False Claims Act & Qui Tam

Quarterly Review

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

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

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

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FROM THE EDITOR

"All progress has resulted from people who took unpopular positions."
–Adlai E. Stevenson II, March 22, 1954

The year 2010 has arrived and a new decade is now upon us. Certainly, Americans will remember the past 10 years, in large part, as a decade marked by financial crises—crises that were bookended by times of recession. The decade of the 2000s began with the bursting of the "dot-com bubble," and over the course of the ten years that followed, we've witnessed the collapse of corporate giants like Enron and Worldcom, the fall of accounting firms like Arthur Andersen, the dissolution of financial services firms like Lehman Brothers and Bear Stearns, and the failure of large banking firms, like Washington Mutual and Countrywide Financial. In many instances, these financial catastrophes can be directly or indirectly attributed to fraud, whether accounting fraud, mortgage fraud, consumer fraud, securities fraud, etc. These various fraud schemes have led to devastating effects on the American public, including a housing market crash, an energy crisis that saw gasoline prices exceed $4.00/gallon, rising unemployment rates, the failings of vital state and local economies (such as the economies of the state of California and the city of Detroit, Michigan) and massive, unprecedented corporate bailouts from the federal government. Of course, these strains on the economy and on the wallets of the American public have led to even more fraud, including fraud on federal and state government programs. It seems that, during these dire economic times, committing fraud has become a popular thing to do, and no one is immune from being a victim. Consequently, in this era of rampant fraud, the efforts of the fraud-fighting False Claims Act community—however, unpopular they may be—are essential to our economic recovery, as these efforts recover stolen taxpayer funds, punish the wrongdoers, and restore public trust in the government. I commend all of you who seek to rid our government and our nation of fraud waste and abuse, and I sincerely hope that in the decade ahead, we can continue to make progress until ultimately, combating fraud will become the popular thing to do.

As always, I would love to hear from you. Please email me your comments, ideas, articles, and criticisms. I look forward to hearing from you.

Happy New Year (and new decade)!
Cleveland Lawrence III
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Recent False Claims Act & *Qui Tam* Decisions

OCTOBER 1–DECEMBER 31, 2009

A. What Constitutes a False Claim

U.S. ex rel. Schaefer v. Conti Med. Concepts, Inc., 2009 WL 5104149 (W.D. Ky. Dec. 17, 2009)

A relator brought a *qui tam* action against a medical equipment supplier and two of its officers (a husband and wife), alleging that the defendants submitted improperly coded bills to the government and altered prescriptions for reimbursement from Medicare and Medicaid. The government intervened, claiming that the defendants over-billed for back braces provided to patients from 1999-2003 by using an improper billing code, and acted with reckless disregard for the truth of the claims submitted. The government moved for partial summary judgment. The United States District Court for the Western District of Kentucky denied the government's motion. The court held that although there was little factual dispute that the defendants submitted false claims to the government, whether the defendants acted knowingly or, at minimum, with reckless disregard for the truth was not clear from the facts and was a question best left to a jury. The court's decision was based on the fact that although the defendants could have received proper Medicare/Medicaid billing information from the manufacturer of the back braces, the government did not present any evidence showing that the defendants actually did contact the manufacturer to get this information, or that the manufacturer routinely voluntarily provided this information to its customers. The defendants, however, presented evidence showing that they followed the procedures the officers had used at a previous employer and that those procedures were never called into question. As the court noted that billing procedures for back braces is complicated, and that there was evidence suggesting that the defendants actually believed that they were using the proper billing codes, the court held that the facts were not clear enough to warrant summary judgment.

The government's motion also asked the court to estop the defendants from denying liability regarding claims related to falsifying prescriptions, noting that, in a prior criminal action, the defendant company and the husband who served as a company officer had pled guilty to related misdemeanor charges of falsifying one prescription for one patient. The court, though, limited any preclusive effect of the guilty pleas to the single, specific prescription and patient. The court ruled that the government's damages regarding that single prescription would be calculated, but held that the defendants would not be estopped from raising defenses regarding any other allegedly falsified prescriptions. Finally, the court found that the government failed to provide sufficient evidence to prove that the wife was also an officer of the defendant company when the alteration of prescription allegedly occurred and held that judgment against her would be inappropriate. Accordingly, the court denied the government's motion for summary judgment.

U.S. ex rel. Feldman v. Van Gorp, 2009 WL 4756486 (S.D.N.Y. Dec. 7, 2009)

The relator brought a *qui tam* action against Cornell Medical College and one of its rsearchers, alleging that the defendants submitted false claims to the National Institutes of Health ("NIH") to obtain federal funds for HIV research. Specifically, the relator alleged that the defendants made false statements in their grant application, as well as in subsequent progress reports. The defendants moved for summary judgment. The United States District Court for the Southern District of New York denied the motion, finding that issues of material fact existed. The court found that there were issues of material facts regarding whether statements in the defendants' grant applications were false, including statements pertaining to the curriculum, the allocation of work, the HIV status of patients, the adequately disclosed clinical resources, and whether the progress reports mentioned programmatic changes. In addition, the court considered whether the statements at issue were material to the government's decision to award grant funds to the defendants. The defendants offered four affidavits from members of NIH's grant application Initial Review Group, all stating that they would not have scored the defendants' grant application any differently if the relator's allegations were true. The court found that the testimony of these four of the twenty members of the Group did not preclude a finding that a disputed of issue of material fact existed. Next, the defendants argued that the researcher defendant relied on his reasonable interpretation of the reporting guidelines when filling out the progress reports and therefore he could not have knowingly violated the FCA. However, the court noted, the instructions for completing the progress reports required the applicant to "note any difficulties encountered by the program." The court found that whether any differences between the grant application and the program in practice were "difficulties" was a question of fact. The court also determined that the relator's complaint was not prohibited by the FCA's public disclosure bar. Although the court observed that the relator had "previously filed complaints with the American Psychological Association and that New York State Department of Education," the court noted that those complaints "were subject to confidentiality rules," and, consequently, that this was "not a situation where the information was 'publicly disclosed.' However, the court still analyzed whether or not the relator was an original source of the allegations contained in his complaint, and found that, as a Fellow in the defendants' program, the relator had more than mere background information and satisfied the "direct and independent knowledge" element of the FCA's original source exception to the public disclosure bar. Therefore, the court denied the defendants' motion for summary judgment.

See *U.S. ex rel. Bauchwitz v. Holloman*, 2009 WL 4362819 (E.D. Pa. Dec. 1, 2009) at page 13.

JURISDICTIONAL ISSUES

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

U.S. v. Apollo Group, Inc., 2009 WL 3756623 (S.D. Cal. Nov. 06, 2009)

A relator brought a *qui tam* action against his former employer, its subsidiary university, and four individual employees, alleging FCA violations in connection with alleged wrongdoing related to student financial aid requests. The defendants moved to dismiss on the grounds that the FCA's first to file rule barred the allegations. The United States District Court for the Southern District of California granted the defendants' motion, holding that a pending proceeding based on the same material elements as this action barred the relator's complaint under the first-to file rule. The court found that in both proceedings, the actions relied on allegations of the same type of conduct, namely, that the defendants' management encouraged its employees to ignore and/or falsify student applicants' qualifications for financial aid, by offering incentive-based compensation. Further, the court observed that the relator's complaint did not add anything new or useful to the pending claim. Therefore, the court granted the defendants' motion to dismiss under the first-to-file rule.

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

U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co., 2009 WL 5182306 (E.D. La. Dec. 22, 2009)

A relator brought a *qui tam* action against multiple insurance companies and adjusting firms, alleging that the defendants defrauded the government by submitting false claims for payment under the government's flood insurance program. Specifically, the relator alleged that the defendants shifted the costs of policy payments to the government by systematically overstating flood damage (which was covered by the government's program) and understating wind damage (which would have been covered by the defendants' private homeowners' insurance policies). The defendants previously moved to dismiss the relator's complaint, contending that the court lacked subject matter jurisdiction because the relator based its suit on a public disclosure of the alleged fraud, and the relator did not qualify as an original source of the information in the complaint. In an opinion summarized below, the United States District Court for the Eastern District of Louisiana denied the defendants' motion in part and granted it in part. The court held that although the relator's allegations had been "publicly disclosed" for the purposes of the FCA, the relator still qualified as an "original source" of those allegations, which gave the court subject matter jurisdiction over the relator's claims.

The current opinion deals with the defendants' subsequent motion for an interlocutory appeal of the court's decision regarding subject matter jurisdiction, arguing that the relator is merely a "sleuth," who did not have first-hand knowledge of the alleged fraud, and who therefore cannot qualify as an original source under the FCA. The defendants argued an interlocutory appeal was warranted, since the question of whether the relator could qualify as an original source without first-hand involvement in the alleged fraud constituted a controlling question of law as to which there is substantial ground for difference of opinion. The court denied the defendants' motion, finding that the determination of whether the relator qualifies as an original source is factually specific about which there was not a substantial ground for a difference of opinion. The court held that the defendants did not demonstrate a substantial ground for difference of opinion as they failed to show any case law to support their contention and since the statute does not provide such a rule. Finally, the defendants argued that an interlocutory appeal would materially advance the ultimate resolution of the case because a finding that the relator was not an "original source" would terminate the litigation. The court rejected this argument, finding that termination of litigation does not automatically entitle a litigant to an interlocutory appeal of every non-final order. Therefore, the court denied the defendants' motion for interlocutory appeal.

U.S. ex rel. Ondis v. City of Woonsocket, 2009 WL 3838803 (1st Cir. Nov. 18, 2009)

The relator brought a *qui tam* action against a city and its mayor, alleging that the city defrauded the government by making false statements to HUD when applying for federal grants. Specifically, the relator alleged that the city misrepresented that it would promote subsidized housing while it actually planned to eliminate subsidized housing. The government declined to intervene. The defendants moved to dismiss for lack of subject matter jurisdiction. The United States District Court for the District of Rhode Island dismissed the action based upon the FCA's public disclosure bar and the relator appealed to the Court of Appeals for the First Circuit. The circuit court affirmed the district court's dismissal of the action, finding that the FCA's public disclosure bar divested the court of subject matter jurisdiction over the relator's action.

