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

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

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

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FROM THE EDITOR

Recently, I debated a False Claims Act defense lawyer about the need for clarifying the reach of the Act. At the crescendo of the discussion, he retorted, "The Act's working *well enough*! Why mess with the Act based on a few court decisions?!" The "well enough" argument is actually a refrain I have heard from all sides of the FCA community. While this pithy statement for the *status quo* certainly has a ring to it, perhaps it could be strengthened with some additional talking points:

- Yes, recent decisions have jeopardized everything from Iraq war funds to Medicaid dollars to hurricane relief efforts, but the Act has worked "well enough" to recover over $20 billion since 1986. (The federal government wants to protect *all* of its money?!?! Now, they are just being greedy!)

- Yes, fraudulent schemes have become vastly more complex over the last two decades, but there is no need for the Act to keep up with the times. (Can someone help me? I am trying to surf the Internet with my 1986 Commodore 64 computer.)

- Yes, the government relies on contractors for *everything* from paying Medicare claims to guarding our borders, but it's better to "keep it simple" by only protecting checks personally inked by government employees. (My parents seem to think *they* paid for my college education just because they gave me the money to pay my university! Perhaps I need to walk them through the *Totten* decision.)

- Okay, so Congress forgot to extend the conspiracy provision to all FCA violations, but, seriously, how often do fraudfeasors *really* work together to hide government funds? (Besides, don't we want to encourage teamwork when it comes to government contracts?!?)

- Okay, so companies that wrongfully retain government funds are regularly able to evade FCA liability, but isn't our whole country built on the "finders keepers, losers weepers" honor system? (Where's the trust?)

- There is no need to define "obligation," for the current patchwork of reverse FCA case law makes it crystal clear. (If you start defining statutory terms, how will I ever hit my firm's billable hours quota?)

- Yes, there are many ways to dismiss and sanction frivolous cases, but if you take the public disclosure bar away from defendants, how will they dismiss *meritorious* cases?!?! (Besides, this whole "public-private partnership" works a lot better without those pesky whistleblowers exposing all of the corporate skeletons.)

- Okay, so calculating the statute of limitations period currently requires a calculator, a dart board, and a flow chart, but this injects a little suspense into our practice. (Uniform rules are boring!)

- The FCA *should* require the relator to have evidence of an actual invoice at the pleading stage. After all, the False Claims Act is *really* about identifying pieces of paper, not that whole "fraud" thing. (Wanted: Billing clerk who understands the complexities of an intricate healthcare fraud scheme.)

- There is no need to extend anti-retaliation protections to those who are merely trying to *stop* the fraud. Where do you draw the line? (Extending whistleblower protections is anti-business!)

- CID subpoenas are so intrusive that we should *only* trust the Attorney General to authorize them. (Perhaps in his free time, the Attorney General could also brew the morning coffee at the Justice Department.)

- Okay, even if these court decisions were wrongly decided, I am sure they will not impact the thousands of cases currently under seal at the Justice Department. Moreover, contractors have vowed to not abuse these loopholes to their benefit. (Again, where's the trust?!?)

This has been an enlightening exercise for me. I am sold! If I represented fraudfeasors or those who have benefitted under the *status quo*, I, too, would argue that the Act is working "well enough." However, as we know all too well, "well enough" is not good enough when it comes to fighting fraud in the modern times.

Sincerely,

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Recent False Claims Act & *Qui Tam* Decisions

JANUARY 1–MARCH 31, 2008

A. Section 3729(a)(7) Definition of "Obligation"

U.S. ex rel. Marcy v. Rowan Cos., Inc., 2008 WL 588745 (5th Cir. Mar. 5, 2008)

Relator brought an FCA and a reverse FCA action against offshore drilling companies, alleging the companies failed to disclose their illegal dumping activity in statutorily required reports, so as to avoid paying civil fines under applicable federal statutes. The Fifth Circuit, in affirming a lower court's dismissal of the relator's § 3729(a)(2) claims, found that the defendants' statutory requirements to report their illegal dumping were not "material" to the defendants' lease with the federal government, since compliance with those statutory requirements was not a prerequisite to continuation of the lease agreement. The court of appeals, relying on earlier precedent, also affirmed the dismissal of § 3729(a)(7) reverse FCA claims, for the "obligation" to pay the fines or penalties was not a sufficiently "fixed obligation," but was instead "contingent" upon the government's prosecutorial discretion.

Relator alleged that his former employer—a group of offshore drilling companies—instructed him to illegally dump hazardous materials into the Gulf of Mexico, that they intentionally failed to report this activity as is required by federal law, and that they intentionally omitted a record of these discharges from their statutorily required reports. As a result, the realtor alleged, the companies avoided paying civil fines and other penalties under several federal statutes. The relator filed a lawsuit against the drilling companies, alleging, among other things, violations of the False Claims Act, including violations of section 3729(a)(2) (making a false record or statement to get a false claim paid by the government) and section 3729(a)(7) (using a false record or statement to avoid an obligation to pay money to the government). The defendants moved to dismiss the complaint, alleging that the relator failed to state a claim under the False Claims Act and that the relator did not plead the False Claims Act counts with sufficient particularity to satisfy the requirements of Federal Rule of Civil Procedure 9(b). The U.S. District Court for the Eastern District of Louisiana did not reach the Rule 9(b) question, but nonetheless dismissed the False Claims Act counts, holding that the relator failed to state a claim under the False Claims Act. The relator appealed and the 5th Circuit affirmed the district court's ruling.

Section 3729(a)(2) Claim Was Properly Dismissed

The Fifth Circuit affirmed the lower court's ruling, dismissing the section 3729(a)(2) claim. The court found that the defendants, pursuant to a lease contract, did not request or demand payment from the United States, but rather, were extracting natural resources—oil—that belonged to the United States. However, the relator argued that the illegal dumping necessarily violated the lease, and since the defendants failed to report their illegal dumping, they impliedly certified compliance with the lease, and as received the benefit of being able to continue to take government property as provided by the lease. The court declined to rule on whether the defendants made a claim to the government for payment by impliedly certifying compliance with the lease. Instead, relying on its prior decision in *U.S. v. Southland Management Corp.*, 326 F.3d 669 (5th Cir. 2003), the Fifth Circuit affirmed the dismissal of this claim because it found that the defendants' statutory requirements to report their illegal dumping were not material to the defendants' lease with the United States, since compliance with those statutory requirements was not a prerequisite to continuation of the lease agreement.

Reverse False Claims Act Claim Was Properly Dismissed

With respect to the reverse False Claims Act claim, the court affirmed the lower court's dismissal. The 5th Circuit, relying on its precedent in *U.S. ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648 (5th Cir. 2004), ruled that any obligation the defendants may have had to pay fine and/or penalties to the U.S. government were potential and contingent, since, even if the government was aware of the illegal dumping, it still would have had to choose whether or not to impose any penalty against the defendants. In addition, the court noted that any potential obligation to pay the government arose from statutory provisions—the lease agreement did not impose upon the defendants any obligations to pay money to the government. Thus, quoting its decision in *Bain*, the court held that the relator did not state a claim under section 3729(a)(7), since the potential obligation to pay the government did not "arise out of an economic relationship between the government and the defendant (such as a lease or contract or the like) under which the government provides some benefit to the defendant wholly or partially in exchange for an agreed or expected payment or transfer of property (or on behalf of) the defendant to (or for the economic benefit of) the government." Ultimately, the court held that "[a]ll polluters face the prospect of liability for violations of environmental laws, regardless of whether they contract with the federal government or not. If such violations were enough to create a reverse False Claims Act claim, it would broaden the scope of the Act far beyond present interpretations."

Relator's Motion To Amend His Complaint Was Properly Denied

The court of appeals also noted that after the district court dismissed the relator's False Claims Act claims, the relator moved to amend his complaint, in order to add allegations that the Department of Justice would seek indictments against at least one of the defendants after investigating the relator's allegations and that one of the defendants had agreed to plead guilty to a felony. The district court denied that motion. The Fifth Circuit affirmed that ruling, holding that "[t]he relevant time for evaluating the nature of Defendants' obligation to pay is when they made or used the false statements. . . . The government's pursuit of charges against individual Defendants occurred well after the false certifications alleged by Marcy in the complaint. Accordingly, the facts Marcy wished to add would not have assisted him in stating a reverse False Claims Act claim.

B. Section 3729(a)(7) Calculating Damages

United States v. Rogan, 2008 WL 442413 (7th Cir. Feb. 20, 2008)

The federal government brought an FCA action against a hospital administrator, alleging the administrator conspired with others to defraud the Medicare and Medicaid systems by concealing referrals that violated the Stark and Anti-Kickback Acts. After an Illinois district court entered judgment of $64 million for the government, the defendant-administrator appealed the decision. In affirming the decision, the Seventh Circuit ruled that the defendants' statements were materially false under the FCA, for the statements were "capable of influencing" a government official. The court of appeals rejected the administrator-defendant's argument that "materiality" could only be established by having a federal employee testify that the government was sure to enforce the underlying laws. Moreover, noting that Medicare and Medicaid payments are conditioned on providers not violating the Stark and Anti-Kickback Acts, the Seventh Circuit agreed with the government that all of the violative claims alleged in the case should be paid back trebled to the government. Lastly, while not opining on the question of whether the Eighth Amendment's Excessive Fines Clause actually applies to civil FCA actions, the court of appeals determined that the $64 million judgment was not at level of being "grossly excessive," for it was less than four times the actual damages and was well within the single digit level the Supreme Court found acceptable in *State Farm Mutual Automotive Insurance Co. v. Campbell,* 538 U.S. 408 (2003).

The federal government successfully obtained a $64 million judgment against Peter Rogan, a former hospital administrator, who conspired with others to defraud the Medicare and Medicaid systems by concealing patient referrals that violated the Stark and Anti-Kickback Acts. Rogan appealed the decision to the Seventh Circuit.

Testimony of Government Official Is Not Necessary To Establish "Materiality"

Rogan argued that the federal government failed to introduce sufficient evidence that the underlying claims were "materially" false. According to Rogan, the government could have only satisfied the "materiality element" by having a federal government employee testify that it would not have paid the claims if he knew the providers were violating the Stark and Anti-Kickback Acts.

In rejecting Rogan's argument, the Seventh Circuit stressed that "materiality" is established under the FCA by merely showing that the false claims were "capable" of influencing the government's decision to pay. In turn, testimony from a claims-processing officer along the lines of "I follow the law" is not required. Instead, "materiality" is an objective standard, which, in this case, is dictated by the language of the Stark and Anti-Kickback Acts. The fact that "overworked, harried, or inattentive disbursing officers" failed to reject the claims has no baring on whether or not the claims were "materially" false.

"Reliance Element" Satisfied

Rogan countered that the federal government did not actually "rely" on his omissions. While seeming to agree for the first time that "reliance" is an element into the FCA, the Seventh Circuit ruled that this was easy to show in this case, for the truth would have revealed that the reimbursements were illegal. Again, the court stressed that a government employee was not needed to testify that illegal claims would not have been paid.

Single Damages Are Entire Amount Paid By The Government for Stark-Violative Claims

Then, the court turned its attention to damages. Rogan maintained that even though they may have been violating the Stark Act when they submitted reimbursement claims to Medicare, the patients still received medical care, so there were not actual monetary damages to the government. The court of appeals, in soundly rejecting this limited reading of the Act, noted that when the government pays Medicare claims, it attaches certain conditions. The court reduced the inquiry to a simple, pithy statement: "When the conditions are not satisfied, nothing is due." Accordingly, the Seventh Circuit ruled that nothing was due to Rogan for his violative claims, so he was liable for three times the entire amount paid under the 1,812 false claims. The final calculation came out to $64 million.

Court Refuses To Entertain Defendant's Eighth Amendment Arguments

Rogan countered that this amount violated the Eighth Amendment's Excessive Fines Clause. As an initial matter, the court of appeals stressed that it was far from clear whether the Excessive Fines Clause even applies to civil actions under the False Claims Act. Indeed, the U.S. Supreme Court has recently distanced itself from even considering the Act punitive. For example, in *Hudson v. United States*, 522 U.S. 93 (1997), the Court overruled *United States v. Halper*, 490 U.S. 435 (1989), and held that penalties under the False Claims Act are not criminal punishment for the purpose of the Fifth Amendment's Double Jeopardy Clause. This reversal alone raised serious questions for the court of appeals over whether the Excessive Fines Clause was also inapplicable.

However, the Seventh Circuit decided that this issue was not germane in the case at bar, for Rogan had failed to raise an excessive-fines argument in the district court, and there is no general doctrine of plain-error review in civil cases. Moreover, because Rogan persuaded the lower court to exclude certain evidence that was necessary to assess "excessiveness," the Seventh Circuit determined that the record was unsuitable to even resolve his constitutional argument. Lastly, the final $64 million judgment was less than four times the actual damages, which is well within the single-digit level found acceptable in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). Indeed, given the egregious facts of this case and the state of the record, the court of appeals ended by stating, "[F]or all we can tell, Rogan's penalty may be too low."

U.S. ex rel. Longhi v. Lithium Power Tech., Inc., 530 F. Supp. 2d 888 (S.D. Tex. 2008)

Relator filed suit against a technology company, alleging that the company violated the False Claims Act by making false statements and fraudulently inducing the Department of Defense to accept its contract proposals. The relator further alleged that every invoice from the company under those contracts was false. The district court granted summary judgment in favor of the relator, finding the company liable. The court then turned to the question of the amount of damages sustained by the government and held that the government's actual damages amounted to three times the full amount paid on each of the contracts. Finally, the court determined that the defendant's civil penalty amounted to one forfeiture for each of the four contracts, and assessed the maximum penalty for each forfeiture.

Alfred Longhi, a relator, filed a *qui tam* action in the District Court for the Southern District of Texas against Lithium Power Technologies, Inc. and two individual defendants, alleging violations of sections 3729(a)(1) and (a)(2) of the False Claims Act. Longhi's complaint alleged that the defendants fraudulently induced the Department of Defense's Small Business Innovation Research Program to accept four contract proposals to fund the defendants' development of special batteries that could later be marketed to the government. The complaint alleged that the defendants accomplished this fraud by misrepresenting their level of experience and facilities. The district court granted summary judgment in the relator's favor, finding that every invoice under the four contracts that the defendants submitted constituted a false claim. The court was then faced with the challenge of determining the damages and civil penalty to be assessed against the defendants.

Actual Damages

The court first noted that the False Claims Act provides for the assessment against a liable defendant of "3 times the amount of damages which the government sustains" because of the defendant's actions. However, the court stated that it could not locate any specific standard for calculating damages under the False Claims Act, and that there appeared to be a dearth of caselaw on the issue of calculating damages for liability based on a fraudulently induced grants. The court observed that in *U.S. v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972), the Fifth Circuit held that damages under the Act are limited to "the amount that was paid out by reason of the false claim," and that in *U.S. ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196, 200 (D.C. Cir. 1995), the D.C. Circuit held that damages amount to "only those damages that would not have come about if the defendant's misrepresentations had been true." The court further noted that the Fifth Circuit requires a direct causal nexus between the false statement and the damage sustained by the government. Consequently, the court determined that all of the funds received under the four contracts were directly linked to the defendants' misrepresentations. However, no consequential damages were recover-able. Relying on *Aerodex*, the court rejected the defendants' "no harm, no foul" argument that the government did not sustain any damages, since it received the benefit of its bargain with the defendants. The court held that the government did not receive what it bargained for, since the government would not have accepted the defendants' proposal had the defendants been truthful. The court determined that the benefit of the government's bargain was to award funds to eligible and deserving small businesses, and the defendants were not eligible to receive those funds. Moreover, the court found that since the contracts at issue were not traditional procurement contracts, the government never received an end product from the defendants, and thus, the contracts did not result in any tangible benefit to the government. Instead, the court held that the government had been damaged for the entire amount of the contracts, since all of the funds awarded to the defendants were diverted from other, deserving small businesses. Therefore, in accordance with the D.C. Circuit Court's ruling in *U.S. v. TDC Mgmt Corp., Inc.*, the district court determined that the entire value of the SBIR program was lost, since the very purpose of the program—to make small businesses more competitive—was frustrated. As a result, the court held that "the proper amount of actual damages for the Four Contracts is the amount paid out on the Four Contracts—$1,657,455.00—multiplied by three for a total of $4,972,365.00."

Civil Penalty

The court then turned to the civil penalty to be assessed against the defendant. The court noted that the False Claims Act provided for a minimum penalty of 5,500 and a maximum penalty of $11,000, but observed that one of the four contracts predated an amendment of the civil penalties provision, and thus, any civil penalty under that contract was capped at $10,000. In calculating the civil penalty, the court first considered whether a penalty should be assessed for each of the 54 vouchers the defendants submitted under the four contracts. The court, applying the Supreme Court's rationale in *U.S. v. Bornstein*, 423 U.S. 303 (1976) and *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), concluded that civil penalties should be assessed for each of the defendants' causative acts. The court held that the four contracts comprised the defendants' causative acts, and therefore the court assessed four civil penalties against the defendants. The court further held that the the defendants would be assessed the maximum penalty for each forfeiture, since they engaged in a knowing and systematic fraud. Thus, the court assessed the maximum civil penalty of $10,000 for the earliest contract, and the maximum civil penalty of $11,000 for each of the three subsequent contracts, for a total penalty of $43,000.

C. Section 3730(d)(1) Reasonable Attorneys' Fees

***U.S. ex rel. LeFan v. General Electric Company*, 2008 WL 152091 (W.D. Ky. Jan. 15, 2008)**

After the government intervened and settled a *qui tam* action, the relators filed Section 3730(d)(1) motions, seeking "reasonable" attorneys' fees and costs against the defendant. While a Kentucky district court recognized that it was free to look to a national market in determining "reasonable fees," particularly given the area of legal specialization, it chose to reduce the relators' attorneys' fees to correspond to the "going rate" for complex civil litigation in the jurisdiction. However, to compensate the firms for their delay in receiving payment during the sixteen years of litigation, the court calculated the attorneys' fees based on their current hourly rates. Over the defendants' objections, the court awarded the relators attorneys' fees for the time they spent assisting the government with the *government*'s factual investigation. Lastly, the court awarded attorneys' fees for the time spent preparing and successfully litigating the fee petition, especially since the allotted time was less than three percent of the hours of the main case.

