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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

"Give me six hours to chop down a tree and I will spend the first four sharpening the axe."
–Abraham Lincoln, 16th President of the United States

Back in 1863, Abraham Lincoln signed America's first False Claims Act statute into law. At that time, the country was in the middle of the Civil War and fraud against both the Union and Confederate armies was rampant, as defense contractors supplied both sides with substandard rations, munitions and equipment. "Lincoln's Law" helped to curb such fraud, by allowing whistleblowers to help the Government prosecute the fraudsters and recover the Government's money, in exchange for a reward. As times and technologies changed, it became apparent that the False Claims Act needed to be updated and revised as well, so the statute was first amended in 1943, and then again in 1986. In the nearly 25 years since those amendments, the statute has worked very well, returning about $25 billion to the federal fisc.

However, as fraud schemes become more and more complex and as fraudsters come up with new ways to cheat the Government and to hide their misconduct, the False Claims Act and other, similar laws must be constantly fine-tuned; otherwise, the Government will lose ground in the war on fraud. Thus, the Government continues to "sharpen the axe," by providing whistleblowers with better and better tools to combat fraud. For instance, the Patient Protection and Affordable Care Act—the sweeping healthcare reform legislation that was signed into law this past March—includes several significant amendments to the False Claims Act, which remove unnecessary obstacles plaintiffs faced when bringing lawsuits on behalf of the Government. These amendments prescribe exactly how the FCA's "public disclosure bar" should be applied and explicitly states that claims which violate the Anti-Kickback Statute will automatically give rise to liability under the False Claims Act. Furthermore, a few weeks ago President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act. Among other things, this comprehensive financial reform legislation creates a new SEC whistleblower program that rewards whistleblowers who assist the SEC's enforcement efforts.

As we reflect on the past twelve months in this "year-in-review" issue, it is clear that the Government is responding as fraud schemes become increasingly more creative and sophisticated, and in the past year Congress has given whistleblowers an even sharper "axe" to use. The False Claims Act & *Qui Tam* Quarterly Review intends to publish articles on these new legislative initiatives in the upcoming issues, to keep you informed as these new provisions take effect.

Of course, should you ever wish to submit an article for publication or to provide any feedback regarding the journal, please contact me. I can be reached at:

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All the best,
Cleveland Lawrence III

Recent False Claims Act & *Qui Tam* Decisions

JULY 1, 2009–JUNE 30, 2010

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

U.S. ex rel. Jamison v. McKesson Corp., 2009 WL 3176168 (N.D. Miss. Sept. 29, 2009)

A relator filed a *qui tam* action against numerous defendants, including an equipment supplier ("McKesson"), its subsidiary ("MediNet"), a nursing home chain ("Beverly"), a company that later acquired Beverly ("GGNSC"), a related company involved in strategy ("Ceres"), a medical services LLC ("CSMS"), an ancillary LLC ("Golden Gate"), and several unnamed defendants. The complaint alleged Medicare fraud, Anti-Kickback Statute violations, and other common law claims. The government intervened in the case and alleged that McKesson used MediNet as a conduit between Beverly and McKesson in order to sell its products to the nursing home chain. As a result of this arrangement, the Government contended that the nursing home chain retained a substantial percentage of money paid by Medicare for durable medical equipment ("DME") services, and in return, McKesson was allowed to exclusively provide DME supplies. The government alleged that this arrangement violated the Anti-Kickback Statute. The defendants moved to dismiss for lack of particularity and failure to state a claim.

The United States District Court for the Northern District of Mississippi granted the motion in part. The court denied the motions to dismiss for lack of particularity because it found that the government alleged enough facts about the fraudulent scheme to put the defendants on notice. Specifically, the court noted that the complaint's description of the kickback scheme between McKesson, Beverly, and MediNet met the requisite "who, what, when, where, and how" of fraud. Furthermore, the complaint alleged that McKesson organized CSMS as a sham supplier to induce Beverly to refer its patient bases to MediNet and McKesson. As proof, the court also noted that the government pled several internal documents that referenced the allegedly fraudulent scheme. The court also held that since the government alleged GGNSC assumed Beverly's liabilities, the government pled fraud with particularity against the GGNSC.

The court also denied the motions to dismiss for failure to state a claim because the government alleged enough facts to detail an Anti-Kickback statute violation and false certification, by stating that McKesson, CSMS, and MediNet falsified or caused the falsification of a certification of compliance with the Anti-Kickback Statute and by stating that CSMS knowingly misled state licensing officials to license it despite its noncompliance with the necessary licensing requirements. Finally, the court stated that MediNet submitted claims to Medicare which represented

that CSMS provided certain services, when in fact, those services were actually provided by MediNet. The court also determined that the plaintiffs properly pled presentment by alleging reliable indicia that false claims were actually submitted. Moreover, the court held that the conspiracy claim could be maintained, since the complaint alleged an agreement among McKesson, MediNet, CSMS, and Beverly, which provided that McKesson and MediNet would capture millions of dollars of profit annually from Medicare payments for enteral services for CSMS and Beverly, and in exchange, CSMS and Beverly would refer all enteral orders and non-enteral services for all of Beverly's Medicare residents to McKesson and MediNet. The complaint further alleged that the acts of creating CSMS as a supplier, referring business from Beverly and CSMS to McKesson and MediNet, exchanging discounts for the referral of business to McKesson and MediNet, and submitting claims to Medicare in CSMS's name when it did not provide the services were all joint actions in furtherance of the conspiracy.

However, the court dismissed the FCA claims against Golden Gate and Ceres, leaving only common law claims against those defendants. The court also dismissed all claims against unnamed defendants for lack of particularity, so as to prevent investigation through discovery. Finally, the court dismissed the Section 3729(a)(1) claim against Beverly, as that claim did not include an allegation that the defendant submitted any false certifications.