Specifically, the court found that information published in local newspapers, as well as the government's responses to the relator's FOIA requests constituted public disclosures, and that the relator's allegations were based upon the public disclosures. The relator asserted that he did not base his claim on publicly disclosed information, but on his own private investigation, contending that he acquired his knowledge of the city's alleged misrepresentations by reviewing information he received through FOIA requests. The court held that the government's responses to FOIA requests constitute public disclosures, since such information is disseminated to the public. The relator conceded that the city's opposition to subsidized housing had been publicized by a newspaper, but he argued that the city's alleged misrepresentation to promote subsidized housing was never publicly disclosed by the paper. The court disagreed, and held that the relator's allegations were substantially similar to those contained in the public disclosures, and were thus based upon those public disclosures.

Having found that the relator's allegations had been previously publicly disclosed, and that the relator's allegations were based upon the public disclosures, the court turned to the question of whether the relator qualified for the original source exception to the public disclosure bar. The court determined that the relator did not qualify, since he failed to show that he possessed any direct and independent knowledge of his allegations. The court stated that the relator's knowledge was a compilation of publicly disclosed information and knowledge based on research into public records. This, the court held, is not direct knowledge. Consequently, the relator's complaint was dismissed.

U.S. ex rel. Putnam v. E. Idaho Reg'l Med. Ctr., 2009 WL 3806337 (D. Idaho Nov. 2, 2009)

A relator brought a *qui tam* action against a medical center, several hospitals, and other individuals. The defendant medical center and one of the individual defendants moved to dismiss, contending that the relator's allegations were prohibited by the FCA's public disclosure bar. The defendants pointed to three instances in which they argued that the relator's allegations had been previously publicly disclosed, but the United States District Court for the District of Idaho rejected each of the defendants' arguments and denied their motion. The defendants then moved for reconsideration of the court's order, asserting that the court erred with respect to one of the three purported public disclosures—namely, that the relator divulged her *qui tam* allegations in a prior state court deposition, and that her statements, made in a civil hearing, constituted a public disclosure under the FCA.

U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co., 2009 WL 3353314 (E.D. La. Oct. 19, 2009)

A corporate relator brought a *qui tam* action against a group of insurance companies and adjusters, alleging that homeowner's insurance policies extended by the defendants covered various wind damage to homes, but that, in the aftermath of Hurricane Katrina, the defendants mischaracterized much of the damage as flood damage (which was not covered by the homeowners' policies), thereby reducing the amounts the defendants were required to pay on insurance claims. The complaint further alleged that the costs to cover any remaining damage were then improperly passed along to the federal government's flood insurance program. The defendants moved to dismiss the complaint, contending that the court did not have subject matter jurisdiction over the relator's allegations, because the *qui tam* suit was based upon a public disclosure of the fraud, the relator was not the original source of the allegations in the complaint, and the relator did not file its amended complaint under seal. The defendants also argued the court should dismiss the case for failure to state a claim. The United States District Court for the Eastern District of Louisiana granted the motion in part and denied the remainder of the motion. The court held that although the relator's allegations had been "publicly disclosed" for the purposes of the FCA, but that the relator qualified as an "original source" of those allegations. Thus, the court concluded that it had subject matter jurisdiction over the relator's claims. In addition, the court held that the relator was not required to file its amended complaint under seal and even if it were required to do so, its failure would not bar the court's subject matter jurisdiction. Finally, the court found that relator's allegations were pled with sufficient particularity against all but three of the defendants, as the complaint included information such as property details, the amounts overstated in claims, the names of adjusters and other details.

The Public Disclosure Bar

The defendants argued that the relator's allegations had been publicly disclosed in civil and administrative hearings, congressional reports, and articles from the news media. In response, the relator claimed that the alleged disclosures revealed few specific allegations of fraud and did not identify any of the defendants in the case at hand. The court, however, held that the defendants could have been identified from the public disclosures, since those disclosures included a specific time period, a specific region, and other unique information. Thus, the court determined that the relator's claims had been "publicly disclosed" for the purposes of the FCA. However, the relator argued that it qualified for the "original source" exception to the public disclosure bar, as it had direct and independent knowledge of the defendants' alleged fraud scheme, and had voluntarily provided this information to the government. The defendants argued that the relator could not have had direct knowledge of fraud because it was a corporation and it did not actually see any false claim as it merely conducted property re-examinations. The court agreed with the relator, noting that the relator's complaint alleged facts that could establish direct knowledge of fraud acquired through its own effort. Specifically, the relator's complaint described in detail 57 specific properties, specific perpetrators, and specific amounts—information that was qualitatively different from the publicly disclosed information. In addition, the relator investigated the properties in question and thus had the first-hand information about the alleged fraud. The court further noted that the relator's status as a corporation did not deprive it of the ability to have direct knowledge of fraud. Finally, the court found that the relator had voluntarily provided the information to the government as required under the FCA. Thus, the court concluded that the relator qualified for the public disclosure bar's original source exception, and consequently, the court retained subject matter jurisdiction over the relator's claims.

Filing the Amended Complaint Under Seal

The defendant argued that the court should dismiss the amended complaint because the relator did not file it under seal. The court rejected this argument, finding that the FCA imposes no such requirement for amended complaints. Furthermore, the relator's amended complaint alleged the same type of fraudulent conduct as the original complaint, which the government had already reviewed. Therefore, the court held that the relator's failure to file its amended complaint under seal did not violate the FCA's seal requirement and was not grounds for dismissal.

Pleading Fraud With Particularity

The defendants claimed that the relator's complaint lacked sufficient details to meet the particularity requirement under Fed.R.Civ.P. 9(b). However, the court held that the complaint satisfied the heightened pleading requirements, as it contained a listing of properties involved in the claim, the policy numbers of the various policies under which the claims were paid, the amounts paid under those policies, whether or not those amounts represented policy limits, and the relator's own determination of the amount of damage the property actually suffered. Therefore, the claims generally did not warrant dismissal. However, the court noted that for three of the defendants, the relator could not provide sufficient details aside from alleging that those defendants were the adjusters for specific insurance company defendants. Therefore, the court found that the relator did not plead with enough particularity concerning those three defendants and the claims against those defendants were dismissed.

The relator had also alleged that the defendants violated the FCA's "reverse false claims" provision, which prohibits making or using false statements to avoid, conceal or reduce an obligation to remit money or property to the United States. However, the court found that the relator failed to plead this claim with particularity, as the complaint did not identify an obligation that would require the defendants to pay money to the government. As a result, this claim was dismissed.

See *U.S. ex rel. Feldman v. Van Gorp*, 2009 WL 4756486 (S.D.N.Y. Dec. 7, 2009) at page 4.

See *U.S. ex rel. Ven-A-Care v. Actavis Mid Atl. LLC*, 2009 WL 3171798 (D. Mass. Oct. 02, 2009) at page 25.

FALSE CLAIMS ACT RETALIATION CLAIMS

U.S. ex rel. Herndon v. Appalachian Reg'l Cmty. Head Start, Inc., 2009 WL 4840950 (W.D. Va. Dec. 16, 2009)

The relator brought a *qui tam* action against his former employer, which operated a federally funded children's educational program. The relator alleged that the defendant knowingly filed false claims with the U.S. Department of Health and Human Services (HHS) and fired him in retaliation for his investigation of those claims. The jury returned a verdict for the relator. The relator then moved for attorneys' fees and costs. The defendant moved for judgment as a matter of law, claiming there was insufficient evidence of a false or fraudulent claim and insufficient evidence that the relator engaged in protected activity in furtherance of an investigation of potential FCA violations. In the alternative, the defendant contended that statements made to the jury by the relator's counsel warranted a new trial. The United States District Court for the Western District of Virginia denied the defendant's post-trial motions and awarded attorneys' fees and costs to the relator. First, the court found that there was adequate evidence to support the jury's verdict that the defendant filed a false or fraudulent claim within the meaning of the FCA. The jury's award of $35,169 represented the cost of an employee retreat held by the defendant, which included no training sessions and did not benefit the program or the participants in the program. The defendant argued that it identified the retreat and its estimated cost in its application to HHS for funds and therefore it could not be liable for making a false claim. The court found that the jury was justified in believing that the expenditures violated the purposes and conditions of the program grant from HHS and that the defendant's certification was knowingly or recklessly false. The court refused to address the defendant's contention that the evidence was insufficient to support the relator's retaliation claim, finding that Rule 50(a) barred the argument because the defendant failed to raise it before the case went to the jury. In addition, the court found that there was no basis for a new trial. Finally, the court overruled the defendant's objections to the relator's inclusion of a legal assistant's time in calculating attorneys' fees, holding that the fees were reasonable in relation to the nature and complexity of the case.

Thompson v. Quorum Health Res., LLC, 2009 WL 4758752 (W.D. Ky. Dec. 7, 2009)

The plaintiff sued his former employer, a healthcare management company, alleging retaliatory discharge under the FCA. Specifically, the plaintiff alleged that the defendant terminated his employment because he began investigating what he

believed to be fraudulent activity and subsequently filed a *qui tam* lawsuit based on his investigation. The *qui tam* action was still pending at the time of his termination. The plaintiff later voluntarily dismissed the *qui tam* action. Both parties moved for summary judgment on the remaining retaliation claim. The United States District Court for the Western District of Kentucky denied both motions, finding that a genuine issue of material fact existed. As an initial matter, the court found that the plaintiff's good faith while he gathered documents and spoke with his attorney regarding his potential *qui tam* claim satisfied the requirement of engaging in protected activity under the FCA. Next, the court found that the defendant knew that the plaintiff had filed a *qui tam* action prior to terminating him, as the defendant received two letters referring to the *qui tam* action before it suspended the plaintiff. The court then held that the there was a genuine issue of material fact regarding the defendant's reason for terminating the plaintiff. The court held that the defendant provided a legitimate, non-discriminatory reason for plaintiff's termination, namely, the plaintiff's failure to cooperate with the defendant in its attempt to investigate the alleged fraud despite repeated warnings. However, the court also held that the plaintiff provided evidence to show that the defendant's stated reasons for terminating the plaintiff's employment were merely a pretext, as the plaintiff claimed that the defendant knew of his pending action sooner than they were admitting and that the defendant's auditor had called the plaintiff a "whistleblower." In addition, the defendant did not conduct any further investigation of its decision to terminate the plaintiff's employment between the time the defendant suspended the plaintiff for his activities and later terminated his employment. The court found that this was enough to create a genuine issue of material fact as to the defendant's reason for termination. Therefore, the court denied both motions for summary judgment.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Not Filed Under Seal

See *U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 2009 WL 3353314 (E.D. La. Oct. 19, 2009) at page 8.