D. Section 3730(d)(4) Attorneys' Fees & Expenses for "Frivolous" *Qui Tam* Suits

U.S. ex rel. Haight v. Catholic Healthcare West, 2008 WL 607150 (D. Ariz. Feb. 29, 2008)

An animal rights group brought an FCA *qui tam* action against a medical research facility, alleging that it made false claims in connection with an NIH research grant application to fund cancer research involving the use of dogs. After an Arizona district court granted summary judgment in favor of the defendant-facility, the defendant-facility filed a 31 U.S.C. § 3730(d)(4) motion seeking attorneys' fees and expenses from the relator. While the defendant-facility conceded that the underlying allegations were not "frivolous," it argued that Section 3730(d)(4) still applied, for the relator's "obvious social agenda" demonstrated that it was "brought primarily for purposes of harassment." In denying the motion, the district court declared that, given the potential "sizeable award," it could not conclude that the suit was *primarily* brought for purposes of harassment, as required to award § 3730(d)(4) attorneys' fees and expenses.

An animal rights group brought an FCA *qui tam* action against a medical research facility, alleging that it made false claims in connection with an NIH research grant application to fund cancer research involving the use of dogs. While the district court ultimately dismissed the relator's action, it concluded that the claims were not so lacking in legal merit as to be deemed frivolous. Nevertheless, the defendants subsequently filed a motion seeking attorneys' fees and expenses pursuant to 31 U.S.C. § 3730(d)(4), arguing that even though the claims were not "frivolous," Section 3730(d)(4) still applied, for the claims were "brought primarily for purposes of harassment." Specifically, the defendants claimed that the relator used this litigation to advance its social agenda of stopping the use of animals in medical research.

Suit Was Not Brought *Primarily* For Purposes Of Harassment

Section 3730(d)(4) provides for attorneys fees to a prevailing defendant when a plaintiff's claims are "clearly frivolous" or "brought primarily for purposes of harassment." In parsing the language of the Act, the court noted that if evidence of an improper motive were the only consideration, the inquiry would end. However, § 3730(d)(4) provides that not only must evidence exist that plaintiffs were motivated by an improper purpose, but also that their claims were brought "primarily" for that purpose. Having previously concluded that the relator's claims were not frivolous, the court was unable to conclude that the promotion of relator's social agenda was "paramount over asserting their non-frivolous claims that, if successful, could have earned them a sizable award." In turn, because there was no showing that the claims were brought primarily for purposes of harassment, the court denied the defendants' § 3730(d)(4) motion for attorneys' fees and non-taxable costs.

Prevailing Party Awarded FRCP 54(d)(1) Costs

The court then took up the issue of whether the defendants were allowed costs under FRCP 54(d)(1). Rule 54(d)(1) provides that costs other than attorneys' fees "should be allowed to the prevailing party." Citing an earlier Ninth Circuit decision, the court laid out the controlling case law: "The unsuccessful litigant can overcome this presumption [in favor of the award of costs under Rule 54(d)] only by pointing to some impropriety on the part of the prevailing party that would justify a denial of costs. . . . A district court therefore must award costs unless the prevailing party is guilty of some fault, misconduct, or default worthy of punishment." *U.S. ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1414 (9th Cir.1995) (applying Rule 54(d) in a False Claims Act case) (citation omitted).

While the relator did not allege any impropriety or misconduct on the part of the defendants, the relator claimed that a permissive award of costs would chill the exercise of rights by *qui tam* litigants both in this case and other FCA cases. However, the court countered that such a blanket exclusion of costs in FCA cases was rejected in *Lindenthal*. *Id*. at 1413–14.

With no evidence of "some impropriety on the part of the" defendants, the court allowed costs in the amount taxed by the clerk of the court.

U.S. ex rel. Chabot v. Westgate Homes, Inc., 2008 WL 360785 (M.D. Fla. Feb. 8, 2008)

After a relator served his unsealed *qui tam* complaint on the defendant, the defendant filed an answer in which it denied the relator's claims and asserted a counterclaim for attorneys' fees and expenses under 31 U.S.C. § 3730(d)(4). The relator, in moving to dismiss the counterclaim, argued that Section 3730(d)(4) does not create an independent cause of action. While a Florida district court ruled that, as a matter of procedural technicality, § 3730(d)(4) could not be raised as a counterclaim, the court did allow the "substance" of the demand, for it placed the relator on notice that such an award would be sought if the defendant prevailed.

Gregory Chabot brought an FCA *qui tam* action against Westgate Homes, Inc. When the government declined to intervene in the suit, Chabot served the complaint on the defendant. Subsequently, Westgate filed an answer, which included a counterclaim seeking attorneys' fees and expenses under 31 U.S.C. 3730(d)(4). Chabot filed a motion to dismiss the counterclaim as procedurally improper.

Chabot argued that Westgate's Counterclaim was improper because Section 3730(d)(4) does not create an independent cause of action. Instead, Chabot maintained, "a claim for fees and costs must be made by motion only if [Westgate] prevails and can establish that the claims were objectively frivolous, vexatious or brought for the purpose of harassment."

Section 3730(d)(4) Simply Needs To Be Raised By Motion, Not As A Cause of Action

As an initial matter, the court noted that it is well established that unless otherwise specified by statute, a request for an award for attorneys' fees is "simply a demand for a particular remedy" rather than an independent cause of action. *E .g., Valcon II, Inc. v. United States,* 26 Cl.Ct. 393, 398 (Cl.Ct. 1992). Moreover, the Eleventh Circuit has explained that a party's failure to plead a demand for attorneys' fees will not usually bar that party from later seeking attorneys' fees. *Capital Asset Research Corp. v. Finnegan,* 216 F.3d 1268, 1270–71 (11th Cir. 2000) (citing *Engel v. Teleprompter Corp.,* 732 F.2d 1238, (5th Cir. 1984)).

Thus, as a matter of procedural technicality, the court agreed that Westgate erred in labeling its demand for attorneys' fees as a counterclaim. However, the court ruled that the substance of the demand was appropriate, for it puts Chabot on notice that such an award will be sought if it prevails and the statutory requirements are satisfied. Therefore, the court did not strike the demand itself.

U.S. ex rel. Montgomery v. St. Edward Mercy Medical Center, 2008 WL 110858 (E.D. Ark. Jan. 8, 2008)

After an FCA defendant was successful in using the recent U.S. Supreme Court *Rockwell* decision to dismiss a *qui tam* suit, it filed a motion with an Arkansas district court seeking attorneys' fees and expenses pursuant to 31 U.S.C. § 3730(d)(4). In denying the defendant's motion, the court ruled that it could not deem the suit "frivolous" under § 3730(d)(4), especially since the deciding *Rockwell* decision was not established law when the originally filed his *qui tam* suit.

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

U.S. ex rel. Duxbury v. Ortho Biotech Products, L.P., 2008 WL 244304 (D. Mass. Jan. 25, 2008)

After the government declined to intervene in a former sales representative's *qui tam* action against a pharmaceutical manufacturer, a Massachusetts district court granted the relator's motion to amend his complaint and to add a co-relator pursuant to FRCP 15(a). However, then, the defendant-manufacturer moved to dismiss the amended complaint, arguing, *inter alia*, that the FCA public disclosure bar, 31 U.S.C. § 3730(e)(4), applied and that the complaint failed to satisfy the particularity requirements of FRCP 9(b). The court agreed that the FCA public disclosure bar applied and that the second relator did not qualify for the bar's § 3730(e)(4)(B) original source exception, for he had failed to "voluntarily provide[] information to the government before filing [his] action." Moreover, the court stressed that even if the second relator qualified for the exception, the Section 3730(b)(5) first-to-file bar would have barred him, for the first relator's complaint was still "pending" at the time the second relator was added as a co-plaintiff. Turning its attention to the first relator, the court determined that he qualified for the bar's original source exception, but only for the time that he was employed by the defendant-manufacturer. However, the court noted that in the time period between the filing of the original complaint and the filing of the amended complaint, a *qui tam* action was filed—and dismissed—in another court that raised the same allegations that the first relator now wished to elaborate on in his amended complaint. The court ruled that "bare bones allegations" in the original complaint was not sufficient to qualify him as the first person to file on these particular allegations. Then, without addressing the question of whether the action in the other suit was still actually "pending," the court dismissed the amended complaint under the § 3730(b)(5) first-to-file bar. Lastly, the court ruled that the complaint was also dismissed under Rule 9(b), for while the relator detailed the underlying fraudulent marketing scheme, he failed to tie the scheme to a false claim that was actually submitted to the government.

From 1992 to 1998, Mark Duxbury climbed the corporate ladder at Ortho Biotech Products, L.P., ultimately becoming a regional key account specialist for the oncology sales force. In this position, he uncovered a number of illegal marketing practices. When the company refused to change its practices, he filed a FCA *qui tam* suit against the company in November of 2003.

Two years later, in July 2005, the United States declined to intervene in the suit. Subsequently, the court granted Duxbury's FRCP 15(a) motion to amend his complaint and to add fellow Ortho employee Dean McClellan as a co-relator. At that time, the court noted that McClellan did not bring any new legal claims against Ortho, but rather added additional supporting facts to the legal claims previously made by Duxbury.

The relators alleged three separate FCA violations in their amended complaint. First, they alleged that beginning in 1992, Ortho undertook a scheme to give kickbacks to providers and hospitals to induce them to prescribe Procrit. The kickbacks allegedly included free samples, off-invoice discounts, rebates, consulting fees, educational grants, payments to participate in studies or trials and advisory board honoraria. The relators alleged that the kickbacks caused providers and hospitals to submit false claims for payment to Medicare. They claim that the time period of the false claims is from "December 1992 to the present."

Third, the relators alleged that Ortho promoted off-label dosing of Procrit in violation of the Food, Drug and Cosmetic Act and used "sham drug trials" to falsify eligibility for Medicare reimbursement for off-label uses of the drug. The relators claimed that the time period for this claim was from January 1998 to the present.

Ortho moved to dismiss the amended complaint in its entirety on the grounds that the court lacked jurisdiction under the public disclosure bar, that certain claims were barred by the "first-to-file" rule, and that the relators had failed satisfy Rule 9(b).

Public Disclosure Bar Applied

The court first turned it attention to relators' kickback allegations, which Ortho maintained was blocked by the FCA public disclosure bar. Ortho asserted that the essential elements supporting this claim were publicly disclosed in prior civil litigation and various government and media reports prior to Duxbury filing his initial complaint in November 2003. The prior litigation highlighted by Ortho was the multi-district AWP litigation taking place in the District of Massachusetts, *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, Civ. No. 01-12257-PBS ("AWP MDL").

Relators argued that the AWP MDL did not publicly disclose Ortho's alleged fraud because (1) "it only revealed the component of Ortho's scheme that involved consumers, insurers and third party payers but not the manipulation of the Medicare reimbursement system," and (2) "it did not contain elements of the scheme of having Ortho's sales force intentionally cause the submission of false claims to the Government."

Without much discussion, the court ruled that a § 3730(e)(4) "public disclosure" occurred, for the allegations in the AWP MDL predated the relators' complaint and the allegations were substantially the same as those detailed in the relators complaint. This led the court to conclude that it was "inescapable that Relators' claims [were] based upon the public disclosures."

Qualified for Original Source Exception for Claims Submitted During His Employment

However, the court determined that Duxbury qualified for the public disclosure bar's original source exception, 31 U.S.C. § 3730(e)(4)(B), for his knowledge of the alleged fraud was both independent and direct. However, the court ruled that his "direct knowledge" of Ortho's activities only extended to the time he was employed by the company. Thus, he only qualified as an original source with regard to allegations concerning the 1992–1998 time period.

Co-Relator Did Not Qualify for Original Source Exception

McClellan, on the other hand, did not qualify for the original source exception, for he had not "voluntarily provided the information to the Government before filing an action," as mandated under § 3730(e)(4)(B). Here, because the court found that McClellan was not asserting any new claims, but was merely adding "supporting facts to the legal claims previously made" by Duxbury, the court ruled that McClellan needed to show that he provided the information to the government prior to Duxbury filing suit in November 2003.

First-to-File Bar Would Have Also Prevented Co-Relator's Suit

Moreover, even if McClellan qualified for the original source exception, the court stressed that he would have been tripped up by the Act's "first-to-file" bar, 31 U.S.C. § 3730(b)(5). The court, declaring the first-to-file bar to be "exception-free," ruled that the bar "cannot be circumvented simply by amending the complaint to add McClellan as a relator when his claims would have been barred had they been brought on their own."

Relators' Initial Allegations Were Not Sufficient To Qualify As Being "First-Filed"

The court then turned its attention to the relators' off-label marketing claims. The court observed that one month after Duxbury filed his original *qui tam* complaint, a separate relator filed a *qui tam* complaint in the District of Colorado that also alleged a scheme by Ortho to off-label market Procrit. (Notably, the District of Colorado *qui tam* suit was dismissed prior to the relators filing their amended complaint.)

While Ortho conceded that the relators' amended complaint included off-label marketing allegations, Ortho maintained that these allegations were not in the original complaint, so they were barred under the first-to-file bar. (Of particular note, neither party raised the issue of whether the District of Colorado suit was "pending" at the time the relators filed their amended complaint. Because neither party raised the issue, the court also took a pass on the question.)

While seeming to credit Duxbury for including the off-label allegations in his original complaint, the court disregarded their inclusion as being "bare bones allegations" that were not sufficient "placeholder[s] for the widespread off-label marketing scheme that relators now wish to allege." Likewise, the court ruled that these allegations were not sufficient to trigger the first-to-file rule when it came to the later-filed District of Colorado suit. However, without diving into the sufficiency of the District of Colorado complaint, the court ruled that this later-filed suit blocked the off-label allegations detailed in the relators' *amended* complaint. In turn, the court dismissed the relators' off-label allegations under the Act's first-to-file bar.

Allegations Failed To Satisfy Rule 9(b)

Returning its attention to Duxbury's 1992–1998 kickback allegations, the court then assessed whether these allegations satisfied the Rule 9(b) pleading requirements. Citing the First Circuit's *Karvelas* decision, the court stressed that "it is not enough to allege details of the scheme if there are not also particularized allegations regarding the false claims that were actually submitted to the federal government."

Here, while Duxbury did not identify an individual piece of paper that was submitted to the government, he identified individual providers, approximate amounts of free samples, discounts, "off-invoice" rebates, and educational grants involved in the scheme. Perhaps overlooking or misreading *U.S. ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720 (1st Cir. 2007), the court ruled that this was not sufficient to satisfy Rule 9(b).

Accordingly, although court concluded that it had subject matter jurisdiction to hear Duxbury's claims of alleged kickbacks which occurred during his employment at Ortho, the court dismissed the claims with prejudice for failing to satisfy Rule 9(b).

FALSE CLAIMS ACT RETALIATION CLAIMS

U.S. ex rel. Erickson v. Unitah Special Svcs. Dist., 2008 WL 634979 (10th Cir. Mar. 6, 2008)

Relator brought a section 3730(h) anti-retaliation claim against her former employer. In affirming a Utah district court's dismissal of the suit, the Tenth Circuit agreed that the relator had failed to demonstrate that she was terminated "because of" FCA-protected conduct. Specifically, the court highlighted an independent audit report that detailed numerous non-retaliatory bases for terminating the plaintiff.

Pro se relator Kathryn Erickson filed a False Claims Act suit against her former employer, alleging that she was suspended and later terminated from her general manager job because she exposed her company's alleged misuse of federal funds. In response, the defendant alleged that Erickson was fired in response to a report prepared by an independent auditor that raised concerns about various payments the company had made, which did not conform to the company's internal policies. The defendant moved for summary judgment, which the district court granted. The relator appealed.

The Tenth Circuit affirmed the district court's ruling. The court relied on the district court's finding that the independent audit report provided multiple bases for terminating the relator and refused to consider Erickson's appellate arguments—arguments that were not raised with the district court—that the defendant failed to follow its procedures when it suspended and then fired her, that the defendant could not have relied on the audit report as a basis for firing her, since that report had not been completed at the time of her termination, and that the defendant should have been required to defend and indemnify her with respect to her subsequent criminal indictment for obstruction of justice for knowingly falsifying documents.

Hoyte v. American National Red Cross, 2008 WL 564649 (D.C. Cir. Mar. 4, 2008)

A panel of the D.C. Circuit, in affirming the D.C. District Court's dismissal of an action alleging a reverse False Claims Act violation, agreed that it was obliged to defer to the federal government's decision to dismiss the reverse false claim count. However, only a majority of the panel held that the dismissal of the underlying FCA suit necessitated the dismissal of the relator's anti-retaliation suit.

Michelle Hoyte was formerly employed as the Director of Quality Audits for the American Red Cross. Hoyte alleged that in February 2004, while serving in that capacity, she discovered that the American Red Cross had mishandled over 600 units of blood at one of its facilities, and that officials and staff of the American Red Cross were aware of the mishandled blood but did nothing about it. Prior to this occurring, in April 2003, the D.C. District Court issued a consent decree, which incorporated an agreement between the American Red Cross and the United States, which outlined certain blood handling and reporting requirements that the American Red Cross had agreed to follow. The consent decree further provided that the Food and Drug Administration could asses various penalties against the American Red Cross—up to specified maximums—should it violate the consent decree.

