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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

"Income tax has made more liars out of the American people than golf."
–Will Rogers, humorist and social commentator

It's that time of year again! Tax time is upon us once more. Unfortunately, the quote above still rings true, even though Will Rogers died nearly 75 years ago. Fortunately, however, the Internal Revenue Service has developed a mechanism for exposing tax cheats—the IRS Whistleblower Office program. Under this program, whistleblowers who discover fraud against the IRS (especially substantial fraud), can report the fraud to the government, and if their efforts assist the IRS in collecting unpaid taxes, interest, and penalties, the whistleblower stands to receive a share of the government's recovery as a reward. Taxpayers Against Fraud Education Fund has worked very closely with the IRS Whistleblower Office to implement this program. In fact, TAFEF recently held its second IRS Whistleblower "boot camp" event, during which several staff members from the IRS Whistleblower Office—including Office Director Stephen Whitlock—teamed up with TAFEF to educate the relators' community on the particulars of the IRS program. This year's event saw a 10% increase in attendance from last year's inaugural event, demonstrating both the pressing need for, and the heightened interest in, the program.

The success of this private-public partnership underscores the need for additional federal government programs designed to reward whistleblowers who report other types of fraud. Currently, Congress is considering a similar program that will reward whistleblowers who expose fraud against the Securities and Exchange Commission—a program that is desperately needed in the wake of the Bernard Madoff scandal and the resulting unparalleled economic hardships his fraud scheme created. An effective SEC Whistleblower program will make corporate America more accountable and hopefully, will help to change the culture of fraud, waste and abuse that seems to currently prevail in this country—a culture that Will Rogers commented on nearly a century ago.

As always, please feel free to share your comments and suggestions, as I continue to work to improve this journal. I am also interested in any articles that you might want to submit for publication. You can send me your thoughts and/or submissions at:

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I look forward to hearing from you, and best of luck with this year's tax return!

–Cleveland Lawrence III

Recent False Claims Act & *Qui Tam* Decisions

JANUARY 1–MARCH 31, 2010

FALSE CLAIMS ACT LIABILITY

A. What Constitutes a False Claim

U.S. ex rel. Williams v. Renal Care Group, 2010 WL 1062634 (M.D. Tenn. Mar. 22, 2010)

A relator brought a *qui tam* action against a medical and surgical instruments manufacturer, a dialysis service provider, and a dialysis equipment supplier that provided equipment to patients who received dialysis treatment at home. The government intervened and the relator non-suited her claims without prejudice. The government alleged that the defendant supplier submitted false claims to Medicare, stating that since the defendant provider actually controlled and operated the defendant supplier, the supplier was ineligible to receive the higher payments from Medicare for dialysis supplies used for in-home treatment. The government moved for summary judgment on this issue. The defendant also moved for summary judgment, arguing that they complied with the applicable Medicare regulations, since Medicare officials knew of their corporate structure and had informed the defendant provider's attorney that the defendant supplier's role as a supply company for provider's patients was legal, and since Medicare continued paying the defendants' claims for more than six years. The defendants also argued that their conduct was in line with widespread industry practice, that they lacked any fraudulent intent, and that they did not make any false representations that were material to their Medicare payments.

The United States District Court for the Middle District of Tennessee granted the government's motion for partial summary judgment and denied the defendants' motion for summary judgment. The court found that the defendant companies operated almost as one, as they shared office space, payroll, insurance, employees, and human resource services. The court noted that the defendant supplier relied on the defendant provider to enroll patients, and that 90% of those patients were treated at the provider's facilities. The court found that nearly all aspects of the defendant supplier's business were intertwined with the defendant provider in some fashion. The court found that the defendants could not disregard the relevant Medicare statutes, legislative history and regulations and merely rely on their contacts with various Medicare officials, since the court determined that the applicable statutes and regulations were not ambiguous. Consequently, the court held that the defendants exhibited reckless disregard of the law. The court found that defendants violated a condition of payment, not simply a condition of participation in the Medicare program, because the defendant provider was found to have created the defendant supplier solely for the purpose of receiving higher Medicare payments. As a result, the court also granted the government's motion and entered judgment in the government's favor, in the amount of $19,366,705, plus interest.

U.S. v. Govereh, 2010 WL 28565 (N.D. Ga. Jan. 5, 2010)

The government brought a criminal action against an individual tax service consultant, alleging that the defendant submitted false claims to the IRS based on twenty tax returns he filed for several taxpayers, using his Electronic Filing Identification Number ("EFIN"). Specifically, the government alleged that the defendant intentionally included false information on the returns, directed the taxpayers to seek a Refund Anticipated Loan ("RAL")—which is a bank loan that provides tax refund recipients with a loan in anticipation of the taxpayers later receiving a refund check from the IRS. The defendant would then have the taxpayers cash the RAL check, pay him an exorbitant fee for preparing their tax return, and then suffer the consequences of repaying the RAL loans when the IRS refused to provide tax refunds in the amounts the taxpayers expected to receive. A jury found the defendant guilty on fourteen counts of presenting or causing presentment of false tax returns to the IRS.

The defendant moved for acquittal or alternatively for a new trial, contending that the FCA did not apply to the tax returns he completed and filed with the IRS. The defendant specifically claimed that the requests for refunds did not constitute a claim for monies to be refunded because the claims were not properly executed per the IRS regulations, since the taxpayers did not sign their electronically-filed returns and therefore the IRS would not have regarded those forms as properly filed. However, the court held that the returns filed by the defendant did constitute claims under the FCA. The court found that the FCA "has been applied to protect the Government from a wide range of fraudulent claims, including tax returns that claim refunds to which the filers are not entitled." Consequently, the court held that the returns prepared by the defendant constituted fraudulent attempts to cause the government to pay out sums of money, irrespective of whether the paperwork had been submitted properly—the defendant could not escape criminal responsibility based on the technicality of not meeting the filing requirements or the IRS's possible carelessness. The court also concluded that "[b]oth documentary evidence and testimony permitted a reasonable jury to find the defendant guilty beyond a reasonable doubt," that evidence of the defendant's past convictions for perpetrating other fraud schemes was more probative than prejudicial, and that, ultimately, the defendant received a fair criminal trial. Therefore, the defendant's motion for judgment of acquittal or for a new trial was denied.

JURISDICTIONAL ISSUES

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

Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson, 2010 WL 1189557 (Mar. 30, 2010)

A relator brought a *qui tam* action against a county soil and water conservation district and its district supervisors, alleging FCA violations and retaliatory discharge. Specifically, the relator alleged that the defendants knowingly submitted false claims under several government contracts for remediation of flood-affected areas. The United States District Court for the Western District of North Carolina rejected the relator's claims and granted summary judgment in the defendants' favor, based on the FCA's public disclosure bar. The district court found that the relator failed to demonstrate that she did not base her fraud allegations on previously publicly disclosed state agency administrative reports. On appeal, the Fourth Circuit reversed the district court's decision and held that the public disclosure bar did not apply, since the alleged fraud had been previously disclosed in an administrative report prepared by a state agency—and not by a federal agency. Essentially, the Fourth Circuit held that in order to constitute a "public disclosure" under the False Claims Act, an administrative report must be prepared by a federal government agency. The defendants appealed the Fourth Circuit's ruling to the United States Supreme Court.

The Supreme Court reversed the Fourth Circuit's decision and held that the term "administrative," as used in the FCA's public disclosure bar provision, includes administrative reports, hearings, audits, or investigations prepared by federal, state and local government agencies. The relator had argued that "administrative, as used in section 3730(e)(4)(A) should not include non-federal sources because local governments would then be able to shield themselves from *qui tam* liability by discretely disclosing evidence of fraud in public reports. The relator further argued that while federal inquires and their outcomes are readily available to DOJ attorneys, many state and local reports never come to the attention of federal authorities. The Court found this proposition implausible because many state and local investigations are occurring at any given time and many DOJ attorneys are aware of these investigations. Ultimately, the Court held that the relator should have been less concerned with whether or not allegations of fraud landed on the desk of a DOJ lawyer. The Court found that the relator failed to show that the petitioners' reading of the statute would lead to results that Congress could not have intended and held that although the word "administrative" may be sandwiched between the federal words "congressional" & "General Accounting Office" in FCA

section 3730(e)(4)(A), that category of public disclosures is sandwiched between two other categories that have been generally understood to include nonfederal sources—namely, "criminal, civil, or administrative hearing[s]" and "the news media." These textual clues negated the force of the Fourth Circuit's application of the *noscitur a sociis* canon of statutory interpretation, which states that the meaning of a word in a statute can be ascertained by looking at the meaning of the words it has been grouped with. The Court ruled that disclosures made in a state or local report, audit, or investigation triggered the public disclosure bar. Accordingly, the Court reversed the Fourth Circuit's decision and the case was remanded for further proceedings.

U.S. ex rel Lopez v. Strayer Educ., Inc., 2010 WL 1039867 (E.D. Va. March 18, 2010)

A relator brought a *qui tam* suit against a university and a related entity, alleging false certification with the Higher Education's Act incentive compensation ban for college recruiters. Specifically, the relator alleged that the defendants entered into a Program Participation Agreement (PPA) with the government in order to participate in financial aid programs. After the relator's deposition, the defendants moved to dismiss under Fed. R. Civ. P. 12(b)(1) on the basis that the relator's claims were based on a public disclosure. The government filed a Statement of Interest in opposition to the motion. The United States District Court for the Eastern District of Virginia granted the motion. The court determined that the relator's allegations had been previously disclosed in news reports, congressional hearings, administrative reports, and prior civil cases against other similar defendants. While most of these sources did not name the present defendants specifically, the court held that the relator's theory of liability was susceptible to generic repetition by unqualified relators. The court also noted that two newspaper articles detailing potential fraud in college recruiting did name the defendants specifically. Hence, the court held that public disclosures under the False Claims Act did occur, since the publicly disclosed information was sufficient to put the government on notice of the likelihood of fraud. The court then held that the relator did not qualify as an original source for whom the public disclosure bar would not apply. The court based this holding on the lack of knowledge regarding the factual allegations made in the complaint exhibited by the relator in her deposition, coupled with the relator's counsel's involvement in two other similar cases. Accordingly, the court dismissed the case.

U.S. ex rel. Compton v. Circle B Enter., Inc., 2010 WL 942293 (M.D. Ga. Mar. 11, 2010)

A relator brought a *qui tam* action against his former employer, a manufacturer of prefabricated modular housing, and other corporations and individuals. The relator alleged that the defendants presented false claims under a government contract for providing mobile homes to Hurricane Katrina victims and that he defendants conspired to violate the False Claims Act. Specifically, the relator alleged that the defendant manufacturer subcontracted with other defendants in violation of Federal Acquisition Regulation (FAR) 52.203-6. Additionally, the relator alleged that the defendants violated the Anti-Kickback Act by entering into illegal oral agreements, under which the subcontractors agreed not to sell mobile homes to the government directly, in exchange for payments from the defendant manufacturer. The government declined to intervene. The defendants separately moved to dismiss the complaint for lack of subject matter jurisdiction based on FCA's public disclosure bar, as well as on the grounds that the complaint failed to state a claim and failed to plead fraud with particularity.

The United States District Court for the Middle District of Georgia granted the defendants' motions to dismiss. The court held that the FCA's public disclosure bar did not apply to the relator's claims, since the sources containing the purported publicly disclosed information failed to describe how the defendants entered into illegal oral agreements or made payments under those agreements. However, the court held that the relator failed to sufficiently allege that the defendants submitted a false claim to the government. Moreover, the court held that the relator failed to plead fraud with particularity because the relator failed to allege the sufficient details of the alleged fraudulent scheme. The court found that the relator's complaint did not fail as a matter of law, since it was based on a violation of the Anti-Kickback Act and such a violation could constitute a false claim under the FCA. The court granted the relator leave to file an amended complaint.

FCA Public Disclosure Bar

The defendants contended that the relator's allegations had been publicly disclosed through news reports, a letter to the government, and the contract itself. The court, though, observed that these sources either merely disclosed that the defendant manufacturer lacked a license to manufacture mobile homes and used the defendant subcontractors to fulfill its obligations or failed to allege that the defendants engaged in any wrongdoing. Therefore, the court found that the sources did not publicly disclose the relator's allegation that the defendants entered into illegal oral agreements or made improper payments under those agreements. Accordingly, the court held that the public disclosure bar did not apply.

Failure To State A Claim

The court found that the relator proceeded under an implied false certification theory of liability, but failed to plead that the government conditioned its payment on compliance with either the applicable FAR regulations of the Anti-Kickback Act. Rather, the court found that the relator only alleged a statutory violation and breach of contract, but failed to sufficiently allege that a false claim was submitted to the government. The court thus granted the defendants' motions to dismiss on this issue.

Particularity Requirement

The court also found that the relator failed to meet the heightened pleading requirement, as it found that the relator failed to identify who committed the alleged fraud and the time when the fraudulent scheme allegedly occurred. Furthermore, the relator failed to allege facts constituting the underlying fraud scheme that gave rise to the false claims and how he knew of the fraudulent scheme. Accordingly, the court held that the relator failed to plead fraud with particularity and granted the defendants' motions to dismiss for this reason as well.

Leave to File Amended Complaint

The court granted the relator leave to file an amended complaint to the extent that the complaint would be based on a violation of the Anti-Kickback statute. The court found the alleged payments that the defendant manufacturer made to the subcontractors constituted kickbacks because they were made for the purpose of obtaining favorable treatment in connection with the government contract. It then noted that the defendant subcontractors could have sold mobile homes directly to the government at a lower contract price than the government paid to the defendant manufacturer. The court found that if the relator alleged such facts, then the payments to the subcontractors constituted commercial bribery in connection with a government contract, and therefore fell within the definition of a "kickback." The court concluded that the relator's complaint did not fail as a matter of law to the extent that it was based on a violation of the Anti-Kickback statute. Accordingly, the court permitted the relator to file an amended complaint.

U.S. ex rel. Feldstein v. Organon, Inc., 2010 WL 358078 (3rd Cir. Feb. 2, 2010) (unpublished)

A relator brought a *qui tam* action against a drug manufacturer and its affiliates, alleging that the defendants knowingly withheld information regarding side effects when seeking FDA approval for the drug Raplon and caused the submission of false claims for reimbursement to Medicare and Medicaid regarding the drug. The government declined to intervene. The defendants moved to dismiss for lack of subject

matter jurisdiction and failure to plead fraud with particularity. The United States District Court for the District of New Jersey granted the defendants' motion, finding that the relator's claims were not pled with particularity and that the FCA's public disclosure bar applied, since the relator's allegations had been previously publicly disclosed in various personal injury lawsuits filed against the manufacturer. The relator appealed the district court's decision to the Third Circuit.

