it is below the $2 million threshold in the statute, we still have the backup of the pre-amendment rule, subsection (a) of the statute. We still pay, we still accept, we still process those claims.

Michael Sullivan: But you are interested in all of those claims—the big ones and the small ones.

Steve Whitlock: Yes. We can't have a situation where people say, "Look, the IRS has a materiality threshold of $2 million and anything below that is fair game." That can't happen. We can't send that message in any way. We're open to everything, and we have a separate process to receive and analyze submissions that are below the $2 million threshold for a 7623(b) case.

Michael Sullivan: Are "willful" violations more attractive, or more of a priority for the IRS?

Steve Whitlock: "Willful" can bring in some interesting, additional considerations. When you're talking about the willful failure to file, willful underreporting, you get into matters that may be of interest to our criminal investigators. So, if we've got evidence of willfulness, that can make a difference in terms of which part of the IRS may be interested in the case.

Michael Sullivan: Have you seen any particular types of whistleblowers come into the program more than others?

Steve Whitlock: That's hard to say at this point with the volume of cases, and I'm not looking at all of them. I can tell you we get a wide range. We have people who have a personal relationship with the taxpayer—that could be a family or business relationship with the taxpayer—and they know something is not right. We have business competitors, we have people who are employees or former employees of the taxpayer.

We have some cases where people are just very knowledgeable about the industry, and they can see patterns of behavior that really point to abusive practices. They know what the indicators are. They do some research and get some specifics out of a public filing, or out of some other source, to say, "Okay, when these things are present, almost invariably there is a tax noncompliance issue. This taxpayer has these three things present, and here's where they are." That's an interesting case.

Michael Sullivan: Does a whistleblower have to have *direct* knowledge of the violation?

Steve Whitlock: No. They need to have information that is credible and substantive, and that we can act on. It may be indirect. The more attenuated you get from "real" knowledge, there may be credibility questions that we have to sort through. But we've accepted cases from people who say, "You know, I wasn't in the meeting, but here's what I understand was going on in the meeting." And that is part of their submission, and we'll evaluate that and see if that's enough for us to go on.

Sometimes we can take information provided by the whistleblower and combine it with information known to the IRS, and together that gives us enough of an insight to say, "This is something we are going to go after."

Michael Sullivan: What about true "outsiders?" Somebody who doesn't necessarily work in the entity that is the taxpayer, or doesn't have a relationship with the taxpayer, but who has figured out that "something is going on." Would they have a potential claim?

Steve Whitlock: Sure, we get those. Some of them are very good. Some of them are purely speculative, and you can't get very far with pure speculation. In cases where the core of the submission is an analysis of public documents, we see greater problems with speculation about what the taxpayer is doing.

Michael Sullivan: What should TAF's lawyers look for in screening clients and screening cases?

Steve Whitlock: Documents are helpful. Having "been there" is helpful. The kinds of things that you would look at and say, "Do I believe this person? Can I prove this case? Is evidence going to be available to corroborate this?" Corroboration may not be available to the whistleblower, but the IRS may be able to obtain information directly from the taxpayer or from another source that can prove or disprove the issue raised. The issue raised needs to be something that we can get proof on.

Another thing is it needs to be "material." The IRS has many more taxpayers than we have the resources to audit. We routinely make choices about which taxpayers to audit, knowing that some of those we choose not to audit might have understated their tax liability. So, one of the questions that I would want to understand from the whistleblower is, "Why should the IRS take this case? What is in it for the IRS?" Is it a substantial amount of money? Is this a topic that has a lot of abuse ramifications

outside the particular company? Does this whistleblower give us some insight into the company that we wouldn't otherwise have?

Sometimes we'll go in and do an examination of a taxpayer and we'll say, "We're going to look in this particular aspect of the operation. We're concerned about depreciation, we're concerned about executive compensation." The whistleblower comes in and says, you really need to be concerned about their entertainment expenses in this division because that division has been really playing fast and loose, and here's what's going on. We might not have looked at that division, but for the information the whistleblower is able to provide us. Do we look at every entertainment item on a tax return? No, we can't possibly, but if somebody can point us to one that really makes a difference, that is material, that's something we take a look at.