Hoyte alleged that she urged the staff at the American Red Cross to report the mishandled blood to the Food and Drug Administration, as the consent decree required, but they did nothing. She alleged that she scheduled a meeting with the American Red Cross's Senior Vice President for Quality Assurance and Regulatory Affairs, but was fired by her supervisor by telephone on the day before the meeting was to take place. She then filed a *qui tam* action, alleging both a reverse false claim count, under section 3729(a)(7), as well as a retaliation count, under section 3729(h). The American Red Cross moved to dismiss both counts and, subsequently, the federal government moved to dismiss the reverse false claim count. The D.C. District Court first granted the government's motion to dismiss the first count, and later granted the American Red Cross's motion to dismiss the second count. Hoyte appealed both orders.

Reverse False Claims Act Claim Was Properly Dismissed

The D.C. Circuit affirmed the lower court's rulings, and held that, the district court properly dismissed the reverse false claims count, since the federal government moved to dismiss that count, and since, absent a showing of fraud on the court—and there was no evidence of fraud on the court in this case—"the Government has what amount to 'an unfettered right to dismiss' a *qui tam* action." The court rejected the relator's proposal that the court recognize an exception for federal government motions to dismiss that are "clearly contrary to manifest public interest."

Retaliation Claim Was Properly Dismissed

With respect to the second count, for retaliation, the D.C. Circuit, relying on its rationale outlined in *U.S. ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731 (D.C. Cir. 1998), again affirmed the lower court's ruling concluding that the matters Hoyte was investigating could not have reasonably led to a viable False Claims Act case, since she never alleged that the American Red Cross was under any obligation to transmit any money to the federal government, and thus, could not have violated section 3729(a)(7) of the False Claims Act. The court noted that the consent decree did not impose any such obligation on the American Red Cross. The court determined that Hoyte was simply investigating "mere regulatory noncompliance," not false or fraudulent claims.

The Dissent

Circuit Judge Tatel wrote a separate opinion, concurring in part and dissenting in part. This opinion notes that, although the reverse False Claims Act claim was properly dismissed, Hoyte's retaliation claim should have not been dismissed, since, pursuant to *Yesudian*, a relator only needs to show that "they reasonably believed their employer violated the FCA—a standard Hoyte plainly satisfies."

Martin v. ARC of D.C., 2008 WL 821044 (D.D.C. Mar. 28, 2008)

Plaintiff filed a False Claims Act suit against her former employer, which received federal funds from the Department of Health and Human Services, as well as funds from the District of Columbia. The complaint alleged, *inter alia*, that the employer violated the False Claims Act by firing her when she complained about the employer's alleged negligence and fraud in servicing its clients, who were mentally retarded and developmentally disabled people. The employer moved to dismiss, arguing that the complaint failed to satisfy Rule 12(b)(6). In granting the motion, the court noted the controlling case law, which mandates that "the relator must be investigating matters that reasonably could lead to a viable FCA case." Here, because the court determined that she did not have a "viable FCA claim," and was instead merely "investigating the defendant's failure to comply with its funding requirements," the court ruled that she could not bring an actionable claim under the Act's anti-retaliation provision.

Plaintiff Lowry Martin filed an action against her former employer, the Arc of the District of Columbia, alleging that the defendant violated both the False Claims Act and the District of Columbia Whistleblower Protection Act, when it allegedly received federal funds from the Department of Health and Human Services through the Mental Retardation and Development disabilities Administration, but neglected its duties to assist its mentally retarded and developmentally disabled clients find jobs by failing to fulfill its obligations to hire qualified job coaches for its clients—the defendant was required to hire job coaches with at least one year of experience, which, the plaintiff alleged, they failed to do. She alleged that the defendant must have submitted false documents to the federal government, since the defendant could not obtain annual funding from the federal government without falsely certifying that it had complied with its job coach hiring requirements. The plaintiff further alleged that when she filed a grievance with the defendant regarding this alleged conduct, she was ignored and then terminated. As a result, she commenced her lawsuit, alleging, among other things, a substantive violation of the False Claims Act, a retaliation claim under the False Claims Act and a claim under the D.C. Whistleblower Protection Act. The defendant moved to dismiss the action, arguing that the complaint did not state a claim under Rule 12(b)(6). The district court dismissed the False Claims Act and Whistleblower Protection Act claims.

Complaint Did Not State a Claim for a Substantive Violation of the False Claims Act

The court first noted that "[n]owhere in plaintiff's complaint does she allege that a fraudulent claim was submitted to the government for payment, nor does she allege who submitted such a claim, nor the time frame for when the fraudulent submissions were made." The court observed that the plaintiff requested an opportunity to use discovery as a means to find evidence to support her allegations that a false statement must have been made to the federal government, since the federal government gave the defendant money even though the defendant had not complied with the federal government's funding requirements. The court determined that the plaintiff had not pled fraud with particularity, "because the complaint fails to identify who, if anyone, made a false representation to the government and fails to provide any of the purported details such as the time, place, and contents of the alleged false representation." Thus, the substantive False Claims Act claim was dismissed.

Complaint Did Not State A Claim For Retaliation Under the False Claims Act

The court next dismissed the plaintiff's False Claims Act retaliation claim. Citing its 4-week old decision in *Hoyte v. American National Red Cross*, 2008 WL 564649 (D.C. Cir. Mar. 4, 2008), the court noted that in order to bring a retaliation claim under the False Claims Act, "the relator must be investigating matters that reasonably could lead to a viable FCA case. An employee's investigation of nothing more than his employer's non-compliance with federal or state regulations does not state a claim under the FCA." Here, the court opined, the relator failed to produce any false certifications upon which the defendant's funding was conditioned. Moreover, the court found that the plaintiff did not allege any facts demonstrating that she was investigating a viable FCA claim, merely that she was investigating the defendant's failure to comply with its funding requirements. Therefore, the court held that her retaliation claim should be dismissed.

Haka v. Lincoln County, 2008 WL 314046 (W.D. Wis. Feb. 4, 2008)

A recently terminated county child support administrator brought a 31 U.S.C. § 3730(h) anti-retaliation suit against the county and the county board of supervisors. In a motion for summary judgment, the defendant-board of supervisors argued that the plaintiff had failed to state an actionable § 3730(h) claim, for he did not show that a *majority* of the county board acted with a retaliatory motive when it voted to eliminate the plaintiff's position. In denying the defendant-board's motion, the court ruled that once the plaintiff established the unlawful motive of an individual with significant influence over the board, it became the defendant-board's burden to show that the board would have made the same decision even if the member did not have a retaliatory motive.

International Game Tech., Inc. v. Second Jud. Dist. of Nevada, 2008 WL 795611 (Nev. Mar. 27, 2008)

In this case, the Nevada Supreme Court decided that in order to maintain a claim for retaliation under Nevada's False Claims Act, a plaintiff does not need to allege that his/her employer pressured him/her to participate in fraudulent activity. The court held that such an assertion is only required when the employee did in fact participate in the fraudulent activity.

James McAndrews, while employed by the appellant, came to believe that the appellant had falsified tax records in order to fraudulently conceal or decrease the amount of taxes it owed to the state of Nevada. He then initiated a state court action under Nevada's False Claims Act to recover the funds he alleged his former employer allegedly owed to the state. The state district court dismissed his case, holding that the Nevada tax department has primary responsibility over tax fraud claims, and therefore, McAndrews failed to state a claim under Nevada's False Claims Act.

Mr. McAndrews then filed a second lawsuit, this time alleging that his now former employer had retaliated against him upon discovering that he had filed the initial Nevada False Claims Act lawsuit. He alleged in this second lawsuit that the appellant violated the whistleblower protection provisions of Nevada's False Claims Act by suspending all of his work-related duties and barring him from the work premises, as retaliation for his original lawsuit alleging tax fraud. He said that his suspension lasted until the time the state district court dismissed the tax fraud case, at which point he was fired. The company moved to dismiss his retaliation complaint, arguing that Nevada's False Claims Act only holds employers liable for retaliation if the employer coerced an employee to participate in fraudulent activity, by threatening the employee with termination or demotion. The state district court denied the motion, and decided that, based on legislative intent, the statute only required plaintiffs to show harassment or a threat of termination or demotion in order to recover. However, the state district court noted that the language of the statute was ambiguous. The company then filed a petition for writ of mandamus, requesting that the Nevada Supreme Court compel the district court to dismiss McAndrews' complaint.

The Nevada Supreme Court conducted a de novo review of the statute, which reads:

> Liability of employer for violations of NRS 357.240; entitlement of employee to remedies.
>
> 1. An employer who violates subsection 2 of NRS 357.240 is liable to the affected employee in a civil action for all relief necessary to make him whole. . . .
>
> 2. An employee is entitled to the remedies provided in subsection 1 only if;

> (a) He voluntarily disclosed information . . . or voluntarily acted in furtherance of an action pursuant to this chapter; and
>
> (b) *He was harassed, threatened with termination or demotion, or otherwise coerced by his employer into any participation in fraudulent activity.*

NRS 357.240(2) (emphasis in opinion). The court, relying on principles of statutory interpretation, reasoned that this language provided two bases for employee-plaintiffs to recover when they have been retaliated against by their employers. First, the statute provides a remedy for employees who voluntarily engaged in protected whistleblower activity. Second, the statute provides a remedy for employees who participated in fraudulent activity, but only to the extent that their employers pressured them to do so. As a result, the court found that the state district court properly denied the company's motion to dismiss McAndrews' retaliation claim and the petition for writ of mandamus was denied.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Lack of Knowledge

U.S. ex rel. Farmer v. City of Houston, 2008 WL 771710 (5th Cir. Mar. 25, 2008)

Relator filed a *qui tam* suit against the a city and a nonprofit organization, alleging that the defendants violated sections (a)(2) and (a)(3) of the False Claims Act by allegedly receiving funds from the Department of Housing and Urban Development based on false and fraudulent information. In a split decision on whether the relator had proved the *mens rea* requirement, the majority held that that no reasonable jury could find that the defendants knew they were submitting and paying false claims. The dissent, on the other hand, chastised the majority for wrongly taking this issue from the trial court. Notably, by deciding the case on this issue, the Fifth Circuit avoided reaching a decision on whether sections (a)(2) and (a)(3) include a so-called "presentment requirement."

In 2001, following Hurricane Allison, Marsha Farmer applied to the city of Houston's "Emergency Home Repair Program" for assistance in repairing her roof. The home repair program was administered by the city's Urban League, with funds received from a block-grant from HUD. After Ms. Farmer applied for assistance, the city sent inspectors to her home in order to determine whether she qualified for assistance under the program. The inspectors concluded that she did not qualify, and no work was performed on her roof. Ms. Farmer recalled that her roof had previously been entirely replaced, and so she became suspicious when she reviewed the inspectors' repair estimates and realized that the estimates to repair her roof were about twice as much as it had cost to replace her roof in the past. She investigated repair costs for other properties in the community and determined that the city had been approving reimbursements for materials far in excess of what was actually needed to perform the repairs on those homes. Consequently, she filed a *qui tam* action in the U.S. District Court for the Southern District of Texas, alleging that the city and the Urban League violated sections (a)(2) and (a)(3) of the False Claims Act by conspiring and subsequently carrying out a scheme to fraudulently induce HUD to provide money to fund the home repair program. The United States declined to intervene in her lawsuit, and, after discovery, the defendants moved for summary judgment on both claims.

The district court, relying on the D.C. Circuit's decision in *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), held that Ms. Farmer could not maintain her (a)(2) claim without presenting evidence that the defendants had presented a false claim to an officer or employee of the federal government. Since Ms. Farmer was unable to show that any of the allegedly false documents were presented to

HUD, the district court granted summary judgment in favor of the defendants on the (a)(2) claim. With respect to the relator's claim under section (a)(3), the district court again granted summary judgment in favor of the defendants. The court held that Ms. Farmer failed to produce any evidence of an agreement between the defendants to get false claims paid. Ms. Farmer appealed the district court's rulings to the Fifth Circuit.

The (a)(2) Claim—Fifth Circuit Sidestepped Presentment Issue

The Fifth Circuit affirmed the district court's ruling on Ms. Farmer's (a)(2) claim. However, the circuit court determined that it did not need to reach the question of whether claims under section (a)(2) necessarily involve an implicit presentment requirement. Instead, the circuit court held that Ms. Farmer's (a)(2) claim could not be maintained because she did not produce any evidence that the defendants had knowledge that any of their claims contained falsehoods. Thus, the court held, Ms. Farmer's allegations with respect to (a)(2) did not satisfy the False Claims Act's scienter requirement. The court noted that circumstantial evidence can sometimes be sufficient to withstand a summary judgment motion, but the court ultimately held that, in this case, no reasonable jury would find that the defendants acted with knowledge that the documents at issue contained false information.

The (a)(3) Claim—Fifth Circuit Affirmed Summary Judgment for Defendants

The Fifth Circuit also affirmed the district court's grant of summary judgment on the relator's (a)(3) claim. Quoting *U.S. ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare, Sys.*, 274 F. Supp. 2d 824 (S.D. Tex. 203), the court held that summary judgment was proper because Ms. Farmer failed to produce any evidence that the defendants "shared a specific intent to defraud the [G]overnment." The court further held that the allegations in Ms. Farmer's complaint were "not enough to raise an inference of even a tacit agreement."

The Dissent

Chief Circuit Judge Edith Jones wrote a separate opinion, concurring in part and dissenting in part. Judge Jones determined that the scienter issue had not been preserved on appeal, noting that even though one of the defendants had raised this argument before the district court, the district court did not rule on that issue and that the parties had argued the (a)(2) claim on the basis of the presentment issue (and, earlier, on the basis of the public disclosure bar). Judge Jones took issue with the fact that "[t]he majority "bypasse[d] both the original source and presentment issues and instead affirms summary judgment based on an undeveloped argument that there was no 'knowing' misuse of federal funds in this case." The judge concluded that affirming summary judgment on the (a)(2) claim was "nothing short of a windfall, a *sua sponte* summary judgment on appeal."

Moreover, Judge Jones put more stock in the evidence Ms. Farmer had produced in support of her (a)(2) claim, including erroneous cost breakdowns throughout various third-party contracts between the city and its repair contractors. Judge Jones could not understand how the circuit court could be so convinced that no reasonable jury could find that Ms. Farmer's (a)(2) claim satisfied the False Claims Act's scienter requirement. She stated that "[t]he majority's account of what a jury would 'expect' to find in the evidence, or what sort of 'thinking would drive the jury's assessment' is not only unpersuasive, but highlights that the majority is performing its own fact-finding." She concluded that she "cannot agree that *all* reasonable jurors would have no choice but to follow the majority's serpentine course through the evidence to reach its conclusion." (italics in original).

U.S. ex rel. Taylor-Vick v. Smith, 2008 WL 54798 (5th Cir. Jan. 4, 2008)

A former medical facility office manager filed an FCA *qui tam* action against the facility, alleging that its doctors knowingly "up-coded" their patient visits to obtain higher Medicare payments. A Texas district court granted the facility's summary judgment motion and the Fifth Circuit affirmed. Noting that the facility "under-coded" as much as it "up-coded," the Fifth Circuit ruled that the relator had not produced evidence that created a factual issue concerning the scienter element. The court of appeals determined that, at the most, the relator had shown evidence of innocent mistakes or negligence, which is not sufficient to state a claim under the FCA.

From 1997 until 2002, Margaret Taylor-Vick worked as an office manager at a medical facility that provides orthopedic care. During the course of her employment, she discovered that the facility and several of its doctors were engaged in improper Medicare billing practices. In particular, she began to suspect that the doctors were "up-coding" their patient visits by having her use codes that required 15-minute patient examinations, even when they were seeing 50 to 80 patients in a given day. After her concerns were ignored by the facility, she filed an FCA *qui tam* action against the facility and several of its doctors. When the government declined to intervene in the suit, the defendants filed a motion for summary judgment.

Because she had no direct knowledge of actual instances of "up-coding," Taylor-Vick sought to make her case through circumstantial evidence. Specifically, Taylor-Vick employed an expert witness to analyze defendants' billing records and determine whether there was a pattern of "up-coding" from which the court could draw an inference of scienter under the FCA. Her expert witness concluded that while there was evidence of "under-coding," there was a pattern sufficient to indicate that false claims may be occurring.

The defendants' witness, however, found that the defendants under-coded more often than they up-coded, thereby "costing the practice revenue" and actually undercharging Medicare rather than overcharging Medicare. In short, their witness concluded that while they had "some documentation issues that need[ed] improvement," there was no intent to steal from the Medicare system.

Based on the expert analysis, the lower court found that Taylor-Vick had failed to satisfy the FCA *mens rea* requirement and that, "[a]t the most, [she had] shown innocent mistakes and negligence," which are not FCA violations. Accordingly, the district court held that summary judgment was proper. Taylor-Vick appealed the decision to the Fifth Circuit.

Mens Rea Element Not Satisfied

Taylor-Vick maintained on appeal that, although she had no direct evidence of *scienter*, she had provided adequate circumstantial evidence of *scienter*. Specifically, Vick argued that the evidence analyzed by her expert showed a pattern of erroneous billing, which, when combined with her testimony that the facility was aware certain billing anomalies, added up to an inference of *scienter*.

The Fifth Circuit, however, reached back for a pre-1986 FCA Amendments quote when it held that the evidence must demonstrate "guilty knowledge of a purpose on the part of [the defendant] to cheat the Government." *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972). However, perhaps backtracking, the court of appeal then highlighted that the relator must, at least, have evidence that the defendants "recklessly cheated the government."

In affirming the lower court's decision, the court of appeals noted that even the relator's own witness acknowledged that the erroneous billing included not only over-billing but also under-billing, which, according to the court, "show[ed] that Defendants were merely negligent billers." Accordingly, because the Fifth Circuit agreed that the relator had merely shown that the defendants were negligent, the court agreed that summary judgment should be granted for the defendants in this case.