B. What Constitutes a False Claim?

U.S. v. Menominee Tribal Enter., 2010 WL 2465505 (E.D. Wis. June 15, 2010)

The government brought an FCA action against a manufacturer of lumber and forest products and two of the company's former employees. After trial, a jury returned a verdict in favor of the defendants. The defendants then moved for attorneys' fees under the Equal Access to Justice Act. The defendants contended that the government failed to satisfy its burden of showing that its position was substantially justified and that it had established a reasonable connection between the facts alleged and theory propounded.

First, the defendants contended that the government failed to follow its own policies before filing the law suit. The court, though, found that the Bureau of Indian Affairs policy manuals alleged to have been violated did not have the force of law or regulation, but were merely useful as guides. Therefore, the court held that the defendants did not establish that the government failed to follow internal policies. Second, the defendants contended that the government failed to adequately investigate the factual basis for the lawsuit, arguing that the government had no idea how billing worked and never knew how it was allegedly being defrauded. The court held that the fact that the scope of the alleged fraud changed over time did not mean that the government could not pursue its FCA action. Third, the defendants contended that the government failed to establish a motive to defraud. The court, though, held that the government was only required to prove that the defendants had knowledge about the submission of false bills—the FCA does not require the government to present a motive to defraud. Lastly, the defendants contended that the nature of the suit was based in contract rather than fraud. In response, the court held that the existence of contract performance clauses did not foreclose the possibility of FCA liability.

Since the United States District Court for the Eastern District of Wisconsin rejected the defendants' arguments, it denied their motion for attorneys' fees.

U.S. ex rel. Powell v. American Intercontinental Univ., Inc., 2010 WL 2245574 (N.D. Ga. June 02, 2010)

Relators brought a *qui tam* action against a for-profit accredited university and a related corporation, alleging that the defendants made false statements in their Program Participation Agreements (PPA), which were submitted to the Department of Education (DOE) when the defendants requested Pell Grant of Stafford Loan funding. In particular, the relators alleged that the PPA's falsely certified that the university did not provide incentive based compensation for enrollment counselors—which was prohibited. The relators also alleged that the PPAs contained false statements about accreditation and student eligibility. The defendants moved to dismiss the relator's complaint, arguing that the complaint failed to state a claim and failed to plead fraud with particularity. The defendants claimed that the representations contained in the PPAs were not certifications of compliance

with either the incentive compensation ban or with accreditation requirements. Rather, they asserted that the PPA requirements were merely conditions for participation in the federal programs, and thus, any purported misrepresentations in the PPAs could not lead to liability under the FCA. The United States District Court for the Northern District of Georgia disagreed with the defendants. Relying on Seventh and Ninth Circuit precedent, the court held that misrepresentations made in PPAs can indeed provide a basis of liability under the FCA.

The defendants also argued that the relators failed to allege particularized facts that established that they submitted false statements or false claims to the government. The court, though, noted that the relators alleged first-hand knowledge of the allegations due to their employment with the defendants. Consequently, the court held that the relators' complaint satisfied the particularity requirements and denied the defendants' motion to dismiss.

U.S. ex rel. Chabot v. MLU Servs., Inc., 2010 WL 1539975 (M.D. Fla. Apr. 18, 2010)

A relator brought a *qui tam* action against a construction company, alleging submission of false claims and false certification. Specifically, the relator alleged that the defendant entered into a contract with the Federal Emergency Management Agency (FEMA) to install manufactured housing in Florida in 2004 and 2005. The relator alleged that the contract required the defendant to conform to all applicable state and local licensing requirements and that the defendant's claims to FEMA for payment under the contract were false because the defendant was in fact not licensed to install manufactured housing. In addition, the relator argued that the defendant hired various subcontractors to perform certain duties, but that the defendant did not have the necessary general contractor's license that would have allowed for hiring these subcontractors. This conduct, according to the relator, constituted a violation of the False Claims Act.

The defendant moved for summary judgment on the relator's claims, arguing that it did not submit false claims. The defendant did not argue that it had obtained the licenses that the relator complained about; rather, the defendant argued that it did not need to obtain those licenses. The defendant's argument was based on its characterization that it only installed "semi-permanent" travel trailers—not permanent mobile homes—and therefore was not required to be licensed under Florida law. The defendant also argued that it diligently consulted with federal, state and county authorities who confirmed that no license was required for the defendant's work under the FEMA contract. The relator countered, arguing that the defendant absolutely did need a license, since its work was more akin to building permanent mobile home structures than to building overnight or temporary travel trailers, since the defendant's installation included blocking, anchoring and strapping trailer down. In addition, the defendant argued that it would have only needed to obtain a general contractor's license in the event that it was installing a "building" or "structure," and that the travel trailers it installed fit neither definition. The relator argued that the defendant's work fell within the definition of "related improvements to real estate," a type of work for which a general contractor's license was required. The United States District for the Middle District of Florida determined that these issues involved factual disputes that could not be resolved on summary judgment.

The defendant further argued that even if it did submit false claims, it did not do so knowingly and thus did not violate the FCA. The relator had argued that the defendant's claims for payment under the FEMA contract were all false, since they all included an implied certification that the defendant had satisfied all applicable licensing requirements. The defendant responded by arguing that it did not "lie" to the government and reasonably believed that it was not required to be licensed in order to perform its duties under the FEMA contract. The defendant further argued that it could not be held liable for impliedly falsely certifying compliance with state licensing requirements, since compliance with those regulations was not a condition of payment under the FEMA contract. In response to that argument, the relator offered an affidavit of a FEMA contracting officer who testified that "[n]ot only was [compliance with those regulations] a condition of payment, we would have terminated the contracts if we would have known otherwise." Again, the court found that these competing arguments turned on issues of material fact, and held that summary judgment was not appropriate. Thus, the court denied the defendant's motion.