The circuit court affirmed the district court's decision. Notwithstanding the fact that the relator had alleged that the defendants caused the presentment of false Medicare and Medicaid claims, while the personal injury lawsuits had alleged that the drug manufacturer concealed harmful side effects from doctors and the consuming public, thereby causing personal injuries, the Third Circuit still found that the relator's allegations were "based upon" (*i.e.* "substantially similar to") the publicly disclosed information. Finally, the court held that the relator was not an original source of his allegations, since the relator—a former employee of the drug manufacturer—never worked on projects involving Raplon and could not demonstrate that he had direct and independent knowledge (which the court also termed "immediate, first-hand knowledge") of the information on which his allegations were based. The court found that the relator only became aware of that information from his communications with others who, presumably, did have direct and independent knowledge. Consequently, the Third Circuit affirmed the district court's decision and dismissed the relator's complaint. Since the circuit court held that the public disclosure bar applied, it did not reach the district court's holding on the particularity requirement.

In re Pharmaceutical Industry Average Wholesale Price Litigation, 2010 WL 419384 (D. Mass. Feb. 1, 2010)

A relator brought a *qui tam* action against three pharmaceutical companies, alleging that the defendants fraudulently caused the government to overpay for certain drugs under Medicare and Medicaid. The government intervened in the action. The defendants separately moved to dismiss the case, contending that the relator was barred under the FCA's public disclosure rule. The United States District Court for the District of Massachusetts denied the defendants' motions. The court focused its holding on the fact that even if there had been a prior public disclosure of information on which the relator's allegations were based, the relator qualified as an original source of those allegations, and thus was not barred from bringing the *qui tam* action. The court specifically found that the relator possessed direct and independent knowledge of the defendants' true prices for the relevant drugs in the marketplace. In addition, the court noted that the information at issue had not been publicly disclosed, as it was available only to participants in the pharmaceutical industry through GPOs that negotiated prices with the defendants and then transmitted them to their members, including the relator. Furthermore, the defendants' alleged scheme was based upon creating inducements for pharmacies (like the relator) to buy their products based on the difference between these negotiated prices and the prices that the defendants reported to the government. The court noted that the relator learned of the defendants' true prices in the manner that the defendants intended. Moreover, the relator had knowledge of the marketplace and the methods by which price and spread information was communicated by manufacturers to Medicare and Medicaid providers. Therefore, the court found that the relator qualified as an original source and on that basis, the court denied the defendants' motions to dismiss.

U.S. ex rel. Cox v. Gen. Dynamics Armament and Technical Products, Inc., 2010 WL 99048 (D. Neb. Jan. 6, 2010)

A relator brought a *qui tam* action against an ammunition manufacturer, alleging that the defendant billed the government for services not rendered and made false certifications. The relator also alleged that the defendant violated the RICO Act and state and federal whistleblower statutes including the FCA's retaliation provision. The government declined to intervene as to the FCA claims and the relator withdrew the other claims. The defendant moved to dismiss the FCA claims, contending that, due to the FCA's public disclosure bar, the court lacked subject matter jurisdiction over the relator's complaint. The defendant also contended that the relator failed to plead fraud with particularity. The United States District Court for the District of Nebraska held that that the relator's complaint was not foreclosed by the public disclosure bar, as the relator qualified for the bar's "original source" exception. The defendant had argued that the relator's allegations had been previously publicly disclosed in a prior action the relator filed against the defendant and some of its affiliates—an action that was dismissed without prejudice when the current action was filed. The court determined that the relator's allegations had been publicly disclosed, and turned its attention to whether the relator qualified for the FCA's "original source" exception to the public disclosure bar, which allows relators to file *qui tam* actions that are based on publicly disclosed information, as long as the relator has direct and independent knowledge of the allegations and voluntarily provided that information to the government prior to filing a *qui tam* complaint.

The defendant argued that the relator learned of the alleged FCA violations during the course of his employment as a quality assurance specialist with a government agency and that since the relator's duties included ensuring the quality of goods that the defendant produced, he could not have "voluntarily" alerted the government to the defendant's alleged fraud, since his job required him to do so. The court, however, could not determine whether or not any part of the relator's job duties required him to search for and report false claims to the government. Thus, since the relator possessed direct and independent knowledge of the infor-

mation on which he based his allegations and demonstrated that he voluntarily provided the information to the government prior to the filing of his action, the court concluded that the relator qualified as an original source of the information on which his allegations were based, and denied the defendant's motion to dismiss for lack of subject matter jurisdiction.

However, the court summarily determined that the relator failed to plead fraud with particularity and directed the relator to file amended complaint.

FALSE CLAIMS ACT RETALIATION CLAIMS

U.S. ex rel. Howard v. Urban Inv. Trust, Inc., 2010 WL 832294 (N.D. Ill. Mar. 8, 2010) (unpublished)

A relator brought a *qui tam* action against her former employer (a real estate investment trust fund company), its successor, a professional employer organization, and three individuals. The relator alleged retaliation and constructive discharge under the FCA and intentional infliction of emotional distress. Specifically, the relator alleged that the defendant employer engaged in embezzlement of government funds. The employer and professional employer organization (which provided payroll, benefits and human resources services for the employer and its employees) agreed that they were essentially the relator's co-employers. The relator alleged that she reported the alleged embezzlement to both co-employers, but nothing was ever done to resolve the problems. She further alleged that she was being harassed on the job, that another employee was hired to take over many of her job duties and that she eventually decided to leave her employment, which she alleged amounted to a constructive discharge. The professional employer organization moved for summary judgment.

The United States District Court for the Northern District of Illinois granted in part and denied in part the summary judgment motions. The court found that the relator provided sufficient evidence to show that she engaged in protected activity, that the professional employer organization was aware of her engagement in protected activity, and that, being motivated by her engagement in protected conduct, the defendant failed to investigate and stop the harassment she alleged she suffered. These factors were sufficient, the court held, for a reasonable jury to conclude that the relator pled a valid FCA retaliation claim. Thus, the court denied the professional employer organization defendant's motion for summary judgment on the relator's FCA retaliation claim.

West v. Timex Corp., 2010 WL 227662 (2nd Cir. Jan. 21, 2010) (Unpublished)

A relator brought a *qui tam* action against his former employer, a watch manufacturer, alleging false billing and retaliatory discharge under the FCA and Connecticut state law. Specifically, the relator alleged that the defendant falsely billed the government under a contract with the Air Force Exchange Service (AAFES). The contract allegedly contained a "most favored customer" (MFC) clause that required the defendant to provide AAFES a net price for its products that was equal to or better than any price offered to its other customers. The relator alleged that the defendant breached the MFC clause when it offered another customer a net price better than what it offered to AAFES. The United States District Court for the District of Connecticut granted judgment as a matter of law in the defendant's favor with respect to the relator's FCA claims and retaliatory discharge under the Connecticut state law.

On appeal, the Second Circuit held that the relator's FCA claim for false billing could not be maintained because the relator relied on a draft contract containing the MFC clause, but failed to demonstrate that the defendant and AAFES actually entered into a contract containing the MFC clause. Likewise, the circuit court found that the relator failed to demonstrate that the defendant terminated his employment because of his complaints about pricing offered to the other customer. The court noted that although the relator's employment was terminated within a week of his final complaint, he had made similar complaints for a year. Furthermore, the defendant offered evidence showing that the relator's employment was terminated as a result of general restructuring. Therefore, the Second Circuit found that the evidence did not lead to an inference that the defendant terminated the relator in retaliation. Thus, the circuit court affirmed the district court's decision.

U.S. ex rel. Howard v. Urban Inv. Trust, Inc., 2010 WL 148643 (N.D. Ill. Jan. 14, 2010)

A relator brought an action against her former employer, its affiliates and several individuals, alleging embezzlement of HUD government funds, submission of false claims and retaliatory discharge under the FCA. One of the individual defendants moved to dismiss the relator's retaliatory discharge claim, on the grounds that the relator's corporate-veil allegations were invalid, because she (the individual defendant) was not the relator's employer during the time of the relator's discharge, and because the court had previously concluded that the defendants did not employ the relator. Another individual defendant also joined the motion. The United States District Court for the District of Illinois found that the relator sufficiently stated the veil-piercing allegations as to both of these defendants. The court also found that the relator sufficiently stated the retaliatory discharge claim with respect to the first individual defendant, since this individual defendant was clearly affiliated with the defendant employer during the time the relator alleged that instances of harassment and discrimination occurred. Therefore, the court held that even though this individual defendant may have severed her relationship with the defendant employer, she could still be liable under the FCA for retaliatory discharge. The court also found that the relator sufficiently alleged that all of the defendants employed the relator at all relevant times. The court clarified that its earlier ruling on that issue resulted from the relator's allegation that she was hired by the defendant company's parent corporation and that her labor was then

leased to the defendant company. However, the court stated, the relator amended her complaint and explained that the parent company and the defendant company (and the individual defendants) were co-employers, and as such, were all subject to liability for retaliatory discharge under the FCA. Thus, the court denied the defendants' motion to dismiss.

See *Johnson v. The Univ. of Rochester Med. Ctr.*, 2010 WL 598655 (W.D.N.Y. Feb. 18, 2010), at p. 30.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Not Knowingly False

U.S. ex rel. Putnam v. E. Idaho Reg'l Med. Ctr., 2009 WL 3806337 (D. Idaho Mar. 10, 2010)

A relator brought a *qui tam* action against a medical center, hospital, several clinics, a speech language pathology service provider, its owner, and other individuals, alleging that the defendants fraudulently billed Medicare. Specifically, the relator alleged that the hospital received invoices for speech language services and sought reimbursement from Medicaid for those invoices. However, the claims for reimbursement were allegedly false, because the invoices on which those claims were based failed to distinguish between speech language services performed by licensed speech language pathologists (which were covered by Medicaid) from services performed by unlicensed aides or assistants (which were not covered). The government intervened and moved for summary judgment, but the defendant hospital was not a party to that motion. The non-hospital defendants also cross-moved for partial summary judgment. The United States District Court for the District of Idaho denied the motions. The court held that the government proved the lack of a genuine issue of material fact with respect to the elements of falsity, presentment, and materiality, but the court determined that a genuine issue existed regarding the whether the non-hospital defendants acted knowingly or recklessly, since the billing at issue was only submitted by the defendant hospital. The court concluded that a jury could reasonably find that the non-hospital defendants may not have understood the complicated Medicaid reimbursement regulations and may not have been aware that the claims the hospital submitted to Medicaid included services that aides or assistants rendered, which were not reimbursable.

In addition, the court, refusing to retroactively apply the amended False Claims Act's liability provisions that were enacted as part of the Fraud Enforcement and Recovery Act of 2009, held that in order to be liable for causing the hospital to submit false claims to Medicaid, the relator would have to show that the non-hospital defendants intended for the government to pay false claims. The court observed that the agreement the non-hospitals defendants entered into with the hospital did not contemplate that the non-hospital defendants' payments from the hospital would be dependent on the hospital's receipt of Medicaid reimbursements. Thus, the court concluded, the link between the non-hospital defendants' invoices to the hospital and Medicaid's decision to reimburse the hospital for those invoices was too attenuated to establish liability. Essentially, the court found that while it was clear that the non-hospital defendants intended for the hospital to rely on the statements in their invoices, there was no evidence that they intended for the government to ever receive those statements.

Consequently, the court denied the government's motion for summary judgment. The defendants' motion was denied as moot.

Landau v. Lucasti, 2010 WL 93282 (D.N.J. Jan. 6, 2010)

A relator brought a *qui tam* action against a doctor, a clinic and a telecommunications provider, alleging that the defendants submitted false claims for reimbursement from Medicare. The government declined to intervene. The relator moved for partial summary judgment as to the question of FCA liability against the doctor and the clinic, stating that no genuine issue of disputed facts existed regarding the allegations that the doctor and the clinic knowingly presented false Medicare claims and sought payment from Medicare for the doctor's infusion therapy treatment, when the doctor was actually not present during the infusions. The defendants also moved for summary judgment, contending that the relator failed to present sufficient evidence to show that the claims at issue were actually false and that the relator failed to offer sufficient evidence of the doctor's knowledge of any falsity.

The United States District Court for the District of New Jersey noted that the relator's complaint alleged fraud between the years 2000 and 2006. The court observed that the applicable Medicare regulations were clarified and expanded upon on January 1, 2002. Consequently, the court held that the relator's claims pertaining to the defendants' billing practices prior to January 1, 2002 could not survive the defendants' motion to dismiss, but the claims pertaining to billing after January 1, 2002 could be maintained.

The court reasoned that prior to 2002, the applicable regulations were ambiguous with regard to whether or not Medicare would reimburse for infusion therapy treatments that were conducted outside the presence of a physician. However, those regulations were made clear in 2002, and unambiguously required the doctor to directly supervise the infusion treatment by remaining in the office suite during such treatments; any Medicare claims for infusion therapy treatment during which the doctor was not present were false for FCA purposes. The defendants had argued that the relator failed to show that the defendant doctor knowingly submitted false claims. They contended that they billed for infusion treatments as a service "incident to" the defendant doctor's treatment, which was permitted by the regulations. The court determined, however, that the defendants' claims at issue did not bill Medicare for the infusion services "incident to" the services of the defendant clinic's nurses, but instead, found that the vast majority of those claims identified the defendant doctor as the provider and used the billing code for physician services. The court also noted that the relator offered evidence that she and a colleague warned the defendant doctor that his billing practices might violate the Medicare regulations and provided the defendants with documentation in support of their concerns. Therefore, the court held that a reasonable jury could find the defendant doctor acted in reckless disregard of the truth by failing to consider the relevant governing regulations. As a result, the court denied the defendants' summary judgment motion with respect to Medicare claims submitted after January 1, 2002.

The court, though, accepted the defendants' argument that the relator's complaint failed to show that the defendants knowingly submitted false Medicare claims prior to January 1, 2002. Since neither the pre-2002 regulations nor the pre-2002 prevailing industry practice made clear that the doctor's presence was required for the infusion therapy treatment to be reimbursable under Medicare, the court held that, at best, the defendants' pre-2002 billing practices were, at worst, negligent, but did not amount to a knowing violation of the FCA. Thus, the court dismissed the relator's complaint to the extent that it alleged false claims for infusion therapy services rendered before the year 2002.