B. Lack of Falsity

U.S. ex rel. Bott v. Silicon Valley Colleges, 2008 WL 59364 (9th Cir. Jan. 4, 2008)

Former for-profit university recruiters filed an FCA *qui tam* action against the university, alleging that the school violated the Higher Education Act (HEA) when it conducted periodic salary adjustments for its recruiters. The Ninth Circuit, in affirming a California district court's dismissal of the *qui tam* suit, noted in an unpublished opinion that the HEA does not prohibit salary reviews generally, but rather bars payment adjustments based solely on the number of students recruited. According to the court of appeals, the relators failed to plead specific facts supporting the inference that salary reviews were performed *solely* on the basis of recruitment success, or that the reviews were merely a sham mechanism for funneling improper incentive payments.

C. Lack of Materiality

***U.S. ex rel. Digiovanni v. St. Joseph's/Candler Health System, Inc.*, 2008 WL 395012 (S.D. Ga. Feb. 8, 2008)**

A relator, a long-time hospital employee in charge of receiving and distributing medical supplies, filed an FCA *qui tam* action against the hospital, alleging it fraudulently created and submitted Medicare claims that included impermissible charges for supplies and reusable equipment. While the complaint did not identify a specific false claims that was actually submitted to the Medicare system, a Georgia district court ruled that complaint still satisfied Rule 9(b), for the supporting documentation and the relator's firsthand knowledge of the scheme sufficiently added an "indicia of reliability" that the claims were actually submitted to the government. However, the court still dismissed the suit, for the alleged false claims were not "material" to the government's decision to pay. In particular, because the underlying Medicare Part A claims were paid based on a predetermined rate for each patient seen at the hospital, it did not matter that the hospital was allegedly including improper charges in individual Medicare patient bills.

For almost four decades, Cheryl Digiovanni was employed by Saint Joseph's/Candler Health System, Inc., where she was responsible for receiving and distributing supplies and, in turn, was quite familiar with equipment billing at the hospital. After her concerns about the hospital's billing practices went unaddressed, she filed an FCA *qui tam* action alleging a pattern of fraudulent Medicare billing. Specifically, she alleged that the hospital fraudulently created and submitted claims to Medicare that included impermissible charges for supplies and reusable equipment.

After the government declined to intervene in the suit, the defendant filed a motion to dismiss, arguing that Digiovanni's complaint failed to satisfy Rule 9(b) and that it failed to identify the "materiality" of any of the allegedly false or fraudulent statements.

The defendant-hospital argued that while Digiovanni may have sufficiently alleged the improper practices, her complaint failed to satisfy the heightened Rule 9(b) pleading standard, for it failed to identify the actual submission of any false claims. With this argument, the hospital distinguished patient "bills" and other internal billing records from "claims" that were prepared and submitted to the government for reimbursement. Specifically, the hospital argued that while the complaint detailed charges for reusable equipment that were included in patient bills, it did not show that Medicare was actually charged for the specific reusable equipment that was included in these bills. For this reason, the hospital argued that the complaint failed to allege or identify any "claims" that were actually submitted to the government.

Digiovanni countered that because she worked for the hospital and possessed firsthand knowledge of the scheme, the particularity requirements of Rule 9(b) should be relaxed and her complaint should be credited with the necessary indicia of reliability.

Complaint Satisfied Rule 9(b)

The district court found the recent *Atkins* case to be instructive. *U.S. ex rel. Atkins v. McInteer,* 470 F.3d 1350 (11th Cir. 2006). In *Atkins,* the relator alleged an elaborate medical billing scheme for defrauding the government by submitting false claims. Even though the complaint cited particular patients, dates, and corresponding medical records, the Eleventh Circuit held that the relator had failed to provide the next link in the liability chain: "showing that the defendants *actually submitted* reimbursement claims for the services." *Id.* at 1359 (emphasis in original). The Eleventh Circuit held that the relator had failed to plead with particularity because he "summarily concluded," without specifically alleging, that the defendants submitted false claims to the government for reimbursement. However, the district court observed, in dismissing the complaint in *Atkins,* the Eleventh Circuit also emphasized that the relator did *not* profess to have firsthand knowledge of the defendants' submission of false claims.

In the instant case, because Digiovanni claimed to have a level of firsthand knowledge, the court declined to dismiss the complaint solely for failing to plead with particularity. The court ruled that even though the complaint did not specifically identify "claims" submitted to the government, the allegations of improper billing—together with the supporting documentation—strongly implied an allegation that the hospital was submitting claims to Medicare for these patient charges.

Claims Were Not "Materially" False

Reaching outside of the circuit, the court then turned its attention to whether the false claims were "material," as required by other circuits. *See, e.g., U.S. ex rel. Gross v. AIDS Research Alliance-Chicago,* 415 F.3d 601, 604 (7th Cir. 2005). Surveying the case law, the court noted that Seventh Circuit "materiality requirement" is satisfied when there is a showing that the falsity was a "prerequisite to government payment." *Id.* at 604. The Fourth Circuit, on the other hand, imposes a lower standard and bases materiality on whether the falsity was "capable of influencing" the payment decision. *Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 785 (4th Cir. 1999).

The defendant-hospital argued that under any materiality standard, the complaint failed to identify the "materiality" of the allegedly false claims, especially since the itemized costs on an ordinary inpatient claim do not affect the amount Medicare reimburses a provider. 42 C.F.R. § 412.2(f). Instead, according to the defendant, inpatient claims—Medicare Part A—are reimbursed under the Medicare Prospective Payment System (PPS). Under PPS, hospitals are reimbursed based on a pre-determined rate for each Medicare admission, regardless of what appears on an individual patient's bill.

Agreeing with the defendant's "no harm, no foul" analysis, the court ruled that Digiovanni's false claims were not "materially" false. In turn, the court concluded that the Digiovanni failed to plead an actionable claim under the FCA.

D. Statutory Immunity

U.S. ex rel. Conrad v. Blue Cross Blue Shield of Mississippi, 2008 WL 341650 (S.D. Miss. Feb. 5, 2008)

While working as a management consultant for a Medicare provider, a relator discovered that a provider was submitting fraudulent Medicare claims and that a Medicare carrier was, at the very least, grossly negligent in paying these claims. The Medicare carrier unsuccessfully argued to a Mississippi district court that 42 U.S.C. § 1395u(e)(3) entitles the carrier to statutory immunity, regardless of whether the carrier acted with gross negligence or fraudulent intent. The court, embracing a recent Tenth Circuit interpretation, held that the carrier is only immune for payments that are made "in the absence of gross negligence or intent to defraud the United States." In turn, the court permitted the relator's *qui tam* action to proceed.

Sherrie Conrad, a healthcare provider's management consultant, notified Blue Cross Blue Shield of Mississippi that her employer was submitting false Medicare claims to Blue Cross. When it refused to take action, she brought an FCA *qui tam* action against Blue Cross, alleging that it was grossly negligent or knowingly causing her employer's false claims to be submitted to Medicare. After the government declined to intervene in the suit, Blue Cross moved for judgment on the pleadings, arguing that it enjoyed complete statutory immunity and that Conrad has failed to state a claim upon which relief could be granted. Specifically, Blue Cross maintained that 42 U.S.C. § 1395u(e)(3) entitled the carrier to complete statutory immunity, regardless of whether it acted with gross negligence or fraudulent intent.

Medicare Contractors Do Not Enjoy Statutory Immunity

The court began its analysis by examining the language of 42 U.S.C. § 1395u(e)(3), which provides:

> (1) No individual designated pursuant to a contract under this section as a certifying officer shall, in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payments certified by him under this section.
>
> (2) No disbursing officer shall, in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payment by him under this section if it was based upon a voucher signed by a certifying officer designated as provided in paragraph (1) of this subsection.
>
> (3) No such carrier shall be liable to the United States for any payments referred to in paragraph (1) or (2).

In dissecting this statutory language, the court first noted that this very question was recently considered by the Tenth Circuit in *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Ut.*, 472 F.3d 702, 710 (10th Cir. 2006). In *Sikkenga*, the Tenth Circuit held that Section 1395u(e)(3) unambiguously confers limited immunity upon Medicare carriers. Specifically, "the payments referred to and incorporated by § 1395u(e)(3)" for which carriers will be immune "are payments made 'in the absence of gross negligence or intent to defraud the United States.'" *Id.*

Largely parroting the reasoning announced in *Sikkenga*, the court denied the defendant's motion and held that the defendant-Medicare contractor was not entitled to complete statutory immunity.

Medicare Contractor Potentially "Caused" False Claims To Be Submitted By Not Adequately Auditing Claims

In the alternative, Blue Cross argued that Conrad did not raise an actionable FCA claim, for she did not adequately allege that the Medicare contractor "caused" false claims to be submitted. Conrad countered that Blue Cross caused false claims to be submitted to Medicare, for it "failed to uncover or investigate [her concerns that her employer was submitting false claims], in gross dereliction of its duty to audit. . . ." Moreover, Conrad stressed that certain instances of fraud were "not noticed by Blue Cross, despite the fact that a cursory examination of the facilities would have uncovered these facts."

Taken as true and viewed in the light most favorable to Conrad, the court ruled that these allegations were sufficient to state a claim for relief under the FCA. Accordingly, the court also denied the defendant's supplemental motion for judgment on the pleadings.

E. Time-Barred

<u>*U.S. ex rel. Told v. Interwest Constr. Co., Inc.*, 2008 WL 598120 (10th Cir. Mar. 4, 2008)</u>

The Tenth Circuit affirmed a ruling by the U.S. District Court for the District of Utah, granting summary judgment in favor of a False Claims Act defendant, since the relator's claims were time-barred under the False Claims Act's statute of limitations.

Morris Told filed a *qui tam* action in the Utah District Court in August 2003 against Interwest Construction Co., Inc., alleging violations of the False Claims Act as well as common law claims. The claims were based on allegations that, from 1992 through 1994, the defendant wrongfully retained funds that were owed to its subcontractors (including the relator's company) and that the defendant failed to make timely payments to its subcontractors. The defendant moved for summary judgment, asserting that all of the relator's claims were barred by the applicable statutes of limitations—the defendant argued that the False Claims Act claims were barred by the False Claims Act's six-year statute of limitations for actions brought by relators. The district court agreed and granted summary judgment in favor of the defendant. The relator appealed. With respect to the False Claims Act's statute of limitations, the relator conceded that his claims were time barred.

Applying the reasoning it had previously announced in *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702 (10th Cir. 2006), the Tenth Circuit found that the False Claims Act's six-year statute of limitations applied to the relator's False Claims Act claims, and rejected the relator's request that the court "reconsider and reverse itself on this issue for sound policy reasons." The court also rejected the relator's contention that the district court should have allowed him to pursue an additional claim, which arose in 1999 and that was allegedly unrelated to the time-barred claims. The circuit court stated that "the district court found that [the relator] had failed to state the relevant allegations [regarding this new claim] in the complaint itself, and thus construed the argument [the relator] raised in his opposition motion as an implicit motion to amend the pleadings. It then denied that motion." The circuit court, upon reviewing the complaint, found the allegations regarding this new claim fell short of the False Claims Act's pleading standards and that the district court did not abuse its discretion in denying the relator's request to file an amended complaint. Finally, the circuit court found that the district court did not err when it failed to separately rule on his claim regarding yet another new, additional False Claims Act claim. The circuit court found that the district court should have explicitly addressed this claim, but that its failure to do so was not reversible error, since the relator's complaint did not allege any of these allegedly new False Claims Act violations and these contentions were only brought on appeal. The circuit court held that these contentions were also another implicit motion to amend the complaint—a motion that the district court implicitly denied.

F. Lack of Government Funds

<u>*U.S. ex rel. Fellhoelter v. Valley Milk Prods., L.L.C.*, 2008 WL 217116 (E.D. Tenn. Jan. 24, 2008)</u>

Relator, a former USDA employee who supervised a group of USDA milk processing plant auditors, filed a *qui tam* suit in the District Court for the Eastern District of Tennessee against two milk producers, alleging that they violated the False Claims. The companies did not receive any government funds, but, by statute, were required to pay into a fund to provide for payments to farmers who supplied milk to the industry. The USDA served as an agent to receive the money paid into the fund and distributed to the farmers. The relator alleged that the defendants cheated the fund in a variety of ways. The relator violated the False Claims Act's seal provision by serving his complaint on the defendants, but the district court still granted the government time to decide whether it would intervene, and the government ultimately declined to intervene. The defendants moved to dismiss, arguing that the relator violated the seal provisions, and that his complaint failed to state a claim. The district court dismissed the complaint on both grounds.

Kyle Fellhoelter, a relator, brought a False Claims Act *qui tam* action against Valley Milk Products, L.L.C., Maryland & Virginia Milk Producers Cooperative Association, Inc., and one individual. The relator filed his complaint under seal, but immediately served the defendants with his complaint, in violation of the Act's sealing provisions. The court re-instituted the seal and allowed the government time to determine whether it would intervene, and the government declined intervention. The relator's complaint alleged that the defendants violated the Act . Although the fund was administered by the USDA, it did not include any federal funds. The relator claimed that the defendants cheated the fund by paying less than they were statutorily required to pay, by misrepresenting themselves in order to receive an unfair competitive advantage over their competitors, and by producing milk that did not meet the standards for human consumption. The defendants moved to dismiss the complaint, arguing that the complaint failed to state a claim, and that the the relator violated the seal by wrongfully serving the complaint on them. The court granted the defendants' motion on both grounds.

Violation of the Seal

The court noted that Fellhoelter clearly violated the seal when he served his complaint on the defendants before the seal was lifted. The court, quoting an earlier slip op opinion, determined that this violation warranted dismissal of the relator's complaint, since "compliance with the mandatory filing requirements of the statute is essential to the assertion of the statutory right. The Relator's right to bring a *qui* tam [sic] action recover a portion of the damages allegedly due to the Government is a right created solely by statute. The Relator lost the right to bring this statutory cause of action when he violated the filing requirements of the statute."

Failure To State a Claim

The court also found grounds to dismiss the complaint on the basis that the relator failed to state a claim under the False Claims Act. The court first observed that the relator failed to identify which section(s) of the False Claims Act formed the basis of his allegations and that his complaint merely made conclusory statements regarding the defendants' alleged violations. The court considered each section of the False Claims Act that might possibly have served as the basis for the relator's claims, also reasoned that he failed to state a claim under any of those sections. The court agreed with the defendants' argument that dismissal of the case was required, since the parties agreed that the case did not involve government funds. The court concluded that "claims that do not reach or ultimately threaten to reach the government fisc should not and cannot be subject to the FCA." Thus, the court decided that Fellhoelter did not state a claim under sections (a)(1), (2) or (3) of the Act. The court next considered whether Fellhoelter's complaint stated a claim under section (a)(7) of the Act, which covers reverse false claims. The court determined that the complaint did not state a claim under that section either, since the relator did not allege "that the defendants made a false record or statement at the time they owed a sufficiently certain obligation to the government."

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Driscoll v. Serono Inc., 2008 WL 728939 (D. Mass Mar. 18, 2008)

A relator alleged a violation of the False Claims Act, stating that the defendant-pharmaceutical company and various of its affiliates knowingly accepted payment or reimbursement from public and private health insurers for the defendant's drug, which exceeded the reimbursement price set by an agreement between defendant and the Food and Drug Administration. While the federal government eventually intervened and settled the federal FCA claims against the defendant, the remaining federal claims against pharmacy-defendants were not settled. The pharmacy-defendants all moved to dismiss the relators' complaint, and while each defendant alleged various grounds for dismissal, they all alleged that the complaint failed to plead fraud with particularity, as is required by Federal Rule of Civil Procedure 9(b). Relying solely on *U.S., ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220 (1st Cir. 2004), the court dismissed the remaining claims under Rule 9(b), for while the complaint detailed the fraudulent scheme, it failed to identify a particular false claim for payment that was submitted by any of the pharmacies to the government.

Christine Driscoll filed a *qui tam* case against Serono Laboratories, Inc. and Area-Serono, S.A. (collectively "Serono"), alleging that Serono knowingly accepted payment or reimbursement—that exceed the price set by an agreement between Serono and the Food and Drug Administration—from public and private health insurers for Serono's drug, Serostim. The complaint was amended four times. The amendments added False Claims Act claims against various pharmacies that dispensed Serostim (Lincourt Professional Pharmacy, Bioscrip, Inc., Capitol Drugs, Curascript Pharmacy, Inc., Priority Pharmacy, Total Remedy Prescription Center, Discount Medical Pharmacy, Accent Rx, Beverly Hills Pharmacy, TDI Pharmacy, Echo Drugs (Flushing), and Echo Drugs (Brooklyn)), and included claims against Serono and the pharmacies for alleged violations of various state false claims acts. In addition, Frank Garcia was added as a relator with respect to the state law claims. The United States intervened and settled the federal False Claims Act claims alleged against Serono. The United States did not intervene as to the federal False Claims Act claims against the pharmacies. None of the states whose false claims acts were alleged to have been violated elected to intervene. The court does not discuss whether Serono moved to dismiss the remaining claims against it. However, each of the pharmacies moved to dismiss the remaining claims against them. Although the pharmacy defendants presented various grounds for dismissal, each defendant moved to dismiss on the grounds that the complaint failed to plead fraud with particularity.

The district court, citing *U.S., ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220 (1st Cir. 2004), stated that when pleading a violation of the False Claims Act, a complaint must plead with particularity not only the existence of the fraud, but also details about the allegedly false or fraudulent claims the defendant submitted for payment. The court found that the relators' complaint failed to satisfy this standard, since it only describes an allegedly fraudulent scheme, but does not identify even one particular false claim submitted for payment by any of the pharmacies to any government entity and it does not include any details concerning the dates, content, identification numbers, or dollar amounts of any false claims submitted.