Michael Sullivan: We have talked a bit in the TAF presentation today about issues arising with certain types of whistleblowers—attorneys, CPAs, or other persons who might have been involved with the whistleblower. Is there a dividing line from your perspective that really raises red flags?

Steve Whitlock: The "current representative" is really a bright red flag. When we have somebody who is currently representing the taxpayer, and they want to become a whistleblower, they need to become the "former representative." There is a conflict of interest there that is really profound.

Michael Sullivan: When you say "representative," do you mean representative before the IRS, as opposed to an attorney in some other capacity?

Steve Whitlock: Exactly right. We are dealing with situation where, at one end of the spectrum, we've got the attorney or the CPA who is appearing in the audit, on behalf of the taxpayer, and might be the only one who shows up to talk to the auditor. The taxpayer might not even appear. And they are supposed to be representing the taxpayer client's position. If that individual is to then provide information to the IRS about non-compliance by their client, that's beyond the pale.

You can suggest a different situation where, let's say the individual is representing the taxpayer on a business transaction or on some other matter and, in the course of that representation, learns that—maybe it's a real estate closing, and they find out that this high income individual has no tax return to provide to the mortgage company in order to document their income for the purposes of their mortgage. Is that client confidence something that can be provided to the IRS? We'd have to work through that and understand the facts and where the privilege lies, and what the law says on that issue. But we cannot deal with them when they are representing the taxpayer in a tax matter before the IRS and want to talk about tax liability problems to the IRS.

Michael Sullivan: In the process of evaluating a claim, if it's determined that it is based at least in part on privileged information, but not necessarily information from the taxpayer's representative in an IRS proceeding, what would typically happen?

Steve Whitlock: Well, we would withhold from the audit team information that's privileged, assuming the privilege does apply, because we're trying to protect the integrity of the audit. What would actually flow to the audit team would be information they can use. We would also make sure that there is no contact between the whistleblower and the audit team, which might otherwise be permissible if we didn't have a concern about privileged information in the whistleblower's submission. We want to insulate the audit team from any contact because we want to be able to say, with integrity, that we have not used information that we are not allowed to use, directly or indirectly, in building the taxpayer case.

Michael Sullivan: The Large and Mid-Size Business Division has described a "Three-Step Process" for whistleblower claims (LMSB-04-0508-033). Is that one that is now serving as a model for other divisions of the IRS?

Steve Whitlock: Right, that really is the model we're using. We built it off of the experience of LMSB and made some variations to accommodate the different organizational structures in other parts of the IRS.

Michael Sullivan: Would you describe the various steps in what happens to a claim when it comes to the Whistleblower Office?

Steve Whitlock: We do an initial administrative scan to make sure that we understand what the case is about. At that level, we're going to see whether the claim meets the statutory thresholds for subsection (a) or (b) of the statute.[3] Is it signed under penalty of perjury? Sometimes they promise that they have documentary evidence, but there's no attachment. We're going to be looking for those kinds of things, and administratively perfect the case as an initial step. If it's below the dollar threshold for a (b) case, we'll send it to the Ogden Informant Claims Examination (ICE) unit to be processed as an (a) case.

The next step in the process is a more in-depth analysis by an experienced analyst on the Whistleblower Office team, who is going to be looking at things like, "Do we have returns filed by this taxpayer?" "Are any of those returns under audit?" "Do we have any prior claims filed against this taxpayer by other whistleblowers?" "Do we have any other pending whistleblower cases from this whistleblower"—to get an understanding of whom we are dealing with, and what we've got, and whether that's something that may be relevant.

They're going to also look for "badges of fraud" and make a determination of whether we should run this case through Criminal Investigation to determine whether a criminal investigation ia appropriate in this matter. In most cases, there are not badges of fraud in the tax sense. Tax fraud has a specific meaning.

Michael Sullivan: Intent to violate the tax laws, as opposed to intent to commit some other offense?