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.

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

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

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

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

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

U.S. ex rel. Mason v. State Farm Mut. Auto. Ins. Co., 2009 WL 2486339 (D. Idaho, Aug. 13, 2009)

The relators sued the defendant—an insurance company—for violation of the FCA, alleging that the insurer caused false Medicare claims to be presented to the government, when those claims should have been paid by the insurer. The government declined to intervene. The United States District Court for the District of Idaho granted the defendant's motion to dismiss for failure to state a claim, but granted the relators leave to amend. The relators' withdrew their original claim, but their amended complaint alleged a "reverse false claim," contending that the defendant was the primary insurer, that the defendant made or used a false statement to avoid its duty to pay claims covered by insurance, and that the defendant instead allowed Medicare to pay those claims and failed to reimburse Medicare for those payments. The defendant then moved to dismiss the amended complaint for failure to state a claim. The court again granted the defendant's motion to dismiss, based on its holding that, pursuant to the provisions of the Medicare Secondary Payer Statute, the alleged false statements—hospital bills that were submitted to Medicare—were not actually false, since the relators did not demonstrate that any facts were misrepresented in those claims. The court also found that the hospital had a right to seek contingent payment from Medicare for those bills until the insurer's obligation to pay had been determined, and that the amended complaint did not allege that the defendant knew that Medicare paid the hospital's claims or that the defendant was aware of any existing duty to reimburse Medicare for any such payments. The court also declined to grant the relators leave to further amend their complaint, finding that the relator could not cure the deficiencies in their earlier complaints.

See *U.S. ex rel. Bauchwitz v. Holloman*, 2009 WL 4362819 (E.D. Pa. Dec. 1, 2009) at page 86.

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

U.S. ex rel. Folliard v. CDW Tech. Servs., Inc., 2010 WL 2593521 (D.D.C. June 28, 2010)

A relator brought a *qui tam* action against an information technology corporation and a subsidiary company that sold its products—including sales to the government. The relator alleged that the defendants presented false claims to the government by certifying and listing non-compliant products, in violation of the Trade Agreements Act (TAA). The D.C. District Court had previously dismissed the relator's claims for failure to state a claim. In the instant case, the defendants moved to dismiss the complaint because another similar *qui tam* complaint had been filed two years before and the defendants argued that the instant complaint was barred under the FCA's first-to-file bar provision. The government did not intervene, but filed a statement of interest in the case. The district court granted the defendants' motion and dismissed the complaint for lack of jurisdiction. The court held that although the previously filed action did not explicitly reference the TAA; it gave the administrative agencies themselves notice of the potential fraud in connection with the respective contracts. The court also held that no new internal information was provided to prove a difference in the material elements of fraud and that the government was equipped on its own from the earlier complaint to find the instant contracts.

First-to-File Bar

The relator contended that his complaint was distinguishable from the previously filed action because he alleged different types of fraud involving different federal contracts and agencies. The defendants countered, claiming that the relator's claims were barred because they were based on the same material elements of fraud alleged in the previous action. The court observed that the relator only added a different location regarding the alleged fraud and held that this additional information was not enough to establish a difference in the material elements of the fraud as alleged in the two complaints. The court held the government was equipped to discover on its own the extent to which the defendants had other federal procurement contracts that were governed by the TAA and in turn, whether any wrongdoing had occurred. The court observed that the purpose of first-to-file bar was not to enable the government to intervene at its discretion in materially similar fraud actions, but to protect the first-filed relator in order to incentivize private citizens to bring informative claims under the FCA. The court held the relator's action was based on the facts underlying the previously filed *qui tam* action and hence held that it lacked jurisdiction over the relator's claim under first-to-file bar.

U.S. ex rel. Chovanec v. Apria Healthcare Group, Inc., 2010 WL 1980164 (7th Cir. May 19, 2010)

A relator filed a *qui tam* action against a healthcare group, alleging that the defendant fraudulently billed Medicare and Medicaid for medical devices and related services that were unnecessary or should have been billed under less expensive reimbursement codes. The complaint stated that the fraud took place at the defendant's office in Illinois from 2002–2004. The US District Court for the Northern District of Illinois found that two other *qui tam* actions against the defendant were already pending, and both of those prior actions alleged the same fraudulent billing. Consequently, the district court dismissed the present relator's complaint under the False Claims Act's first-to-file bar, which provides that only the government can bring a "related" FCA action that is based on facts in a pending action. The district court held that the present relator's case was related to the earlier suits, even though the present relator's suit differed from the other suits in that it alleged fraud occurring at a different time and place—those differences, the court held, were irrelevant and insufficient to overcome the first-to-file bar. Four days after the district court dismissed the relator's suit, the other pending actions were settled. The relator then moved for reconsideration of the district court's ruling, arguing that the settlement not only ended the prior actions that blocked her suit (as those suits were no longer pending actions), but also established that the three *qui tam* actions did not overlap, as the time periods involved in the settlement were different from those alleged in the relator's dismissed suit. The district court, however, denied this motion and the relator appealed to the Seventh Circuit.