B. Laches

See *U.S. ex rel. Head v. Kane Co.*, 2009 WL 3765394 (D.D.C. Nov. 12, 2009) at page 16.

C. Statute of Limitations

U.S. ex rel. Bauchwitz v. Holloman, 2009 WL 4362819 (E.D. Pa. Dec. 1, 2009)

The relator brought a *qui tam* action against two individual researchers and two universities, alleging that the defendants made false statements in their claims for federal grants. Specifically, the relator alleged that the defendants misrepresented the findings of DNA research when they applied for research grants and did not correct the misrepresentations on subsequent progress reports and renewal applications submitted to the government between 1991 and 2006. The individual defendants published an article in 1994 containing allegedly fabricated findings regarding their DNA research. The relator suspected that the defendants had falsified their findings and consequently began his own investigation. He also informed the Office of Research and Integrity ("ORI") of his suspicions regarding the individual defendants' findings. In 2002, as a part of his investigation, the relator submitted FOIA requests and learned that the defendants had obtained federal grants for their research.

The government declined to intervene in the relator's case. The defendants moved for summary judgment, asserting that the statute of limitations barred the relator's claims. The United States District Court for the Eastern District of Pennsylvania granted the motion in part and denied it in part, holding that the FCA's six-year statute of limitations barred all of the relator's claims except one pertaining to a federal grant application filed by the defendant university in 2001. The court held that the date the defendant filed the allegedly false claims triggered the limitation

period. In addition, it held that the tolling provision did not apply to private relators if the government did not intervene in the action.

Statute of Limitations and Tolling Under the FCA

In order to determine of the appropriate limitations provision, the court first determined the time of accrual of the action. The court held that payment of grants was not a pre-requisite for liability under the FCA, as the government relied upon the false statements in deciding the awarding of federal grants. Therefore, the court held, the FCA action accrued from the date of submission of the grant application, as that was the date on which the harm to the government occurred. Next, the court considered the applicability of the FCA's statute of limitations tolling provision to private relators in actions in which the government declined to intervene, concluding that the tolling provision only applied to the government and thus did not extend the period during which the relator could bring his *qui tam* suit. In addition, the court found that the statute of limitations would have barred relator's claims even if the tolling provision did apply to private relators because the relator had extensive knowledge and understanding of the facts underlying the fraud based on the article published in 1994. Moreover, the relator had already notified ORI of his suspicions regarding the defendants' alleged scientific misconduct in 1990. Thus, the court held that the six-year statute of limitations period barred all of the relator's claims against the defendant universities, except the one regarding the filing of a grant application in 2001.

What Constitutes a False Claim?

The relator alleged that the defendants falsely certified progress reports regarding their research and that, as a result, each of the defendants' progress report constituted a separate false claim. Although the court found that a progress report was a pre-requisite to the federal funding for subsequent budget periods, it held that the progress reports certified only the information contained within them and not any alleged false statement made in the defendants' initial grant application. In addition, the court held that the defendants' financial status reports did not amount to claims for payment from the government, as they were only reconciliation forms submitted to the government and only provided an accounting of how the grantee spent funds. Accordingly, they did not constitute false claims. Thus, the court granted in part and denied in part defendants' motion for summary judgment.

U.S. v. Carell, 2009 WL 3335031 (M.D. Tenn. Oct. 13, 2009)

The government sued a health management company, its president and its owners under the FCA, charging that the defendants submitted fraudulent cost reports to Medicare, seeking reimbursement. Specifically, the complaint alleged that the defendants concealed the related-party relationship among them and did not list

management fees on an "at cost" basis, as required by Medicare rules, resulting in overpayment by Medicare of approximately $6.3 million. In addition to recuperation of the overpayment, the government sought civil penalties for each violation and treble damages. The government also sued for unjust enrichment and payment by mistake. The defendants moved to dismiss, contending that the FCA's statute of limitations barred the suit. They claimed that the government did not sue within three years of the date that an official of the United States charged with the responsibility to act in the circumstances should have learned of the facts material to the government's action. In response, the government asserted that it—in the form of the Justice Department—neither knew nor had reason to know of the facts material to the action until the case was first referred to the Criminal Division of the U.S. Attorney's Office, and that subsequent tolling agreements between the defendants and the government established the government's suit as timely. The United States District Court for the Middle District of Tennessee denied the defendants' motion to dismiss. The court agreed that, under the FCA, the "official of the United States charged with the responsibility to act in the circumstances" is a Justice Department official, but the court declined to decide whether that Justice Department official must be within DoJ's Civil Division. Consequently, the court found that the government did not know about the alleged fraud scheme until the case was first referred to the U.S. Attorney's Office.

The defendants further argued that the government <u>should have known</u> about the alleged fraud far sooner, pointing to a government contractor's prior knowledge of the alleged related-party relationship. However, the court rejected this argument as well, noting that the contractor did not provide the government with knowledge about the fraudulent cost reports for the years at issue in the government's complaint. In addition, the court held that the question of when the government should have known about the violations that gave rise to its claims was a material factual issue that could not be resolved on a motion to dismiss. The court held that the government had successfully pleaded facts that, if proved, would establish that its cause of action accrued within the statutory limitations period. Accordingly, the court denied the defendants' motion to dismiss the FCA claims.

See *U.S. ex rel. Ven-A-Care v. Actavis Mid Atl. LLC*, 2009 WL 3171798 (D. Mass. Oct. 02, 2009) at page 25.

D. Relator Released Defendant from FCA Claims

U.S. ex rel. Head v. Kane Co., 2009 WL 3765394 (D.D.C. Nov. 12, 2009)

The relator brought a *qui tam* action against his former employer, a provider of moving and logistics services to the government. The complaint alleged that the defendant defrauded the federal government by overcharging on invoices and by falsely certifying compliance with the Services Contract Act. The government intervened. The defendant raised the affirmative defenses of laches and the statute of limitations against the government and pled twelve counterclaims against the relator. The government moved to dismiss the affirmative defenses. Both the government and the relator moved to dismiss the counterclaims as void against public policy and for failure to state a claim. The United States District Court for the District of Columbia granted the government's motion to strike the affirmative defenses and granted in part the government's and relator's motions to dismiss the defendant's counterclaims. The court granted defendant leave to amend the remaining counterclaims.

Laches as an Affirmative Defense

The defendant argued that the government had "slept on its rights" by waiting four years after the *qui tam* suit was filed to intervene, and should therefore be barred from pursuing the action. The government moved to strike this defense. The court found that the doctrine of laches was "inapplicable" to the government's FCA claim and that the government acted in the public interest by seeking to hold the defendant accountable under the FCA. Consequently, the court granted the government's motion to strike laches as an affirmative defense.

Counterclaims Dismissed As Void Against Public Policy

The defendant raised 12 counterclaims. Several of these counterclaims alleged breach of a separation agreement entered into by the relator and the defendant, following the relator's termination from his employment—the separation agreement was entered into about two weeks after the *qui tam* suit was filed. The agreement provided that the relator would turn over to the defendant all correspondence and records concerning the defendant, and the defendant alleged that the relator breached this provision by failing to return certain email correspondence received from the defendant's CFO, pertaining to the Services Contract Act allegation. Instead of returning this document to the defendant, the relator included it as an exhibit to his complaint. Both the relator and the government moved to dismiss this counterclaim on the grounds that it violates public policy by discouraging relators from bringing *qui tam* actions. The court agreed and held that enforcing a private agreement that requires a *qui tam* plaintiff to turn over possible evidence to a defendant who is under investigation would unduly frustrate the FCA. Consequently, this counterclaim was dismissed.

The separation agreement also provided that each party would release the other from claims and liabilities arising from the relator's terminated employment and that each would indemnify the other for damages arising out of a breach of the agreement. The court also dismissed the defendant's counterclaim based on this provision as void against public policy, finding that FCA defendants may not shift liability to the relator.

The separation agreement further provided that neither side would make any disparaging statements about the other. The defendant argued that the relator breached this agreement and the defendant's remaining counterclaims alleged defamation, tortious interference with economic advantage, intentional interference with contract, intentional interference with prospective business advantage, malicious prosecution, libel, slander, and fraud.

In analyzing these counterclaims, the court relied on two factors. First, the court held that counterclaims could be maintained where "the conduct at issue is distinct from the conduct underlying the FCA case." Second, the court held that counterclaims could be maintained where "the defendant's claim, though bound upon the facts of the FCA case, can only prevail if the defendant is found not liable in the FCA case." The court found that the majority of these remaining counterclaims were based on alleged statements made by the relator in the course of the proceeding or to third parties. These counterclaims were held to be insufficient, as they did not make clear when the alleged statements were made or to whom. Thus, the court refused to consider these counterclaims, but granted the defendant leave to amend them. However, the defendant also alleged that the relator made disparaging remarks to third parties that were not involved in the litigation, and that the relator's statements were not made in this proceeding or during the Government's investigation. The court held that this counterclaim could be maintained, as it would not impede the relator's ability to sue. Therefore, the court denied the motion to dismiss this counterclaim.

Finally, the court dismissed the counterclaim for malicious prosecution, as premature, but denied the motion to dismiss the counterclaim for injunctive relief, since that claim was based on the defendant's breach of contract claims, which were to be amended.

FEDERAL RULES OF CIVIL PROCEDURE

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

Strom ex rel. U.S. v. Scios, Inc., 2009 WL 5062323 (N.D. Cal. Dec. 23, 2009)

A relator brought an action against a pharmaceutical company and a healthcare company, alleging that the defendants fraudulently caused doctors to submit false claims for reimbursement under Medicare and other federal healthcare programs. Specifically, the relator alleged that the defendants knowingly caused doctors to submit false or fraudulent claims for payment to the government for off-label, non-approved uses of a drug, which was not covered by federal health care programs. In addition, the relator argued that the presentment of false claims to the government caused by the defendants amounted to unjust enrichment of the defendants at the expense of the government. The defendants moved to dismiss the relator's complaint for failure to state a claim and for failure to plead fraud with particularity.