The relators' requested that they be permitted to further amend their complaint and further requested that they be permitted to obtain discovery from the Department of Justice in order to gather details related to the allegedly false claims purportedly submitted by the defendants. The court, though, denied this request, noting that the First Circuit has expressly discouraged the use of discovery by relators for this purpose. The court ultimately concluded that "[s]ince the relators' subpoena *duces tecum* [to the Department of Justice] is for the purpose of developing the very details and specifics which should have been in their possession *before* the filing of the complaint, the multiple motion to quash the subpoena *duces tecum* are granted." Consequently, the court denied the relators' motion for leave to further amend their complaint.

Sweet v. TMI Mgmt. Sys., 2008 WL 724275 (D.N.J. Mar. 17, 2008)

The relator filed a *qui tam* suit against her former employer, alleging that it violated the False Claims Act by paying her and other employees less than they were owed under a contract with the Government Services Administration—a contract that purportedly dictated the wage the company was to pay the relator and the other employees. A New Jersey district court granted the defendant's Rule 9(b) motion to dimiss, finding that the complaint failed to even plead the date, place, or time of the fraud.

Dorothy Sweet, the relator, filed a False Claims Act case against her employer, TMI, alleging that TMI was subject to the terms of a contract with the General Services Administration. That contract, the relator alleged, dictated the wage TMI was to pay to the relator and to other TMI employees. The relator alleged that TMI did not pay her and these other employees the amount dictated by the General Services Administration contract. TMI moved to dismiss the relator's complaint.

The district court granted TMI's motion to dismiss, finding that the relator failed to even identify which provision of the False Claims Act she alleged TMI had violated. The court further found that the complaint failed to allege the False Claims Act scienter element, and therefore could not possibly plead a claim under any of the seven subsections of the Act. In addition, the court declared that the relator did not satisfy the requirements of Federal Rule of Civil Procedure 9(b), since she did not plead the date, place, or time of the fraud and did not use any alternative means of substantiating her allegations.

U.S. ex rel. Repko v. Guthrie Clinic, P.C., 2008 WL 687161 (M.D. Pa. Mar. 12, 2008)

A relator filed a False Claims Act case against a group of defendants, asserting that the defendants alleged scheme of referring patients in exchange for favorable financial agreements violated the Stark and Anti-Kickback Acts and that every claim that was submitted to the government violated the False Claims Act. Most importantly, in denying the defendants' Rule 9(b) motion, the court ruled that the relator pled fraud with sufficient particularity, even though he did not attach any of the allegedly false claims that were submitted to the government, since the relator had asserted that *every* claim that the hospital submitted to the government was fraudulent.

Rodney Repko filed a *qui tam* complaint (and two subsequent amended complaints) against a clinic, a hospital, the hospital's holding company, and two individuals, alleging that every claim the hospital submitted to the government for payment was the result of referrals by doctors working for the clinic and that these referrals were given in exchange for various financial agreements between the clinic and the hospital, which gave the clinic favorable terms, including low interest-rate loans. The relator alleged that the defendants' conduct violated various statutes and common law, including the False Claims Act. With respect to the False Claims Act, the relator alleged violations of sections 3729(a)(1) (presenting a false claim to the government), (a)(2) (using a false record to get a claim paid by the government), (a)(7) (concealment), (a)(3) (conspiracy) and section 3730(h) (retaliation—the relator was formerly employed as the general counsel for the clinic). The relator also asserted that the hospital's claims violated the Stark law, under the theory that the claims were the result of referrals that were illegal under that law. Moreover, the relator brought various common law claims against the defendants. The government declined to intervene in the relator's case.

The defendants moved to dismiss the relator's complaint. With respect to the False Claims Act claims, the defendants argued that those claims were not pled with sufficient particularity, that the relator failed to state a claim under the False Claims Act for conspiracy, concealment or retaliation, that the relator False Claims Act claims were barred by the statute of limitations, and that the relator's ethical violation warranted striking the allegations in the relator's complaint. The defendants also argued that the relator did not have standing to bring his Stark law claims or common law claims.

In response, the relator filed a motion to further amend his complaint, in the event that the court ruled that the complaint at issue did not plead the False Claims Act claims with the requisite particularity, pursuant to Federal Rule of Civil Procedure 9(b).

The district court granted the defendants' motion in part, and denied it in part. The retaliation claim was dismissed as time-barred, and the concealment claim was dismissed for failure to state a claim. The remaining False Claims Act claims were not dismissed. In addition the court held that the relator did not have standing to assert his Stark law claims and common law claims.

Relator Satisfied the Particularity Requirements of Rule 9(b)

The court ruled that the relator pled fraud with sufficient particularity, even though he did not attach any of the allegedly false claims that were submitted to the government, since the relator had asserted that *every* claim that the hospital submitted to the government was fraudulent. In addition, the court found that the relator discussed in detail why each referral was illegal under the Stark and Anti-Kickback laws. The court stated that "the attachment of some or all of the allegedly fraudulent claims would serve no further purpose consistent with Rule 9(b) because the defendants are on notice that the basis of the alleged fraud in each claim is the relationship between defendants, not anything unique to a particular claim, that has caused these claims to be allegedly fraudulent."

Relator Properly Stated a Claim for Conspiracy

The district court rejected the defendants' argument that the relator had failed to state a claim with respect to conspiracy under the False Claims Act. The court noted that the relator's conspiracy claim could go forward, since he had alleged an agreement among the defendants whereby the hospital and its holding company would give the clinic financial support in exchange for the clinic referring large volumes of patients to the hospital. In addition, the relator alleged that the parties had engaged in acts in furtherance of that conspiracy (i.e., the clinic did receive the financial support in exchange for the referrals).

Relator's Concealment Claim Was Dismissed

The district court agreed with the defendants' argument that the concealment claim should be dismissed, since the relator did not state a claim under section 3729(a)(7). The court held that the relator merely alleged that the defendants submitted false claims and concealed the money that resulted from those claims, an allegation that is insufficient to support a concealment claim under the False Claims Act. The court stated that "it is not sufficient that defendants have concealed their obligation to pay back the fraudulently obtained funds, because this would result in every violation of § 3729(a)(1) necessarily resulting in a violation of § 3729(a)(7) as well. Thus, the court dismissed the relator's concealment claim.

Relator's Retaliation Claim Was Time-Barred By 180-Day Statute of Limitations Period

The court observed the decision in *Graham County Soil & Water Conservation Dist. v. Wilson*, 545 U.S. 409 (2005), wherein the Supreme Court held that retaliation claims under the False Claims Act are subject to the statute of limitations period prescribed by the most closely analogous state statute. The court then stated that the most analogous state statute in this instance was Pennsylvania's whistleblower law, which established a period of 180 days from the date of the alleged violation for plaintiff's to bring retaliation claims. The relator, who had served as the general counsel for the clinic until 1998 when he was allegedly forced out of his job and denied certain compensation, brought his retaliation claim in 2004, and so that claim was clearly was time-barred.

Relator Did Not Have Standing To Pursue His Stark and Common Law Claims

In addition to his False Claims Act claims, the relator brought claims against the defendants alleging violations of the Stark law, as well as common law claims for unjust enrichment and payment by mistake of fact. The defendants moved to dismiss these claims, arguing that the relator did not have standing to bring them, since the government declined to intervene in the relator's case. The district court held that the relator did not have standing to bring his Stark law claim, since, unlike the False Claims Act, the Stark law does not permit relators to bring lawsuits on behalf of the government, nor does that law allow for a partial assignment of the government's damages to relators. The court noted that even though the government could still choose to intervene in the relator's case, the relator would still only be able to pursue claims that the government has partially assigned to relators; Stark law claims are not such claims and therefore, the relator did not have standing to pursue that claim.

With respect to the relator's common law claims, the court applied the same reasoning and held that the relator had no standing to bring those claims either, since there has been no assignment to relators of the government's claims for unjust enrichment or payment by mistake of fact. Thus, those claims were dismissed.

Remaining False Claims Act Claims Were Not Time-Barred

As an initial matter, the district court pointed out that the date of the relator's initial complaint—not the date of subsequent amended complaints—was the operative date for calculating statutes of limitations, pursuant to Federal Rule of Civil Procedure 15(c)(1)(B). The court rejected the defendants' argument that, pursuant to *U.S. v. Baylor Univ. Med. Ctr., et al*, 469 F.3d 263 (2d Cir. 2006), Rule 15(c)(1)(B) was inapplicable because of the False Claims Act's sealing provision. The court distinguished *Baylor*, noting that in that case, the government did not intervene until eight years after the relator had filed the original complaint, whereas, in this case, the government declined to intervene. In addition, the court held that the two cases were distinguishable because the relator filed each of the amended complaints and the allegations in his amended complaints clearly arise out of the same occurrences as set forth in the original complaint. Thus, the court held, the defendants, who consented to the filing of the second amended complaint, were on notice of the relator's claims since the time the original complaint was unsealed. Therefore, the court ruled that Rule 15(c)(1)(B) applied and that it would relate the relator's complaints back to the date of the original complaint, which was within the False Claims Act's six-year statute of limitations period.

The court next held that the provision for extending the statute of limitations until the fraud is discovered applies both to relators as well as the government. The court found that even though the relator, in his capacity as general counsel for one of the defendants, may have had knowledge of the alleged fraud during the time the fraud was ongoing, "it is the government's knowledge, not the relator's knowledge, that is relevant." The court further noted that section 3731(b)(2) states that actions alleging violations of the False Claims Act must be brought within three years from "when facts material to the right of action are known or reasonably should have been known *by the official of the United States charged with responsibility to act in the circumstances*." (emphasis added by the court). The court refused to dismiss the False Claims Act claims as time-barred, since there was no showing that the government knew or should have known about the alleged fraud prior to the filing of the initial complaint.

Relator's Alleged Ethical Violations Did Not Warrant Striking Allegations In The Complaint

The defendants moved to strike the False Claims Act allegations from the relator's complaint, contending that the relator committed an ethical violation since he served as general counsel of the defendant clinic during the time that the alleged False Claims Act violations occurred and his complaints were based on knowledge he acquired while serving in that role. More specifically, the defendants argued that, pursuant to Federal Rule of Civil Procedure 12(f) (which authorizes federal courts to strike from pleadings, among other things, any impertinent or scandalous matters) and Pennsylvania Rule of Professional Conduct 1.6 (which prohibits attorneys from revealing client information without informed consent), that the relator's complaint should be stricken. The court denied the defendants' motion to strike, noting that the defendants cited no cases in support of their position, and that it appeared that the relator had not committed an ethical violation, since, pursuant to Pennsylvania Rule of Professional Conduct 1.6(c)(3), attorneys are permitted to reveal a client's confidential information in order "to prevent, mitigate or rectify the consequences of a client's criminal or *fraudulent act* in the commission of which the lawyer's services are being or had been used."

Relator's Motion to Amend His Complaint Was Denied As Moot

Finally, the district court denied the relator's motion to further amend his complaint as moot. The relator filed this motion, seeking to amend his complaint in the event that the district court ruled that the complaint at issue failed to satisfy Rule 9(b)'s particularity requirements. Since the court ruled that the relator had pled his False Claims Act claims with the requisite particularity, the court denied the motion to amend the complaint.

U.S. ex rel. Tucker v. Nayak, 2008 WL 140948 (S.D. Ill. Jan. 11, 2008)

A doctor's office insurance billing clerk filed an FCA *qui tam* action against her employer-doctor, alleging that the doctor repeatedly ordered her to bill Medicare for procedures he supposedly performed, even though these procedures took place when he wasn't even in the building. In granting the defendant-doctor's Rule 9(b) motion to dismiss, an Illinois district court stressed that a relator must identify at least one false claim that was actually submitted to the government and cannot rely on the "mere possibility" that a claim was submitted. Here, the relator alleged the underlying scheme, but the court faulted her for failing to link these allegations with an actual claim that made its way to the government.

From 2001 to 2006, Pam Tucker served as an insurance billing clerk in P.D.L. Nayak, M.D.'s office. According to Tucker, Nayak regularly ordered his staff to bill Medicare for certain medical and technical procedures performed while Nayak *was not* in the building, even though he knew that the procedures were only payable if the procedures had been performed while he *was* actually in the building. Tucker estimated that Nayak submitted such bills to Medicare amounting to approximately $50,000 per week and totaling in excess of $10 million. After the government declined to intervene, Nayak filed a motion to dismiss, arguing the complaint failed to satisfy Rule 9(b)

Complaint Failed To Satisfy Rule 9(b)

The court highlighted *U.S. ex rel. Crews v. NCS Healthcare of Ill., Inc.*, 460 F.3d 853, 856 (7th Cir. 2006), even though the decision dealt with a summary judgment motion, as opposed to a motion to dismiss. Nonetheless, the court applied *Crews* and Rule 9(b) and require the relator to identify at least one knowingly false claim that was actually submitted to the government. Moreover, the court stressed that the relator "cannot rely on the mere probability that a claim was filed."

Applying this standard, the court ruled that the complaint failed to satisfy Rule 9(b). Specifically, the court faulted the complaint for failing to allege "at an individualized transaction level" that Nayak knowingly submitted a false claim for payment or made a false statement regarding any specific procedure or patient. Accordingly, the court granted Nayak's motion to dismiss.

LITIGATION DEVELOPMENTS

A. *Pro Se* Relators

U.S. ex rel. Timson v. Sampson, 2008 WL 509527 (11th Cir. Feb. 27, 2008)

A relator, proceeding *pro se*, appealed a Florida district court's dismissal of a *qui tam* action. Affirming the lower court's decision, a *per curiam* Eleventh Circuit decision held that a private individual cannot proceed *pro se* with a declined *qui tam* action. The court noted that the government remains the real party in interest in a declined *qui tam* action, and that the long-established case law mandates that only a licensed attorney can conduct proceedings in court for *another* person.

After the government declined to intervene, John Timson decided to move forward *pro se* with his *qui tam* action. Subsequently, a Florida district court granted the defendants' motion to dismiss and held that a *qui tam* relator cannot proceed post-declination unless he is represented by a licensed attorney. Timson appealed the decision to the Eleventh Circuit.

Private Individual Cannot Bring *Pro Se Qui Tam* Suit

As an initial step, the Eleventh Circuit noted that the language of the FCA is silent on the question of whether a private individual can bring a *qui tam* suit *pro se*. Turning next to the case law, the Eleventh Circuit noted that while it has never addressed the issue, the circuits that have addressed the question have all held that *pro se* relators may not prosecute *qui tam* actions. *See, e.g., Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1126–28 (9th Cir. 2007); *U.S. ex rel. Lu v. Ou*, 368 F.3d 773, 775–76 (7th Cir. 2004).

The court, then, observed 28 U.S.C. § 1654, the general provision permitting parties to proceed *pro se*, which provides: "In all courts of the United States the parties may plead and conduct *their own cases* personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."28 U.S.C. § 1654 (emphasis added). Notably, while the provision provides a personal right, it does not extend to the representation of the interests of others. The Eleventh Circuit echoed its earlier sentiment that "[t]he United States is the real party in interest in a *qui tam* action under the False Claims Act. . . ." *U.S. ex rel. Walker v. R&F Properties of Lake County, Inc.*, 433 F.3d 1349, 1359 (11th Cir. 2005). Moreover, the court chronicled the long-established case law that mandates that only a licensed attorney can conduct court proceedings in court for another person.

In turn, because the FCA does not explicitly permit *pro se qui tam* suits and 28 U.S.C. § 1654 does not authorize *pro se* litigants to represent the interest of others, the court of appeals affirmed the lower court's decision and held that *pro se* relators cannot represent the government in a *qui tam* suit. (Notably, while some courts have held that relators cannot proceed *pro se* with declined *qui tam* suits, this Eleventh Circuit decision seems to hold that a *qui tam* relator cannot even "bring" a *qui tam* action in the first place.)

B. Attorneys' Fees for Prevailing Party

U.S. ex rel. Ritchie v. Lockheed Martin Corp., 2008 WL 608586 (D. Colo. Mar. 4, 2008)

The Colorado district court granted summary judgment in favor of defendants who were alleged to have submitted false claims for payment to the federal government and to have retaliated against the relator for refusing to participate in scheme. The relator's complaint was dismissed with prejudice and the court ordered the relator to pay the defendants' costs. The relator filed a motion to review the award of costs, arguing that the False Claims Act precludes payments of defendant's costs, that allowing awards of costs to defendants would have a chilling effect on future False Claims Act cases, and that the clerk of court erred in awarding excessive fees for defendants' costs for copying documents. The court, in denying the relator's motion, held that the plain language of the False Claims Act does not limit awards of costs to situations where the relator's actions were "frivolous, clearly vexatious, or brought primarily for the purposes of harassment."

Ruth Ritchie filed a *qui tam* action against Lockheed Martin Corp. and Lockheed Martin Space Systems Co., alleging that the defendants violated the False Claims Act by submitting false claims for payment and also by retaliating against her when she refused to participate in those alleged activities. The court granted the defendants' motion for summary judgment on these issues, dismissed the relator's claims with prejudice, and ordered that the "Defendants may have their costs by filing a bill of costs." The defendants filed a bill of costs, itemizing their claims costs, and requesting over $3,000 in total costs and the clerk of court entered an award in that amount. The relator objected and filed a motion to review the clerk's award.

The district court denied that motion, holding that the plain language of the False Claims Act does not limit awards of costs to situations where the relator's actions were "frivolous, clearly vexatious, or brought primarily for the purposes of harassment." The court found that the provision containing this language—section 3730(d)(4)—applies to awards of defendants' attorneys' fees and expenses, but not costs. The court held that the rule governing awards of defendants' costs is Federal Rule of Civil Procedure 54(d)(1). The court also found that the relator "has failed to show why the potential danger of chilling future FCA claims—standing alone—should overcome the traditional presumption that a district court will award costs to a prevailing party." Finally, the court determined that the relator failed to show why the defendants' costs for copies of deposition transcripts was excessive, noting that the relator did not respond to the defendants' argument that they had no control over those costs and were required to incur the costs in order to obtain copies of the deposition transcripts in the case.