The Seventh Circuit first addressed the question of whether or not the relator's suit was a "related" action based on the facts of the other two prior actions, determining that if the relator's suit was a related action, then the settlement of the two prior suits would be of no consequence, since the relator would still be barred from re-filing her *qui tam* suit. The court reasoned that the FCA requires that such related actions be dismissed, not stayed until the prior cases are resolved. The Seventh Circuit concluded that in order to be "related," for FCA purposes, the allegations pled in the respective complaints—without regard to the issues that were settled—do not need to share completely identical facts, but rather must plead the same <u>material</u> facts. The court found that the present relator's suit was a "related action based on the facts underlying the pending action[s]," since the prior actions alleged "an ongoing fraud orchestrated by [the defendant]'s national staff," regardless of the time period or specific office alleged.

After concluding that the relator's complaint was a related action that should have been dismissed, the court noted that the district court was not required to dismiss the relator's case with prejudice, since the other suits were no longer pending. Consequently, the circuit court held that the relator should be allowed to file a new *qui tam* action alleging facts that are unrelated to the prior cases, and that the

district court erred by dismissing the complaint with prejudice. Thus, the Seventh Circuit vacated the district court's decision and remanded the matter with instructions to the district court to dismiss the complaint without prejudice.

U.S. ex rel. Westmoreland v. Amgen, Inc., 2010 WL 1634315 (D. Mass. Apr. 23, 2010)

A relator brought a *qui tam* action against an international biotechnology company and several of its corporate affiliates, alleging that the defendants violated the False Claims Act by providing various kickbacks (in the form of sham consulting agreements, all-expense paid retreats, free services, and price concessions) to induce healthcare providers to purchase one of their drugs—which caused those providers to submit Medicare and Medicaid claims to the government that falsely certified that they were in compliance with the anti-kickback laws. One such alleged kickback was in the form of "excess overfill," whereby the defendants were alleged to have provided providers with excess amounts of the drug, and encouraged those providers to bill the government for the entire amount, even though the excess amounts exceeded the necessary dosage and may not have ever been administered. The relator further alleged that the defendants reported an inflated Average Sales Price (ASP) to Medicare and Medicaid, causing the government to overpay for the drugs. Moreover, the relator alleged that the defendants engaged in a conspiracy to violate the FCA by engaging in the alleged fraudulent conduct with intent to cause false claims to be presented to the government. Eventually, the United States and several State governments intervened in the relator's suit.

The defendants moved to dismiss these allegations, arguing that the FCA's first-to-file rule barred the claims and that the plaintiffs failed to state a claim upon which relief could be granted. The United States District Court for the District of Massachusetts granted the defendants' motion to dismiss.

First-to-File Bar

The court found that Count I of the relator's complaint—alleging illegal kickbacks to providers—was barred in part under the FCA's first-to-file rule. The court first determined that the relator's complaint was the first to plead that the defendants engaged in a widespread promotion scheme of encouraging and teaching providers to bill for excess overfill. Thus, these claims were not barred by the first-to-file rule.

The court then considered the other kickback allegations and determined that the allegations that the biotechnology company provided kickbacks in the form of sham consultancy agreements, all-expense paid retreats, and other free services were all barred by the first-to-file rule, since previous complaints had amply pled the essential facts of the relator's kickback allegations against that defendant. However, the court found that these allegations were not barred as to the affiliated defendants, since the prior complaints made no mention of these defendants' alleged involvement in the kickback scheme.

The court then turned to the allegations that the defendants inflated ASP. The defendants argued that these claims were also barred, citing previously-filed complaints that alleged that same scheme. The relator argued that these allegations should not be barred against the affiliated defendants, since the prior complaints did not identify those defendants. The court, though, held that "the government likely had adequate notice of the scheme," since "almost identical facts" had been previously pled against those defendants' corporate affiliates and parent corporations. The court stated that the analysis of these claims could be distinguished from the analysis of the claims alleging sham consultancy agreements, all-expense paid retreats, and other free services, because the prior complaints alleging those latter claims did not implicate the affiliated defendants' parent corporations or corporate affiliates.

Next, the court considered Count II of the relator's complaint—alleging that the defendants conspired to violate the FCA. The defendants conceded that this conspiracy allegation had not been included in prior complaints, yet they still argued that the first-to-file rule barred the conspiracy allegations, claiming that the "essential facts" of the conspiracy claim had been previously pled. The court, however, determined that the relator's complaint "contains essential elements of a fraudulent scheme absent from the [prior] complaints." Therefore, the court held that the relator's conspiracy claim was not barred by the first-to-file rule.

Failure to State A Claim

The defendants contended that the plaintiffs failed to allege any false claim for payment under an express or implied certification theory, arguing that compliance with the anti-kickback statutes was not a condition of payment under Medicare or Medicaid.

With respect to the plaintiffs' express certification theory, the defendants stated that the Medicare Enrollment Form only requires providers to agree to comply with the anti-kickback laws in the future, but does not require providers to expressly certify past compliance with those laws. Thus, they argued, the Medicare and Medicaid bills at issue were not false. The court disagreed, observing that it could "[see] no reason why an express certification of compliance with a particular statute cannot be prospective, as long as it is knowingly false when made," and finding that the promise to comply with the anti-kickback laws was a condition of payment, and not merely a condition of participation. The court, though, ultimately held that the plaintiffs failed to state a claim because they did not allege that the providers who allegedly received kickbacks from the defendants were knowingly making a false statement when they agreed to comply with the anti-kickback laws on their respective Medicare Enrollment Forms. In order to maintain their claims, the court held that the plaintiffs would have needed to allege that "when the providers signed the enrollment forms, they knew that they would be accepting kickbacks from the Defendants in violation of the anti-kickback statute." In addition, the States argued that the defendants caused providers to violate the FCA since the providers were required to complete State Medicaid enrollment forms and to either certify "compliance with applicable state and federal laws,' or agree "to not engage in or commit fraud or abuse." The court rejected this argument and held that such broad language was insufficient to constitute an express certification of compliance with the anti-kickback laws. As a result, the court held that the plaintiffs failed to state a claim under their express certification theory.