The relator's complaint alleged that the defendants created a market for outpatient use of the drug at issue and encouraged such use despite having no scientific evidence that the drug was effective. Since the defendants lacked any evidence supporting the efficacy of the drug, the relator alleged that the defendants acted in reckless disregard of the truth when they encouraged submission of claims to Medicare for off-label uses of the drug. The court found that these allegations satisfied the scienter element of an FCA action. Next, the relator alleged that the sole reason Medicare authorized reimbursement for off-label uses of the drug was because of the defendants' misrepresentations. The relator also separately alleged that a study conducted by the defendants did not support the efficacy of outpatient use of the drug. The court found that the relator satisfied the FCA's falsity element as well. Therefore, the United States District Court for the Northern District of California concluded that the relator successfully alleged an FCA violation and denied the defendants' motion to dismiss for failure to state a claim.

The court also held that the relator's complaint had been pled with particularity. The defendants contended that the complaint failed to specify details of the allegedly false claims, such as the names of the doctors or the dates of treatment. Because the fraud at issue concerned fraudulent inducement of doctors and the complaint provided exhaustive allegations relating to it, the court found that the specifics of the claims themselves were less important. The court noted that the complaint sufficiently alleged that the defendants' reckless misrepresentation of scientific evidence caused doctors to submit claims for unreasonable and unnecessary treatments and provided exhaustive allegations relating to the fraud. The court found that since the relator's allegations sufficiently notified the defendants of the nature of the action and the numerous claims involved, it would be unfair and burdensome to require the relator to identify the claims one-by-one at the pleading stage. Next, the defendants contended that the relator failed to plead a connection between any of the pharmaceutical defendant's alleged promotional activities and the submission of any particular claim. Although the defendants terminated promotion of the drug after the summer of 2005, the court found that majority of the allegations suggested that the only reason any doctor prescribed the drug was because of the defendants' earlier promotion. Furthermore, the relator alleged that the defendants' prior promotional activities created a market for off-label use of the drug. Thus, the court denied the defendants' motion to dismiss for failure to plead fraud with particularity.

Onnen v. Sioux Falls Indep. Sch. Dist. #49-5, 2009 WL 4891704 (D.S.D. Dec. 17, 2009)

The relator brought a *qui tam* action against his former employer—a school district—and its officials, alleging that the defendants applied for and subsequently received from the government, more than $2 million based on false and fraudulent representations that they had hired qualified teachers and graduated individuals who took proper courses. The government declined to intervene. The defendants filed a motion to dismiss or in the alternative, for a more definite statement. The relator opposed the motion to dismiss and sought leave to amend his complaint. The court granted the defendants' motion to dismiss, finding that the relator's complaint "lacked the specificity necessary to meet the requirement of Rule 9(b)." The court then considered the relator's motion for leave to amend his complaint. The defendants contended that granting the relator's motion would be futile. They argued that the relator's former employer, although under the control of the school district, is a state agency and thus is not a person subject to a *qui tam* action. The court found that there must be a "fact specific inquiry" to determine what constitutes a state entity and held that it could not conduct such an inquiry at this stage. The defendants also challenged an additional claim that the relator was seeking to add to the amended complaint, which alleged deprivation of his due process rights in his termination. The court held that the relator could not add the claim, which was pending in state court, until he had exhausted his state court remedies. Next, the defendants contended that the relator's complaint failed to plead fraud with particularity and only contained "generalized time frames and non-fact specific assertions." However, the court found that the relator's proposed amended complaint alleged the timeframe, identified the individuals who allegedly made false representations about teachers and students, and alleged that defendants knew that the school awarded non-qualified students degrees, failed to report it and later changed reports to make student placement rates look better to help the school's accredita-

tion. The court found that this was enough detail to inform the defendants of the factual "core" of the fraud claims. Thus, the court held that the proposed amended complaint gave the defendants sufficient notice of the claims that school officials were making false representations about students and teachers in order to obtain federal funds. Finally, the defendants argued that the proposed amended complaint failed to state a claim for which relief could be granted. However, the court found that the relator had alleged that the defendants entered into an agreement in order to receive federal funds, that the defendants intentionally violated that agreement, and that the defendants executed the agreement without any intention of carrying out all of the requirements. The court found that the agreement constituted conditions of payment and could support a viable claim for purposes of the FCA. In addition, the allegations were sufficient to support a retaliation claim under the FCA. Consequently, the United States District Court for the District of South Dakota granted the relator's motion for leave to file an amended complaint.

Hopper v. Solvay Pharm., Inc., 2009 WL 4429519 (11th Cir. Dec. 04, 2009)

The case was filed by two relators, both of whom were sales representatives for defendant Solvay Pharmaceuticals, Inc. Solvay later acquired defendant Unimed Pharmaceuticals, Inc., and the two companies manufactured and marketed the drug Marinol, which is a synthetic form of THC—a hallucinogenic compound found naturally in marijuana. Marinol had been approved by the Food and Drug Administration for use as an appetite stimulant for AIDS patients and as an anti-nausea treatment for cancer patients. The relators alleged that Marinol is not particularly effective for those uses and that, in 2001 Solvay directed them to implement a scheme of illegal off-label marketing of Marinol, whereby Solvay sales representatives would provide kickbacks to healthcare professionals as a means of encouraging them to prescribe the drug for appetite loss in cancer patients and for treatment of nausea in HIV patients, even though neither of these uses of the drug had been approved by the FDA and were thus not eligible for payment under federal and state healthcare programs. The relators further alleged that as a result of this off-label marketing scheme, federal and state healthcare programs improperly paid false claims for Marinol prescriptions used for off-label purposes. Although the relators did not allege that the defendants themselves submitted false claims to the government, their complaint alleges that the defendants caused numerous third parties to do so, thereby creating liability under both the federal False Claims Act and under the state FCAs of Illinois, California and Massachusetts. The relators' complaint essentially alleged two FCA causes of action: (1) an action alleging that the defendants caused third parties to present false claims to the government and (2) a separate action alleging that the defendants made or used false statements or false records to get false claims paid or approved by the government.

The Government declined to intervene in the relators' case. The defendants moved to dismiss the complaint, arguing that the relators' complaint failed to satisfy Rule 9(b)'s heightened pleading requirements. The district court agreed with the defendants and dismissed the relators' suit, noting that the relators did not identify any actual false claims that the defendants caused to be presented to a government healthcare program. The court declined to retain supplemental jurisdiction over the relators' state law claims. The relators appealed the district court's decision to the 11th Circuit. On appeal, the 11th Circuit considered whether the relators' complaint satisfied Rule 9(b), even though it did not identify specific false claims and did not allege that the defendants intended for their alleged false statements to influence the government to pay false claims.

Application of Rule 9(b)

With respect to the relators' first cause of action, alleging that the defendants caused third parties to submit false claims to the government, the 11th Circuit reasoned that since the cause of action includes the element that false claims be presented to the government, it is necessary for relators to allege specific false claims that were actually submitted to the government. The court found that although the relators noted that prescriptions and Medicaid payments for Marinol between 2001 and 2005—the period during which the alleged off-label marketing scheme occurred—increased dramatically, and although their complaint "offers detailed allegations of an illegal scheme to cause the government to pay amounts it did not owe," it could not satisfy Rule 9(b) as it "does not allege the existence of a single actual false claim," or "a specific person or entity that is alleged to have presented" a false claim to the government, or the "dates, times, or amounts of individual false claims." The appeals court also noted that the relators did not claim to have personal knowledge of the billing practices of any individual or entity that would have submitted the false claims alleged in their complaint, but only implied that such persons and entities existed and that such false claims were presented to the government. Consequently, the 11th Circuit affirmed the district court's dismissal of the relators' cause of action alleging that the defendants caused the presentment of false claims to the government.

The circuit court then turned to the relators' second cause of action—that the defendants made false statements to get false claims paid. The court observed that this FCA provision does not include the same presentment element, and the court concluded that the provision does not require relators to show that a defendant submitted false claims to the government or that a defendant's false statement was ever submitted to the government. However, the court, relying on the Supreme Court's decision in *Allison Engine Co. v. U.S. ex rel. Sanders*, determined that this FCA provision does require relators to show: (1) that the defendant made a false statement for the purpose of getting a false claim paid or approved by the government; and (2) that the defendant's false statement actually caused the government to pay a false claim. The court held that the relators' complaint could not establish these elements. First, the court declared, the relators failed to link any alleged false statements by the defendants to the government's decision to pay false claims. The court stated that the relators did not allege that the defendants intended that their allegedly false statements would result in the government paying false claims; instead, the court held, the relators alleged that the defendants' statements were to be relied upon by healthcare professionals as a means to induce them to write Marinol prescriptions for off-label purposes. Second, the court, again relying on the *Allison Engine* decision, held that the relators had to show that the government actually paid a false claim. "If the government has not paid funds it does not owe," the court stated, "it has suffered no loss. To impose liability in such a case would do nothing to protect the government from loss due to fraud, and it would extend liability beyond the 'natural, ordinary and reasonable consequences' of a defendant's conduct." Consequently, the court determined that the relators' second cause of action could not be maintained and was properly dismissed by the district court.

Application on FERA Amendments to the FCA

It should be noted that the relators' claims were brought prior to the enactment of the Fraud Enforcement and Recovery Act of 2009 (FERA), which removes the "to get a false claim paid or approved" language from the federal statute. Through FERA, Congress specifically sought to overturn much of the language of *Allison Engine* that the court relied on—especially the portions of the opinion interpreting the term "to get a false claim paid or approved" to mean that defendants' intent should be considered as a factor. By removing that term from the federal FCA, Congress made clear that defendants need not specifically intend that their false statements be actually relied upon by the government. Moreover, Congress announced that this new FERA provision is to apply retroactively, taking effect on June 7, 2008—two days <u>before</u> the Supreme Court's *Allison Engine* decision was published. The 11th Circuit only discussed FERA in a few short footnotes, and ultimately refused to apply the new FERA provision to this case. The court agreed with a district court opinion (from the District of Columbia) that held that the FERA retroactivity provision at issue only applies to "claims" (and not "cases") that were pending on or after June 7, 2008. The court applied the FCA's definition of "claim"—which is "any request or demand . . . for money or property"—and held that since the relators did not assert that any such claims were pending on or after June 7, 2008, the clarifying retroactivity provision did not apply.