U.S. ex rel. Atkinson v. Pennsylvania Shipbuilding Co., 2008 WL 191167 (E.D. Pa. Jan. 22, 2008)

After extensive litigation in which the Third Circuit ultimately dismissed a *qui tam* action pursuant to the FCA public disclosure bar, 31 U.S.C. § 3730(e)(4),

the FCA defendant filed a motion seeking costs pursuant to 28 U.S.C. § 1919. In opposition to the motion, the relator argued that the court could not award costs, for it had previously ruled that the suit was not "frivolous." A Pennsylvania district court, in granting the defendant's motion, ruled that even though the case was not frivolous, it could award costs under § 1919 when justice so requires. Given the lengthy litigation, the court ruled that it was "just" to award the defendant its deposition costs of $28,275.99.

C. Removal of State-Law Case

Wisconsin v. Amgen, Inc., 516 F.3d 530 (7th Cir. Feb. 4, 2008)

The State of Wisconsin filed a state court action against a pharmaceutical manufacturer alleging the company violated state law when it submitted fraudulent pricing information. After a federal district court lifted the seal on a different action raising the same basic allegations under the federal FCA, the defendant-manufacturer sought to remove the state court action to the federal courts. A Wisconsin district court ruled that the action was not removable and sanctioned the manufacturer for attorneys' fees and costs. After the defendant-manufacturer appealed the decision to the Seventh Circuit, the court of appeals agreed that the suit was not removable, for one of the parties was a citizen of the State of Wisconsin and the suit was not a federal-question suit. However, the Seventh Circuit reversed the lower court's sanctions decision, for the particular issue had only been squarely addressed in one previous appellate opinion, thus giving the defendant-manufacturer a "reasonable basis" for seeking removal.

The State of Wisconsin filed a suit in a Wisconsin state court against Dey and others, charging fraudulent pricing of pharmaceutical drugs in violation of Wisconsin state law. Three times Dey removed the case to federal district court under 28 U.S.C. § 1446. Three times the district court remanded the case to state court, and the third time it sanctioned Dey in the amount of $14,208 in attorneys' fees and costs. Dey appealed the decision to the Seventh Circuit.

Dey argued that to the court of appeals that it had reasonable grounds for seeking removal. For support, Dey highlighted that the federal district court in Massachusetts had recently unsealed of a complaint that charged Dey and others with violating the federal False Claims Act. Dey maintained that the filing of that suit had created federal jurisdiction over Wisconsin's suit for the first time, and so the suit was removable to federal court for the first time.

Lack Of Diversity Of Citizenship Prevents Removal Of State-Based Claims

Section 3732(b) of the federal False Claims Ac provides that "the district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under [31 U.S.C. §] 3730." However, because the State's claims are founded on an alleged violation of Wisconsin law and do not arise under the federal law, the pertinent removal statute, 28 U.S.C. § 1441(b), only authorizes removal when there is diversity of citizenship. Here, the court ruled that this condition was not satisfied. Accordingly, the Seventh Circuit agreed that the case could not be removed to the federal courts.

Defendant Had an "Objectively Reasonable Basis" To Seek Removal

However, the court of appeals reversed the lower court's sanction order. The U.S. Supreme Court has held that "absent unusual circumstances, courts may award attorney's fees under [the removal statute] only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005). In this case, the Seventh Circuit noted the novelty of the issue of removability of a suit arguably brought within federal jurisdiction by Section 3732(b) as a result of the subsequent filing of an FCA suit. Indeed, this particular issue had only been previously addressed in one previous appellate opinion, *U.S. ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870 (D.C. Cir. 1999).

Given the paucity of appellate authority, the Seventh Circuit held that Dey an "objectively reasonable basis" for attempting to remove the suit had for the third time. Accordingly, the court of appeals affirmed the lower court's removal decision, but it reversed the sanction order.

D. Counterclaims Against the Government

United States v. Manhattan-Westchester Medical Services, P.C., 2008 WL 241079 (S.D.N.Y. Jan. 28, 2008)

After the government brought an FCA action against a healthcare provider for submitting fraudulent Medicare claims, the provider filed counterclaims for various unpaid Medicare claims and expenses. In dismissing the defendant-provider's counterclaims, a New York district court stressed that the Social Security Act requires the provider to exhaust its administrative remedies *before* filing suit. Thus, because the defendant-provider had not first presented its claims for benefits for administrative review, the court dismissed the counterclaims.

E. Interlocutory Appeal

In re Pharmaceutical Industry Average Wholesale Price Litigation, 2008 WL 163644 (D. Mass. Jan. 16, 2008)

In assessing the timeliness of an intervened FCA *qui tam* action alleging thousands of false Medicare and Medicaid claims spanning fourteen years, a Massachusetts district court rejected the application of *United States v. The Baylor University Medical Center*, 469 F.3d 263 (2d Cir. 2006), which held that a government's complaint-in-intervention did not relate back under FRCP 15(c)(2) to the *qui tam* complaint's original filing date. The defendant filed a motion for interlocutory appeal, which the court denied. The court noted that even if *Baylor* applied to the case at bar, there would still be four years' worth of Medicare claims and six years' worth of Medicaid claims to be litigated. Thus, under the interlocutory appeal provision, 28 U.S.C. § 1292(b), the court ruled that the defendant had not met its burden of demonstrating that an immediate appeal would significantly decrease discovery or expert expenses or that it would otherwise materially advance the end of the litigation.

F. Entry of Final Judgment

U.S. ex rel. Fent v. L-3 Comm. Aero Tech LLC, 2008 WL 697302 (N.D. Okla. Mar. 12, 2008)

Following one defendant's dismissal from a False Claims Act case and the relator's failure to file an amended complaint re-alleging claims against that defendant, the defendant filed a Rule 54(b) motion, requesting the court to enter final judgment on all of the relator's claims against it. In denying the motion, the court held that there was a just reason to delay entry of judgment, for an interlocutory appeal remained a distinct possibility.

Raytheon was one of two defendants to a *qui tam* suit filed by relator Clayton Fent. The lawsuit alleged that the defendants violated the False Claims Act by conspiring to submit false claims, by presenting false claims to the government, and by retaliating against him. The complaint also alleged a wrongful termination claim under Oklahoma law. Both defendants filed motions to dismiss the complaint. The district court granted Raytheon's motion to dismiss, holding that the complaint allegations against Raytheon rested solely on the fact that Raytheon owned a minority share of the other defendant company. The complaint made no assertions that Raytheon had any direct involvement in any of the alleged conduct. The court also dismissed 3 of the 4 claims against the other defendant, allowing the plaintiff to only maintain his retaliation claim against that defendant. The court granted the plaintiff leave to amend his False Claims Act claims, but the plaintiff did not file an amended complaint. Consequently, Raytheon was terminated as a party.

Since all of the claims against Raytheon had been dismissed, pursuant to Federal Rule of Civil Procedure 54(b), Raytheon moved the court to enter partial judgment, notwithstanding the fact that the plaintiff still had a pending claim against the other defendant. Raytheon argued that, unless final judgment in its favor was entered, it might be subject to the obligations of parties in the case, including discovery obligations. The district court denied this motion, stating that Rule 54(b) requires the court to make two findings: (1) that the judgment is final; and (2) that there is no just reason to delay entry of judgment. The court held that the second element was not satisfied, since the possibility of an interlocutory appeal remained, which provided a reason to delay entry of judgment. The court held that Raytheon had no reason to be concerned that it would be subject to discovery or other obligations of the parties, since Raytheon had been dismissed as a party and the plaintiff waived his right to file an amended complaint against Raytheon. The court held Raytheon's concerns were insufficient to justify entering judgment under Rule 54(b), but stated that it would "adequately protect Raytheon from the 'expense and distraction' of participating in discovery."

G. Truth in Negotiations Act Litigation

U.S. ex rel. Sallade v. Orbital Sciences Corp., 2008 WL 724973 (D. Ariz. Mar. 17, 2008)

The relator, W. Austin Sallade, filed an action against Orbital Sciences Corporation, alleging seven counts for various alleged violations of the False Claims Act and the Truth in Negotiations Act. Orbital moved to dismiss the original complaint for failure to plead fraud with particularity, and the court granted that motion with respect to counts five, six and seven. The relator then filed an amended complaint, and Orbital moved to dismiss counts five, six and seven of the amended complaint.

Count five alleged that, under a subcontract, Orbital fraudulently directly billed its general contractor, Boeing and ultimately, the federal government, for "supplier management" and "suppler quality" personnel, when, in fact, Boeing should have been billed on an indirect cost basis, since those personnel performed general, multi-contract functions. Sallade alleged that, as a result of this practice, during fiscal years 2003 through 2005, Orbital fraudulently billed the federal government for labor costs amounting to at least $1 million. Count six alleged that Orbital violated the Truth in Negotiations Act by inflating its expected costs on the Boeing subcontract for which it was negotiating a price, by failing to report certain costs and pricing data. Count seven alleges that Oribtal improperly charged the federal government for spare and excess materials before it actually needed those materials to perform duties under its contracts.

The district court held that the relator's allegations under Count five satisfied the requirements of Rule 9(b), since the relator's amended complaint included a specific false claim, by identifying a particular project for which Orbital hired new employees, as well as a particular Orbital manager who stated that the costs were being directly billed to Boeing. The relator asserted that these allegations are examples of a broader fraudulent scheme by Orbital and its Vice President of Quality to hire additional personnel and fraudulently directly bill the costs. The court ruled that the relator could proceed to discovery regarding Orbital's direct billing for personnel hired by that Vice President during fiscal years 2003 through 2005. However, the relator was not allowed to proceed on discovery with respect to direct billing for any other personnel that may have been referenced in Count five, since the relator failed to plead any such allegations with particularity and did not include any examples of such conduct.

The district court, though, ruled that counts six and seven did not meet Rule 9(b)'s particularity requirements, since count six did not identify any specific claim for payment that was allegedly knowingly submitted by Orbital in violation of the Truth in Negotiations Act. Thus, the court dismissed that count, but granted the relator leave to again amend his complaint. The court cautioned, that the relator could not amend his complaint by merely alleging that every invoice submitted by Orbital was fraudulent, without pleading the "who, what, when, where, and how" of the submission of even one invoice containing allegedly fraudulently negotiated costs.

With respect to Count seven, the district court ruled that the relator did not plead fraud with particularity, since the relator simply asserted that Orbital fraudulently billed for certain unidentified items from 2003 through 2005. The court noted that the relator failed to identify the specific materials and failed to allege when Orbital directly billed the government for those materials. The court further noted that the relator had been asked to provide such information when he first amended his complaint and that at oral argument, when asked whether he had any additional facts to add, he stated that he did not. Therefore, the court determined that it would be futile to allow the relator to again amend his complaint with respect to Count seven, and this count was dismissed with prejudice.

In addition, after ruling on the defendant's motion to dismiss, the court corrected an error in a prior order, wherein the court denied Orbital's motion to dismiss Count four of the relator's complaint, which alleged that Orbital violated the False Claims Act by intentionally misinterpreting a contract to allow it to directly bill the federal government for certain commonly used facilities and equipment; the relator included a specific false claim to substantiate this claim. However, the court decided that it erroneously concluded that the false claim used to substantiate Count four was characteristic of the rest of the fraudulent scheme alleged in Count four—in fact, that claim mimicked the allegations in Count three. The court then dismissed Count four, since that count included the additional allegation that Orbital was won the contract at issue by submitting an inappropriately low bid, since Orbital did not have to include the costs of necessary facilities, equipment, and materials, since the government had already paid for those. The court concluded that this additional allegation did not state a claim under the False Claims Act, since the Act does not prohibit fraud in the negotiation of government contracts and does not prohibit charging the government less than is appropriate on a contract.

H. Lobby Disclosure Act

***United States v. National Training and Information Center, Inc.*, 2008 WL 781927 (N.D. Ill. Mar. 20, 2008)**

The United States brought a False Claims Act case against the National Training and Information Center ("NTIC"), alleging that NTIC accepted federal grant money and certified that it would comply with the provisions of the Lobbying Disclosure Act by not using any of the grant money for lobbying activities prohibited by that Act. However, the government alleges, NTIC sought reimbursement from federal funds for lobbying activities. NTIC succeeded in having the government's original complaint dismissed, as the district court determined that the Lobbying Disclosure Act did not cover all of NTIC's activities that formed the basis for the government's complaint. The government amended its complaint, by asserting that NTIC's actions also violated the requirements of the Office of Justice Programs Financial Guide, and alleging a breach of contract claim. NTIC sought to have the amended complaint dismissed. The district court denied NTIC's motion, finding that the amended complaint satisfied the requirements of Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6). The court rejected NTIC's argument that the requirements of the Lobbying Disclosure Act contradict the Office of Justice Programs Financial Guide requirements; the court held that these additional requirements only supplement the requirements of the Lobbying Disclosure Act. Moreover, the court reiterated its rejection of NTIC's argument, in response to the original complaint, that the Lobbying Disclosure Act is unduly vague.

Judgments & Settlements

JANUARY 1–MARCH 31, 2008

Dey and Takeda Settlement: *In Re: Alabama Medicaid Pharmaceutical AWP Litigation*—(Circuit Court of Montgomery, Alabama)—January 9, 2008

Two pharmaceutical companies, Dey, LP and Takeda Pharmaceuticals, North America, Inc. agreed to pay $6.75 million to the State of Alabama to resolve claims that they fraudulently inflated the reported prices of their prescription drugs causing Alabama's Medicaid program to overpay. The settlement arose from a suit filed by Alabama's Attorney General Troy King in 2005 against 73 pharmaceutical companies, alleging that these companies fraudulently overpriced and misreported their drugs to the State of Alabama. Dey will pay the State of Alabama $4.75 million and Takeda will pay $2 million. The settlement with Dey resolves claims about its overpricing of drugs related to asthma and pulmonary diseases, and the settlement with Takeda resolves claims about overcharging for its drug Actos: a drug used for diabetes. GlaxoSmithKline and Novartis have a trial scheduled for June 16, 1008.

Lafayette General Medical Center Settlement: *U.S. ex rel. Mallavarapu v. Arcadiana Technology LLC* (W.D. LA)—January 23, 2008

Lafayette General Medical Center (LGMC) of Lafayette, Louisiana, agreed to pay $1.8 million to the government to settle claims that it defrauded Medicare, Medicaid, the Federal Employee Health Benefit Plan, and Tricare by billing for unnecessary cardiology procedures. The settlement arose from a *qui tam* complaint filed in 2004 by a cardiologist, Christopher Mallavarapu. In his complaint, Mallavarapu alleged that another physician, Mehmood Patel, was engaging in fraudulent activity from 1999 to 2004 by performing medically unnecessary angiogram, angioplasty, and stenting procedures on patients at hospitals in the LGMC network in order to bill federal and state health programs at a higher rate. These potentially dangerous procedures were often invasive and were performed even on healthy patients. During an investigation, the federal authorities found internal reports from the hospital which demonstrated that LGMC knew about Patel's conduct but failed to take corrective measures. Alan K. Breaud of Breaud & Lemoine represented relator Christopher Mallavarapu. The case was investigated by the U.S. Department of Health and Human Services. The prosecution and settlement was handled by Assistant U.S. Attorneys Alec Alexander and Kelly Uebinger along with investigator Chris Knighton.

Big Dig Bechtel Parsons Settlement: *U.S. ex rel. Johnston v. Bechtel Corp. et al* (D. Mass)—January 30, 2008

Bechtel Infrastructure Corp. and Parsons Brinkerhoff, two consulting firms involved in the construction and design of the Central Artery/Tunnel Project or "Big Dig" in Boston, agreed to pay more than $407 million to the U.S. and the Commonwealth of Massachusetts to settle criminal and civil allegations that they provided inadequate services and billed the government for substandard work on the tunnel. The "Big Dig" project, a megaproject which rerouted Interstate 93 into a tunnel through central Boston to relieve traffic congestion, started in 1985 and has cost over $14.6 billion of taxpayer money. From 1985 to 2005, Bechtel and Parsons Brinkerhoff formed a joint venture to handle the management of the "Big Dig" project which included design management, construction management, and 'Quality Assurance'. The U.S. and the Commonwealth of Massachusetts began an investigation of Bechtel and Parsons Brinkerhoff in 2004 after defects such as constant leaking were observed in the tunnel. Additionally, a criminal investigation of the firms by Massachusetts Attorney General Martha Coakley began in 2006 after a motorist was killed in I-90 tunnel ceiling collapse. In 2006, the U.S. also intervened in a *qui tam* suit filed by relator Daniel Johnston against a number of contractors and consulting firms involved in the 'Big Dig' including Bechtel and Parsons Brinkerhoff for fraudulent billing and false certifications. In their investigation, the U.S. and Massachusetts concluded that Bechtel and Parsons Brinkerhoff had failed to provide adequate oversight services in four different areas: the construction of the I-93 tunnel's slurry wall panels, the installation and monitoring of ceiling bolts in the I-90 Connector tunnel, the handling of the payment claims and work by the various contractors, and the monitoring of the concrete used for the slurry walls. The settlement releases the companies from all criminal and civil liabilities related to the I-90 collapse, the defects in the slurry walls, and the False Claims Act suit. The Commonwealth of Massachusetts will receive more than $399.2 million as its share of the recovery with the United States receiving close to $20.5 million. The vast majority of the state recovered funds will be held in a Central Artery/Tunnel Project Repair and Maintenance Fund. Additionally, twenty four other Section Design Consultants (SDC's) involved in the "Big Dig" project agreed to pay $51 million to settle claims made by Massachusetts' Cost Recovery Program, that increased design and recovery costs of the "Big Dig" project were the result of faulty management. Aggregate Industries, the largest concrete supplier of the project, previously agreed to settle criminal and civil allegations for $50 million for providing substandard concrete. Relator Daniel Johnston will receive $150,000 as his share of the recovery. TAF members Suzanne Durell and Bob Thomas represented Johnson. As part of the Agreement, the U.S. and Commonwealth of Massachusetts reserved the right to sue the companies if a future catastrophic event causing more than $50 million in damages occurs within ten years of the agreement. Both Bechtel and Parsons Brinkerhoff were required to enact corporate compliance programs to prevent future conduct from occurring and to conduct internal investigations and report to the U.S. and Commonwealth of Massachusetts if construction defects could lead to a future catastrophic event. The settlement was handled by Assistant U.S. Attorneys Fred M. Wyshak, Jeffrey M. Cohen, Anthony E. Fuller, Eugenia M. Carris, and Special Assistant Attorney Paul Ware. The investigation was handled by the New England Office of the U.S. Department of Transportation, the FBI, and the Massachusetts State Police.