Similarly, the court rejected the plaintiffs' implied certification theory. The court recognized previous decisions that held that "liability based on an implied certification theory requires that the relevant statute or regulation expressly state that compliance with a particular requirement is a precondition of payment." Since the plaintiffs could not direct the court to a statute or regulation that makes clear that compliance with the anti-kickback laws is a condition of payment under Medicare or Medicaid, the court held that they failed to state a claim under their implied certification theory as well.

U.S. ex rel. Pfeifer v. Ela Med., Inc., 2010 WL 1380167 (D. Colo. Mar. 31, 2010)

A relator brought a *qui tam* action against her former employer—a medical devices manufacturer—as well as its parent corporations, a laboratory, eight named associated physicians, and several "John Doe" physician defendants. The relator alleged that the defendants violated the Anti-Kickback Statute and the Stark law when the defendant manufacturer paid kickbacks to other defendants in the form of training fees, entertainment, and other benefits under various training contracts for use of its products. As a result of these allegations, the relator filed suit under the False Claims Act, alleging Medicare and Medicaid fraud. The defendants filed various motions to dismiss, with some arguing that the FCA's first-to-file bar applied, since another relator had already previously filed a *qui tam* action against them making the same allegations, and others arguing that the public disclosure bar applied, that the relator's complaint failed to plead fraud with particularity and failed to state a claim. In addition, one of the defendant physicians argued that service of process was insufficient. The United States District Court for the District of Colorado granted in part and denied in part the defendants' motions.

First-to-File Bar

The court first examined the first-to-file bar and the similarities between the present case and the previously filed case, and noted that the defendant manufacturer and one of the defendant physicians had been named as defendants in a prior *qui tam* action. The court further found that the relator's allegations in this case were essentially the same as those made in the prior complaint, as both complaints alleged that the defendant manufacturer paid for entertainment and travel expenses for the defendant physicians who purchased its products. Moreover, the relator admitted that her kickback allegations were based on the underlying facts in the prior complaint. The court, though, recognized that the relator's complaint in the current suit alleged additional claims that were not included in the prior *qui tam* action. These claims were based on an alleged scheme in which the defendant physicians were compensated for entering into training contracts that ostensibly required those physicians to provide training in exchange for training fees—although no training was ever provided. The court concluded that the FCA's first-to-file rule did not bar these claims, since they were distinct from the claims in the prior action.

Public Disclosure Bar and the Original Source Exception

The court then turned to the defendants' public disclosure bar arguments. The defendants argued that the relator's allegations had been previously publicly disclosed in two newspaper articles that focused on investigations of post-marketing trials by the defendant manufacturer and its largest competitors. Since these articles were outside the scope of the pleadings, the court converted the defendants' motion to dismiss on public disclosure grounds into a motion for summary judgment. The court was not persuaded by the defendants' argument and determined that the information in these articles was not substantially similar to the relator's allegations, since the articles did not discuss the defendant manufacturer's training agreements that the relator alleged. Furthermore, the relator attested that she never saw the newspaper articles prior to filing the present action and alleged facts demonstrating how and when she obtained her direct and independent knowledge of the allegedly fraudulent training contract scheme. Also, the relator attested that she provided material evidence and information to the government prior to filing of the present action. Therefore, the court concluded that even in the relator's allegations had been publicly disclosed prior to the filing of her *qui tam* complaint, she qualified as an original source of the facts underlying those allegations.

Rule 9(b)'s Particularity Requirement

The court observed that the relator's complaint named the defendant manufacturer and the defendant parent corporations as defendants. However, the court held that the relator failed to identify specific fraudulent acts by the defendant parent corporations and did not assert that the corporate veil should be pierced. The court held the relator failed to plead fraud with particularity and dismissed the claims against the parent corporations. The court then observed that the relator did provide the "who, what, when, where and how" of the alleged transactions with regard to the defendant manufacturer, the defendant laboratory, and four of the defendant physicians. These defendants' motions to dismiss were denied. However, the court held that the relator failed to provide specific details concerning the other four named defendant physicians' allegedly fraudulent dealings with the defendant manufacturer and accordingly, these defendants' motion to dismiss on Rule 9(b) grounds was granted.

The court dismissed the insufficient service of process argument as moot, since it was raised by one of the physician defendants whose motion to dismiss was granted on Rule 9(b) grounds.

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

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

U.S. ex rel. Becker v. Tools & Metals, Inc., 2009 WL 2245207 (N.D. Tex. July 27, 2009)

Two relators, Becker and Spencer, brought separate *qui tam* actions against an industrial supplier ("TMI"), an advanced technology company ("Lockheed"), and other individuals, alleging various FCA violations. Becker's action was filed first and named TMI as a defendant and the other defendants were named in Spencer's action, which was filed six months later. After the United StatesDistrict Court for the Northern District of Texas consolidated the two *qui tam* actions, the relators filed a joint amended complaint adding additional claims and defendants. The government partially intervened and filed a complaint-in-intervention against TMI, Lockheed and two individual defendants. The government declined to intervene on various other claims brought by the two relators and declined to intervene against various other defendants named by the two relators. The relators filed another joint amended complaint, which included the non-intervened claims and defendants. The defendants filed separate motions to dismiss, including a motion to dismiss on public disclosure grounds filed by one of the individual defendants. After motions to dismiss were filed, the court dismissed several of the plaintiffs' claims against various defendants and, applying the FCA's first-to-file bar, prohibited relator Becker from participating in or recovering from the claims against Lockheed, since that defendant was not included in Becker's original *qui tam* complaint.