U.S. ex rel. Dillahunty v. Chromalloy Oklahoma, 2009 WL 3837294 (W.D. Okla. Nov. 16, 2009)

A relator brought a *qui tam* action against an aerospace manufacturing company, its affiliates, and a private equity firm, alleging that the defendants defrauded the government by submitting false claims for payment. In particular, the relator alleged that the defendants presented the government with airplane engine parts

and falsely certified that the parts had been serviced according to certain specifications. The government declined to intervene in the case. The defendant firm moved to dismiss the relator's complaint for lack of personal jurisdiction and alternatively joined the remaining defendants' motion to dismiss for failure to state a claim and failure to plead fraud with particularity.

The United States District Court for the Western District of Oklahoma denied the defendant firm's motion to dismiss, holding that the FCA authorizes nationwide service of process, and that traditional long-arm jurisdictional analysis did not apply. Instead, the court used an inconvenience analysis and found that the forum was not so inconvenient as to infringe on the defendant's due process rights. The court then addressed the defendants' motion to dismiss for failure to state a claim. It found the relator's complaint failed to allege that: (1) the specifications at issue were required by statute or by the government contracts at issue; (2) the payment of the contracts was conditioned on the defendants' compliance with the specifications; or (3) the defendants' compliance with the specifications was material to the government's decision to pay. Finally, the court found that the complaint failed to plead fraud with particularity. The court observed that the complaint named five defendants but failed to individually identify which defendant made allegedly false representations, when any representations was made, or even whether the defendants actually submitted claims to the government. Thus, the court held the relator failed to plead fraud with particularity and granted the defendants' motion to dismiss.

U.S. ex rel. Gale v. Raytheon Co., 2009 WL 3378976 (S.D. Cal. Oct. 19, 2009)

The relator brought a *qui tam* action against his former employer, and the defense contractor that hired the former employer as a subcontractor. The relator's complaint alleged that the defendants fraudulently obtained federal funds to build and test electronic systems controlling a fleet of naval battleships. The relator also claimed that the defendants charged the federal government at a higher rate for the work than what they paid to the employees, misappropriated taxpayer funds, and needlessly and recklessly endangered navy personnel by hiring an unqualified building maintenance and janitorial company. The defendants moved to dismiss for lack of particularity, pursuant to Federal Rule of Civil Procedure 9(b). The United States District Court for the Southern District of California granted the defendants' motion to dismiss the complaint. The court found that the relator's allegations regarding the defendants' allegedly fraudulent claims for payment were vague and conclusory, and did not allege any specific facts to support the inference that the defendants' bills to the government were fraudulent and were made with knowledge of falsity. The court also found that the complaint did not identify who made the purported false claims, when and over what period of time the defendants made such claims, and why the claims were fraudulent. The court granted defendants' motions and dismissed the relator's complaint with prejudice and without leave to amend.

Lacy v. New Horizons Inc., 2009 WL 3241299 (10th Cir. Oct. 09, 2009) (unpublished)

The relator filed a *qui tam* action against several long-term-care facilities for mentally retarded adults. She alleged that the defendants billed Medicare, Medicaid, and the Social Security Administration for services that had not been performed. Additionally, the relator alleged that the defendant: (1) improperly billed the government for reimbursement after patients had died or during hospital absences; (2) used false records for reimbursement; (3) filed annual cost reports that included non-reimbursable expenses; (4) violated Medicare's anti-kickback provisions; and (5) improperly discharged the relator for reporting violations of state and federal law. The government declined to intervene. The district court dismissed the relator's complaint for failure to plead her fraud allegations with particularity, as required by Fed.R.Civ.P. 9(b), and for failure to state a claim under the FCA. The relator appealed. In an unpublished decision, the Tenth Circuit affirmed the dismissal of the complaint, holding that the relator's complaint lacked particularity because she merely alleged in general terms a scheme to bill Medicaid in advance and failed to provide any details regarding the implementation of that plan. The court noted that the complaint failed to plead essential facts with particularity, such as the dates, patients, amount of goods or services billed, content and identification numbers of forms or bills submitted, individuals involved, and period of time during which the alleged fraud occurred. The appellate court further affirmed the dismissal of the relator's anti-kickback claims, finding that there was no allegation of any compensation made in exchange for referrals. Finally, the circuit court determined that the relator's claim for retaliation and improper discharge could not be maintained, as she did not allege that the defendants terminated her employment for acts in furtherance of an action under the FCA, and thus failed to meet the statutory requirement. Consequently, the circuit court affirmed the district court's dismissal.

U.S. ex rel. Ven-A-Care v. Actavis Mid Atl. LLC, 2009 WL 3171798 (D. Mass. Oct. 02, 2009)

The relator brought a *qui tam* action against a group of pharmaceutical companies, alleging that the defendants submitted false claims and statements to the Medicaid program, which resulted in overpayments. The government declined to intervene.

The defendants jointly and individually moved to dismiss the relator's claims. The defendants first argued that the relator's allegations were prohibited under the FCA's public disclosure bar. The United States District Court for the District of Massachusetts, however, disagreed and held that the government reports upon which the defendants' motions were based, did not satisfy the public disclosure/original source rule. The court noted that the reports failed to specifically identify the defendants, drugs, individual manufacturers, or actual prices, and thus failed to satisfy the public disclosure rule, thereby giving the court subject matter jurisdiction.

The defendants also argued that they did not present claims to the government, and were therefore not liable under the FCA. The defendants also argued that the relator failed to plead that defendants made false statements with the specific intent that the United States rely on the statements to approve their claims. The district court held that defendant's submission of the claims necessarily induced government reliance on the submitted information and was sufficient to satisfy the requirements of a false statement made with the purpose of inducing payment. The court concluded that each claim submitted by the defendant to Medicaid led directly to a federal expenditure. The court further held that the relator's claims had been plead with the requisite particularity, since the relator's complaint specifically listed the drugs in the lawsuit by defendant, labeler code, name, dosage, and National Drug Code information. The complaint also identified the fraudulent Average Wholesale Price and Wholesale Acquisition Cost figures for each drug, and specifically showed the spread of each drug, as a raw dollar amount and as a percentage, by comparing the published figures with relator's contract price. Finally, the complaint alleged that the defendants reported false, inflated AWPs and WACs for the drugs, knowing Medicaid relied on these prices to determine reimbursement rates.

The defendants also asserted that the statute of limitations foreclosed all of the relator's claims that were based on transactions that occurred before May 21, 2002—six years before the current complaint was filed—and that the current complaint did not relate back to prior amended complaints, even though those prior complaints may not have identified all of the current defendants. The defendants further argued that allowing any relation back would violate their Fifth Amendment rights. The court disagreed and found that the defendants failed to demonstrate that the delay in unsealing the current complaint against them was improper or prejudicial; rather, the court held that "any delay in unsealing the case was caused by the Government exercising its right to obtain lawful extensions of the seal to investigate what is an incredibly large and complex scheme." Thus, the court held that the relator's claims related back to the date of the earlier complaint that first identified specific drugs. The defendants also contended that only the government could invoke the FCA's tolling provision when it filed a complaint-in-intervention. The district court rejected this argument as well, noting that while the tolling provision discusses government officials, nothing in that provision

precludes relators from also making use of it when they amend their complaints. Ultimately, the court refused to grant the defendants' motion to dismiss on that ground, and held that resolution of the issue would be best handled on a motion for summary judgment.

Finally, the court refused to dismiss the relator's claims against the individual defendants, finding that, in their SEC filings, those defendants claimed to make and market pharmaceuticals, and thus were properly named as defendants.

See *U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 2009 WL 3353314 (E.D. La. Oct. 19, 2009) at page 8.

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

Bridges v. Omega World Travel, Inc., 2009 WL 5174283 (E.D. Ark. Dec. 18, 2009)

A relator brought a *qui tam* action against a travel agency, alleging that the defendant defrauded the government by violating a contract intended to reduce travel costs for government employees. Specifically, the relator—an FBI agent who employed the defendant to book travel for government business—alleged that the defendant violated provisions of the FCA by knowingly booking him more expensive airline tickets when less expensive tickets were available. The relator alleged that he discovered these discrepancies before using the tickets, forced the defendant to book his travel at the less expensive rate, and prevented the government from actually being overcharged. The defendant moved to dismiss the relator's complaint, arguing that the court lacked subject matter jurisdiction and that the relator failed to state a claim. The United States District Court for the Eastern District of Arkansas denied the defendant's motion to dismiss. The court found that jurisdiction was proper, since the relator's allegations had not been previously publicly disclosed, and even if a public disclosure of those allegations had been previously made, the relator qualified for the FCA's original source exception to the public disclosure bar. The court also determined that the relator's complaint successfully stated a claim under the False Claims Act, since his allegations were actual and material. The court noted that even though the government did not actually pay the more expensive price for the relator's tickets, the FCA does not require that the government suffer actual damages—liability attaches when a defendant knowingly presents a false claim to the government, which the defendant is alleged to have done. The court stated that government employees should not have to "sit back and permit fraud to be perpetrated on the government in order to have a claim under the FCA." In addition, the court rejected the defendant's argument that the relator's claims should fail because they only allege potential liability and not an actual monetary obligation owed by the defendant to the government. The court clarified that the requirement of an actual monetary obligation owed to the government only applies in the context of "reverse" false claims, and that the relator's complaint alleged a direct FCA claim. Finally, the court held that the relator's complaint satisfied the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), noting that the relator specified the dates of the alleged fraud, alleged all pertinent details regarding the transactions at issue (including the amounts, dates of travel, etc.), and identified one of the defendant's employees with whom he allegedly spoke with regarding the transactions. Consequently, the court denied the defendant's motion to dismiss.