3. Editor's note: Subsection (a) of 26 U.S.C. § 7623 is the "old" IRS rewards provision. The 2006 amendments to the statute added subsection (b), which addresses the "new" rewards available if the statutory criteria are met.

Steve Whitlock: Right. We have a "specific intent" tax fraud statute, so most cases are going to go to the civil side—Large and Mid-Size Business, Small Business/Self-Employed, and a small number to Tax Exempt & Government Entities. They're going to evaluate the case to see whether they want to proceed, whether this is something that, when considering the other ways they could be spending their time, they want to spend some time on this. "Does it contribute to an ongoing audit? Does it cause us to start an audit?"

Those kinds of questions get resolved at this stage with a "Subject Matter Expert" who understands the operations of the IRS, understands the tax matters, understands where the resources are, and can make an assessment of whether it makes sense to go after the issue raised by the whistleblower.

The Subject Matter Expert will also be advised by counsel at that stage on technical tax issues and on evidentiary questions. In most cases, we don't have any evidentiary questions. But in those where, for example, we get a document that is stamped "attorney-client privilege" or "attorney work product" or whatever, we're going to analyze the documents and how the documents came to be in the hands of the whistleblower to determine whether the privilege might apply; and if the privilege might apply, whether it's been waived. All of those sorts of questions have to be sorted out. So, that's the initial review. The end of their analysis should include some interaction with the whistleblower or their counsel, in order to really understand the facts.

Michael Sullivan: Typically an interview?

Steve Whitlock: Yes. Then, the next question is, "Should we proceed?" And the business decision gets made, "Is this something we want to go after?" If the answer is no, that's the end of it.

Michael Sullivan: Who makes that decision?

Steve Whitlock: That decision would be made by the Subject Matter Expert, maybe with a supervisory review. There may be a team of people looking at it, depending on what the nature of the issue is and how that issue is being managed in the IRS. We have some issues that are really rather significant and are being managed as a coordinated team approach to make sure that they are approached consistently around the country.

So, that's the business decision that gets made, "Do we pursue it?"

Then there is a legal question. "Is there anything about the evidence that's been offered?" "Is there anything about this case that should give us pause—that we may have a problem using the information now or in the future, should the taxpayer take us to court at the end of the day." If the answer to that legal question is "no legal issues," then fine, we proceed. If the answer to that question is that we see some legal issues, then we are going to get a "risk analysis" from the lawyers. There will be a decision from a business side as to whether, knowing what the risks are, we want to proceed or not. Or, whether we say, "We're going to proceed, but we're going to keep that information out

of the mix." In that case, those people who have seen the information that we're keeping out of the mix will be walled off from any involvement in the case. So, the question that often comes up is, "Is this a Whistleblower Office determination to pursue the case?" The answer is really no. We're making determinations that are relevant to the *reward*.

As I suggested earlier in discussing the difference between False Claims Act and this statute, the decision on whether to conduct an examination or an investigation is a decision that gets made by the operating side of the IRS, the Large Mid-Sized Business Division, or Small Business/Self-Employed. They're going to make that call, not the Whistleblower Office.

The question of whether the Secretary has taken action "based on" the information provided by the whistleblower is a two-part question. "Did the Secretary take action?" That's the business decision by Small Business/Self-Employed, or Large and Mid-Sized Business. Part 2, if action was taken, was it "based on" the information provided by the whistleblower? The Whistleblower Office will make that determination, and that's a determination that I think would be appealable to Tax Court.

Michael Sullivan: You mentioned that part of the initial screening is to see if prior claims have been filed involving the taxpayer. Is it possible to have two different whistleblowers, or multiple whistleblowers, providing different pieces of the puzzle, where all of the claims would go forward?

Steve Whitlock: I think it is, and part of this depends on the complexity of the tax return that we are looking at. It's not hard to build a scenario where "Whistleblower No. 1" comes in and says, "You should look at "Taxpayer X" on a particular credit," and another person comes in and says, "They've got a problem over here on a transfer pricing issue," and somebody else comes in and says, "You need to take a look at something else."