The court also denied the relator's motion for partial summary judgment as to FCA liability. The relator had argued that summary judgment was appropriate, contending that there was no dispute regarding the facts that the defendants presented Medicare claims for payment, that some of those claims were false, and that the defendants knowingly submitted those false claims. The court, though, disagreed, and held that summary judgment with respect to the defendants' scienter was not proper, as the defendants presented expert testimony that the industry-wide practice allowed for doctors to not always be present during the infusion therapy services, as long as they were immediately available. The court held that "[a] jury could find that a reasonable and prudent doctor would be satisfied by the experts in his own field and was merely negligent." The court ultimately determined that although there was evidence suggesting that the doctor acted recklessly (which would subject the defendants to FCA liability), there was also evidence suggesting that the doctor acted negligently (which would not subject the defendants to FCA liability). As a result, the court ruled that summary judgment with respect to the defendants' liability was not appropriate and the relator's partial motion for summary judgment with respect to the defendants' liability was denied.

The court, did, however, grant the relator's partial motion for summary judgment with respect to the meaning and applicability of the applicable Medicare regulations. The court held that, notwithstanding industry-wide practices regarding the standard of care owed to patients receiving infusion therapy services, the Medicare regulations unambiguously require the presence and availability of the physician if those services are going to be reimbursed by Medicare at the physician services

rate; if the physician is not present and available, then Medicare reimbursement can only be sought at a reduced rate. Therefore, the court granted the relator's partial motion for summary judgment regarding the meaning and interpretation of the Medicare regulations and held that the defendants' post-2002 claims submitted for infusion therapy incident to a physician's services where no physician was present in the office suite during administration of the infusion were false.

B. Statute of Limitations

U.S. ex rel. Davis v. Dist. of Columbia, 2010 WL 547507 (D.D.C. Feb. 18, 2010)

A relator brought a *qui tam* action against the District of Columbia, alleging that the defendant submitted false claims to the federal government for Medicaid reimbursements. Shortly before the close of discovery the relator moved to amend his complaint, proposing to change the time period of the alleged fraud—his original complaint alleged that false claims were submitted in 2002, but following deposition testimony, that allegation was changed to January 2000. In response, the defendant argued that the amended complaint would alter the scope and nature of the case and that the new allegations were barred by the FCA's six-year statute of limitations, as the relator's original complaint was filed in April 2006. The United States District Court for the District of Columbia held that the proposed amended complaint did not alter the scope and nature of the case. The court noted that the "January 2000 date in the proposed amended complaint . . . concerns the submission of an alleged false claim to the District of Columbia government. The proposed amended complaint offers no information about when, or even whether, this claim was submitted <u>to the federal government.</u> Thus, the Court is unable to determine at this time whether [the] proposed amended complaint can survive the False Claims Act's statute of limitations" (emphasis added). The defendants also argued that the proposed amended complaint did not properly plead an FCA violation. However, the court observed that the original complaint and the amended complaint were nearly identical, but for the date change. Since the defendant had already conceded that the original complaint properly alleged that the defendant's Medicaid program submitted false claims to the government, the court held that defendant could not now assert that the proposed amended complaint failed to do so. Accordingly, the court granted the relator's motion to amend.

C. Relator Released Defendant from FCA Claims

U.S. v. Purdue Pharma L.P., 2010 WL 1068229 (4th Cir. Mar. 24, 2010)

A relator brought a *qui tam* action against his former employer—a pharmaceutical company—and its affiliate, alleging that the defendants defrauded the government by fraudulently marketing one of their pain-relief drugs. Specifically, the relator alleged that the defendants, through sales agents and marketing materials, falsely claimed to physicians that their new drug was more potent and less expensive than its predecessor drug. The relator was skeptical of these claims and believed that the defendants were defrauding physicians, and ultimately, the government, through false marketing. The relator filed a *qui tam* action against the defendants in the U.S. District Court for the Western District of Virginia, alleging violations of the False Claims Act based on the defendants' alleged illegal marketing scheme. However, one month before filing his complaint, the relator accepted a severance package from his employer and agreed to release the defendants from any and all past, present or future claims he could bring as of the date of the agreement. In addition, he agreed to waive any right to accept any relief or reward resulting from an action against the defendants. Although the relator never discussed his fraud allegations with the government prior to filing his *qui tam* complaint, the government had already begun an independent investigation into the defendants' marketing practices, including their marketing of the pain-relief drug at issue in the relator's complaint. Although the government eventually elected not to intervene in the relator's suit, its investigation continued after the *qui tam* suit was filed.

Once the *qui tam* suit was unsealed and served on the defendants, they moved to dismiss the complaint on the grounds that the release that the relator signed before resigning from employment barred the relator's action, that the public disclosure bar applied, and that the relator failed to plead fraud with particularity. The district court dismissed the case and denied the relator leave to amend his complaint. Applying Ninth Circuit precedent, the district court held that since the government's investigation of the defendants' marketing scheme was not yet complete when the *qui tam* action was filed, the release the relator executed did not bar his action, since enforcing the release agreement would prevent the relator from supplementing the government's investigation and prosecuting the he fraud alleged. However, the court still dismissed the relator's complaint, as it concluded that the relator failed to plead fraud with particularity. The relator appealed the district court's decision to the Fourth Circuit, and the defendants also filed a cross-appeal, asserting that the district court erred in refusing to enforce the release agreement.

The Fourth Circuit found that the district court erred in its decision not to enforce the release, but nonetheless affirmed the dismissal of the relator's complaint with prejudice, determining that it would be wasteful to send the case back to the district court, only for that court to reinstate a decision it had already made, but on other grounds. The Fourth Circuit considered arguments from the defendants, the relator, and the government (which filed an *amicus curiae* brief). The defendants argued that pre-filing releases are presumptively enforceable and should be treated no differently than voluntary waivers and releases in other contexts. The relator, though, argued that enforcing the release would undermine the purposes of the False Claims Act. He also argued that he in fact had no claim to release on the date the release agreement was signed, since all *qui tam* claims belong to the government, not to relators, and since his rights as a partial assignee of the government's claim only arose after the *qui tam* suit was filed, which occurred a month after the release was executed. Moreover, he argued that, pursuant to the FCA, he could not release or otherwise settle the *qui tam* claim without the express consent of the U.S. Attorney General. The government argued in its *amicus* brief that, as a general matter, pre-filing releases should not be enforced, since doing so would likely deprive the government of useful information from relators that would it would not otherwise receive. However, in this case, the government took the position that the release agreement should be enforced, since the government already had independent knowledge of the relator's fraud allegations prior to the filing of the *qui tam* complaint.

The circuit court rejected the relator's argument that the release required the Attorney General's consent, noting that the FCA only requires the AG's consent when a relator seeks to unilaterally settle FCA claims after a suit has been filed. Similarly, the court rejected the relator's argument that the release could not preclude his *qui tam* suit because he had no claim to release until after he filed his complaint. The court concluded that as soon as the relator became aware of the defendant's alleged fraud against the government, he had an interest in, and a right to file, the *qui tam* case, and by signing the release agreement, he voluntarily relinquished that right.

Finally, the Fourth Circuit was left to consider the public policy arguments for and against enforcing the release agreement. The court, relying on both Ninth and Tenth Circuit precedent, agreed with the government's position and held that, since "the government was aware, prior to the filing of the *qui tam* action, of the fraudulent conduct represented by the relator's allegations, the public interest has been served and the Release should be enforced." The circuit court determined that the government need not have completed its investigation before the filing of the *qui tam* suit for such releases to be enforceable; rather, the court agreed with the government, which stated in its *amicus* brief that "the proper focus of the inquiry is whether the allegations of fraud were sufficiently disclosed to the government, not whether the government's investigation was complete." Consequently, the Fourth Circuit held that that the district court erred by refusing to enforce the release agreement. Consequently, the Fourth Circuit held that the district court erred by refusing to enforce the release the relator signed.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. v. Chubb Institute, 2010 WL 1076228 (D.N.J. Mar. 22, 2010)

Relators brought a *qui tam* action against their former employer, a technical career training institute, alleging that the defendant made false representations to the Department of Education, and its accrediting agencies, which allowed the defendant to improperly secure student financial aid in the form of loans and grants from the federal government. The relators also alleged that the defendant falsely certified compliance with the governing regulations and conspired to defraud the government. The defendant moved to dismiss, arguing that the relators failed to plead fraud with particularity and failed to state a claim.

The United States District Court for the District of New Jersey granted the defendant's motions to dismiss. The court found that the relators' allegations failed to plead fraud with particularity under Rule 9(b) and failed to provide facts of false claims submitted for payment. The court found that the allegations only contained the "what" and failed to provide more specific "who, when, how, and why." The court found that even though the relators alleged five types of misrepresentation, they failed to allege facts identifying any particular false claim allegedly submitted to the government, or any facts showing that the defendant used a false statement to get a false claim paid. At most, the court observed, the relators identified documents supporting the allegations of false reports, but failed to provide a reasonable basis for concluding that the defendant submitted false claims. The relators also failed to allege the circumstantial facts indicating that the defendant knowingly violated the FCA or was aware that its submissions contained erroneous data. Therefore, the court concluded that the relators failed to provide a reasonable basis for inferring that the defendant had the requisite scienter with regard to providing false information to the government. These deficiencies led the court to conclude that the relators' allegations of fraudulent misconduct against the defendant lacked sufficient particularity to satisfy Rule 9(b) requirements. Consequently, the court granted the defendant's motion to dismiss, but dismissed the relators' complaint without prejudice and allowed them an opportunity to demonstrate why they should be granted leave to further amend their complaint.

U.S. ex rel. Wall v. Circle Const., LLC, 2010 WL 1170468 (M.D. Tenn. Mar. 15, 2010)

A relator originally brought a *qui tam* action against a construction company and its subcontractor, alleging that that the defendants knowingly submitted false payroll certifications under a government contract in violation of both the Davis-Bacon Act and the False Claims Act. The government intervened and, along with the relator, settled the claims against the subcontractor. The government then moved for summary judgment against the construction company. The defendant moved for judgment on record, contending that the Department of Labor (DOL) had primary jurisdiction under the Davis-Bacon Act. The defendant also moved to dismiss on the grounds that the complaint failed to meet Rule 9(b)'s particularity requirements. The United States District Court for the Middle District of Tennessee denied the defendant's motions as untimely. The court, though, granted the government's motion for summary judgment, finding that the government established the material facts for the defendant's FCA violations. It found that the defendant falsely certified compliance with the applicable regulations regarding wage and payroll certifications and that the government would not have paid the defendant had it known about the defendant's false certifications. Consequently, the court awarded treble damages to the government. However, the court declined to impose a civil penalty.

Sanches v. City of Crescent City, 2010 WL 934060 (N.D. Cal. Mar. 15, 2010)

A relator brought a *qui tam* action against her former employer, a city, as well as the city's housing authority and its officers, alleging that the defendants conspired to defraud the government and alleging a claim under the False Claims Act for retaliatory discharge. Specifically, the relator alleged that the defendants used money received from the HUD for unauthorized purposes. The defendants moved to dismiss, contending that the relator failed to state a claim and failure to plead fraud with particularity. The government declined to intervene, but did file a statement, taking issue with some of the arguments raised in the defendants' motion. The United States District Court for the Northern District of California, however, granted the defendants' motion to dismiss. The court found that the relator sufficiently stated a claim under the FCA, but failed to plead fraud with particularity. The court observed that the relator admitted in her opposition brief that she had failed to provide specific allegations as to who, when, where, and how of the alleged misconduct. Therefore, the court granted the relator leave to file an amended complaint that complies with Rule 9(b).

U.S. ex rel. Magee v. Lockheed Martin Corp., 2010 WL 972214 (S.D. Miss. Mar. 12, 2010); *U.S. ex rel. Magee v. Lockheed Martin Corp.*, 2010 WL 972215 (S.D. Miss. Mar. 12, 2010)

A relator brought a *qui tam* action against a global security and advanced technology company, a space operations company, a scientific and technology applications service provider, an IT and management service provider and its owner, and other individuals. The government intervened as to the relator's claims against all the defendants, except the defendant technology company and the defendant space operations company (technology defendants). The government then filed an amended complaint, and the relator filed a third amended complaint, against all the defendants. The non-technology defendants separately moved to dismiss both the relator's third amended complaint and the government's amended complaint. These defendants contended that the government failed to state a claim and failed to plead fraud with particularity. The United States District Court for the Southern District of Mississippi granted in part these defendants' motions to dismiss the relator's amended complaint and denied in part as to the government's amended complaint. The court found that because the government had intervened in the action, the government's amended complaint became the operative pleading to all the claims against all the non-technology defendants. Therefore, the court dismissed the relator's third amended complaint, to the extent that it was duplicative of the government's claims.

The court denied the no-technology defendants' motion to dismiss the government's complaint, finding that the government sufficiently alleged its claims and pled fraud with particularity. In a separate order, the court also denied the technology defendants' motion to dismiss the relator's complaint. The technology defendants argued that the relator did not identify any false statements made or false claims submitted by their employees—they argued that the relator failed to even identify any specific employees. The court, though, disagreed and found that the relator sufficiently alleged his claims against the technology defendants and satisfied the particularity requirements of 9(b).

U.S. ex rel. Westrick v. Second Chance Body Armor, Inc., 2010 WL 623466 (D.D.C. Feb. 23, 2010)

A relator brought a *qui tam* action against his former employer—a manufacturer of various body armor (Second Chance)—and related business affiliates and individuals, alleging FCA violations and other common law claims. One of the defendants (Toyobo) manufactured a synthetic fiber called Zylon, which Second Chance used as a component in bulletproof vests. Second Chance sold tens of thousands of vests containing Zylon to local, state and federal law enforcement agencies. Toyobo and Second Chance eventually determined that Zylon degraded

at a higher rate than expected—Second Chance had provided a five-year warranty on its Zylon vests—under certain light, heat and humidity conditions, resulting in less protection to users of Zylon-containing vests. Yet, Toyobo continued to sell Zylon to Second Chance and Second Chance continued to sell vests containing Zylon to government entities. Following two incidents in which police officers were shot while wearing Second Chance vests containing Zylon, Second Chance stopped selling those vests, and informed consumers of the degradation issues and offered to replace vests containing Zylon. Subsequently, the relator filed a *qui tam* action against Toyobo, Second Chance and the government intervened and filed an amended complaint, adding four of Second Chance's high-ranking executives as defendants. The resulting complaint alleged that the defendants violated the False Claims Act by presenting fraudulent claims and causing false claims to be presented, by making false statements in support of those claims, and by conspiring to defraud the government. The government asserted claims for common law fraud, and unjust enrichment as well. The government also asserted claims for payment by mistake and breach of contract against Second Chance only. Toyobo moved to dismiss the claims it faced, contending that the complaint failed to plead fraud with particularity, and failed to plead that Toyobo conspired with Second Chance to defraud the government or that Toyobo presented false claims to the government. The United States District Court for the District of Columbia denied Toyobo's motion to dismiss.