Becker then moved for an interlocutory appeal, contending that before the court applied the first-to-file rule, it should have decided the public disclosure issue and

determined whether Spencer's original *qui tam* complaint—which was filed six months after Becker's—was barred by the FCA's public disclosure bar. Becker argued that the court should have determined the question of subject matter jurisdiction before considering the first-to-file question, and that had the court resolved the public disclosure question first, Spencer's original *qui tam* complaint would have been dismissed and the first-to-file bar would not have precluded Becker's action. A group of defendants opposed Becker's motion and the court ultimately denied the motion and held that Becker's motion for certification of an order for appeal was moot; the court found that it was not necessary to decide the public disclosure issue, since the claims against the only defendant who raised that issue were dismissed for failure to state a claim. Hence, the court held that there was no danger of adjudicating claims for which the court did not have subject matter jurisdiction, and the court denied Becker's motion.

See *U.S. ex rel. Leveski v. ITT Educ. Serv., Inc.*, 2009 WL 3079526 (S.D. Ind. Sept. 23, 2009) at page 83.

See *U.S. ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 2009 WL 2450716 (1st Cir. Aug. 12, 2009) at page 39.

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

U.S. ex rel. Kirk v. Schindler Elevator Corp., 2010 WL 1292143 (2nd Cir. Apr. 6, 2010)

A relator brought a *qui tam* action against his former employer—an elevator company—violated the False Claims Act by obtaining multiple government contracts based on misrepresentations and omissions regarding the number of veterans it employed (which was required under the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) and the Veterans Employment Opportunities Act). The relator, a Vietnam veteran himself, had complained to the Department of Labor that his employer had demoted and constructively terminated his employment, in violation of the VEVRAA. The agency then launched an investigation into the defendant's compliance with the statute.

In the meantime, the relator filed his *qui tam* complaint, which was based, in large part, on information the relator received as a result of his wife filing several requests to the Department of Labor under the Freedom of Information Act (FOIA). The government declined to intervene. The defendant moved to dismiss the complaint, arguing: (1) that since the relator's allegations were largely based on information he and his wife received from the Department of Labor, the False Claims Act's public disclosure bar divested the district court (the U.S. District Court for the Southern District of New York) of subject matter jurisdiction over the relator's claim; (2) that the complaint failed to satisfy Rule 9(b)'s pleadings requirements; and (3) that since the relator had already filed a complaint with the Department of Labor, which was also investigating the relator's allegations, the district court should defer to the agency and dismiss the action under the "primary jurisdiction" doctrine. The district court granted the motion to dismiss, finding that the relator could not maintain his claim that the defendant submitted false reports regarding the number of veterans it employed, because the defendant had not certified the accuracy of the reports that were alleged to be false. In addition, the court held that the FOIA reports the relator received constituted public disclosures under the False Claims Act, and consequently the court lacked subject matter jurisdiction over his claims. The relator appealed the district court's decision to the Second Circuit.

The Public Disclosure Bar and Subject Matter Jurisdiction

The circuit court first considered the public disclosure issue. The court recognized that the FCA's public disclosure provision was recently amended as part of the Patient Protection and Affordable Care Act, but in reliance on the Supreme Court's decision in *Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, the Second Circuit held that the newly amended public disclosure provision is not retroactive and did not apply to this case. The circuit court then observed that "every circuit to have considered this issue has determined that information produced in response to a FOIA request becomes public once it is received by the requester." However, the Second Circuit held that even though the information had been publicly disclosed, the FOIA-requested materials were not among the enumerated categories of public disclosure sources that are listed in the False Claims Act. The circuit court recognized that the materials at issue arguably fell into the category of administrative reports or investigations, both of which listed are in the False Claims Act. The Second Circuit held that documents produced in response to FOIA requests do not automatically qualify as publicly disclosed administrative reports or investigations, since "FOIA is simply a mechanism for granting the public access to information in the possession of an agency;" rather, the determination of whether or not "a document obtained through a FOIA request is an enumerated source within the meaning of [the public disclosure bar provision] depends on the nature of the document itself." Otherwise, the court held, Congress's intent, in 1986, to eliminate the "government knowledge bar" would be completely undermined, since, obviously, the government always possesses the information it disseminates in response to FOIA requests. The court also noted that this interpretation of the public disclosure bar provision was in accord with the federal government's position, as stated in an *amicus curiae* brief filed by the United States. The court concluded that the FOIA documents on which the relator's allegations were based merely consisted of copies of the defendant's filings with the Department of Labor and letters from the agency indicating when no responsive records could be found. Since these documents don't qualify as public disclosures under the False Claims Act, the Second Circuit vacated the district court's ruling and remanded the issue.

Failure to State a Claim

The court then considered the defendant's contention that the relator's complaint failed to properly state a claim. The court held that the relator properly stated a claim against the defendant for knowingly presenting false claims to the government under either an express or implied false certification theory, when he alleged that the defendant violated the FCA by submitting bids for government contracts without having filed the necessary reports regarding the number of veterans it employed. In addition, the court held that the relator stated a claim against the defendant for knowingly making a false statement in support of a false claim, when he alleged that the defendant also violated the FCA by filing reports that were necessarily false, since the defendant never made an attempt to identify the veterans it employed and was left to fabricate the numbers used in its reports to the Department of Labor. Since the reporting requirements were a condition of payment under the defendant's contracts with the government, the court held that the defendant's false statements regarding the number of veterans it employed was material to the government's decision to pay the defendant under those contracts. Thus, to the extent that the district court's ruling conflicted with the Second Circuit's opinion on the validity of the relator's claims, that ruling was vacated as well and the case was remanded for further proceedings consistent with the circuit court's opinion.