The IRS is going to make a value determination on whether to pursue all of those issues, or none of those issues. If we pursue those issues, it's possible that all three will be resolved with an assessment and collection of tax—which means in the whistleblower's favor—and we're going to have to decide whose information substantially contributed: which one did we take action based on, and then the extent to which they substantially contributed. That's going to be pretty interesting.

I can also give you a hypothetical where we have a taxpayer that we didn't plan to audit. Whistleblower No. 1 comes in and gives us information about, let's say, a transfer pricing question. Based on that information, the IRS decides to conduct an audit of the taxpayer. When we conduct the audit of the taxpayer, we don't limit our scope to just the transfer pricing issue. When we look at that kind of taxpayer, there are other things that we are going to look at. It might be executive compensation. It might be depreciation issues. Depending on the business the taxpayer is in, what their return looks like, things that we just go ahead and decide to pursue.

Should a second whistleblower come in and say that there's an executive compensation issue that you need to take a look at, then the question I need to ask at the determination of the awards stage is, " Did that second whistleblower substantially

contribute to the decision to look at executive compensation?" Maybe not, because maybe that's a standard part of the examination of any taxpayer of this type, and so once we got into the door with Whistleblower No. 1, maybe Whistleblower No. 2 really doesn't contribute substantially to what we wind up doing.

Michael Sullivan: What if Whistleblower No. 1 has identified Issues 1 and 2, and you naturally come across Issue 3, does Whistleblower No. 1 get credit for what you discovered?

Steve Whitlock: This is a question about whether we would be taking action on issue 3 based on the information the whistleblower provided on issues 1 and 2. If you take the hypothetical where we would not have conducted an audit of the taxpayer but for the information provided by the whistleblower, and we include issue 3 because that is an issue we look at when we audit this type of taxpayer, I think the whistleblower will get credit for issue 3. One of the sort of interesting results of that is, we could go in, look at the issues raised by the whistleblower, and find a $5 million question on those issues. When we open up other issues that we normally look into for this type of taxpayer, we could make a $50 million adjustment. We wouldn't have done the examination, but for the information provided by the whistleblower in the first place. I think we've taken action based on their information. That's a pretty good deal.

Michael Sullivan: That is a good deal. We have talked about the statute of limitations in IRS Whistleblower claims, and how lawyers who are accustomed to *qui tam* cases under the False Claims Act may not realize some differences.

Steve Whitlock: Correct me if I'm wrong, but in the False Claims Act situation generally when you file the Complaint under seal, that filing tolls your statute of limitations. So, when is the statute tolled with our cases? When you bring that case to us, that has no impact on when the statute of limitations is tolled. It is not until the IRS takes a specific type of action in dealing with the taxpayer that we meet our obligation on the statute of limitations.

So in our case, filing the information with the IRS simply starts an IRS investigation or examination, and does nothing to the statute of limitations.

What can happen is, in our evaluation by Subject Matter Experts, they may find that a three-year statute is going to apply in this particular case, and it is six months before that three-year period is going to run out. What can we do at six months? If there's not much we can do in six months, the case is just not going to go forward. It may be that we will be able to pick up that issue in a subsequent year, but if we are close to the statute running out, we have limited options unless we can get agreement from the taxpayer to extend the statute.

Another issue on the statute of limitations is that, of course, there are a number of statutory periods of limitations, depending on what kind of case you are dealing with. One of the points that will never be apparent is that the taxpayer, particularly in large cases, frequently agrees to allow the statute of limitations to be extended. Why do they

do that? Well, suppose there is a complex audit going on, and they think they are going win on some of these issues, and they are not so sure on others. It may be in their interest for us to work together with them and get it right. So by mutual agreement, we extend the statute of limitations. There are other things that can keep the statute open.

That's the key point—the "tax years" may still be open, and you might not know about it.

Michael Sullivan: Is there still is a preference for "recent year" events in these claims?