Presenting False Claims and the Falsity and Knowledge Requirements

The complaint alleged that Second Chance presented false claims, in the form of fraudulent invoices, to various local, state, and federal government agencies. Toyobo argued that the complaint did not allege that it presented any false claims to the government or ever provided a warranty regarding the performance of any of Second Chance's vests. However, the court observed that the government alleged a fraudulent scheme in which Toyobo was alleged to have participated and that the complaint adequately alleged that Toyobo engaged in a scheme with Second Chance to induced the presentment of allegedly false claims. Accordingly, the court held that FCA's presentment requirement had been pled with the required particularity. The complaint also alleged that Second Chance induced the government to pay false claims, by predicating each Zylon vest sale and each corresponding invoice submission upon a fraudulent five-year warranty despite the fact that the defendants knew that the vests lost strength when exposed to sunlight, high temperatures and humidity. The court found that the complaint pled the fraud scheme with sufficient particularity, especially since the complaint included details of time, place, and content of the alleged fraud and identified individuals allegedly involved in the fraud. The government also provided numerous dates of specific memos, faxes, meetings, and sales events during which the parties were alleged to have agreed to withhold or downplay the discoveries regarding Zylon degradation. Finally, the government clarified that it made payments for falselywarranted Zylon vests as a result of the fraud. Therefore, the court concluded that the government's fraud allegations satisfied the pleading requirements of Rule 9(b). Furthermore, the complaint asserted that even though Toyobo was aware of Zylon's deficiencies, it continued in its partnership with Second Chance and allowed Second Chance to continue to market vests containing Zylon. The court found that the complaint sufficiently alleged that Toyobo knowingly participated in a scheme in which Second Chance made fraudulent claims to the government. Therefore, the court concluded that the allegations regarding Toyobo's knowledge were sufficient pled.

Making False Statements and the Materiality Requirement

Alternatively, the complaint alleged that Toyobo knowingly misrepresented and concealed facts, thereby creating a false record that in part caused Second Chance to submit false claims to the government. The court observed that liability under this provision of the FCA attaches even if the defendant itself did not present the false statement to the government. However, the court noted that, pursuant to the False Claims Act amendments of 2009, in order to be liable for making a false record in support of a false claim, the false record must be material to the false claim that was alleged to be presented to the government. The court determined that this 2009 amendment applied retroactively to this case, as the retroactivity provision states that the amendment applied to all claims that were pending on or after June 7, 2008 and this case was indeed pending on that date. As a result, the court evaluated whether or not Toyobo's alleged false record was material to Second Chance's alleged false claims to the government. Applying the "natural tendency" test announced by Congress when the 2009 amendments were enacted, the court held that the complaint's allegations that "Toyobo knowingly misrepresented and concealed facts, creating a false record that in part caused Second Chance to submit a false claim to the government . . . more than satisfies the materiality requirement" and was sufficient to meet Rule 9(b)'s pleading standard.

Notably, the court's retroactive application of the 2009 FCA amendments is a departure from the court's earlier, months-old ruling in *U.S. v. Science Applications Int'l Corp.*, 653 F.Supp. 2d 87 (D.D.C. 2009). In *Science Applications*, the court also held that the retroactivity provision of the 2009 amendments only applied to "claims" that were pending on or after June 7, 2008, but the court refused to define claims to mean lawsuits (as it did in this case) and instead defined claims to mean requests or demands to the government for money or property—the definition of claim as used throughout the False Claims Act. Consequently, in *Science Applications* the court held that the retroactivity provisions of the 2009 amendments were not applicable, since there were no pending requests or demands to the government for money or property.

Conspiracy To Defraud

The complaint specifically alleged that Toyobo and Second Chance acted with intent to defraud consumers—including the government—when they originally rejected the idea of warning customers about Zylon's degradation problems, allowing Second Chance to continue selling Zylon-containing vests with five-year warrantys for nearly two more years. The court found that the complaint's detailed assertions regarding the meetings and communications between Toyobo and Second Chance were sufficient to state a conspiracy claim under the False Claims Act.

Consequently, Toyobo's motion to dismiss the causes of action it faced was denied.

U.S. ex rel. Sanchez v. Lymphatx, 2010 WL 547499 (11th Cir. Feb. 18, 2010)

A relator brought a *qui tam* action against her former employer—a medical care center—and its owners, alleging that the defendants knowingly submitted false bills to Medicare for lympedema treatments. The relator also brought a claim for retaliatory discharge, alleging that the defendants terminated her employment after she complained about their allegedly illegal billing practices. The government declined to intervene. The United States District Court for the Southern District of Florida dismissed the relator's complaint for failure to plead the alleged fraud with particularity and failure to state a claim for retaliation. On appeal, the Eleventh Circuit held that the relator's allegations lacked the requisite "indicia of reliability" under Rule 9(b) to support her allegations of wrongdoing. Specifically, circuit court found that the relator failed to plead details of the alleged fraud with respect to time, place, dates and the persons involved. Thus, the court affirmed the district court's decision regarding the fraud allegations. However, the circuit court reversed the district court's dismissal of the retaliation claim and held that since the retaliation claim did not depend on the fraud allegations, that claim was subject to Rule 8(a)'s notice pleading standard. The court stated that the relator's repeated complaints regarding the defendants' allegedly unlawful actions and her warnings that the defendants were incurring significant criminal and civil liability were sufficient to maintain her retaliation claim. Therefore, the court reversed the district court's decision on the retaliatory discharge claim and affirmed the district court's decision regarding the substantive fraud allegations.

Johnson v. The Univ. of Rochester Med. Ctr., 2010 WL 598655 (W.D.N.Y. Feb. 18, 2010)

Two relators brought a *qui tam* action against their former employer, a teaching hospital, and the university that owned and operated the hospital, alleging that the defendants submitted false Medicare and Medicaid claims to the government. Specifically, the relators alleged the defendants submitted false claims for anesthesiology services performed at the hospital, by allowing residents to perform certain procedures in the absence of a teaching or attending physician and by falsifying records to indicate otherwise. The relators also alleged retaliatory discharge.

The defendants moved to dismiss for failure to plead fraud with particularity and failure to state a claim. The United States District Court for the Western District of New York granted the defendants' motion to dismiss and denied the relators leave to amend their complaint. The court held that the relators failed to plead their fraud allegations with particularity; although the relators properly alleged a fraudulent scheme, they failed to plead that Medicaid or Medicare was ever billed for any of the procedures at issue or that any of the allegedly falsified records related to Medicaid or Medicare patients. Thus, they failed to plead an essential element to their fraud claim and that claim was dismissed.

The court also dismissed the relators' claim for retaliatory discharge, concluding that the relators failed to state a claim. While the court acknowledged the relators' allegations that they repeatedly made informal complaints regarding their concerns about the defendants' procedures, the court found that the relators failed to allege that their complaints were made in furtherance of an FCA action or were a part of an investigation into alleged fraud. The court also found that the relators failed to allege they had any knowledge that the procedures which lacked proper supervision were actually billed to Medicare or Medicaid and failed to allege that the defendants possessed knowledge that they were engaged in any protected activity. The court then denied the relators' motion to amend their complaint as frivolous and in bad faith.

U.S. ex rel. Chapman v. Office of Children and Family Servs. of State of New York, 2010 WL 610730 (N.D.N.Y. Feb. 16, 2010)

A relator brought a *qui tam* action against two state agencies and a state official, as well as a private university and several of its officials, alleging submission of false claims for reimbursement under Title IV-E of the Social Security Act. Specifically, the relator alleged that the university improperly sought reimbursement from the state agency that, in turn, received reimbursement from the Department of Health and Human Services. Moreover, the relator alleged that the state agencies allowed themselves to be overcharged by the university, as those charges were passed on to the federal government. The United States declined to intervene. After the government's notice of non-intervention, the relator was obligated to file an amended complaint removing the state agency as a defendant, since the state, its agencies and employees acting in their official capacity are not subject to liability in *qui tam* actions brought under the FCA—the federal government must sue such defendants itself. The relator sought to name the state actors as defendants, though, in the event that the United States decided to intervene in the suit at a later date. The United States District Court for the Northern District of New York disagreed, and dismissed the allegations against the state defendants, finding that such defendants are not "persons" subject to the *qui tam* provisions of the False Claims Act. The university defendants separately moved to dismiss the relator's claims against them, arguing that the *qui tam* complaint failed to meet Rule 9(b)'s heightened pleading standard. The court held that the relator only pled general allegations of fraud and failed to provide specifics with respect to time, place and the individuals involved. Furthermore, the relator pled facts that established that the university defendants received payments for claims submitted to the state agencies, but failed to allege that those claims were fraudulent. Therefore, the court concluded that the relator's amended complaint failed to satisfy Rule 9(b) and granted the university defendants' motion to dismiss.

Boone v. Mountainmade Found., 2010 WL 519759 (D.D.C. Feb. 15, 2010)

The plaintiffs brought an action against their former employer, a nonprofit organization, alleging retaliatory discharge under the FCA and wrongful termination under West Virginia common law. The plaintiffs also alleged that the defendant misused funds contained in the organization's bank accounts. Moreover, the plaintiffs sought a declaratory judgment that their actions constituted protected activity under the FCA. The United States District Court for the District of Columbia observed that employees are protected from retaliatory discharge while investigating viable FCA actions, but the defendant argued that the plaintiffs failed to state a claim for retaliatory discharge because they did not allege that the defendant submitted false claims to the government. However, the plaintiffs alleged that the defendant's grant applications contained false statements about fund spending.

The court, applying the heightened Rule 9(b) pleading standard, held that the plaintiffs failed to specify any content of the grant applications submitted to the government and failed to allege any false representations that the defendant made to the government regarding its use of the grant funding. Notably, the plaintiffs did not dispute that Rule 9(b) applied to their retaliation claims, even though claims for retaliation generally do not allege fraud or mistake. In addition, the court, relying on the Supreme Court's reasoning in *Allison Engine Co. v. United States ex rel. Sanders*, held that the plaintiffs failed to allege that the defendant's allegedly false representations to the government were made with the intention that they would result in the government paying a false claim. Even though the 2009 amendments to the FCA explicitly reject this intent requirement and are retroactive as if they were enacted two days before the Supreme Court's decision was published, the court held that those amendments were not applicable, since the retroactivity provision states that it applies to pending "claims." The court determined that "claims" in the context did not mean causes of action, but rather claims to the government for money or property. After adopting this view, the court held that none the "claims" at issue in the case were still pending, and thus, the retroactivity provision did not apply.

Consequently, the court held that the plaintiffs failed to plead that their activities could have reasonably led to the investigation of a viable FCA claim and that they could not show that they engaged in protected activity under the FCA. As a result, their claim for retaliatory discharge failed and the court granted the defendant's motion to dismiss that claim and dismissed the declaratory judgment action as well. Following the dismissal of the retaliation claim, the court was left with no federal cause of action, and declined to exercise supplemental jurisdiction over the plaintiffs' state law claim. The state law claim was dismissed as well. However, the court dismissed the plaintiffs' claims without prejudice.

U.S. ex rel. Armfield v. Gills, 2010 WL 309462 (M.D. Fla. Jan. 26, 2010)

Relators brought an action against an eye care center and a doctor, alleging that the defendants submitted false claims, fraudulently billed Medicare, and violated the Anti Kickback Statute. Specifically, the relators alleged that the defendants submitted a claim to Medicare for a cataract surgery that was performed on one of the relators, and that this claim was false, because the procedure was performed, not by the defendant doctor, but by the doctor's assistant. In addition, the relators alleged that the defendants improperly billed Medicare for the same relator's follow-up repositioning procedure—the relators alleged that the defendants billed Medicare for a procedure which required a new incision, even though the defendant doctor did not make a new incision. Moreover, the relators alleged that the defendants violated the Anti-Kickback statute by making referrals for a same day physical examination to a physician occupying space in the defendant eye care center's facility. The defendants moved to dismiss the relators' complaint for failure to plead fraud with particularity, arguing that the services performed by the defendant physician's assistant were properly billed under the doctor's provider number as those services were incident to the defendant doctor's procedures and treatments. The defendants also contended that the relators' allegations that the doctor was not present in the operating room when the physician assistant performed the services were insufficient, arguing that the doctor satisfied the "direct supervision" requirement because he was physically present in the ambulatory surgical center and was not required to be physically present ill the operating room. The relators also moved for leave to file a second amended complaint.

The United States District Court for the Middle District of Florida held that the relators' allegations regarding the defendants' alleged practice of submitting false Medicare claims failed to meet Rule 9(b)'s particularity requirement. Likewise, the court found that the relators' allegations that the defendants violated the Anti-Kickback Statute also failed to satisfy the Rule 9(b) requirement. The court stated that the relators' allegation of the defendants' "pattern and practice" of improperly billing Medicare could not satisfy Rule 9(b), since the relators only alleged a single patient's experiences. The court held: that "Plaintiffs' allegation of Defendants' 'practice and custom' of submitting false claims, without resort to a speculative presumptive drawn from Plaintiffs' single patient experience, does not satisfy Rule 9(b)." Finally, the court held that the relators' Anti-Kickback allegations were deficient and failed to state a claim, since the relators did not allege that the defendants received any remuneration from the physician who performed the physical examinations, which is an essential element of a claim under the Anti-Kickback Statute. Consequently, the court granted the defendants' motion to dismiss, but granted the relators' motion for leave to file a second amended complaint without prejudice.

U.S. ex rel. Parato v. Unadilla Health Care Ctr., Inc., 2010 WL 146877 (M.D. Ga. Jan. 11, 2010)

A relator brought a *qui tam* action against her former employer, a health care provider, and other individuals, alleging submission of false claims and retaliatory discharge under the FCA. Specifically, the relator alleged that the defendants falsely certified compliance with government regulations in order to receive funds under a federal grant program and from Medicare. The government declined to intervene. The defendants moved to dismiss the relator's FCA claims, contending that the relator failed to state a claim and failed to plead fraud with particularity. The defendants also moved for a more definite statement. One individual defendant separately moved to dismiss on similar grounds. The United States District Court for the Middle District of Georgia denied the defendants' motions to dismiss with respect to the allegations regarding the grant funds, but granted the motions with respect to the Medicare allegations.