U.S. ex rel. Lobel v. Express Scripts, Inc., 2009 WL 3748805 (3d Cir. Nov. 10, 2009)

The relator brought an FCA claim against his former employer, an independent pharmacy benefit manager, alleging that the defendant falsely certified that compliance with regulations that required dates, signatures, and registration numbers on all prescriptions for controlled substances. The government declined to intervene. The defendant moved to dismiss the complaint for failure to state a claim. The United States District Court for the Eastern District of Pennsylvania granted the defendant's motion. The relator appealed, arguing that his complaint adequately pled violations of the FCA under theories of express and implied certification. The Court of Appeals for the Third Circuit affirmed. The appeals court rejected the relator's express certification claim, finding that the relator failed to identify a single claim the defendant submitted in which it falsely represented compliance to the government that affected its eligibility for payment. The court further rejected the relator's implied certification claim, finding that the relator's allegations could not give rise to liability under the FCA since compliance with the regulations at issue was not a condition of payment. In reaching its holding, the court relied on the Supreme Court's decision in *Ashcroft v. Iqbal,* which held that "'bare assertions,' 'legal conclusions,' and 'formulaic recitation[s] of the elements of a cause of action' are 'not entitled to the assumption of truth.'" The court found that the relator's complaint was deficient, as it merely quoted the FCA and alleged in conclusory fashion that the defendant violated the FCA by submitting claims for prescriptions filled in violation of applicable regulations. Therefore, the court affirmed the district court's judgment dismissing relator's complaint for failure to state a claim.

A. Applicability of False Claims Act Amendments of 2009

U.S. ex rel. Sanders v. Allison Engine Co., Inc., 2009 WL 3626773 (S.D. Ohio Oct. 27, 2009)

Consolidated *qui tam* suits were filed against four entities that supplied generator sets to the government for constructing missile destroyers. The district court granted the defendants' motion for judgment as a matter of law for lack of evidence. On appeal, the Sixth Circuit reversed this decision. The defendants then appealed to the Supreme Court, which vacated the circuit court's decision, and remanded the case to the circuit court, which in turn remanded the case back to the District Court. Before the district court could rule, the liability provisions of the False Claims Act were amended and clarified by the Fraud Enforcement and Recovery Act of 2009 (FERA). By FERA's provisions, these amended liability provisions were to be applied retroactively, and would impact this case. The defendants moved to preclude retroactive application of FERA or alternatively to declare FERA unconstitutional. Both the relator and the government filed responses in opposition to the defendant's motion, and contending that the case was pending on the effective date of the amending provisions and therefore the FCA amendment would apply to the case.

Interestingly, the FERA amendments were designed by Congress to overrule the Supreme Court's prior decision in the case, and, to that end, FERA specified that the amendments to the FCA's liability provisions were to take effect on June 7, 2008—two days before the Supreme Court's decision was announced. However, when faced with the dilemma of proceeding in a manner that was consistent with the Supreme Court's ruling, or proceeding in the manner that Congress directed, the district court held that FERA's retroactivity provision only applied to "claims"—defined under the FCA as requests to the government for money or property—that were pending on June 7, 2008, and since there obviously were no such pending "claims" remaining in the case, FERA's retroactivity provisions did not apply and the Supreme Court's ruling was the appropriate interpretation of the law. Moreover, the district court held that FERA's retroactivity provision violates the Constitution's ex post facto clause—which prohibits Congress from creating liability for past acts that did not violate the law at the time those acts were committed—and is therefore unconstitutional. The district court reasoned that the FCA punishes those who commit fraud against the government and that by using FERA to clarify Congressional intent with respect to the FCA's liability provisions, Congress expanded liability under the FCA, and violated the Constitution in the process. Consequently, in an order that is particularly offensive

to congressional intent, the district court refused to recognize that FERA's FCA amendments apply to *Allison Engine*—the very case to which those amendments were specifically designed to apply.

See *Hopper v. Solvay Pharm., Inc.,* 2009 WL 4429519 (11th Cir. Dec. 04, 2009) at page 21.

B. Costs and Attorney's Fees

U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 2009 WL 3723087 (D. Ariz. Nov. 04, 2009)

The relator filed a *qui tam* action against her former employer, alleging substantive False Claims Act violations as well as retaliatory discharge under the FCA. Previously, the defendants filed suit against the relator in state court, alleging breach of contract and other claims, in connection with the relator's removal of documents. The defendant's claims were voluntarily dismissed, but the defendant re-asserted them as counterclaims in the FCA. The United States District Court of Arizona entered judgment in favor of the defendant on the relator's claims and on the defendant's counterclaims. The defendants then moved for attorney's fees under state contract law and under the court's statutory sanctioning powers. The court granted partial fees for the contract claim, the state court claims, and the federal counterclaim.

To determine whether or not to grant attorney's fees on the breach of contract counterclaim, the court examined the merits of the relator's defense, avoidable expense, and several other factors. The relator argued that she was privileged to take documents in violation of her employment contract for discovery purposes, in order to prove her *qui tam* claim against the defendant. However, the court found that in removing the documents she was not cooperating in a government investigation, reporting fraud, or preserving evidence. Instead, the court found that the relator obtained the documents without regard to whether they pertained to the specific claims she intended to bring. In addition, the court found that there was no basis for the relator to believe that the defendant was destroying, altering, or falsifying documents. Based on this and other factors, the court awarded the defendant attorney fees but reduced them do to extreme hardship of the relator. Concerning the retaliation claim, the court declined to award fees to the defendant. The defendants alleged that the relator did not sue in good faith because she had previously claimed that defendant terminated her in retaliation for reporting workplace violence. The court, however, noted that relators might have had a good reason not to tell employers of their intent to sue under the FCA. The court further found that this did not indicate that the relator brought the claim in bad faith and held that a retaliation claim's lack of merit is not, by itself, grounds for sanctions. Lastly, the court held that no fees would be awarded as a sanction against the relator's attorneys for the *qui tam* proceeding. The court denied this request because the filing of a complaint cannot be the basis for sanctions and if the court were to award a fee based on the pursuit of the *qui tam* action it would contravene that principle. In addition, the court found that the defendants failed to show the extent that any sanctionable actions enlarged its expense beyond what it would have been required to spend in the course of good faith litigation. Therefore, the court granted in part and denied in part defendant's motion for award of attorney's fees.

C. Parallel Criminal Proceedings

Creel v. Jahani, 2009 WL 4250065 (D. Colo. Nov. 25, 2009)

A relator brought a claim under the False Claims Act action against her former employer, a medical service provider, and its medical officer, alleging retaliatory discharge. The plaintiff claimed that defendants defrauded Medicare by billing for unnecessary follow-up visits, billing ordinary care as "urgent," and billing for doctor visits to patients that had not occurred. She further alleged that she was fired from her job after she complained to the defendants about her concerns and then ultimately reported the alleged fraud to the Department of Health and Human Services. While the case was pending, local and federal government law enforcement agents executed search warrants on the defendants' facilities and offices and informed the defendants that they were the subject of a criminal investigation. The defendants moved to stay the proceedings in the civil case or in the alternative, sought entry of a protective order, asserting that the majority of relevant documents were not in their possession, due to the criminal investigation. The United States District Court for the District of Colorado denied the defendants' motion. The court found that allowing discovery to proceed in the civil action would not cause unfair prejudice to the defendants, whereas a stay would substantially prejudice the plaintiff. The court first distinguished the two actions: the criminal investigation concerned prescription drug distribution while the civil case concerned Medicare billing. Second, the court noted that none of the defendants in the civil case had been indicted in the criminal investigation. Because the criminal investigation and the civil case were unrelated and no indictment had been issued to trigger Fifth Amendment issues, the court found that there was little likelihood of unfair prejudice to the defendants by allowing discovery to proceed in the civil action. Finally, because the plaintiff's case was for money damages and she had fears concerning the continuance of the defendants' medical practice, it was important for her to be at the front of the creditor line. Thus, the prejudice to her case caused by delay could be substantial. Therefore, the court denied the defendants' motion.

D. *Res Judicata* and Collateral Estoppel

See *U.S. ex rel. Schaefer v. Conti Med. Concepts, Inc.*, 2009 WL 5104149 (W.D. Ky. Dec. 17, 2009) at page 3.

Judgments & Settlements

OCTOBER 1–DECEMBER 31, 2009

University of Medicine and Dentistry of New Jersey October 1, 2009 (D.N.J)

The University of Medicine and Dentistry of New Jersey (UMDNJ) agreed to pay the federal Government $8.3 million to settle allegations that it illegally paid kickbacks to cardiologists and caused the submission of false claims to Medicare. In order to maintain its funding and accreditation as a state-licensed Level 1 Trauma Center, UMDNJ's University Hospital had to perform a certain number of cardiac procedures (including cardiac catheterizations and cardiothoracic surgery) every year. In 1995, when the frequency of those procedures began to decline, the hospital tried to bring in more patients through part-time employment contracts with a number of community cardiologists. The government alleges that those employment contracts served as vehicles to pay illegal kickbacks to the cardiologists for their referrals. The settlement was the result of a coordinated effort among the U.S. Attorney's Office for the District of New Jersey, Affirmative Civil Enforcement Unit; the Commercial Litigation Branch of the Justice Department's Civil Division; the FBI; and the U.S. Department of Health and Human Services, Office of Inspector General.

Harborside Healthcare, McKesson Corp., HHC Nutrition Services October 8, 2009 (N.D. Miss.)

Harborside Healthcare and HHC Nutrition Services agreed to pay the United States $1.375 million to resolve allegations that the company violated the Anti-Kickback Statute and the False Claims Act through durable medical equipment (DME) scam. The Government alleged that McKesson Corp., and its affiliate MediNet Corp provided kickbacks and assistance and, in return, Harborside purchased its DME from McKesson. Harborside also agreed to forego $498,000 in DME claims that had not yet been billed to Medicare. The settlement provided $275,000 for the relator, Thomas Jamison. TAF member J. Brad Pigott represented Jamison. Albert Morris of the DOJ and Feleica L.Wilson from the U.S. Attorney's Office for the Northern District of Mississippi handled the case for the Government.

MPC Products Corporation October 15, 2009 (N.D. Ill.)

MPC Products Corp., a defense contractor engaged primarily in the production and repair of aircraft, including fighter jets and helicopters, agreed to pay $22.5 million in civil penalties and a $2.5 million criminal fine to settle allegations that it overcharged the government in a series of military contracts. The company and two of its executives were also charged with criminal obstruction of a federal audit. The settlement arose from a *qui tam* suit filed in 2003 by relator Joe Caputo, a former pricing analyst at MPC. Caputo alleged that MPC told him in 1990 to falsify costs/price justifications so that MPC could increase its profit margin on government contracts as a means of lowering its prices in bids for private sector business. Caputo worked closely with federal authorities over several years to gather and analyze information on his employer. The settlement provided $4.5 million for Caputo as a relator's share, and an additional $252,320 for his expenses and attorney fees. TAF member Mark Kleiman and Dennis Favaro represented the relator. Assistant U.S. Attorney Samuel Miller represented the government in the civil case, and Assistant U.S. Attorney Jacqueline Stern is handling the criminal investigation.