Steve Whitlock: "Recent" varies depending on the taxpayer. There are some taxpayers who have open audit years that go back a lot more than three years because that's just the nature of the way an examination of that taxpayer progresses. If we've closed a year, it's going to be hard to re-open. There are substantial administrative process hurdles that you have to overcome to do that. It could be that we just now close one from five years ago because it took that long to work through that examination and the appeals aspects. But once it's closed, there is a degree of finality.

If somebody brings us an issue that's four, five, six years old, we can take a look at it. We can see if that year is still open and then inject the issue into that open examination or audit—we use those terms interchangeably.

However, if we have been working through the examination process with the taxpayer for three or four years, and then we come in toward what would otherwise be the end of the process and say, "We want to take a look at your entertainment expenses in the Poughkeepsie division," we may want to have a pretty good reason for doing that. It may need to be pretty material to do that. And, as I suggested earlier, in any business, "recent" is easier to collect than "old." So, those are some of the factors that are going to come into play.

Michael Sullivan: The current regulations endeavor to provide for "confidentiality" of the identity of the informant or whistleblower. What steps generally does the IRS take to try to preserve confidentiality?

Steve Whitlock: Well, you have to begin by understanding that the IRS puts a premium on protecting confidentiality. We have statutory requirement to protect the confidentiality of taxpayer returns and return information is broadly defined. It includes information about the whistleblower, so that's taxpayer information within the scope of the statutory protection. And there's a culture in the IRS about protecting taxpayer information, so we start from there.

We add some additional protections with statements on cover sheets that we send with these documents that this is "informant information," and it's to be put in "seven-level protection." All the emails are supposed to be encrypted, and we have built our software to default to "encrypt," in exchanging emails within the IRS. So we have those kinds of things going on.

We really reinforce the warning, but the biggest protection is just the fundamental ethos in the IRS built around protecting the integrity and confidentiality of taxpayer

information, and that includes whistleblower identity information. People understand that it's a very, very big deal to disclose it. I have a report that I receive every morning that tells us about bad things that happen in the IRS. One of the things on that report every morning is every inadvertent disclosure of taxpayer information. People are really aggressive about these reports. For example, somebody sent something through the mail, and it included a page that it shouldn't have included. That would be an inadvertent disclosure of taxpayer information, and is reported with the mitigation action. The daily report goes all the way up to the Commissioner of IRS, because disclosure of taxpayer information is a very big deal.

Michael Sullivan: Lawyers who try to advise their IRS whistleblower clients accurately sometimes tell them that, while the IRS endeavors to keep their identity confidential, there might be circumstances where their identity would become disclosed, such as if they were needed as a witness in a civil or criminal proceeding.

Steve Whitlock: Right.

Michael Sullivan: Are there others?

Steve Whitlock: Well, you know, there's always human error. Despite everything we do, we do get that report on a daily basis of things that happen. We encrypt all of our laptops, but laptops get stolen, and sometimes the laptop is with a paper file as well, and you haven't encrypted the paper file. Stuff happens. It doesn't happen often, and we're pretty aggressive about it when it does, but you have that situation.

Aside from the "essential witness" situation, I can't think of a case where we would intentionally reveal that information. The other reality is, in many cases the fact that Mr. Smith is interested in this issue is well known to some people. It may not be well known to the taxpayer, but when they see that issue suddenly pop up—"What about this entertainment expense in Poughkeepsie?" "Wait a minute, wasn't that Bob that was giving us a problem about entertainment expenses in Poughkeepsie? I bet Bob was the one that raised that issue."

Michael Sullivan: Someone figures it out, or guesses it.

Steve Whitlock: Yes, and that's going to happen. That's a fact of life in dealing with disclosures in any situation.

Michael Sullivan: There's a seal that prohibits lawyers from talking about cases filed in the *qui tam* arena, but there's no seal in the IRS arena. In fact, we've seen some examples of firms who have sent out press releases about claims they have submitted. From the IRS' perspective, are there any disadvantages or negative effects of publicity about the claims that are filed?

Steve Whitlock: Publicity is a two-edged sword. I would be lying if I said that we received no benefit from some of those press releases. People put some attention on

the Whistleblower Program because of news articles that were written after some of those press releases went out, and we've had a surge in cases. Is that attributable to the press releases? I don't know, but you've got to figure that's a piece of it.