The court found that the relator sufficiently stated a claim with respect to the grant funds, as the relator alleged that the defendants falsely certified compliance with the grant requirements, and that compliance with those requirements was an express condition for the receipt of grant funds. Next, the court found that the relator's grant claim met Rule 9(b)'s particularity requirement, as the relator specified the time the grant application was submitted, identified the signatory to the application, stated the certifications and assurances made in connection with the application, and pled the time the funds were received and the time when the defendant company applied for a continuation of the grant. Furthermore, the relator specifically alleged that the defendant company permitted two individual defendants to engage in actions that would constitute a conflict in interest, that the defendants improperly used the grant money, and that the defendants failed to establish a proper accounting system. Therefore, the court found that the relator properly pled the facts as to time, place, and substance of the alleged fraud relating to the grant claim.

The court, however, found that the relator failed to plead the alleged Medicare fraud with particularity. Even though the relator's allegations referred to a specified time period, the complaint failed to specify details concerning any particular false claim submitted to the government. In addition, the relator failed to provide the amounts of charges, any actual dates, or the particular goods and services for which the defendants allegedly improperly billed the government. The relator also failed to describe any billing policies, identify individuals involved in the billing or provide a copy of any bill or payment. The relator alleged that the individual defendant instructed the billing staff to change codes and bill under improper provider numbers, but she failed to allege that the staff actually followed those instructions and submitted fraudulent bills to the government.

Thus, the court held that the relator set forth allegations sufficient to satisfy Rule 12(b)(6) and Rule 9(b) with respect to her grant claim, but held that she failed to plead the alleged Medicare fraud with particularity. In addition, the court denied the defendants' motion for a more definite statement.

U.S. ex rel. Godfrey v. KBR, Inc., 2010 WL 55510 (4th Cir. Jan. 6, 2010) (unpublished)

A relator brought a *qui tam* action against her former employer, KBR, Inc. and Kellogg Brown & Root Services, Inc., alleging that the defendants were awarded a cost-plus-fee-award government contract to provide dining facilities and meal service at various sites in Iraq, that the defendants contracted with subcontractors to perform these duties, and that the defendants knowingly accepted inflated invoices from those subcontractors and passed those overcharges on to the federal government, thereby unjustly enriching themselves and resulting in violations of the False Claims Act. The relator—who was hired by the defendants to supervise their relationship with the subcontractors—alleged that the defendants: (1) submitted false claims to the federal government; (2) made false statements in support of those claims, by falsely certifying compliance with all terms of their government contract; and (3) conspired with the subcontractors to submit false claims to the government. The relator also alleged that he was entitled to share in any recovery the government might obtain from an alternate proceeding. The United States declined to intervene in the case and the defendants moved to dismiss the relator's complaint for failure to state a claim, arguing that the complaint did not satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). The district court agreed with the defendants and dismissed the relator's complaint. The relator then appealed the district court's ruling to the Fourth Circuit.

Relator's Claims that Defendants Presented False Claims and Made False Statements

The Fourth Circuit affirmed the district court's ruling, holding that the relator failed to allege facts regarding the terms of the subcontracts. Without alleging those facts, the court reasoned, the relator could not show that the defendants knowingly submitted false claims to the government. For instance, many of the relator's allegations were based on his assertion that the subcontracts specified that payment would be conditioned on the number of meals actually served and that the defendants' subcontractors inflated this number and overcharged the defendants, who then knowingly overcharged the federal government. The circuit court, however, determined that the relator failed to allege that payment under the subcontracts was conditioned on the number of meals served, noting that payment could have been conditioned on other factors (such as the cost of supplies), or that the subcontract could have provided for a minimum payment, regardless of the number of meals that were actually served. Since the relator did not allege the terms upon which payment was conditioned, the Fourth Circuit held that his complaint did not satisfy Rule 9(b)'s heightened pleading requirements. In addition, the appeals court rejected the relator's false certification theory of the defendants' liability, in which the relator alleged that the defendants—either expressly or impliedly—falsely certified to the government their compliance with the terms of the government contract, by disbursing to the subcontractors federal dollars that the defendants knew the subcontractors were not entitled to. The Fourth Circuit, though, held that the relator's false certification argument failed, "[b]ecause there are no allegations to support the underlying claim of improper billing." The court based this ruling on the fact that the relator failed to allege that the defendants' government contract made payment contingent upon compliance with particular terms of the contract, and that he failed to allege that the defendants in fact certified compliance with those purported contractual terms. The court held that any failure by the defendants to perform under the government contract would not, in and of itself (and without a false certification of compliance with the contractual terms), give rise to an FCA violation—such failures, the court held, simply amount to a breach of contract, since they do not involve "any objective falsehood." Consequently, the Fourth Circuit affirmed the dismissal of the relator's causes of action based on the defendants' alleged presentment of false claims to the government and alleged false statements in support of those claims.

Relator's Conspiracy Claim

The court then turned to the relator's conspiracy allegation, and held that the district court properly dismissed that cause of action as well. The appellate court stated: "The district court concluded that the complaint 'failed to provide sufficient facts giving rise to an inference of a meeting of the minds and agreement sufficient to support a claim for conspiracy.' We agree. Moreover, the complaint fails to plead sufficient facts to show that the conspirators intended to defraud the government." In support of that last statement, the Fourth Circuit cited the Supreme Court's decision in *Allison Engine Co. v. U.S. ex rel. Sanders*, wherein the Court stated that for liability to attach under the FCA's conspiracy provision "it must be shown that the conspirators had the purpose of 'getting' the false record or statement to bring about the Government's payment of a false or fraudulent claim." The Fourth Circuit, however, did not discuss the fact that the recent amendments to the False Claims Act, which seem to apply retroactively with respect to conspiracy claims related to making false statements in support of false claims, correct the Supreme Court's interpretation of the FCA's conspiracy provision, by removing the "getting" language relied upon by the Court. In fact, the Senate Report regarding the FCA amendments makes clear that this "getting" language was removed from the FCA's provisions regarding making false statements and conspiring to make false statements in order "to specifically address the intent requirement read into [these] section[s] by the Court in *Allison Engine*."

Relator's Alternate Remedy Argument

Finally, the Fourth Circuit rejected that the relator's argument that he was entitled to share in any alternate remedy the government recovered as a result of the defendants' alleged conduct. The court concluded that the relator's claim was premature, since the government never indicated that it was seeking an alternate remedy against the defendants. In addition, the court held that this claim could not be maintained against the defendants, since, if the government did pursue an alternate remedy, the relator's claim to share in any recovery would be a claim against the government, not against the defendants. Ultimately, however, the court held that "because [the relator's] FCA claims have failed, he has no right to participate in any recovery by the government." Consequently, the district court's dismissal of the relator's claims was affirmed.

See U.S. ex rel. Compton v. Circle B Enter., Inc., 2010 WL 942293 (M.D. Ga. Mar. 11, 2010), at p. 7.

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

U.S. v. Medquest Assocs., Inc., 2010 WL 1169773 (M.D. Tenn. Mar. 24, 2010)

A relator brought a *qui tam* action against an operator of an outpatient diagnostic center and several other diagnostic centers. The government intervened and alleged that the defendants unlawfully conducted diagnostic tests at independent testing facilities without the required direct supervision (as opposed to the "general" supervision required when the testing is performed at a hospital or in a physician's practice) of a physician, and that the defendants submitted false claims for diagnostic tests under another Medicare vendor's number. This latter allegation arose following a stock transfer that changed one of the defendants' centers from a physician's office to an independent diagnostic testing facility (IDTF). The government alleged that, for a period of several months following the stock transfer, the defendants continued billing Medicare under the physician's provider number, instead of changing the enrollment status of the physician's office and then properly billing Medicare as an IDTF.

The defendants moved to dismiss the government's complaint for failure to state a claim. The defendants argued that the United States relied on a Local Medical Review Policy (LMRP) to support its argument that direct physician supervision was required for the testing performed at their IDTFs and that since LMRPs do not have the force of law, any noncompliance cannot give rise to liability under the False Claims Act. The defendants also argued that the stock transfer did not constitute a "change of ownership" under the Medicare regulations, and that the transfer did not lead to any improper billing, since physician's offices and IDTFs are under the same fee schedule.

The United States District Court for the Middle District of Tennessee denied the defendants' motion, finding that the government stated a viable FCA claim under the applicable Medicare regulations, which, the court held, make direct supervision by a physician an essential condition of payment for the testing performed by the defendants' IDTFs. Moreover, the court held that the defendants were aware of this requirement, as the government submitted documentation showing that the defendants had previously refunded money to Medicare for failing to fulfill this requirement and that the defendants had included information about this issue in internal documents distributed to their managers.

In addition, the court found that the government stated an FCA claim when it alleged that the defendants improperly continued to use the physician's provider number even though the physician's office had been transformed into an IDTF. As a result, the court denied the defendants' motion to dismiss.

U.S. ex rel. Hutcheson v. Blackstone Med., Inc., 2010 WL 938361 (D. Mass. Mar. 12, 2010)

Relators brought a *qui tam* action against a manufacturer of medical devices, alleging that the defendant violated the False Claims Act by offering kickbacks to doctors in order to increase the use of its products in spinal surgeries, which in turn caused the submission of false claims by hospitals and doctors for payment under Medicare, Medicaid, and other government-funded healthcare programs. The government declined to intervene. The defendant moved to dismiss the complaint, contending that the relators failed to state a claim, failed to plead fraud with particularity, and were barred by the FCA's first-to-file and public disclosure bar. The defendant also moved to transfer the case to another jurisdiction where it was already defending against another *qui tam* action that had been filed prior to the filing of the present complaint.

The United States District Court for the District of Massachusetts denied the defendant's motion to dismiss on first-to-file grounds, finding that the relators' action was not related to the other, prior *qui tam* action, which only made a passing reference to the fraudulent scheme. The court then turned to the defendant's public disclosure argument. The defendant contended that the relators' allegations of a fraudulent kickback scheme had been publicly disclosed in a prior complaint. The court found that the first relator qualified for the original source exception to the public disclosure bar, since she was a regional manager with the defendant and during the course of her employment observed the defendant's business practices, and was a party to meetings, conversations, and other internal communications. However, the court found that the second relator's contribution to the complaint was comparatively weaker, since the second relator's interactions with the defendant only supported and confirmed the allegations in the complaint. The court concluded that the second relator was not an original source. Thus, the court rejected the defendant's public disclosure argument as it related to the first relator, but granted the motion to dismiss with respect to the second relator.

The court then determined that the relators' failed to state a claim under the FCA. The court acknowledged that the provider agreements that the hospitals signed before submitting claims to the government for reimbursement created an express certification of compliance with the Anti-Kickback Statute. However, the court held that these certifications were specific to the party seeking reimbursement and did not oblige the signatories to determine whether the entire transaction complied with the Anti-Kickback Statute. The court also noted that the provider agreements did not create a pre-condition to payment for purposes of the implied certification theory. Since the relators failed to allege that the hospitals themselves received kickbacks, or that they knew or should have known about the kickbacks that the doctors were alleged to have received, the court held that the certifications that the hospitals submitted were not false. The court found that doctors who

were alleged to have received kickbacks also signed provider agreements, certifying their compliance with the Anti-Kickback Statute, and that accepting kickbacks from the defendant would not have complied with that statute, and would have resulted in the submission of false claims. However, the court held that the relators failed to sufficiently allege that the doctors' false statements were material to the government's decision to pay. The court observed that the doctors were not alleged to have sought reimbursement for the use of the defendant's products, but rather for their physician services, and therefore, the purchase of the defendant's devices did not constitute an underlying transaction to the doctors' reimbursement requests. The defendant's motion to dismiss for failure to state a claim was granted.

Finally, the court denied the defendant's motion to transfer venue because of the disparity in caseload between the proposed and present jurisdictions.

U.S. ex rel. Cullins v. Astra, Inc., 2010 WL 625279 (S.D. Fla. Feb. 17, 2010)

The relator brought a *qui tam* action against her former employer, a mail-transporting service provider, alleging that the defendant defrauded the government through a contract with the United States Postal Service (USPS). The relator alleged that the USPS compensated the defendant by periodically submitting certifications to its accounting center that specified the amount the defendant was to be paid. Those certifications were also allegedly sent to the defendant, usually a week or two before the defendant was paid. The relator alleged that the certifications sometimes indicated the defendant would be underpaid for its services, which resulted in the defendant contacting USPS to ensure that the proper payment was received. However, the relator alleged, when the certifications indicated that the defendant would erroneously be overpaid for its services, the defendant would use those certifications to keep and conceal its obligation to repay the overpaid amounts to the USPS until USPS discovered the error and demanded the return of the overpayments. The relator alleged that this practice resulted in violations of the False Claims Act, including a violation of the statute's "reverse false claims" provision, since the contract specified that the defendant was only to be paid for services it actually provided and was obligated to return any overpayments. The government declined to intervene. The defendant moved to dismiss the relator's complaint for failure to state a claim. The United States District Court for the Southern District of Florida held that the relator's allegations failed to establish an FCA violation. The court observed that the relator failed to adequately allege the knowledge and falsity elements of an FCA claim. Also, the relator failed to establish a reverse false claim. Thus, the court granted the defendant's motion to dismiss, but granted the relator leave to amend her complaint.

Knowledge Element

The relator alleged that the defendant violated False Claims Act section 3729 (a)(1) (which is now codified at section (a)(1)(A)), by knowingly causing the USPS to submit false certifications, which resulted in excess payments that defendant retained. The parties agreed that the defendant itself did not present any false claims to the government. However, the relator argued that the defendant caused the USPS to present false claims to the government, thereby subjecting itself to FCA liability. The court disagreed. As an initial matter, the court rejected the relator's argument that the allegedly false certifications were actually "claims," as defined by the FCA, since those certifications were not a request or demand for money or property, but rather merely "appear only to communicate information regarding the payment of governmental contractors between two offices of the USPS." In addition, the court held that even if the certifications did meet the definition of "claim," the defendant did not cause those certifications to be presented to the government, since the USPS submitted the certifications to its accounting department before the defendant ever saw them or was able to act on them. Since the defendant's alleged use of the certifications to conceal overpayments it received did not occur until <u>after</u> the certifications were submitted to the accounting department, the court held that the defendant could not have caused the USPS to present false claims. Thus, the relator's claim under section (a)(1) was dismissed.

Falsity Element

The relator also alleged that the defendant violated FCA section 3729(a)(2) (now codified at section 3729(a)(1)(B)), by using false records and false statements—in the form of the allegedly false certifications—to receive overpayments from the USPS. The relator also alleged that the defendant knew that the certifications were false and that the USPS would rely on those certifications when paying the defendant. The court again disagreed with the relator and held that the relator failed to adequately allege how the defendant used the certifications for false claim payments. The court observed that the relator did not allege that the defendant itself made a false record or statement, but simply alleged that the defendant used those allegedly false records and statements contained in the certifications. The court dismissed the relator's (a)(2) claim, however, noting that the relator failed to allege how the defendant actually used the certifications to induce the government to make overpayments. The court noted that the defendant may have had advance knowledge that overpayments would be made, but that such advance knowledge was not enough to establish that the defendant "used" false statements or records. Therefore, the court held that the relator failed to adequately allege the falsity element of its (a)(2) claim and that claim was also dismissed.