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.

In re Pharm. Indus. Average Wholesale Price Litig., 2010 WL 1375298 (D. Mass. Mar. 25, 2010)

Two relators brought a *qui tam* action against two related pharmaceutical companies, alleging that the defendants defrauded the government by overstating drug pricing information to industry publications that were used by Medicare and Medicaid to calculate reimbursement payments. The defendants moved to dismiss, arguing that the relators' complaint failed to plead fraud with particularity and that the False Claims Act's public disclosure bar deprived the United States District Court for the District of Massachusetts of subject matter jurisdiction over the relators' claims. The court denied the defendants' motion to dismiss for failure to plead fraud with particularity, as it held that the relators pled fraud with particularity since they identified the fraud scheme, specified the drugs involved, and the described the pricing disparity.

With respect to the public disclosure issue, the court held that "[w]hatever the merits of the Defendants' arguments regarding public disclosure, relators prevail on their argument that they both qualify as original sources." The court reasoned that the first relator had direct and independent knowledge of her fraud allegations—and thus qualified as an original source—because she worked for the defendants, was primarily involved in their drug pricing, was present when the defendants allegedly planned to disguise pricing information and personally saw documents that contained inflated prices. The court held that whether or not the second relator qualified as an original source was a "closer question," since that relator was not employed by the defendants, but derived his knowledge from a conversation with a business associate who published the defendants' inflated drug pricing information and was concerned about possible fraud. Therefore, it was unclear whether this second relator's knowledge was sufficiently "direct" to qualify as an original source under the FCA. The court, though, noted that the main purpose behind the FCA is "to encourage suits by those who are 'close observers or otherwise involved in the fraudulent activity,'" and concluded that the second relator did qualify as an original source, since he "was consulted as part of a professional relationship by one of the critical players in the alleged fraud regarding the fraud's very nature as the fraud was occurring." Therefore, the court denied the defendant's motion to dismiss for lack of subject matter jurisdiction.

U.S. ex rel. Jamison v. McKesson Corp., 2010 WL 1223876 (N.D. Miss. Mar. 25, 2010); *U.S. ex rel. Jamison v. McKesson Corp.*, 2010 WL 1276712 (N.D. Miss. Mar. 25, 2010)

A relator brought a *qui tam* action against seven defendants, consisting of a medical wholesale company, the company's durable medical equipment (DME) supplier, a skilled nursing facility chain and its successor, and a supplier of medical products, its corporate owner, and an affiliated DME supplier. The relator alleged that the defendants violated the Anti-Kickback Act by forming an improper joint venture and setting up a sham DME supplier, which only provided supplies and services to the nursing facility chain. In addition, the relator alleged that this DME and other defendants failed to conform to the regulatory standards governing DME suppliers, in violation of Medicare regulations and the False Claims Act. The government intervened.

The defendants all moved to dismiss, arguing that the FCA's public disclosure bar deprived the court of subject matter jurisdiction over the relator's claims. The court converted the motions to dismiss into motions for summary judgment motions, as it determined that public disclosure bar issues are necessarily intertwined with the merits of the case. The relator moved for partial summary judgment regarding the absence of any public disclosure. The United States District Court for the Northern District of Mississippigranted the defendants' converted summary judgment motions. The court observed that the relator had gathered information based on various publically disclosed sources and did not possess any in-depth knowledge about his allegations. The court denied the relator's motion for partial summary judgment because it found there was public disclosure.

The court applied a three prong test to determine whether the public disclosure bar deprived it of subject matter jurisdiction over the relator's claims. First, the court found that the relator's allegations had been publicly disclosed, as information on which those allegations were based had been disclosed in a Special Fraud Alert issued by the Department of Health and Human Service's Office of Inspector General (OIG). The fraud alert was reprinted in the Federal Register. The court observed that the alert identified trends in DME health care fraud and illegal joint venture practices. The court also identified several other OIG published reports on medical equipment compliance. The court found that the public disclosures contained "the very essence" of the relator's allegations. Second, the court held that the relator's allegations were "based upon" the publicly disclosed information, since the relator's allegations were substantially similar to the publicly disclosed information. Third, the court held that the relator was not an original source of the information on which his fraud allegations were based. The court observed that the relator was never employed by any of the defendants, and simply gathered second-hand information from the defendants' employees, as well as from the internet and from various published reports. Accordingly, the court held that the

public disclosure bar applied and that it did not have subject matter jurisdiction over the relator's claims.

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 relator 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 information 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.

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

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

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

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

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

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

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

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

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

The court again rejected the defendants' argument, finding that discovery documents not filed with the court in a civil proceeding could not constitute public disclosure under the FCA, and since the deposition transcript at issue was never filed with the state court and was only "theoretically available" to the public, it did not result in a public disclosure of the relator's allegations. The defendants had argued that even if the relator's deposition transcript did not result in public disclosure, her oral testimony resulted in a public disclosure to those present for the deposition. The court, however, noted that the FCA lists specific types of public disclosures that will deprive a court of subject matter jurisdiction over a relator's *qui tam* action. The court held that disclosure of allegations made outside of one of the specific sources identified in the FCA, regardless of whether made at a public place or in a deposition, did not constitute a public disclosure for FCA purposes. The court reasoned that "the requirement that the transcript from a deposition be filed with the court in order to constitute a 'public disclosure' in a civil hearing would be meaningless if a public disclosure occurs simply because someone at the deposition was an outsider to the information." Therefore, the court found that the relator's deposition testimony did not constitute a public disclosure, and denied the defendants' motion for reconsideration.