My concern is, fundamentally, "Does that disclosure of information adversely affect our ability to pursue the examination on that issue with that taxpayer?" The more that gets out in a press release, the greater risk that the taxpayer figures out that they either are or may be the target of our interest, and they—if they're so inclined—can begin to take steps to conceal their involvement, conceal their activity, circle up the wagons. That's a bad thing, and so, when I get down to the point where I'm going to make an award determination, I've got a range that I've got to apply. If I've seen a material, adverse impact on our ability to pursue the case as far as it really should go, because of something that the whistleblower has done, I think I have to take that into account, and we'll see how that plays out.

Michael Sullivan: So, would it be fair to say that the "best practice" would be *not* to publicize the submission of an IRS Whistleblower claim, and let the IRS do its job?

Steve Whitlock: That would certainly be our preference. But I understand that it's a closed system, and people get frustrated with the closed system. I understand some of the other motives that might cause somebody to put out a press release, and I can't stop them from doing it, but they need to understand that when they do that, they may be affecting the ability of the IRS to pursue the issue. We're not going to shut down because there's a press release. We're not going to decline the case because there was a press release. We're going to look at it on the merits, but you put an extra element of risk in the case and our ability to pursue it if you give the taxpayer a heads up that the IRS is going to be interested in their behavior.

Michael Sullivan: How can an attorney monitor the progress of the case at all, given the restrictions of section 6103[4] and the privacy issues?

Steve Whitlock: It's very hard because we are really not allowed to say anything substantive about the status of the case. In one sense, no news is good news. If we haven't sent you a letter saying that the case is closed, it means it's still open. We do have people assigned to work the cases that are in their inventory. They'll give you what feedback they can. "Yes, we've been talking to the Subject Matter Expert. I will pass on to them your concern, and your desire to do a debriefing with them." Those kinds of things we can do, but we can't say, "Hey look, we're partway through the audit now," or to make it really interesting, "We identified four partners." We can't tell you that. That would be revealing taxpayer information, and we just don't have the authority to do that.

Michael Sullivan: In *qui tam* cases, the government can interview relators over and over. But the IRS doesn't sit down repeatedly with the informant or the whistleblower, and go over evidence that the IRS has gathered?

4. 26 U.S.C. § 6103 (confidentiality and disclosure of returns and return information).

Steve Whitlock: Generally, that's the rule. One of the things that we talked about in the program is helping our people in the IRS understand is that the whistleblower may have some unique insight. Our people are very good, but sometimes they are going to miss issues. Sometimes they're just going to look at the situation on a particular examination and say, "I think these are the five issues I should pursue." The whistleblower comes in and says, "Here's a sixth that you should go after," and in many cases we know how to go after that issue without further help from the whistleblower.

In other cases, our people need to understand that there may be some expertise that would help them understand a novel issue, or a novel application of the law about this taxpayer or unusual fact situations, or some complexities of relationships, and we ought to get the help where we can.

Michael Sullivan: Is there some effort to work out a way for the IRS to be able to communicate with the whistleblower and their counsel at least a little more?

Steve Whitlock: We're trying. There's one critical area where we have to be able to communicate, and that's at the determination stage. The whistleblower and their counsel have to have some insight into the basis for their determination, if for no other reason than to evaluate whether they should appeal. It's in nobody's interest to have all of these cases appealed to the Tax Court, simply because the Tax Court is more likely to give you discovery on what the basis was than the IRS is. We can't have that result, so we have to find a way to fix that. We think we've got an angle; we're working on it.

Michael Sullivan: If there's a recovery by the IRS, how is the whistleblower notified, and what are you able to tell the whistleblower?

Steven Whitlock: That's what we're working on. Right now, the way it works is we tell you, "Here's X number of dollars, and we can't tell you the way we calculated it." And that just can't be the result.

Michael Sullivan: When there is "rolling" recovery based on a whistleblower submission, and the taxpayer is paying the IRS in installments, would the whistleblower also be paid in installments?