AT&T Missouri October 13, 2009 (W.D. Mo.)

AT&T Missouri (formerly known as Southwestern Bell Telephone L.P.) agreed to pay the United States $1.4 million as part of a settlement of a civil lawsuit alleging that the company violated the False Claims Act in connection with the Federal Communications Commission's E-Rate program. Another telecommunications company, American Fiber Systems Inc., filed the suit, which alleged that AT&T Missouri provided false information to the E-Rate program and otherwise violated the program's requirements by engaging in non-competitive bidding practices for E-Rate contracts. American Fiber Systems Inc. was awarded $195,000. The DOJ's Civil Division, with assistance from the FCC's Office of the Inspector General, handled the investigation and settlement of this matter

Mylan Pharmaceuticals, UDL Laboratories, AstraZeneca Pharmaceuticals and Ortho McNeil Pharmaceutical October 19, 2009 (D.N.H.)

Four pharmaceutical companies—Mylan Pharmaceuticals, UDL Laboratories, AstraZeneca Pharmaceuticals and Ortho McNeil Pharmaceutical—have agreed to pay a total of $124 million to resolve claims that they violated the False Claims Act by failing to pay appropriate rebates to state Medicaid programs for prescription drugs. The settlement was divided between federal and state Medicaid programs. The companies had allegedly misclassified certain prescription drugs as "non-innovator drugs," which have a lower rebate rate according to Medicaid regulations. The relator, Ven-A-Care of Florida Keys, FL was awarded $10,787,392. TAF member Jim Breen represented the relator. The U.S. Attorney's Office for the District of New Hampshire and the Commercial Litigation Branch of the DOJ's Civil Division, with assistance from the Medicaid Fraud section within the New Hampshire Attorney General's Office, as well as the National Association of Medicaid Fraud Control Units, handled the case for the government. The case was investigated by members of the Office of Investigations of the Office of Inspector General of the U.S. Department of Health and Human Services.

Omni Home Care October 20, 2009 (S.D. Ind.)

Omni Home Care, a home health care agency in Evansville, Ind., and its parent corporation, Omni Home Health, agreed to pay the United States $1.97 million to settle claims that it violated the False Claims Act between 2006 and 2008. The settlement resulted from the companies' self-disclosure that they had failed to obtain certain required physician approvals before submitting bills for home health services to Medicare. The case was handled by the Justice Department's Civil Division, the U.S. Attorney's Office for the Southern District of Indiana and the Office of Inspector General of the Department of Health and Human Services.

McAllen Hospitals L.P. October 30, 2009 (W.D. Tex.)

McAllen Hospitals L.P., d/b/a/ South Texas Health System (a subsidiary of Universal Health Services Inc.) agreed to pay the United States $27.5 million to settle claims that it violated the False Claims Act, the Anti-Kickback Statute and the Stark Law between 1999 and 2006, by paying illegal compensation to doctors in order to induce them to refer patients to hospitals within the group. The government alleged that these payments were disguised through a series of sham contracts, including medical directorships and lease agreements. $25,208,333 of the settlement went to the federal government and $2,291,667 went to the Texas Medicaid program. The hospital also agreed to enter a 5-year Corporate Integrity Agreement. Former McAllen employee Bruce Moilan filed the qui tam action in 2005, and the settlement provided $5.5 million for him as a relator's share. TAF members Marcella Auerbach and Ken Nolan represented the relator.

Omnicare and IVAX November 3, 2009 (D. Mass.)

Omnicare, Inc., a Kentucky corporation that provides pharmacy services to long-term care facilities, agreed to pay $98 million to settle claims that it violated the False Claims Act and the Anti-Kickback Statute. IVAX Pharmaceuticals agreed to pay $14 million for its role in the same scheme. Approximately $68.5 million of the settlement proceeds will go to the United States, while $43.5 million has been allocated to cover Medicaid program claims by participating states.

The settlement covered a wide range of conduct. From 2000 to 2004, Omnicare allegedly solicited and received $8 million from drug manufacturer IVAX to induce Omnicare to purchase $50 million of IVAX's generic drugs, which Omnicare then recommended physicians prescribe to their nursing home patients. Between 2004 and 2006, Omnicare allegedly paid the nursing home chains Mariner and Sava (among others) $50 million in exchange for the nursing homes' promise to refer their patients to Omnicare for drug purchases, including purchases reimbursed by Medicaid or Medicare. Omnicare also allegedly provided consultant pharmacist services below fair market value to nursing homes in order to induce them to buy prescription drugs for their in-house pharmacies (including drugs covered by Medicaid and Medicare) from Omnicare, in violation of the Anti-Kickback statute. As part of the settlement, Omnicare and IVAX both agreed to enter into a Corporate Integrity Agreement.

Four relators—Adam Resnick, David Kammerer, Deborah Maguire, and Bernard Listiza—filed separate cases which were combined into a single settlement. The relators' shares have not yet been determined. Omnicare agreed to pay $352,500 to relator Kammerer and $155,000 to relator Maguire for costs and attorneys' fees. TAF members Mary Louise Cohen and Timothy McCormack (Phillips & Cohen) represented Resnick; TAF member Shelley Slade (Vogel, Slade & Goldstein) represented Kammerer; TAF member Christopher Mead (London & Mead) represented Maguire; and TAF members Michael Behn and Linda Wyetzner (Behn & Wyetzner) represented Lesitza. Laurie Oberembt, Senior Trial Counsel at DOJ's Civil Division (Commercial Litigation Branch); AUSAs for the District of Massachusetts Gregg Shapiro and Christine Wichers; and Gregory Demske from the Office of the Inspector General handled the settlement for the government.

Diebold Information and Security Systems, LLC November 3, 2009

Diebold Information and Security Systems, LLC, a provider of computer repair services, agreed to pay $850,000 to settle potential False Claims Act claims alleging that the company failed to submit required suitability documentation to the Social Security Administration (SSA) for a substantial number of subcontractor personnel performing services under a five-year maintenance and repair contract. The contract required personnel who performed services under the contract to undergo a suitability determination before their performance commenced, in order to insure that contractor employees would be suitable to comply with conditions relating to the confidentiality of information that may be entrusted to them. The company and its subsidiaries were to submit documentation to SSA, such as fingerprint cards, a statement of personal history, a declaration for federal employment, and a completed Fair Credit Reporting Act authorization form, so that SSA could make a suitability determination for each employee prior to his performance of contract services. An investigation into Diebold's compliance revealed that Diebold failed to submit required suitability documentation for many of its subcontractor personnel performing contract services, which resulted in repair work being performed by unapproved personnel. United States Attorney Rosenstein commended Assistant United States Attorney Michael A. DiPietro and the Office of the Inspector General for Social Security Administration for their work on the investigation and settlement.

Kaiser NW November 12, 2009 (D. Or.)

Kaiser Foundation Hospitals, which includes Kaiser Sunnyside Medical Center, Kaiser Foundation Health Plan of the Northwest, and Northwest Permanente P.C., Physicians & Surgeons (collectively, Kaiser NW) agreed to pay the United States $1,830,322.41 to settle False Claims Act allegations that Kaiser NW billed Medicare for hospice services that had been provided by the Kaiser Northwest Region Hospice without obtaining the required written certifications of terminal illness between 2000 and 2004. The settlement arises from Kaiser NW's self-disclosure in June of 2005. Kent Robinson, Acting U.S. Attorney for the District of Oregon, along with DOJ Civil Division and HHS OIG handled the case.

Trinitas Regional Medical Center November 18, 2009

Trinitas Regional Medical Center (Elizabeth, NJ) agreed to pay $3.02 million plus interest to settle allegations that the hospital fraudulently inflated charges to Medicare patients to obtain enhanced reimbursement from Medicare by requesting additional payments for cases that did not qualify for additional "outlier payments" because they were not extraordinarily costly. The settlement provided $679,000 for relator Tony Kite, who is also the relator in an ongoing case involving similar allegations against Brookhaven Memorial Hospital in East Patchogue, N.Y. TAF members Steve Berman, Shayne Stevenson, and Tom Loeser (Hagens Berman) and Larry Zoglin (Phillips and Cohen) represented Mr. Kite. The DOJ Civil Division, the U.S. Attorney's Office for the District of New Jersey, HHS OIG, the Centers for Medicare and Medicaid Services, and the FBI investigated and handled the case.

Abington Memorial Hospital November 19. 2009 (E.D. Pa.)

Abington Memorial Hospital agreed to pay $800,000 to resolve allegations that the hospital violated the False Claims Act by submitting "outlier" claims for payment that unreasonably increased reimbursements form Medicare, Medicaid, and Tricare. Relator Thomas McCarrey, a former employee at the hospital, was awarded $220,000 (27.5%) of the settlement. In addition, the hospital agreed to pay McCarrey $300,000 to settle his suit under Pennsylvania's whistle-blower statute, and $99,844.94 for expenses and attorney's fees. TAF members Ross Begelman and Marc Orlow (Begelman, Orlow & Melletz) represented the relator. AUSA Virginia Gibson for the Eastern District of Pennsylvania and Daniel Spiro, Senior Trial Counsel of DOJ's Civil Division (Commercial Litigation Branch) represented the government.

James Jones Company LLC, Mueller Co. Ltd., Tyco International and Watts Water Technologies November 24, 2009 (California FCA)

Four companies (James Jones Company LLC, Mueller Co. Ltd., Tyco International, and Watts Water Technologies) agreed to pay 54 municipalities and water districts $39 million to resolve allegations that the companies provided parts for water supply systems that were substandard and contained levels of lead that exceeded industry standards. This settlement brings the total recoveries from related cases to nearly $60 million. James Jones, the main defendant, is a privately held company that manufactures valves and other components for water systems. Watts, Mueller and Tyco were Jones's parent companies at various relevant times. The case was originally filed as a *qui tam* action under the California FCA in 1997. The litigation resulted in three groundbreaking California Court of Appeals opinions in favor of the whistleblower and the other plaintiffs. One opinion confirmed that misstatements in catalogs could form the basis of a California False Claims Act action. Another held that "passive" beneficiaries of fraud who fail to disclose to the government the existence of false claims after learning of them are liable under the state law. Representing the relator were TAF members Stephen S. Hasegawa and Eric R. Havian of Phillips & Cohen, along with co-counsel at Best Best & Krieger; Bowie Arneson Wiles & Giannone; Hanson Bridgett, Hennigan Bennett & Dorman; and Irell & Manella.