Bayonne Medical Center Settlement—February 4, 2008

IJKG, LLC, the firm which purchased the bankrupt Bayonne Medical Center (BMC), agreed to pay the United States $2.5 million to settle allegations that BMC violated the False Claims Act by unlawfully overcharging for services provided to Medicare patients. The allegations arose from a *qui tam* suit filed by relator James Monahan. Monahan alleged that from at least 2000 through 2003, BMC knowingly inflated charges for both inpatient and outpatient care of Medicare patients in its hospital in order to receive supplemental reimbursement from Medicare in the form of outlier payments. Under Medicare guidelines, hospitals may only bill Medicare's outlier payment system for patients with abnormally high medical costs. Monahan will receive $400,000 as his share of the settlement. Because Bayonne Medical Center filed for bankruptcy in 2007, its purchaser, IJKG, agreed to settle all the claims of the U.S. against BMC. The investigation was handled by the Civil Division of the Department of Justice, the U.S. Attorney's Office for the District of New Jersey, the OIG for the Department of Health and Human Services, CMS, and the FBI.

Merck Settlement: *United States, et al. ex rel. H. Dean Steinke v. Merck & Co., Inc.*, (E.D. PA) and *United States ex rel. William St. John LaCorte v. Merck & Co., Inc* (E.D. LA)—February 8, 2008

Merck agreed to pay more than $670 million to the federal government, forty-nine state governments, and the District of Columbia to settle charges that it overbilled and defrauded Medicaid for three of its drugs: Zocor, Vioxx, and Pepcid. The settlement arose from two separate *qui tam* suits filed by H. Dean Steinke, a former regional sales manager for Merck, and William St. John LaCorte, a physician in New Orleans. In his suit, Steinke alleged that from 1997 to 2001, Merck violated the False Claims Act and the Anti-Kickback Statute by fraudulently offering monetary incentives to physicians and hospitals to induce them to switch their patients to Merck's drugs: Vioxx and Zocor. In his suit, Steinke alleged that among the strategies Merck used to induce doctors to prescribe their drugs were phony "research" studies, bogus "training" sessions, and nominal pricing incentives in which doctors or hospitals were offered huge discounts on drugs if they met certain prescription levels. Although these discounts often were more than 90 percent of the Average Manufacturers Price (AMP), Merck did not report these nominal price discounts in its Best Price formulation to the Public Helath Service (PHS), as a result induced Medicaid and state healthcare programs to overpay in reimbursement for Vioxx and Zocor. To settle his suit, Merck agreed to pay $399 million plus interest to the federal government, forty-nine state governments, and the District of Columbia. As his share of the recovery, Steinke will receive $44,690,000. TAF members Mark Kleiman of the Law Offices of Mark Kleiman, Beth Anne Yeager of the Law Office of Beth Anne Yeager, and Steve Cohen of the Cohen Law Group represented Steinke. The second suit, filed by William St. John Lacorte in 1999, alleged that Merck offered discounts of up to 92 percent off the AMP on its drug, Pepcid, to hospitals that purchased a certain amount of the drug in order to induce them to prescribe the drug. These discounts were not reported to the PHS, however, and as a result, caused the federal Medicaid program and state health programs to overpay for Pepcid. Merck will pay $250 million to the federal and state governments, with $137.5 million as the federal share and $112.5 million as the states' share. LaCorte will receive $24,062,500 as his share of the recovery. TAF members Marc Vezina and Sherik Sakla represented LaCorte.

AstraZeneca Judgment: *In Re: Alabama Medicaid Pharmaceutical AWP Litigation*—(Circuit Court of Montgomery, Alabama)—February 12, 2008

An Alabama state court jury ordered AstraZeneca Pharmaceuticals LP to pay $215 million to the State of Alabama in damages for fraudulently overpricing its drugs for reimbursement from Alabama's Medicaid program. Among the drugs made by AstraZeneca are Nexium, used to treat heartburn and acid reflux, and Crestor, used to lower cholesterol. Of the $215 million, $40 million was awarded as compensatory damages and $175 million was awarded as punitive damages. AstraZeneca was one of 73 pharmaceutical companies named in a suit filed by Alabama's Attorney General, Troy King. In his suit, King alleged that these companies had falsely inflated the price of their drugs for a fifteen year period. Alabama does not have a False Claims Act. Jere Beasley represented the State of Alabama. AstraZeneca intends to appeal the ruling to the Alabama State Supreme Court. Takeda Pharmaceuticals and Dey, LP previously settled with Alabama for a total of $6.75 million.

Cathedral Healthcare Systems Settlement: *U.S. ex rel. Salvatori and Iveson v. Tenet Healthcare Corporation et al.* (E.D. Pa.)—March 4, 2008

New Jersey-based hospital system Cathedral Healthcare System agreed to pay $5.3 million to the federal government to settle charges that it defrauded Medicare from 1998 to 2003 by increasing charges for Medicare patients in its hospitals in order to receive a higher reimbursement from Medicare. In cases where the cost of medical care for a Medicare recipient is unusually high, Medicare reimburses a health care provider for these costs through outlier payments. By falsely inflating charges for both inpatient and outpatient services in its hospitals, Cathedral received outlier payments from Medicare above its entitled amount. The settlement arose from three separate *qui tam* cases filed under the False Claims Act. Relators Peter Salvatori and Sara Iveson, who filed the first *qui tam* case against Cathedral Healthcare System, will receive $848,000 as their share of the recovery. Cathedral also entered into a Corporate Integrity Agreement (CIA) with the Department of Health and Human Services, Office of the Inspector General. The investigation and settlement was jointly handled by the U.S. Attorney's Office for the District of New Jersey, the U.S. Attorney's Office for the Eastern District of Pennsylvania, the Department of Health and Human Services, the Center of Medicare and Medicaid Services, and the FBI. U.S. Attorneys Allison Cendali and Anthony J. LaBruna represented the U.S.

Yale-New Haven Hospital Settlement—March 7, 2008

Yale-New Haven Hospital (YNHH) of New Haven, Connecticut, agreed to pay $3,777,861 to the U.S. government to settle liability under the False Claims Act for overbilling Medicare for infusion therapy, chemotherapy, and blood transfusion services from 2000 to 2005. According to a disclosure made by YNHH to the government, the hospital had billed Medicare for two to five units of infusion therapy and chemotherapy administration despite the Medicare regulation that only one unit per patient is reimbursable. The case was investigated by the OIG for the Department of Health and Human Services, the FBI, and was prosecuted by Assistant U.S. Attorney Richard M. Molot along with Auditor Kevin Saunders.

Besler & Co. Settlement—March 8, 2008

Healthcare consulting firm, Besler & Company, agreed to pay more than $2.875 million to the United States to settle claims that it defrauded the U.S. by unlawfully advising hospitals to increase charges for Medicare patients' inpatient and outpatient services in order to receive a higher reimbursement from Medicare. According to allegations made in two separate *qui tam* suits, Besler advised hospitals to falsely inflate charges from 2001 to 2003. James Monahan, the relator in the first of the suits, will receive $460,000 as his share of the recovery. The U.S. Attorney's Office for the District of New Jersey, the Department of Health and Human Services, Office of the Inspector General, the Centers for Medicare and Medicaid Service, the FBI, and the Justice Department's Civil Division coordinated the investigation and settlement.

United States et al., ex rel. Bernard Lisitza v. CVS Caremark Corp. (N.D. Ill.)—March 18, 2008

Retail pharmacy corporation CVS Caremark agreed to pay $36.7 million to the U.S., the Medicaid participating states, and the District of Columbia to settle allegations that it overbilled Medicaid for a widely used antacid drug, by switching patients from the standard generic drug for a more expensive version. According to allegations made in a *qui tam* suit filed in 2003 by relator Bernard Lisitza, CVS had purposefully and unlawfully switched patients from the tablet form of Ranitidine, which is generic Zantac, to a much more expensive capsule version in order to increase its reimbursement from Medicaid. Because the capsule version costs two to four times more than the tablet form of the drug, CVS was able to bill Medicaid for millions more than it was eligible to receive. Relator Bernard Lisitza learned of this fraudulent scheme while working as a temporary receiving pharmacist in Illinois. Of the $36.7 million recovered in the settlement, $21,060,535 will go to the federal government and $15,639,464 will go to the Medicaid participating states, including Illinois, California, Delaware, Florida, Hawaii, Louisiana, Massachusetts, Nevada, Tennessee, Texas, Virginia, and the District of Columbia. As his share of the recovery, Lisitza will receive $3,580,291. TAF members Michael Behn and Linda Wyetzner of Behn & Wyetzner represented Lisitza. Assistant U.S. Attorney Linda A. Wawzenski represented the government.

U.S. ex rel. Thomas v. Chan (E.D. Ark.)—March 29, 2008

Dr. Patrick Chan, a physician in Arkansas, agreed to pay $1.5 million to the U.S. government and State of Arkansas to settle claims that he accepted illegal kickbacks from medical device manufacturers and submitted false claims for payment to Medicare and Medicaid in violation of the federal Anti-Kickback Statute and the False Claims Act. The settlement arose from a *qui tam* suit filed in 2006 by relator John Thomas, a former salesperson for a medical device company. In the suit, Thomas alleged that Chan had entered into unlawful consulting agreements and accepted expensive gifts from Blackstone Medical Inc. and other medical device companies in exchange for using their surgical spine products. Because these kickback arrangements were in violation of the Anti-Kickback Statute, Dr. Chan submitted falsified certifications of compliance with the Anti-Kickback Statute, leading to false claims for reimbursement from Medicare and Medicaid. Thomas will receive $350,000 as his share of the recovery. Of the $1.5 million recovery, $1,049,000 will be paid to the U.S. government and $101,000 will be paid to the State of Arkansas. Chan also pled guilty to criminal charges for violating the Anti-Kickback Statute. He has not yet received his sentencing and faces up to five years in prison. Michael Mitchell and TAF member Janet Goldstein of Vogel, Slade, and Goldstein, LLP represented Thomas. U.S. Attorney Jane W. Duke of the Eastern District of Arkansas represented the U.S. The case was investigated by the Little Rock Division of the FBI and the Department of Health and Human Services.

Otsuka Pharmaceutical Settlement: *U.S. ex rel. Piacentile v. Bristol-Myers Squibb Co. and Otsuka Pharmaceutical Co., Ltd* (D. Mass)—March 28, 2008

Otsuka American Pharmaceutical Co., a subsidiary of the Japanese pharmaceutical corporation Otsuka Pharmaceutical agreed to pay more than $4 million to settle claims that it defrauded the government by promoting its drug, Abilify, for off-label uses. Abilify, an antipsychotic medication used to treat bipolar disorder and schizophrenia, was developed by Otsuka in Japan and co-promoted in the U.S. by Bristol-Myers Squibb. According to a complaint filed by relator Joseph Piacentile, Otsuka and Bristol-Myers Squibb promoted Abilify from 2002–2005 for pediatric patients and for dementia-related psychosis despite the fact that the drug had not yet been approved by the FDA for these uses. Although the FDA did not approve Abilify for dementia-related psychosis and mandated that a black box warning be put on Abilify to detail the possible dangers of taking the drug for that use, Otsuka had sales representatives focus specifically on nursing homes and geriatric care facilities to promote the drug for dementia-related psychosis. Additionally, Otsuka directed its salespeople to call child psychiatrists and specialists to promote Abilify for off-label usage in children. Of the $4 million Otsuka will pay, $2.3 million will go to the federal government with $1.7 million going to the Medicaid participating states. Relator Joseph Piacentile will receive $348,000 as his share of the recovery. In September 2007, Bristol-Myers Squibb paid more than $515 million to settle claims about its fraudulent marketing and pricing practices, including its off-label promotion of Abilify.

Gulshan Sultan Settlement—March 31, 2008

Gulshan Sultan, a psychiatrist in Cleveland, Tennessee, entered into a consent judgment to pay $1.1 million the U.S. and the State of Tennessee to resolve allegations that she violated the federal False Claims Act and the Tennessee Medicaid False Claims Act by falsely billing for services not provided. In order for a psychiatric service to be eligible for reimbursement from Medicare or Medicaid, a physician must have a valid provider identification number. According to a complaint filed in the Eastern District of Tennessee, Sultan billed Medicare and Tennessee for psychiatric services provided by her nurse, who was not a mental health professional, from at least 2000 to 2005 by upcoding those services with her code. This false billing amounted to over 6,000 false claims and cost Medicare and TennCare $267,253. Because of the treble damages and civil penalties of the False Claims Act, Sultan was required to pay $1.1 million. She was also charged with criminal penalties for false billing and was sentenced to two years probation and prohibition from participation in the Medicare and TennCare programs. The investigation and prosecution of the case was handled by the Tennessee Bureau of Investigation, the Tennessee Medicaid Fraud Control Unit, as well as the HHS-OIG, the U.S. Attorney's Office of the Eastern District of Tennessee, and the Office of the Attorney General of the State of Tennessee. The investigation was handled by Assistant U.S. Attorney Elizabeth Tonkin.

Spotlight

Claims Submitted to the IRS Whistleblower Office Under Section 7623

Claims Submitted to the IRS Whistleblower Office Under Section 7623

Notice 2008-4

SECTION 1. PURPOSE

This Notice provides guidance to the public on how to file claims under Internal Revenue Code section 7623 as amended by the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432 (120 Stat. 2958) (the Act) enacted on December 20, 2006.

SECTION 2. BACKGROUND

Section 406 of the Act amended section 7623 of the Internal Revenue Code concerning the payment of awards to certain persons who detect underpayments of tax. Prior statutory authority to pay awards at the discretion of the Secretary was re-designated as section 7623(a), and a new section 7623(b) was added to the Code. Additional provisions in section 406 of the Act establish a Whistleblower Office within the IRS and address reward program administration issues. These provisions were not incorporated into the Code.

The award program authorized by section 7623(a) has been previously implemented through regulations appearing at section 301.7623-1 of the Procedure and Administration Regulations, the substance of which is reprinted as IRS Publication 733, with additional administrative guidance appearing in the Internal Revenue Manual. Those regulations and Internal Revenue Manual provisions will continue to be followed for award claims within the scope of section 7623(a), except to the extent Sections 3.02 and 3.03 of this Notice provides interim guidance regarding submissions of information under section 7623(a).

New section 7623(b) requires that awards be made for submissions meeting certain criteria. Individuals are eligible for section 7623(b) awards based on the amount collected as a result of any administrative or judicial action resulting from the information provided. Because new section 7623(b) includes several requirements that are inconsistent with existing regulations and administrative guidance applicable to award claims under section 7623(a), the regulations which appear at section 301.7623-1 will not apply to the new award program authorized by section 7623(b). This Notice provides interim guidance applicable to award claims submitted under the authority of section 7623(b). In addition, this Notice seeks public comment on the topics covered herein.

SECTION 3. INTERIM GUIDANCE

3.01 Eligibility Requirements to Submit Claims Under Section 7623(b)

To be eligible for an award under section 7623(b), the tax, penalties, interest, additions to tax, and additional amounts in dispute must exceed in the aggregate $2,000,000 and, if the allegedly noncompliant person is an individual, the individual's gross income must exceed $200,000 for any taxable year at issue in a claim. If the thresholds in section 7623(b) are not met, section 7623(a) authorizes, but does not require, the Service to pay for information relating to violations of the internal revenue laws that result in the government's recovery of tax. Submissions that do not qualify under section 7623(b) will be processed under section 7623(a). Unlike payments made on claims under section 7623(b), there is no requirement that payments made on claims under section 7623(a) be subject to the statutory award percentages. The United States Tax Court appeal provisions added by the Act and codified in section 7623(b)(4) are applicable exclusively to award claims under section 7623(b). Accordingly, there is no right to appeal to the Tax Court for claims under section 7623(a).

3.02 Submission of Information for Award under Sections 7623(a) or (b)

(1) Individuals submitting information under section 7623(a) or (b) must complete IRS Form 211, Application for Award for Original Information (available on www.irs.gov) and send the completed Form 211 to:

Internal Revenue Service
Whistleblower Office
SE:WO
1111Constitution Ave., NW
Washington, D.C. 20224

(2) All claims for awards must be submitted under penalty of perjury in accordance with section 3.03(9) below.

Until further guidance is issued, claims for awards may not be submitted electronically or by fax.

3.03 Information to be Included with IRS Form 211

The Form 211 must be completed in its entirety and should include the following information:

(1) The date the claimant submits the claim;

(2) Claimant's name;

(3) Name of claimant's spouse (if applicable);

(4) Claimant's contact information, including address with zip code and telephone number;

(5) Claimant's date of birth;

(6) Claimant's Taxpayer Identification Number (*e.g.*, Social Security Number or Individual Taxpayer Identification Number) and Taxpayer Identification Number of claimant's spouse, if applicable.

(7) Specific and credible information concerning the person(s) that the claimant believes have failed to comply with tax laws and which will lead to the collection of unpaid taxes. This information should include the following:

(i) The legal name of the person(s) (*e.g.*, individual or entity), and any related person(s), that committed the violation of tax laws;

(ii) The person's aliases, if any;

(iii) The person's address;

(iv) The person's Taxpayer Identification Number(s);

(v) A description of the amount(s) and tax year(s) of Federal tax claimed to be owed, and facts supporting the basis for the amount(s) claimed to be owed;

(vi) Documentation to substantiate the claim (*e.g.*, financial data; the location of bank accounts, assets, books, and records; transaction documents or analyses relevant to the claim); and

(vii) Any and all other facts and information pertaining to the claim.