Steven Whitlock: We have done some "partial payments," which is what we call them. We've had a policy on it in the past that I don't think makes a great deal of sense. What we're going to try to do is do something that makes sense.

It's important that the tax issue be resolved. The taxpayer in question must have exhausted their appeal rights on the assessment and have that finally settled. Collection happens reasonably quickly. The taxpayer either has the assets, and they pay, or they don't have the assets and may have to pay over a period of time. If we're in a situation where the payments are going to be made over time, then we can make partial payments if we're sure that there's not going to be something else filed.

I can give you a situation where somebody makes a payment, but we know that the payment has been made in order to create jurisdiction for a refund claim suit. In that situation, although we've been paid, we're not in a position to make the award.

Michael Sullivan: When the taxpayer enters into a settlement agreement with the IRS, it's over at that point?

Steven Whitlock: That's right. And we also have the situation that we have to work through where there are multiple taxpayers. If the abuses occurred in a partnership, the tax liability is visited on the partners. So, let's take the hypothetical situation of the partnership that has 100 partners, which is not all that uncommon. The tax matters partner resolves the issue and concedes the point. The liability then flows through to each of the partners based on whatever the terms of the partnership are, right? And so now, we've got 100 taxpayers to collect from. 50 of them pay up pretty quickly, 25 of them get on an installment agreement, and the other 25 have no assets and come in an offer in compromise, seeking to have the actual liability substantially reduced or eliminated. We've got 100 issues to sort out there.

Michael Sullivan: In determining the reward to the whistleblower within the statutory range of 15–30%, what criteria do you use?

Steven Whitlock: At this point, we are still using the criteria that were provided under the previous policy, which gives a reward of 1%, 10%, 15%, because all of the cases that have come in for an award determination were cases that pre-date the 2006 amendments.

I have drafted some criteria which I intend to publish so that people see what we're going to use, but they're not quite ready. But, we're going to expose the criteria to people so you'll see that we have a starting point, and then adjust from that base level. We have to start somewhere, so we'll start at 15. There are some factors that we would consider to go higher in the range, and some factors that would cause us to say that we shouldn't go higher in the range. Pluses and minuses. We'll see how that sorts out. It can't be algebra, where we plug numbers into a formula and compute a result. This is an art, not a science, and we'll see where that takes us.

I also don't expect that we will ever be in a position where we say that Whistleblower Smith on these facts gets a 16% award, Whistleblower Jones on these facts—which are a little better for Whistleblower Jones—gets an 18 ½% award. You can't divide it that finely. We will likely come up with some relatively arbitrary, but reasonably understandable distinctions between a high, medium, and low, or something like that, and we'll peg some places in the range at 5% increments, or halfway in the range or something else, and that's how we'll make the call.

Michael Sullivan: At the end of the whole process, I take it there is no announcement by the IRS that it has recovered money from "Taxpayer A."

Steven Whitlock: That's correct.

Michael Sullivan: There's also no announcement by the IRS that "Whistleblower B" has recovered a reward, or that "Attorney C" has made a fee in that process. Are there any restrictions on what attorneys can say, or should say, at that point if there is a recovery?

Steven Whitlock: That's between the attorney and the client about how much they want to say about it. There's no prohibition on anyone who has personal knowledge from saying what they know. That's how we get press releases.

In theory, some of those press releases could have identified the taxpayer because the attorney who knows that they've made a submission is not bound by 6103. That's a problem, right? At the end stage, I'm not aware of anything—other than the relationship between the attorney and the client, and their concern about retaliation or some civil liability to the taxpayer—from revealing that, "I received an award of this amount based on my reporting of tax noncompliance by this individual."

We will do a report of our own. We are required by law to do an annual report on actions taken under the statute, and I have to figure out how I'm going to convey that information about awards that we do make.

Michael Sullivan: Are there any statistics available that you can share on types of claims that have come in?

Steve Whitlock: Yes. I am being very careful not to say a whole lot about what the nature of the claims are because (1) I don't want to reveal where we're looking; and (2) every time I do, I get a lot of questions about "Is that mine?"