Reverse False Claim

Finally, the relator alleged a violation of the reverse false claims provision—3729 § (a)(7) (now codified at 3729 (a)(1)(G))—arguing that contract at issue required the defendant to be paid only for the services it provided and to return any overpayments it received. The court dismissed this claim as well, observing that liability under the reverse false claim provision requires a showing that the defendant used a false statement or record to conceal, avoid or decrease its obligation to repay the overpayments to the government, and that the relator failed to establish this element. Consequently the relator's reverse false claim allegation was also dismissed.

U.S. ex rel. Pritsker v. Sodexho, Inc., 2010 WL 438437 (3rd Cir. Feb. 9, 2010) (unpublished)

A *pro se* relator brought a *qui tam* action against a leading food and facilities management provider and its affiliates, alleging that the defendants caused the submission of false claims in connection with two federal school food programs. Specifically, the relator alleged that the defendants retained rebates and credits from their suppliers in violation of regulations requiring that costs reimbursed in cost-reimbursable contracts be net of any rebates or credits ("rebate claims"). The relator also alleged that the defendants purchased food and supplies from higher-cost national distributors who offered to pay rebates and credits rather than from lower cost regional distributors ("procurement claims"). The United States District Court for the Eastern District of Pennsylvania dismissed the rebate claims, holding that the relator's allegations were based on publicly disclosed information and the relator did not qualify as an original source of the information on which the rebate allegations were based. The court also dismissed the procurement claims for failure to state a claim.

On appeal, the Third Circuit agreed with the district that the critical elements of the relator's rebate claims, including the alleged fraud, were publicly disclosed prior to filing of the relator's action, and therefore, the district court lacked jurisdiction over those claims. The appeals court then held the relator failed to state a claim with respect to the procurement claims because the relator did not identify any regulation requiring competitive bidding on the part of the defendants or any authority suggesting that the procurement regulations applied to the supply chain. Thus, the court affirmed the district court's decision.

U.S. ex rel. Resnick v. Weill Medical College of Cornell University, 2010 WL 476707 (S.D.N.Y. Jan. 21, 2010)

A relator brought a *qui tam* action against her former employer (a medical college) and one of its doctors, alleging that the defendants submitted false claims to obtain research funds from the government. Specifically, the relator alleged various "over-commitment" allegations, which stated that the defendants failed to disclose other grants and support she received, which allowed her to over-commit her pro-

fessional time for certain research grants from NIH. She also alleged that the defendants made misrepresentations to the government concerning which researchers were working on which grant projects and misapplied funds to research that was unrelated to the grant applications; falsified research data; "double-dipped" by submitted the same projects several times; and lied to obtain grant extensions. The government reached a tentative settlement with the college to resolve the overcommitment claims regarding 11 of the grants at issue, leaving claims regarding five additional grants unresolved. The government then intervened in the relator's suit, but only against the defendant college, for the purpose of executing the settlement and dismissing the settled claims. Over the relator's objection, the U.S. District Court for the Southern District of New York approved the settlement. The relator then filed an amended complaint against both defendants, alleging FCA violations with respect to the claims that were not included in the settlement.

The defendants moved to dismiss the relator's amended complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), failure to plead fraud with particularity under Rule 9(b), and under the doctrine of *res judicata*. The court granted the defendants' motion with respect to the relator's claims that were encompassed by the settlement, holding that those claims were barred by *res judicata,* since the post-settlement dismissal of those claims with prejudice was a final judgment, the judgment barred future claims by both the government and the relator (who was in privity with the government), and the relator's claims arose from the same nucleus of operative fact as the claims that were settled by the government. The court also noted that *res judicata* also barred those claims to the extent the relator asserted them against the defendant doctor, since the settlement expressly released the college's employee's from liability.

With respect to the remaining claims, the court granted the defendants' motion in part and denied it in part. The court dismissed the relator's claims with respect to her allegations that the defendants falsified data, finding that the relator failed to state a claim, since the alleged falsified research data was included in a grant application that was never funded by the government. The court held that since the government never actually paid a false claim with respect to the alleged falsified data, the relator could not maintain her action under section 3729 (a)(2) of the FCA. However, the court denied the defendants' motion to dismiss the remaining claims, which alleged misapplication of funds and staffing misrepresentations, holding that the relator's allegations were sufficient to describe the fraud scheme and to create a strong inference that the defendants' alleged misstatements misrepresentations were material to the government's decision to fund the remaining grants at issue.

LITIGATION DEVELOPMENTS

A. Appellate Issues

U.S. ex rel. Haight v. Catholic Healthcare West, 2010 WL 376093 (9th Cir. Feb. 04, 2010)

Relators Patricia Haight and In Defense of Animals brought a *qui tam* action against Catholic Healthcare West, one of its scientists, and a group of its corporate affiliates, alleging that the defendants violated the False Claims Act by falsifying information on a grant application to the National Institutes of Health. The United States did not intervene in the relators' suit. The U.S. District Court for the District of Arizona granted summary judgment in favor of the defendants, finding that the relators failed to produce evidence that the defendants' statements were objectively false. The relators filed a notice of appeal 51 days later. The Ninth Circuit stayed that appeal, pending the Supreme Court's decision in *U.S. ex rel., Eisenstein v. City of New York,* in which the Court would decide whether, for purposes of filing notices of appeal under Federal Rule of Appellate Procedure 4(a), parties to non-intervened *qui tam* actions have 60 days in which to file notices of appeal (as they would in any case in which the United States is a party) or whether such parties only have 30 days in which to file notices of appeal (as they would in cases in which the United States is not a party).

Last year, the Supreme Court decided *Eisenstein* and held that the United States is not a party to *qui tam* actions in which it declines to intervene. Consequently, FRAP Rule 4(a)(1)(B), which gives parties 60 days in which parties to file notices of appeal when the United States is a party, does not apply to non-intervened *qui tam* cases and parties in such cases only have 30 days (under FRAP 4(a)(1)(A)) to file notices of appeal. The Ninth Circuit recognized that the Supreme Court's decision directly conflicted with the Ninth Circuit's 1996 decision in *U.S. ex rel. Haycock v. Hughes Aircraft Co.,* in which the circuit court held that the United States is a party to all *qui tam* cases, even when it declines to intervene, and that parties in *qui tam* actions have 60 days in which to file a notice of appeal. Thus, at the time the relators filed their notice of appeal, it would have been timely under the circuit court's holding in *Haycock*. However, the Ninth Circuit was compelled to deny the relators' appeal once *Eisenstein* was decided, on the grounds that it lacked jurisdiction over the untimely notice of appeal. The circuit court stated that "[d]espite acknowledging that its decision would have 'harsh consequences' for some plaintiffs and 'unfairly punish those who relied on the holdings of courts adopting the 60-day limit in cases in which the United States was not a party,' the [Supreme] Court expressly refused to limit its decision to prospective application. Those harsh consequences are now concretely before us: Plaintiffs' appeal is untimely and must be dismissed."

The Ninth Circuit continued, "[i]t is a serious understatement to call this result 'inequitable,'" but, after considering a variety of arguments from the relators, the court determined that its only option was to dismiss the relators' appeal. The court found that while Federal Rule of Appellate Procedure 4(a)(5) permits district courts to extend the time for filing notices of appeal, that rule does not apply to courts or appeal. The court further held that even if FRAP 4(a)(5) granted appellate courts such authority or even if the case was remanded so that the district court could rule on the relator's motion, Rule 4(a)(5) only provides an extra 30 days to move for an extension of time in which to file the notice of appeal, but the relators' motion was filed almost 4 months too late; the court also noted that it had previously held that notices of appeal cannot be treated as motions for extensions of time, so the relators' notice of appeal, which was filed within the extra 30-day period, could not be treated as a timely motion for an extension of time. The Ninth Circuit also held that FRAP 26(b)—which provides the rules for extending time—could not assist the relators, since that rule specifically excludes extending the time to file notices of appeal under FRAP 4.

While the Ninth Circuit stated that it sympathized with the relators, it held that, "[b]ecause *Eisenstein* means that Plaintiffs' notice of appeal is *and always was,* untimely, we have always lacked jurisdiction to address the merits of their appeal." (emphasis in original) Thus, the relators' appeal was dismissed as untimely.

B. Applicability of False Claims Act Amendments of 2009

See U.S. ex rel. Putnam v. E. Idaho Reg'l Med. Ctr., 2009 WL 3806337 (D. Idaho Mar. 10, 2010), at p. 17.

C. Costs and Attorney's Fees

U.S. ex rel. Mackay v. Touchstone Research, 2010 WL 58267 (S.D. Ohio Jan. 5, 2010)

A relator sought attorneys' fees and expenses after settling a *qui tam* action against a Department of Defense contractor. Prior to the *qui tam* action, the defendant brought state claims against the relator for defamation, interference with contractual relations, and unfair competition in West Virginia, based on alleged conduct the relator engaged in while preparing his *qui tam* action. Eventually, the relator brought his *qui tam* action in the United States District Court for the Southern District of Ohio, alleging that the defendants presented false claims and made false statements in the performance of government contracts. The relator also alleged retaliatory discharge under the False Claims Act. While the relator's action was still under seal, the state court litigation continued. The government eventually elected to intervene in the relator's case and all parties then settled the fraud allegations. The relator then moved for attorneys' fees and expenses relating to the fraud allegations. The defendant objected to the fees sought by the relator, arguing that some of the fees sought arose out of the relator's retaliation claim and from the defendant's state court action. The district court referred the matter to a magistrate judge and later adopted the magistrate's report and recommendation after neither party objected. The court rejected the defendant's argument that the relator's invoices with respect to the retaliation claim were too vague to calculate the hours actually spent on the retaliation claim. Instead, the court determined that attorneys are not required to record all of their time in great detail, but need only to provide the general subject matter of each charge, the time expended, and the involved staff member. The court also rejected the defendant's argument that the relator's improperly motion included expenses related to the state court litigation. The court held that these expenses were appropriate, since it was necessary for the relator's counsel to be aware of that litigation.

D. Discovery Issues

U.S. ex rel. Bunk v. Birkhart Globistics GmbH & Co. Logistik Und Serv. KG, 2010 WL 1138434 (E.D. Va. Mar. 18, 2010)

Relators brought a *qui tam* action against a logistics company and other defendants. The government intervened in some, but not all, of the relators' FCA claims. The relators moved to compel discovery, as the defendants refused to respond to discovery requests regarding the relators' non-interened claims. The United States District Court for the Eastern District of Virginia granted the relators' motion to compel, finding that the defendant's grounds for refusing to respond to the relators' discovery request lacked foundation. The court observed that in FCA suits relators maintain the right to continue as a party with "unrestricted participation," even after the government intervenes in their suit. The court also found that the defendants failed to show that the relators' discovery requests were duplicative of the government's discovery requests. The court observed that the defendants failed to offer any case law in support of their argument that the relators' non-intervened allegations were somehow extinguished because the government elected not to pursue them. Finally, the court found no basis for invocation of the doctrine of *res judicata* because the elements were not present. Accordingly, the court required the defendants' to respond to the relators' discovery requests.

E. Government's Dismissal of *Qui Tam* Complaint

U.S. ex rel. Schweizer v. Oce, N.V., 2010 WL 367767 (D.D.C. Feb. 2, 2010)

The relator originally brought a *qui tam* action against her former employer, a print and document management service provider and its related entities, alleging that the defendants knowingly sold non-compliant products to the government, in violation of the Trade Agreements Act. The relator also alleged that the defendant breached its contract that guaranteed governmental purchasers an equal or lower price for the same products purchased by non-governmental buyers. The relator later filed an amended complaint and added another employee as a second relator. Initially, the government declined to intervene, but the government and the second relator eventually reached a settlement with the defendant employer. However, the first relator objected to the settlement. As the settlement was conditioned on dismissal of the causes of action against the defendants, the government moved to dismiss the case in order to effectuate the settlement. The United States District Court for the District of Columbia, with some slight trepidation, granted the government's motion and dismissed the case.

The court noted that the False Claims Act permits the government to settle a relator's case, notwithstanding the relator's objections, if the court determines that the settlement is "fair, adequate, and reasonable under all the circumstances." The court also noted, though, that the FCA permits the government to dismiss a relator's suit over the relator's objection, after notifying the relator of the government's motion to dismiss and giving the relator an opportunity to be heard on the motion. The court recognized an inherent tension between these two provisions of the FCA, stating that "it seems plausible that the United States could very easily circumvent a court's disapproval of a proposed settlement merely by moving to dismiss the suit afterwards and settling the case without the approval of the court, or, as here, by structuring a proposed settlement's finality on the court's dismissal of a suit rather than approval of the settlement."

The court questioned whether this tension resulted in a constitutionality problem for the FCA, since the statute—by requiring a fairness hearing in light of a relator's objections to a settlement of his/her *qui tam* claims—purports to give the judiciary control over the Executive Branch's ability to conduct litigation on behalf of the United States. The court concluded that even if the provision requiring fairness hearings is constitutionally invalid, that provision could be severed from the statute without affecting any of the FCA's other provisions. Thus, the court held that the government can indeed simply move to dismiss a relator's claims and thereby circumvent the requirement of conducting a fairness hearing on the government's proposed settlement with a defendant. Ultimately, the court determined that the government satisfied the FCA's requirements for dismissing *qui tam* actions, since

the government notified the relators of its motion to dismiss their complaint and provided them with an opportunity to challenge that motion. Consequently, the court granted the government's motion to dismiss the relators' complaint.

F. *Res Judicata* and Collateral Estoppel

See U.S. ex rel. Resnick v. Weill Medical College of Cornell University, 2010 WL 476707 (S.D.N.Y. Jan. 21, 2010), at p. 42.