SCCI Hospitals December 2, 2009 (E.D. Mich.)

SCCI Hospitals of America, Inc. (SCCI), a provider of specialized long-term acute hospital care, agreed to pay $830,166 to resolve a False Claims Act suit alleging that the hospital routinely charged Medicare for services that were not medically necessary. TAF members Monica P. Navarro, Maro E. Bush and David L. Haron (Frank, Haron, Weiner and Navarro) represented relators Teri Hall-Dutts, Robert Kuzina and Donna Rudolph. TAF member Patricia Stamler (Hertz Schram, MI) represented relators Christine Paulus and Angela DeGrez. The settlement provided $170,184.11 (20.5%) to be shared by the relators, and $107,983.89 for their expenses and attorneys' fees. AUSA Leslie Wizner of the Eastern District of Michigan handled the case for the Government.

Mercy Medical Center December 2, 2009 (D. Iowa)

Mercy Medical Center of Sioux City, Iowa, agreed to pay the United States $400,000 to settle allegations that it violated the False Claims Act and overcharged Medicare, Medicaid, Tricare, and the Federal Employees Health Benefits Program by inflating charges for heart patients' care. The United States also alleged that Mercy submitted false and misleading statements involving Medicare and Medicaid cost reports for Oakland Memorial Hospital, in fiscal years 2003 through 2006. The United States alleged that Mercy sought reimbursement for non-allowable costs included in Oakland's 2003 through 2006 Medicare and Medicaid cost reports. The case was handled by Assistant United States Attorney Robert M. Butler. The Los Angeles United States Attorney's Office and the HHS OIG provided investigative assistance. Iowa and Nebraska Medicaid Fraud Control Units and Medicare Program Safeguard Contractors (Cahaba Safeguard Administrators and IntegriGuard) also assisted in the investigation.

Itochu Corp. December 7, 2009 (D.D.C.)

Itochu Corp. of Japan and its American subsidiary, Itochu International Inc., agreed to pay $6.75 million to resolve FCA claims involving defective Zylon fiber used as the key ballistic material in bullet-proof vests purchased by the United States for federal, state, local and tribal law enforcement agencies. The United States alleged that the Itochu companies were aware that the fiber degraded quickly over time and that the companies knew that this degradation rendered bullet-proof vests containing woven Zylon unfit for use. The government further alleged that, despite this knowledge, Itochu personnel actively participated in the marketing of the Zylon fiber and downplayed the extent of the degradation problem. This settlement is part of a larger government investigation of the industry's use of Zylon in body armor. As part of the agreement, Itochu has pledged its cooperation in the government's ongoing investigation. The United States has previously settled with five other participants in the Zylon body armor industry for over $47 million. Additionally, the United States has pending lawsuits against Toyobo Co., Honeywell Inc., Lincoln Fabrics, Ltd., Second Chance Body Armor Inc., and First Choice Armor Inc. Several former executives of Second Chance and First Choice are also named in those suits. Multiple agencies participated in the investigation and settlement, including the DOJ's Civil Division; the U.S. Attorney's Office for the District of Columbia; the GSA OIG; the DHS OIG; the Department of the Treasury's Inspector General for Tax Administration; the Defense Criminal Investigative Service; the U.S. Army Criminal Investigative Command; the Air Force Office of Special Investigations; the Department of Energy, Office of the Inspector General; the U.S. Agency for International Development, Office of the Inspector General; the Defense Contracting Audit Agency; and the FBI.

University of Phoenix December 15, 2009

The University of Phoenix agreed to pay the United States $67.5 million to resolve allegations that its student recruitment policies violated the False Claims Act when it accepted federal student financial aid in violation of statutory and regulatory provisions prohibiting post-secondary schools from paying admissions counselors certain forms of incentive-based compensation tied to the number of students recruited. Two former University of Phoenix employees, Mary Hendow and Julie Behn, filed the case and were awarded $19 million from the settlement, and an additional $11 million in attorney's fees. TAF members Dan Bartley and Nancy Krop represented the relators, along with three San Francisco law firms: Lieff Cabraser Heimann & Bernstein, Altshuler Berzon, and McGuinn Hillsman & Palfesky. The government did not intervene in the case, but AUSA Michael Hirst assisted in the litigation. In addition, Charles Scarborough, appellate specialist at the DOJ, assisted in the case and wrote an amicus brief when the case appeared before the 9th Circuit.

Nursing Personnel Home Care, Extended Home Care, and Excellent Home Care December 17, 2009

Three home health care agencies have agreed to pay the United States $9.7 million and will pay New York State $14.3 million to resolve allegations that they submitted false claims to the New York Medicaid and Medicare programs. Nursing Personnel Home Care (Nursing Personnel) was alleged to have knowingly supplied aides with fake training certificates to Extended Home Care (Extended) and Excellent Home Care (Excellent), which then billed New York Medicaid for the aides' services. In addition, Extended and Excellent was alleged to have knowingly billed for aides with fake certificates who were untrained and knowingly submitted claims to the Medicare program for home health aide services purportedly rendered by aides supplied by Nursing Personnel that were not actually provided. The settlement awarded $251,107 from the government's recovery from Nursing Personnel to relator Maurice Keshner, and $1,663,040 from the government's recovery from Extended and Excellent to relator Deborah Yannicelli. Mr. Keshner was represented by TAF members at Kenney Egan McCafferty & Young (PA) and the firm of Waters & Klein (NY). TAF members Mike Bothwell, Julie Bracker, Sara Vann and Timothy McInnis represented Ms. Yannicelli.

Warrick Pharmaceuticals/Schering Plough December 17, 2009 (California FCA)

Warrick Pharmaceuticals, a subsidiary of pharmaceutical giant Schering-Plough, agreed to pay the state of California $21.3 million to resolve allegations that the company deliberately overcharged Californias Medicaid (Medi-Cal) program, causing the program to overpay millions of dollars in pharmacy reimbursement for Albutrol and other drugs. Warrick had allegedly inflated the Average Wholesale Prices (AWPs) in its reports to California. Schering-Plough has paid more than $69 million to state and federal governments to resolve similar allegations, with more cases still pending. Relator Ven-A-Care of the Florida Keys, Inc. originally filed these and other FCA cases. TAF member Jim Breen represented the relator. The California Attorney General's Bureau of Medi-Cal Fraud and Elder Abuse negotiated the settlement.

Our Lady of Lourdes Health Care Services Inc December 15, 2009 (D.N.J)

Our Lady of Lourdes Health Care Services Inc., the parent company of two New Jersey hospitals (Our Lady of Lourdes Medical Center (OLL) in Camden, N.J., and Lourdes Medical Center of Burlington County (LMC) in Willingboro, N.J.), agreed to pay the United States $7.95 million to resolve allegations that the hospitals defrauded Medicare. The settlement arose from a *qui tam* suit relator Tony Kite brought in 2005 (see "Trinitas Regional Medical Center," above). The suit alleged Lourdes and several other hospitals inflated Medicare charges to obtain supplemental outlier payments for cases that were not extraordinarily costly and for which outlier payments should not have been paid. Mr. Kite will receive $356,000, plus interest, out of the Our Lady of Lourdes Health Care Services settlement. TAF members Steve Berman, Shayne Stevenson, and Tom Loeser (Hagens Berman) and Larry Zoglin (Phillips and Cohen) represented Mr. Kite. The DOJ Civil Division, the U.S. Attorney's Office for the District of New Jersey, HHS OIG, the Centers for Medicare and Medicaid Services, and the FBI investigated and handled the case.

Chevron Corporation December 12, 2009 (E.D. Tex.)

Chevron Corporation, Texaco, Unocal Incorporated and their affiliates (the Chevron companies) agreed to pay the United States $45,569,584.74, to resolve claims that they violated the False Claims Act by knowingly underpaying royalties owed on natural gas produced from federal and Indian leases. The suit alleged that the Chevron companies improperly deducted from royalty values the cost of boosting gas up to pipeline pressures; used affiliate transactions to falsely reduce the reported value of gas taken from federal and Indian leases; and improperly reported processed gas as unprocessed gas to reduce royalty payments. In addition, the Chevron companies systematically underreported the value of natural gas they took from federal and Indian leases from March 1988 to November 2008 and, consequently, paid less royalties than they owed to the United States and various Indian tribes. Relator Harrold Wright filed the suit, but because he is deceased, his heirs will receive his share of $12,303,787.88, plus interest.

St. John Health System December 22, 2009

St. John Health System of Tulsa, OK, agreed to pay the United States $13,229,348.88 to settle allegations that it violated the False Claims Act. In April 2008, St. John submitted a self-disclosure report to the Department of Health and Human Service's Office of Inspector General that acknowledged that St. John submitted claims to Medicare and Medicaid that were tainted by the hospital's financial relationships with referring physicians. The case was handled by the Department of Justice's Civil Division and the Office of Inspector General of the Department of Health and Human Services.

Visiting Physicians Association December 23, 2009 (S.D. Ohio and E.D. Mich.)

Visiting Physicians Association, a Michigan professional corporation that provided home health services at various times in Michigan, Ohio, Georgia, and Wisconsin, agreed to pay the United States and the state of Michigan $9.5 million to settle allegations that the association violated the False Claims Act by submitting false claims to Medicare, TRICARE, and the Michigan Medicaid program. The corporation allegedly billed the government programs for unnecessary home visits and care plan oversight services, for unnecessary tests and procedures, and for more complex evaluation and management services than the services that were actually provided. The four relators who brought the case were awarded a total of $1.7 million. TAF members Rick Morgan, Jennifer Verkamp, Lon Engel, Brian Kenney, and Patty Stamler represented the relators. HHS OIG, the FBI, and the Michigan Attorney General's Office investigated this matter. The DOJ's Civil Division, the U.S. Attorney's Office for the Southern District of Ohio, the U.S. Attorney's Office for the Eastern District of Michigan, and the Michigan Attorney General's Office handled the lawsuits.