It's a mix—it's a little bit of everything that the IRS does. We've made referrals to all of the operating divisions. Wage and Investment doesn't do many examinations. Most individual taxpayers are audited by Small Business/Self-Employed. Wage and Investment handles the submission process and things like that. They do some correspondence with the taxpayer to resolve issues, but they generally would not act on something like a whistleblower submission.

So, generally we're talking about Tax Exempt & Government Entities, Large and Mid-Size Business, Small Business/Self-Employed. Criminal Investigations can get involved by taking the case right from the start, or after a civil examination develops additional facts warranting a criminal referral. They're all getting these cases, and it's domestic, it's international. Big guys, medium guys, not many small guys.

Michael Sullivan: I want to conclude by asking you about mistakes that you see attorneys make, and things that you would like to urge lawyers to do, in pursuing these claims.

Steve Whitlock: By and large, the attorneys are doing a pretty good job with the information that they are providing to us. We see reasonably clear arguments. We understand what's going on.

Give us a clear statement about what it is about. If you want to give your client a little extra assurance on confidentiality, one thing that a couple of firms have done is

they will only use the name of the client in the Form 211. Elsewhere in the submission, they will refer to the client as "Mr. X" or some term like that, so that there's not a lot of paper floating around with that person's name on it.

I would also suggest that whistleblowers and their representatives try to understand why we have the process for receiving their submissions in the Whistleblower Office, and not attempt to by-pass the process. We set up the Whistleblower Office review and the Subject Matter Expert review to help us ensure that the audit team gets what they need, but does not get something they can't use. It also helps us to document what we received from the whistleblower, which will be important when the time comes to make an award determination. Another important part is ensuring that the audit team knows what it must do to protect the whistleblower's information from disclosure. Yes, it can be slow and frustrating, but we have a lot of moving parts that need to be coordinated.

Sometimes a whistleblower or a representative will contact an auditor or investigator directly, thinking they can expedite the case and bypass unnecessary bureaucracy. I think that is a mistake, and it can operate against the whistleblower's interests. First, I acknowledge that we had problems getting our program up and running, and some cases sat too long in our hands before getting out to the field. We have taken a number of steps to eliminate those delays, and we can move quickly on a time-sensitive matter.

I think the more important point, from the whistleblower's perspective, is that there can be consequences from direct contact that are not good for the whistleblower. One is that they may give the auditor something he or she is not allowed to have, such as a privileged document. In a case like that, we may have to pull the auditor off the case and start fresh with an "untainted" audit team. That will delay case resolution, at best. It may also provide the taxpayer with a procedural argument to fight the case. If the taxpayer prevails on procedural grounds, there is no assessment and thus no award. Even if the taxpayer loses, there is another opportunity to delay resolution of the case.

Another potential bad outcome for the whistleblower is that the direct submission to the auditor might result in information being included in the audit file that would not otherwise get into the audit file. We try to keep whistleblower information out of the audit file, because the taxpayer has the right to see what is in the audit file under some circumstances. If the direct submission to the auditor gets into the audit file, we might not be able to get it out before the taxpayer sees the file. There is also some risk that the whistleblower's contribution might not be adequately documented if our process is bypassed.

For all of these reasons, I urge whistleblowers and their representatives to work with us, so that we can provide the proper foundation and ensure the information is handled appropriately. That does not mean there will never be direct contact with the auditor or investigator. Rather, it gives us an opportunity to manage the risks.

If you're going to send something in electronic format, it would be helpful to have PDF files or the equivalent, so that for evidentiary purposes, we see what we've really got. To the extent that you do anything really extensive, an index is really essential.

When we get 16,000 pages on a thumb drive, that's a little hard to work through without an index.

A little practice tip is if you send the information in, and you've got electronic media with it that has documentary evidence, don't send that through the U.S. Postal Service. Send it by FedEx or UPS, because our mail process for USPS includes irradiation. Electronic media will get "fried" when it goes through that process.

Michael Sullivan: On behalf of TAF, I thank you, Steve Whitlock.