G. Seal/Service Issues

U.S. ex rel. Pervez v. Maimonides Med. Ctr., 2010 WL 890236 (S.D.N.Y. Mar. 9, 2010)

A relator brought a *qui tam* action against a non-profit hospital and a professional services organization, alleging that the defendants caused the government to pay for fraudulent Medicare reimbursement claims. The government declined to intervene. The defendant hospital moved to dismiss the complaint with prejudice for failure to prosecute, after 346 days elapsed between the unsealing of the complaint and service on the defendant hospital. Alternatively, the hospital moved to dismiss the complaint without prejudice for deficient process. The United States District Court for the Southern District of New York dismissed the complaint without prejudice, holding that, in light of the records and the relevant factors governing dismissal, dismissal with prejudice for failure to prosecute was an inappropriate sanction in the action. Specifically, the court found that the defendant hospital did not claim that it would be prejudiced due to the relator's delay. In addition, because the relator failed to offer any valid excuse for his delay, the court did not extend the time period for him to serve the complaint. Consequently, the court granted the defendant hospital's motion to dismiss without prejudice.

U.S. ex rel. Mailly v. Healthsouth Holdings, Inc., 2010 WL 149830 (D.N.J. Jan. 15, 2010)

In 2007, the relators initially brought a *qui tam* action alleging that the defendants –owners of physical and occupational therapy clinics—had submitted false claims for reimbursement to Medicare. Specifically, the relators alleged that the defendants operated their businesses using unlawful corporate structures and engaged in unlawful fee splitting practices. The government declined to intervene in the suit. In 2009, nine months after the 2007 complaint was unsealed, the relators filed a second *qui tam* complaint, contending that this complaint was filed under the mistaken belief that the 2007 complaint had been dismissed; the relators contended that they misunderstood communications from the Department of Justice regarding the dismissal of the 2007 complaint. The relators did not file the 2009 complaint under seal and did not make any attempts to serve the defendants with a summons and copy of that complaint. The defendants moved to dismiss the 2007 complaint for insufficient service of process and the 2009 complaint for failure to adhere to the procedural requirements of a *qui tam* action. The relators cross-moved for an extension of time to effectuate service. The United States District Court for the District of New Jersey dismissed the 2007 complaint without prejudice and dismissed the 2009 complaint with prejudice for insufficient service of process, noting that the relators failed to effectuate service within the appropriate amount of time. The court dismissed the 2007 complaint without prejudice

for insufficient service of process, observing that the relators failed to explain how their purported misunderstanding with DoJ led to their delay and caused them to make no efforts to verify the status of the case. Further, the court dismissed the 2009 complaint with prejudice, as a result of the relators' failure to abide by the FCA's procedural requirements, since the relators failed to serve that complaint on the defendants and did not provide any reasons for their failure to do so. In addition, the court noted that the 2009 claim would likely have been dismissed anyway, since the FCA prohibits anyone other than the government from bringing a related FCA action based on the same underlying facts as a pending action. Thus, the court granted the defendants' motions to dismiss the 2007 and 2009 complaints and denied the relator's cross motion for an extension of time to effectuate service.

Judgments & Settlements

JANUARY 1–MARCH 31, 2010

Genesys Health Systems: (E.D. Mich. Jan. 1, 2010)

Michigan health care provider Genesys Health System agreed to pay the United States $669,413 to settle allegations that it violated the False Claims Act by billing Medicare for higher levels of service than were actually rendered to patients. Specifically, the government alleged that Genesys overbilled for evaluation and management services provided to cardiology patients. Wendy Domke, a former internal auditor at Genesys who filed the *qui tam* case in 2006, was awarded 20% of the settlement, or $133,882. E. Michael Morris of Morris & Doherty, P.C. (Southfield, MI) represented Ms. Domke. The settlement was a result of a coordinated effort between the Justice Department's Civil Division, the U.S. Attorney's Office for the Eastern District of Michigan, and the Office of Investigations for the Department of Health and Human Services' Office of Inspector General and Office of Counsel to the Inspector General.

Arlington Memorial Hospital: (N.D. Tex. Jan. 4, 2010)

Arlington Memorial Hospital (AMH) of Arlington, TX, agreed to pay the United States U.S. $990,509.50 to resolve allegations that it violated the civil False Claims Act submitting improper claims for payment to the Medicare program between July 1, 2003, and July 1, 2007. The settlement comes as a result of AMH's self-disclosure that that a long-standing contract with a physician group for the interpretation of arterial blood gas (ABG) tests potentially violated federal law. A subsequent investigation revealed that AMH paid a physician group for ABG tests even though such tests no longer required any professional interpretation. Rather than reduce the compensation, or revise the terms of the contract, AMH's former president agreed to pay the group for uncompensated charity care and oversight of AMH's blood gas lab, despite the fact that the contract indicated payments were for interpretation of ABG tests. Medicare ultimately paid AMH for pulmonology-related items and services referred by the group's physicians. Assistant U.S. Attorney Sean R. McKenna handled the case for the government.

Wheaton Community Hospital: (D. Minn. Jan 4, 2010)

Wheaton Community Hospital, the City of Wheaton, Minn. and Dr. Stanley Gallagher (collectively WCH) have agreed to pay $846,461 to settle allegations that their hospital knowingly made false claims to Medicare for unreasonable and unnecessary hospital admissions, in violation of the False Claims Act. The complaint alleged that from 1998 to 2004, WCH admitted some patients and kept others admitted to acute care when doing so was not medically necessary. The settlement provided $203,150 to relator Dr. Steven Radjenovich, who formerly practiced at Wheaton Community Hospital. The Justice Department's Civil Division, the U.S. Attorney's Office for the District of Minnesota and the Department of Health and Human Services' Office of the Inspector General handled the case for the government.

FOBRA Holdings LLC: (W.D. Va. Jan. 20, 2010)

FOBRA Holdings LLC, a dental management company that provides business management and administrative services to 69 clinics nationwide known as "Small Smiles Centers," agreed to pay the United States $24 million plus interest, to settle allegations that it caused bills to be submitted to state Medicaid programs for medically unnecessary dental services performed on children insured by Medicaid—a program that is funded jointly by the federal and state governments. FOBRA also agreed to enter into an expansive five-year corporate integrity agreement with the Office of Inspector General of the Department of Health and Human Services and to implement various remedial measures designed to prevent similar unlawful conduct from occurring in the future. Furthermore, the government's investigation of individual dentists is ongoing, and FORBA is cooperating with that investigation.

According to the Department of Justice press release announcing the settlement, the settlement was reached as a result of the collaborative efforts of the Justice Department's Civil Division and the U.S. Attorneys' Offices for the District of Maryland, the Western District of Virginia, the District of South Carolina, and the District of Colorado handled these cases. The Civil Division led the nationwide investigation, which was conducted by the Office of Inspector General for the Department of Health and Human Services, the Federal Bureau of Investigation, and the National Association of Medicaid Fraud Control Units.

The government's investigation was initiated by three *qui tam* lawsuits filed under the False Claims Act, in the U.S. District Courts for the District of Maryland, the Western District of Virginia, and the District of South Carolina. The three whistleblowers will receive payments totaling more than $2.4 million from the federal share of the settlement.

Robert Bourseau and Dr. Rudra Sabaratnam: (D.C.D. Cal. Jan. 25, 2010)

The United States, joined by the State of California, obtained a $10 million consent judgment against Robert Bourseau and Dr. Rudra Sabaratnam, former owners of City of Angels Medical Center, in Los Angeles, California. The consent judgment resolves a lawsuit alleging that Bourseau and Sabaratnam violated the False Claims Act and the Anti-Kickback Statute by directing a scheme whereby City of Angels would pay "recruiters" at homeless shelters in low income neighborhoods to bring homeless people to the medical center by ambulance for treatment, regardless of the patients' true medical needs. City of Angels then allegedly billed Medicare and Medi-Cal for those services, many of which were medically unnecessary. In addition to the civil judgment, Bourseau and Sabaratnam pled guilty to criminal charges for violating the Anti-Kickback Act and both are awaiting sentencing. Another City of Angels executive, along with two of the center's "recruiters" also pled guilty to similar charges.

The Justice Department's Civil Division, the U.S. Attorney's Office for the Central District of California, the California Attorney General's Office, and the Office of Inspector General of the Department of Health and Human Services handled the investigation and civil lawsuit together.

Sierra Military Health Services, LLC: (D. Md. Jan. 26, 2010)

Without admitting any wrongdoing, Sierra Military Health Services, a wholly-owned subsidiary of Sierra Health Services, Inc., agreed to pay $2.2 million to resolve allegations that it caused the submission of false claims to TRICARE Management Activity (TMA)—a Department of Defense program that serves active duty service members and their families, retired service members and their families, National Guard/Reserve members and their families, survivors and others entitled to DoD medical care—from 1997 through 2004. The United States alleged that in 1997 Sierra entered into a contract with TMA to provide administrative and claims services for TRICARE beneficiaries throughout much of the East Coast and that Sierra subcontracted with other companies, including Post Acute Care LLC, (PAC) to provide those services. Sierra was to receive an administrative fee to pay for costs incurred to perform under the 1997 contract, including costs to pay subcontractors. Sierra, however, is alleged not to have paid PAC from its administrative fee, and instead entered into an agreement with PAC whereby PAC would add its fees to Sierra's health benefits claims that were then submitted to TRICARE. The United States alleged that PAC knew that these fees should have been paid from Sierra's administrative funds, that the PAC claims were false, and that Sierra knowingly caused those false claims to be submitted to TRICARE. PAC no longer exists as a corporate entity. Consequently, the United States recovered from Sierra only.

The case was handled by Assistant U.S. Attorney Roann Nichols, Auditor Mary Hammond, and the Defense Criminal Investigative Service of the Department of Defense.

Atricure, Inc.: (S.D. Tex. Feb. 2, 1010)

Atricure Inc., a medical device manufacturer, has agreed to pay the United States $3.76 million to resolve allegations that it knowingly violated the Food, Drug, and Cosmetic Act and caused the submission of false and fraudulent claims in violation of the False Claims Act, by engaging in the following conduct: marketing its medical devices to treat atrial fibrillation (the most common cardiac arrhythmia or abnormal heart rhythm), even though this use that has not been approved by the U.S. Food and Drug Administration; promoting expensive heart surgery using the company's devices when less invasive alternatives were appropriate; advising hospitals to up-code surgical procedures using the company's devices to inflate Medicare reimbursement; and paying kickbacks to health care providers who used its devices.

The allegations were made against Atricure in a *qui tam* lawsuit filed by a relator under the False Claims Act. The relator will receive a total of $625,000 as the statutory share of the current settlement. According to the Department of Justice, the settlement was the result of the coordinated efforts of the Justice Department's Civil Division, the U.S. Attorney's Office for the Southern District of Texas, the Department of Health and Human Services' Office of Inspector General, and the FDA Office of Chief Counsel.

Eli Lilly—Mississippi: (Feb. 4, 2010)

The State of Mississippi obtained a Consent Judgment and Assurance of Voluntary Compliance against Eli Lilly, resolving allegations that the drug manufacturer committed fraud and violated the Consumer Protection Act by promoting its drug, Zyprexa, to doctors for many uses that had not been approved. In addition, Eli Lilly is alleged to have suppressed internal studies showing that the drug causes diabetes. Eli Lilly admitted to no wrongdoing, but agreed to pay the State $18.5 million and not to make any false or misleading claims regarding Zyprexa or promote the drug for off-label uses. Failure to comply with this agreement will result in further penalties for the company.

Eli Lilly—Arkansas: (Feb. 16, 2010)

The State of Arkansas reached an $18.5 million settlement with Eli Lilly, to resolve allegations that the drug company illegally marketed its drug, Zyprexa, for off-label purposes, including for unapproved uses in children. Eli Lilly admitted no wrongdoing in the settlement.

The bulk of the settlement—$15 million—will go to the State's Medicaid trust fund and after a federal match, the settlement will generate $60 million for the trust fund. The program itself will get $1.4 million as a reimbursement for improperly written prescriptions. In addition, the consumer education and enforcement division of Arkansas' attorney general's office will receive $2 million from the settlement to fund future consumer investigations and litigation.

The settlement restricts Eli Lilly from off-label marketing of Zyprexa and requires the company to use its medical—not marketing—staff to develop materials that promote the drug.

Individuals suing Eli Lilly are not impeded by the Arkansas settlement.

Mercy Hospital (Mercy Medical Center)—Massachusetts: (Feb. 19, 2010)

Mercy Hospital (d/b/a Mercy Medical Center) of Springfield, Massachusetts agreed to pay $2.8 million to the United States, to settle claims that it violated the False Claims Act between 2005 and 2006, by failing to show that it had provided the minimum amount of rehabilitative therapy to Medicare patients, as required by the Medicare regulations. In June 2007, the hospital disclosed to the Department of Health and Human Services Office of Inspector General that it could not demonstrate that it had complied with those regulations. This settlement followed.

The case was handled by the Justice Department's Civil Division and the Office of Inspector General of the Department of Health and Human Services.

Eon Labs., Inc.: (D. Mass. Feb. 22, 2010)

Eon Labs, Inc., a subsidiary of Sandoz, Inc. (which is a subsidiary of Novartis AG) agreed to pay the United States $3.5 million to settle claims that it violated the False Claims Act. The government alleged that in 1999, the Food and Drug Administration informed Eon that it was publishing a notice proposing to withdraw approval of the company's Nitroglycerin SR capsules and that after that notice was published, those capsules were no longer eligible for reimbursement under Medicaid. However, the government alleged that for the next 9.5 years, Eon provided the government with false quarterly reports that misrepresented Nitroglycerin SR's regulatory status and failed to advise that Nitroglycerin SR no longer qualified for Medicaid coverage, which resulted in Eon knowingly causing false Medicaid claims to be submitted for Nitroglycerin SR.

The settlement resolves allegations against Eon in a multi-defendant whistleblower action—Conrad v. Eon Labs, Inc., et al.—filed in the U.S. District Court for the District of Massachusetts. The whistleblower in that case was represented by TAF members Marcella Auerbach and Kenneth Nolan, and will receive a relator's share of the settlement proceeds totaling approximately $525,000.

Brookhaven Memorial Hospital Medical Center: (D.N.J. Feb. 25, 2010)

Brookhaven Memorial Hospital Medical Center, of Long Island, N.Y., agreed to pay $2.92 million, plus interest, to settle allegations that it defrauded Medicare by fraudulently inflating its charges to Medicare patients to receive enhanced reimbursements from the federal government.

The suit was originally filed in the U.S. District Court for the District of New Jersey by a whistleblower, Tony Kite, in 2005 and the United States intervened in the suit in November 2009. Mr. Kite, who was represented by TAF members Larry Zoglin (of Phillips and Cohen LLP), Steve Berman, Tom Loeser and Shayne Stevenson (of Hagens Berman Sobol Shapiro LLP) will receive a relator's share of roughly $613,000, plus interest, out of the settlement proceeds.