If available information is not provided by the claimant, the claimant bears the risk that such information may not be considered by the Whistleblower Office in making any award determination. If documents or supporting evidence are known to the claimant but are not in his or her possession or control, the claimant should describe these documents and identify their location to the best of his or her ability.

(8) Explanation of how the information that forms the basis of the claim came to the attention of the claimant, including the date(s) on which this information was acquired, and a complete description of the claimant's present or former relationship (if any) to the person that is the subject of the claim (*e.g.*, family member, acquaintance, client, employee, accountant, lawyer, bookkeeper, customer). If the claimant identifies multiple person(s) as the subject of a claim, describe his or her relationship to each person.

(9) Information submitted under section 7623 must be accompanied by an original signed declaration under penalty of perjury, as follows:

> I declare, under penalty of perjury, that I have examined this application and my accompanying statement and supporting documentation and aver that such application is true, correct and complete, to the best of my knowledge.

The requirement to submit information under penalty of perjury precludes submissions by: (1) a person serving as a representative of the claimant, or (2) an entity other than a natural person. With respect to claims under section 7623(b), the requirement to submit information under penalty of perjury precludes submissions made anonymously or under an alias.

(10) Joint claims must be signed by each claimant and each claimant must sign the claim under penalty of perjury as described in 3.03(8).

3.04 Examples of Grounds for Not Processing Claims Under Section 7623(b)

Examples of claims that will not be processed under section 7623(b) include:

(1) Claims submitted by an individual who is an employee of the Department of Treasury, or who is acting within the scope of his/her duties as an employee of any Federal, State, or local Government.

(2) Claims submitted by an individual who is required by Federal law or regulation to disclose the information, or by an individual who is precluded by Federal law or regulation from making the disclosure.

(3) Claims submitted by an individual who obtained or was furnished the information while acting in an official capacity as a member of a State body or commission having access to such materials as Federal returns, copies or abstracts.

(4) Claims submitted by an individual who had access to taxpayer information arising out of a contract with the Federal government that forms the basis of the claim.

(5) Claims that upon initial review have no merit or that lack sufficient specific and credible information.

(6) Claims submitted anonymously or under an alias.

(7) Claims filed by a person other than a natural person (such as a corporation or a partnership).

(8) The alleged noncompliant person is an individual whose gross income is below $200,000 for all taxable years at issue in a claim.

3.05 Acknowledgment of Claim by Whistleblower Office

The Whistleblower Office will acknowledge receipt of a claim in writing. If required information has not been submitted on a Form 211, the Whistleblower Office may return a Form 211 to the claimant for completion and submission. Following submission of the claim, the Whistleblower Office may, in its sole discretion, offer the opportunity to confer with the claimant to discuss the claim to ensure that the Service fully understands the information submitted with the claim. The Whistleblower Office, in its sole discretion, may ask for additional assistance from the claimant or any legal representative of such individual. Any assistance shall be under the direction and control of the Whistleblower Office or the office assigned to investigate the matter. The submission of a claim does not create an agency relationship between the claimant and the Federal Government, nor does the claimant act in any way on behalf of the Federal Government.

3.06 Confidentiality of Claimant's Identity

The Service will protect the identity of the claimant to the fullest extent permitted by law. Under some circumstances, such as when the claimant is needed as a witness in a judicial proceeding, it may not be possible to pursue the investigation or examination without revealing the claimant's identity. The Service will make every effort to inform the claimant before proceeding in such a case.

3.07 IRS Process for Evaluating Claim

The process for evaluating a claim is initiated by Service consideration of the information provided by the claimant in light of the facts developed by the Service in investigating the claim. This process will also consider whether the information submitted by the claimant resulted in administrative action taken by the Service or judicial action. For example, in the case of large entities where the entities' tax returns are subject to annual examination by the Service, an administrative action can mean the creation of a new issue under the Audit Plan or a change in the way information about an issue is collected or analyzed, which would not otherwise have occurred without the information provided by the claimant. In other cases, an administrative action may include initiating an examination of the person which would not otherwise have occurred without information provided by the claimant. Alternatively, a claimant's description of information when the alleged noncompliant person is already under investigation and when the information results in no change in the manner regarding how the issue is approached or resolved would not generally be regarded as resulting in administrative or judicial action and therefore would not be eligible for an award.

3.08 Duration of Process from Submitted Claim to Award Determination

The process, from submission of complete information to the Service until the proceeds that serve as the basis for any award determination are collected, may take several years. Accordingly, the Service is unable to make any commitment to the claimant concerning the expected duration of the process.

Payment of awards will not be made until there is a final determination of the tax liability (including taxes, penalties, interest, additions to tax and additional amounts) owed to the Service and such amounts have been collected by the Service. Examples of when a final determination of tax liability can be made include, but are not limited to: (1) at the administrative level, when the Service and person that is the subject of the claimant's allegations enter into a closing agreement which conclusively waives the right to appeal or otherwise challenge a deficiency or additional tax liability determined by the Service; (2) if the person that is the subject of the claimant's allegations petitions the United States Tax Court for a redetermination of a deficiency, when the decision in that case becomes final within the meaning of section 7481; and (3) after the expiration of the statutory period for a taxpayer to file a claim for refund and to file a refund suit based on that claim against the United States or, if a refund suit is filed, when the judgment in that suit becomes final. In a case in which litigation is commenced, any award consideration will be delayed until that litigation has been concluded with finality.

3.09 Percentages Applied to Awards Under 7623(b)

The Whistleblower Office will make the final determination whether an award will be paid and the amount of the award for claims which it processes. Awards will be paid in proportion to the value of information furnished voluntarily with respect to proceeds collected, including penalties, interest, additions to tax and additional amounts. The amount of the award will be at least 15 percent but no more than 30 percent of the collected proceeds in cases in which the Service determines that the information submitted by the claimant substantially contributed to the Service's detection and recovery of tax. If the claimant planned and initiated the actions that led to the underpayment of tax, or to the violation of the internal revenue laws, the Whistleblower Office may reduce the award. If the claimant is convicted of criminal conduct arising from his or her role in planning and initiating the action, the Whistleblower Office will deny the claim.

If an action is based principally on allegations resulting from judicial or administrative proceedings, government reports, hearing, audit, or investigation, or the media, an award of a lesser amount, subject to the discretion of the Whistleblower Office, may be provided; such an award, however, may not exceed 10 percent of the collected proceeds, including penalties, interest, additions to tax, and additional amounts resulting from the action. This reduction in award percentage does not apply if the Service determines that the claimant was the initial source of the information that resulted in the judicial or administrative proceedings, government reports, hearing, audit, or investigation, or the media's report on the allegations.

3.10 Tax Treatment of Awards

All awards will be subject to current federal tax reporting and withholding requirements. Award recipients will receive a Form 1099 or such other form as may be proscribed by law, regulation or publication.

3.11 Appeal Rights

When the Whistleblower Office has made a final determination regarding a claim, the Whistleblower Office will send correspondence to the claimant regarding its final award determination. Final Whistleblower Office determinations regarding awards under section 7623(b) may, within 30 days of such determination, be appealed to the United States Tax Court. In accordance with section 7623(b)(4), decisions under section 7623(a) may not be appealed to the Tax Court.

3.12 Claims Submitted Prior to Date of Enactment of the Act

Information provided prior to December 20, 2006 (the date of enactment of the Act) is covered by the law and policies in place at the time the information was submitted. Supplemental information provided on or after December 20, 2006, will not be considered a new claim unless its receipt prompts the Service to take an administrative or judicial action that would not otherwise have been taken on the basis of the earlier-supplied information alone.

3.13 Additional Questions

An electronic mailbox for email inquiries has been set up and may be accessed at WO@IRS.gov.

SECTION 4. REQUEST FOR COMMENTS

Interested parties are invited to submit comments on or before February 13, 2008. Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2008-4), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20224. Alternatively, comments may be hand delivered Monday through Friday between the hours of 8:00 a.m. to 4:00 p.m. to: CC:PA:LPD:PR (Notice 2008-4), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. Comments may also be submitted electronically via the following email address: Notice.Comments@irscounsel.treas.gov. Please include "Notice 2008-4" in the subject line of any electronic submissions.

SECTION 5. EFFECTIVE DATE

This Notice is effective as of January 14, 2008.

SECTION 6. DRAFTING INFORMATION

The principal author of this notice is Holly Styles of the Office of Associate Chief Counsel, General Legal Services. For further information regarding this notice contact Holly Styles at (202) 927-0900 (not a toll-free call).

IRS Update

TAF's Written Response to N 2008-4

TAF's Written Response to N 2008-4

We write on behalf of Taxpayers Against Fraud ("TAF") in response to the Internal Revenue Service's ("IRS'" or "Service's") request for comments on its interim guidance on how to file claims under Internal Revenue Code section 7623 as amended by the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432 (120 Stat. 2958) ("the Act") enacted on December 20, 2006. *See* Notice 2008-4.

Taxpayers Against Fraud is a nonprofit, public-interest organization dedicated to combating fraud against the United States, whose membership includes over 350 attorneys representing whistleblowers across the United States. See www.taf.org.

As a threshold matter, we want to thank the IRS for the cooperative spirit it has demonstrated to date in its efforts to implement the new whistleblower program. We are convinced that a continued constructive dialogue between the IRS and the whistleblower bar can only help to improve the effectiveness of the program. Following up on the invitation for comments in Notice 2008-4, this letter recites a number of proposed revisions that we believe will facilitate that objective. For purposes of convenience, the proposed revisions are set forth in the order the issues arise in the interim guidance.

SECTION 2

Section 2 of the Notice states the following when referring to the requirements of the statute: "Individuals are eligible for section 7623(b) awards based on the amount collected as a result of any administrative or judicial action resulting from the information provided." The precise language of the statute, however, is different. For example, it does not limit awards to "the amount collected as a result of any administrative or judicial action resulting from the information provided." It states that awards will be calculated based on "the collected proceeds . . . resulting from the action (including any related actions) or from any settlement in response to such action." For purposes of clarity, we suggest simply duplicating the statutory language in this section.

SECTION 3

Subsection 3.02 of the Notice states as follows: "Individuals submitting information under section 7623(a) or (b) must complete IRS Form 211 . . . The Form 211 must be completed in its entirety and should include the following information. . . ." The concern with this language is that whistleblowers in many instances will have information about a taxpayer sufficient to identify the taxpayer but may lack some of the information that is presently requested on the form, such as the Social Security Number or Employee Identification Number of the taxpayer. Similarly, it is frequently the case, particularly in the case of corporate entities, that the exact legal name of the taxpayer who filed the return may not be known to the whistleblower, but sufficient information is known to direct the IRS clearly toward the taxpayer in question. While we understand that the IRS needs sufficient information to investigate a whistleblower's allegations, we believe that claimants can only reasonably be expected to provide the information known to them and that most whistleblowers will rationally be inclined to provide the greatest amount of identifying information possible. We propose that the IRS Guidance should simply require whistleblowers to provide all the information known to them, with a caution that incomplete information on the Form 211 may lead to delay or rejection. This modest change would still achieve the IRS' objective but not discourage whistleblowers from coming forward with valuable, substantive information that could still lead to a recovery by the IRS.

Subsection 3.04 recites a variety of grounds for not processing claims. We question whether this subsection needs to be included in the guidance at all. While the language may reflect IRS policies relating to the prior Form 211 program and the former Special Agreement program, the language in this subsection is not interpretative of the new Act. The matters outlined therein would thus better be clarified through legislative action or court decisions.

In addition to the threshold concern regarding Subsection 3.04, there are also substantive issues with individual paragraphs within the subsection. First, Subsection 3.04(1) proposes to exclude "[c]laims submitted by an individual who is an employee of the Department of Treasury, or who is acting within the scope of his/her duties as an employee of any Federal, State, or local Government." In this regard, it is not clear how the IRS whistleblower program will benefit if state and local government officials are discouraged from stepping forward as whistleblowers, particularly if the employee has dutifully reported the issue to his or her superiors without results. While state and local governments may or may not have some concerns with regard to one of their employees acting as a federal whistleblower, that is an issue left for state or local government entities to resolve. No similar limitation on whistleblowers exists under the federal False Claims Act, 31 U.S.C. sec. 3729, et seq. ("FCA"), and we do not think such a limitation is necessary here.

Subsection 3.04(2) states that the Service will not process "[c]laims submitted by an individual who is required by Federal law or regulation to disclose the information, or by an individual who is precluded by Federal law or regulation from making the disclosure." The problem with this language is that, perhaps inadvertently, it may cover certain individuals in the business sector or private practice, (such as accountants), and thus threatens to discourage some of the most knowledgeable individuals from coming forward. We believe that Subsection 3.04(2) should be eliminated and that the IRS's existing practice of screening whistleblowers and their submissions on a case-by-case basis preserves the agency's ability to reject information it does not want to rely upon in its investigations.

Again, for comparison purposes, it is worth noting that the proposed limitation set forth in the interim guidance does not exist under the FCA, and we see no independent reason for it to be included under the IRS program.

Subsection 3.04(4) provides that the Service will not process "[c]laims submitted by an individual who had access to taxpayer information arising out of a contract with the Federal government that forms the basis of the claim." This provision appears unduly narrow. For example, to the extent that a government contractor has access to the financial records of a taxpayer for reasons unrelated to the IRS but learns of a fraud upon the U.S. Treasury in that capacity, the program would benefit from that whistleblower stepping forward.

Subsection 3.04(5) indicates the IRS will not process "[c]laims that upon initial review have no merit or that lack sufficient specific and credible information." The concern here is simply that the IRS may in some instances elect to proceed later with a claim that it did not pursue upon initial review. Accordingly, we would suggest that, if this subsection is retained at all, the phrase "initial review" be dropped.

Subsection 3.06 discusses the "Confidentiality of Claimant's Identity." The first sentence of the subsection is consistent with prior statements by the IRS regarding its whistleblower program. It states "[t]he Service will protect the identity of the claimant to the fullest extent permitted by law." We believe that this language is sufficient, and that the following sentence is potentially misleading. It states as follows: "Under some circumstances, such as when the claimant is needed as a witness in a judicial proceeding, it may not be possible to pursue the investigation or examination without revealing the claimant's identity." The qualification in the second sentence is problematic in that it attempts to capture in a single phrase a wide variety of factual scenarios, which will vary according to each case. As this could be misleading to whistleblowers, we think it is simpler just to keep the first sentence and adhere to the language the Service has used historically on this issue.

Subsection 3.07 concerns the "IRS Process for Evaluating Claims." While we appreciate the Service's desire to express how it is tentatively planning on evaluating claims, we once again believe that this subsection is not necessary if the objective of the guidance is to explain the procedural requirements for filing claims.

With regard to the substance of this subsection, the first sentence states that "[t]he process for evaluating a claim is initiated by Service consideration of the information provided by the claimant in light of the facts developed by the Service in investigating the claim." This language is problematic, in that it is vague as to when claims will be deemed to be under "consideration" by the IRS. We believe that it is essential that the evaluation of the claim be deemed to be initiated as of the date of the whistleblower's submission. A clear rule on when claim evaluation begins is necessary to encourage the IRS to act promptly on whistleblower information and avoid debates when two or more whistleblowers make submissions on the same allegations.

The subsection also provides that "a claimant's description of information when the alleged noncompliant person is already under investigation and when the information results in no change in the manner regarding how the issue is approached or resolved would not generally be regarded as resulting in administrative or judicial action and therefore would not be eligible for an award." We do not agree that these circumstances should always disqualify a whistleblower. Whistleblowers with "smoking gun" or otherwise dispositive evidence should not be discouraged from coming forward and substantially aiding the government's pursuit of cases. In some instances, whistleblower evidence will help the government win existing cases that might otherwise be lost. These individuals should be encouraged to step forward. It would therefore be counter to the Government's best interest, if it foreclosed here its ability to encourage such persons to provide information, particularly when the Act explicitly gives the IRS discretion to pay reduced rewards under specified circumstances.

Subsection 3.08 addresses the "Duration of Process from Submitted Claim to Award Determination." For the Whistleblower program to be a success, rewards should be paid as expeditiously as possible upon final receipt of funds by the IRS. We understand that the IRS does not wish to pay a reward when the determination of a taxpayer's liability has not been finalized. However, in those instances where a whistleblower claim concerns multiple taxpayers, the whistleblower's reward should be paid as each of those liabilities has been finally resolved. We see no reason why the reward should be delayed until the last of all of the multiple taxpayers' liabilities has been resolved. Given the extended timeframes already involved by necessity under this program, it is contrary to the Act's objectives if rewards are unnecessarily delayed and whistleblowers thus discouraged from pursuing these cases.

Subsection 3.09 concerns the "Percentages Applied to Awards Under 7623(b)." The Subsection discusses, *inter alia*, awards in cases "based principally on allegations resulting from judicial or administrative proceedings, government reports, hearing, audit, or investigation, or the media. . . ." This provision should be clarified to refer to "*federal* proceedings, reports, audits and investigations." The manifest purpose of this language is to address potentially parasitic behavior, *i.e.*, where a whistleblower takes information already known to the United States and seeks to use it as the basis for a reward claim. But in cases where information is only available in a state, local or foreign proceeding, etc., there is no reason to believe the information will necessarily be known to the United States. Accordingly, it would not serve the interests of the United States to discourage whistleblowers from bringing such information to the attention of the Service.

SECTION 5

Section 5 of the Notice says that it is effective as of January 14, 2008. While this is a useful statement, we would respectfully suggest the final guidance make clear this interim guidance is not binding and that the final guidance is prospective in effect only.

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If you have any questions or would like to clarify any of the foregoing comments, please do not hesitate to contact us.

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