According to the Department of Justice, the settlement was the result of a coordinated effort by the Commercial Litigation Branch of the Justice Department's Civil Division; the U.S. Attorney's Office for the District of New Jersey, Affirmative Civil Enforcement Unit; the Department of Health and Human Services, Office of Inspector General, and the Centers for Medicare and Medicaid Services; and the Federal Bureau of Investigation.

EMC Corp.: (Feb. 26, 2010)

Without admitting any wrongdoing, EMC Corp.—a manufacturer of data storage equipment—agreed to pay the United States $87.5 million to settle a probe of the companies pricing practices on sales to federal government agencies. The investigation by the U.S. Justice Department concerned allegations about EMC's fee arrangements with system integrators and other companies that partnered with the storage equipment maker in selling products to federal agencies, and whether those agreements violated the False Claims Act.

As part of the settlement, the company also agreed to restate its earnings for the fourth quarter ended December 31, 2009, to reflect a 1 cent charge related to the settlement as well as a previously announced reorganization of its international operations.

Mariner Health Care Inc., SavaSeniorCare Administrative Services LLC, Leonard Grunstein, Murray Forman, and Rubin Schron: (D. Mass. Feb. 26, 2010)

Atlanta-based Mariner Health Care Inc. and SavaSeniorCare Administrative Services LLC, as well as their principals, Leonard Grunstein, Murray Forman and Rubin Schron, agreed to pay the United States and several states $14 million to settle allegations that they created a kickback scheme in which Omnicare (the nation's largest pharmacy that specializes in dispensing drugs to nursing home patients) would pay Mariner and Sava $50 million in exchange for agreements by Mariner and Sava to continue using Omnicare's pharmacy services for 15 years. The government further alleged that the defendants attempted to cover up the kickback scheme by creating phony business transactions and by falsifying documents.

Approximately $7.84 million of the settlement proceeds will go to the United States, while $6.16 million has been allocated to certain state Medicaid programs. Moreover, as part of the settlement, Mariner has entered into a corporate integrity agreement with the Office of Inspector General of the Department of Health and Human Services, which provides for Mariner to put in place procedures and reviews to avoid and promptly detect conduct similar to that which gave rise to this matter. At the same time, OIG-HHS has reserved its rights to seek exclusions of Sava, Grunstein, Forman and/or Schron from participation in Medicare, Medicaid and all other federal health care programs.

The settlement resolves a whistleblower action, *United States ex rel. Resnick v. Omnicare, Inc., et al.*, filed by Adam Resnick, who was represented by TAF members Tim McCormack and Mary Louise Cohen. From the government, the case was handled by the Justice Department's Civil Division, the U.S. Attorney for the District of Massachusetts, the Office of Inspector General of the Department of Health and Human Services, and the Federal Bureau of Investigation.

In November 2009, the United States, numerous states and Omnicare entered into a $98 million settlement agreement that, among other things, resolved Omnicare's civil liability under the False Claims Act for allegedly paying a kickback to Mariner and Sava.

Trelleborg AB (and four of its subsidiaries), Frank March, SHI, Inc. SII, Inc., Bridgestone Corporation, Bridgestone Industrial Products America, Inc.; The Yokohama Rubber Co., Ltd.; Dunlop Oil & Marine, Ltd., Continental AG, and Phoenix AG: (D.C.D. Feb. 26, 2010)

Fourteen defendants agreed to pay more than $15.4 million to resolve allegations that they fraudulently overbill the U.S. Navy and other federal agencies by engaging in a scheme of bid-rigging and price-fixing on sales of materials used on peirs and other marine construction projects. The defendants were all named in a *qui tam* suit filed by Douglas Farrow, which the United States joined. Mr. Farrow will receive between 15 and 25 percent of the government's recovery.

The Trelleborg companies agreed to pay the United States $14 million, while March, SHI, Inc. and SII, Inc.—both companies that March formerly held a controlling interest in—agreed to pay $1 million. In addition, the Bridgestone defendants have agreed to pay $178,108, Yokohama will pay $173,410, and Dunlop will pay $97,210. None of the defendants have admitted any wrongdoing.

The government's civil case was investigated by the Defense Contract Audit Agency and the Defense Criminal Investigative Service.

After Mr. Farrow filed his lawsuit, the Department of Justice's Antitrust Division commenced a parallel criminal investigation, which resulted in criminal convictions of nearly two dozen corporations and individuals. Trelleborg AB subsidiaries Virginia Harbor Services, Inc. and Trelleborg Industrie S.A.S. each pled guilty to felony antitrust charges and were sentenced to pay criminal fines of $7.5 million and $3.5 million, respectively. These criminal fines are in addition to the $14 million Trelleborg will pay to settle the civil claims.

Christiana Care Health System: (D. Del. Mar. 1, 2010)

Christiana Care Health System (CCHS), Delaware's largest health care provider, has agreed to pay the United States and the State of Delaware a combined $3.3 million to resolve allegations that it violated the federal and the State of Delaware's False Claims Acts, as well as the Stark law and the Delaware Anti-Kickback Statute by, among other things, submitting false claims to Medicare and Medicaid by falsely certifying compliance with all federal and state laws and regulations when, in fact, the company knew that it had an impermissible financial relationship with a group of Wilmington, Delaware neurologists who referred patients to CCHS in violation of federal and state law.

This settlement is one of the largest ever in the State of Delaware under the Federal False Claims Act and the Delaware False Claims Act. As part of the settlement, CCHS will pay the United States $3.014 Million and the State of Delaware $286,000. In addition to paying the settlement amount, CCHS has agreed to enter into a Corporate Integrity Agreement that will be monitored by the United States Department of Health and Human Services, Office of Inspector General (OIG-HHS).

These allegations were first raised in a *qui tam* lawsuit filed by two Wilmington, Delaware neurologists, individually and through their practice. The relators were represented by TAF members Marc S. Raspanti, Kevin E. Raphael, and Michael A. Morse, of Pietragallo Gordon Alfano Bosick & Raspanti, LLP. The relators and their attorneys will receive 19.5% of the recovery, plus attorneys' fees and costs. The U.S. Attorney's Office for the District of Delaware, OIG-HHS, and the Medicaid Fraud Control Unit of the Delaware Department of Justice investigated the allegations and reached the settlement with CCHS.

Houston Independent School District: (N.D. Tex. Mar. 8, 2010)

The Houston Independent School District has agreed to relinquish millions of dollars in requests for federal funds and to pay a total of $850,000 as part of a civil settlement relating to allegations that the school district violated the False Claims Act in connection with the Federal Communications Commission's (FCC) E-Rate program—a program that provides funding for needy schools and libraries to connect to and utilize the Internet.

The United States alleged that the Houston Independent School District 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. The United States further alleged that school district officials received gratuities from technology vendors, including trips, meals and loans.

The settlement was reached as a result of the collaborative efforts of the Justice Department's Civil Division, the U.S. Attorney's Office for the Northern District of Texas, and the FCC Office of the Inspector General.

Abdul Naushad, MD, Wajiha Naushad, Advanced Pain Centers, Azeem Meo, and Ultimate Practice Solutions: (E.D. Mo. Mar. 9, 2010)

The above-named defendants have agreed to pay the United States $820,000 to resolve claims that they violated the False Claims Act by submitting false claims to Medicare, Missouri Medicaid and TRICARE. The claims were first brought in a *qui tam* lawsuit, filed by relators Annetta Schwader and Amanda Richards. Their lawsuit, U.S. ex. rel. Richards, et al. v. Naushad, et al., alleged that Dr. Naushad and his wife—owners and operators of six pain management clinics throughout Missouri, which all do business under the Advanced Pain Center (APC) name—and Mr. Meo—owner and operator of billing company, Ultimate Practice Solutions—engaged in a fraud scheme in which they falsely used physical therapy codes and billed the government for direct one-on-one physical therapy when, in fact, no one at APC performed physical therapy and APC did not even employ a physical therapist.

In addition to the $820,000 payment to the government, Dr. Naushad and the APC entities will enter into an Integrity Agreement with the United States Department of Health and Human Services, Office of Counsel to the Inspector General, that requires Dr. Naushad to implement a compliance program and allows HHS to closely monitor the federal health care billings of Dr. Naushad and the APCs. Additionally, Mr. Meo and Ultimate Practice Solutions will agree to be excluded from participation in federal health care programs for a period of five (5) years.

Rush University Medical Center—Illinois: (Mar. 9, 2010)

Rush University Medical Center will pay more than $1.54 to the United States to settle claims that, from 2000 through 2007, it entered into illegal leasing arrangements for office space with two individual physicians and three physician practice groups, in violation of the Stark law and the False Claims Act.

The allegations against Rush were first raised in a *qui tam* lawsuit filed by Dr. Robert Goldberg and June Beecham. These relators, who were represented by TAF members Fred Cohen and David Chizewer, will receive a share of the government's recovery in the amount of $270,760. The government's team included the coordinated efforts of the Commercial Litigation Branch of the Justice Department's Civil Division; the Department of Health and Human Services, Office of Inspector General; and the Illinois Attorney General's Office.

<u>Robert Wood Johnson University Hospital Hamilton</u>: (D.N.J. Mar. 9, 2010)

Robert Wood Johnson University Hospital Hamilton agreed to pay $6.35 million to resolve allegations of inflating charges to obtain higher Medicare reimbursements, in violation of the False Claims Act. These allegations were first brought in two *qui tam* lawsuits—*United States ex rel. Peter Salvatori and Sara C. Iveson v. Robert Wood Johnson University Hospital at Hamilton and United States ex rel. James Monahan v. Robert Wood Johnson University Hospital at Hamilton*, filed by whistleblowers who will receive $1,111,250 of the total recovery.

The settlement was the result of a coordinated effort by the Justice Department's Civil Division, the U.S. Attorney's Office for the District of New Jersey, the Department of Health and Human Services Office of Inspector General and Centers for Medicare and Medicaid Services, and the Federal Bureau of Investigation.

<u>Alpharma Inc.</u>: (D. Md. Mar. 16, 2010)

Pharmaceutical manufacturer Alpharma Inc., which is now a wholly-owned subsidiary of King Pharmaceuticals, has agreed to pay $42.5 million to resolve allegations that, from 2000 through 2009, it illegally marketed its morphine-based drug, Kadian, by paying healthcare providers to promote or prescribe the drug and by making false representations about the drug's safety and efficacy. Under the agreement, the proceeds from the settlement will be split between the federal government and various states, with the United States receiving roughly $33.6 million to resolve the federal claims and the states receiving approximately $8.9 million to settle their respective claims.

The settlement resolves a *qui tam* lawsuit brought by whistleblower Debra Parks. Ms. Parks, who was represented by TAF members Mary Louise Cohen and Tim McCormack, will receive $5.33 million out of the federal share of the recovery.

According to the Department of Justice press release announcing the settlement, the agreement was the result of collaboration between the Justice Department's Civil Division and the U.S. Attorney's Office for the District of Maryland, with assistance from the National Association of Medicaid Fraud Control Units; the Department of Health and Human Services, Office of Inspector General; the Defense Criminal Investigative Service; the Office of Personnel Management, Office of Inspector General; and the Federal Bureau of Investigation.

Dey L.P. and Dey, Inc.—Florida: (Mar. 16, 2010)

Dey L.P. and Dey, Inc. have agreed to pay $6.5 million to settle claims that they violated the False Claims Act by engaging in a price manipulation scheme which involved setting and reporting inflated prices for Albuterol inhalants, solutions and other related products, which were them reimbursed by the Florida Medicaid program. Of the settlement proceeds, $3.3 million will go to Florida's General Revenue Fund, $1.3 million will be used to reimburse the Agency for Health Care Administration for overcharges it paid to the defendants, and $369,999 will go to the state Attorney General's Medicaid Fraud Informant Program

The allegations were filed by whistleblower Ven-A-Care of the Florida Keys, Inc. on behalf of the State of Florida. Ven-A-Care was represented by TAF member Jim Breen. The Attorney General's Office investigated the claims and later intervened in the lawsuit.

Dr. Todd J. Scarbrough and Melbourne Internal Medicine Associates P.A.: (M.D. Fla. Mar. 23, 2010)

Dr. Todd J. Scarbrough and Melbourne Internal Medicine Associates P.A. (MIMA) agreed to pay the United States $12 million to settle claims that they defrauded Medicare and TRICARE. The government alleged that from its inception in 2008, MIMA—under Dr. Scarbrough's direction—improperly billed for certain radiation oncology services by billing for services not supervised, billing for duplicate and unnecessary services, billing for services not rendered, and upcoding services, thereby causing false and fraudulent claims to be submitted to Medicare and TRICARE.

The allegations were first raised in *United States ex rel. Fangman v. Melbourne Internal Medicine Associates, P.A. and Dr. Todd J. Scarbrough*—a *qui tam* lawsuit initiated by whistleblower, Fred Fangman, former director of radiation oncology at MIMA Cancer Center. Mr. Fangman, who was represented by TAF members Mark Simpson and Michael Sullivan, will receive $2.64 million of the settlement.

Assistant Attorney General Tony West noted that this settlement was the result of a coordinated effort among the Justice Department's Civil Division; the U.S. Attorney's Office for the Middle District of Florida; the Office of Investigations for the Department of Health and Human Services' Office of Inspector General and Office of Counsel to the Inspector General; and the TRICARE Management Activity Office of Program Integrity and Office of General Counsel.

Renal Care Group, RCG Supply Company, and Fresenius Medical Holdings, Inc.: (M.D. Tenn. Mar. 24, 2010)

Renal Care Group, RCG Supply Company, and Fresenius Medical Holdings, Inc. were ordered to pay more than $19.4 million plus interest to resolve claims made in a *qui tam* complaint alleging that, following a merger, Renal Care Group and Fresenius created RCG Supply Company as a sham supply company, in order to fraudulently bill Medicare and Medicaid, in violation of the False Claims Act. The complaint was filed by relators Julie Williams and John Martinez, M.D., who were represented by TAF members Brian Kenney, Emily Lambert and Eric Young, all of the Kenney & McCafferty law firm.

In reaching his decision, U.S. District Judge William J. Haynes, Jr. noted that Renal Care Group failed to heed the advice of its company lawyers when operating the supply company, and discussed an internal audit of the supply company that found that one hundred percent of the company's files were missing information that Medicare required for billing the government program.

The federal investigation into RCG's fraudulent billing practices was conducted by the U.S. Attorney's Office for the Eastern District of Missouri under the direction of acting U.S. Attorney Michael W. Reap, and Assistant U.S. Attorney Andrew Lay with the assistance of the U.S. Attorney's Office for the Middle District of Tennessee, under the direction of U.S. Attorney Edward Yarborough, and Assistant U.S. Attorney Lisa Rivera, and Laurie Oberembt from the Department of Justice.