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

A corporate relator brought a *qui tam* action against a group of insurance companies and adjusters, alleging that homeowner's insurance policies extended by the defendants covered various wind damage to homes, but that, in the aftermath of Hurricane Katrina, the defendants mischaracterized much of the damage as flood damage (which was not covered by the homeowners' policies), thereby reducing the amounts the defendants were required to pay on insurance claims. The

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

The Public Disclosure Bar

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

Filing the Amended Complaint Under Seal

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

Pleading Fraud With Particularity

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

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

U.S. ex rel. Dugan v. ADT Sec. Services, Inc., 2009 WL 3232080 (D. Md. Sept. 29, 2009)

A relator brought a *qui tam* action against the defendant, a merchant selling fire protection and security services. In the complaint, the relator alleged fraud in the inducement of a 1996 GSA contract, fraud with respect to sales of parts and labor,

false claims for payment, false records submitted for payment of false claims, and failure to pay fees. The United States District Court for the District of Maryland noted that the government did not intervene in the relator's suit, and therefore the FCA's six-year statute of limitations applied to the relator's claims. After applying the statute of limitations, the court held that the relator's first count for fraud in the inducement of the contract was barred, since the contract was executed in 1996, but the relator's complaint was not filed until 2003.

The court dismissed the second count, alleging fraud with respect to sales of parts and labor, as well as counts three and four, which alleged false claims for payment and false records submitted for payment of false claims. The court concluded that the relator failed to state a claim with respect to each of these claims, as she failed to identify a false representation that the defendant made to the government, failed to identify any particular claim for payment that actually included fraudulently inflated labor charges, was unable to provide specific examples of when the defendant overcharged the government, and failed to identify any specific records, dates, or individuals involved in the alleged fraud.

Finally, the court dismissed the fifth count, alleging failure to pay fees owed to the government, pursuant to the FCA's public disclosure bar. The defendant successfully argued that at least some of the relator's allegations had been publicly disclosed in various reports following GSA audits and investigations, and that the relator modified her complaint to include information that was reflected in those reports. The court further found that the relator could not demonstrate that she qualified for the FCA's original source exception to the public disclosure bar. Although the relator had voluntarily disclosed information to the government before she filed her complaint and before the government's reports were publicly disclosed, the court found that the information she provided was broadly-worded and vague. It was only after the public disclosures, the court found, that the relator amended her allegations and offered a more substantial complaint. Thus, the court concluded, the relator was not an original source of the allegations contained in her complaint, since she could not "allege specific facts—as opposed to mere conclusions—showing exactly how and when . . . she obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and support those allegations with competent proof."

U.S. ex rel. Hixson v. Health Mgmt. Sys. Inc., 2009 WL 3003258 (S.D. Iowa Sept. 21, 2009)

Two attorney–relators brought a *pro se qui tam* action against the State of Iowa's Medicaid Third Party Liability contractor and several of its individual and corporate affiliates, alleging that the defendants violated the FCA by failing to recover from liable third parties certain funds paid by Iowa Medicaid for expenses that

were necessitated by medical negligence. The defendants moved to dismiss the action on multiple grounds, each of which is discussed below.

Did the Public Disclosure Bar Apply?

The defendants argued that the court lacked subject matter jurisdiction over the action and that the public disclosure bar applied, as that the relators' action was based on information provided through the state's equivalent to FOIA, information available in the defendants' response to various requests from the Iowa Department of Human Services, and information available in a publicly-filed verdict form in a different case. The United States District Court for the Southern District of Iowa ultimately disagreed, and held that the public disclosure bar did not apply. The court held that the documents were publicly disclosed—the FOIA-like documents constituted an administrative report because they came from a state agency that administered a federal program; the information contained in the defendant's response to the Iowa Department of Human Services was a part of an open bid process that was available for public review and qualified as information disclosed at an administrative hearing; and the publicly-filed verdict form was a form of civil hearing and hence in public domain. However, the court held that the information used to bring the action did not give rise to an inference of fraud. Thus, the relators' allegations could not be "based upon" those disclosures and the public disclosure bar did not apply.

Were the Relators' Claims Pled With Particularity

The defendants also moved to dismiss on the grounds that the relators failed to identify any claim, false record or statement, or facts to support their allegation of a conspiracy, and thereby failed to state fraud with particularity, as required by Federal Rule of Civil Procedure 9(b). However, the court stated that the defendants' allegedly improper requests for federal dollars to administer Medicaid in the state constituted false claims and/or statements material to false claims under the FCA. However, the court concluded that those claims were not false claims, since, pursuant to state law, the defendants "are not required to seek reimbursement for Medicaid payments for costs necessitated by medical negligence." The court determined that the defendants had followed a reasonable statutory interpretation and had not made any false claim knowingly or recklessly. The court further noted that since relators had failed to identify any false claim, they had also failed to allege a claim of conspiracy to present the false claims. Therefore, the court held that relators failed to state fraud with enough particularity to satisfy Rule 9(b).

Were the Claims Against the Individual Defendants Barred by Sovereign Immunity?

The individual defendants further argued that they were sued in their official capacities and the claims against them were actually claims against the state. Thus, those defendants contended, they did not qualify as "persons" under the FCA and the relators' claims against them could not be maintained. The court responded by noting that even if those defendants had been sued in their individual capacities, as the relators argued, it still did not appear that the individual defendants acted outside their official duties. Therefore, the court found that those defendants did not come within the statutory definition of "person" and hence the Eleventh Amendment barred the relators' claims against them.

Could the Relators Proceed *Pro Se*?

Finally, the defendants argued that the relators lacked standing to bring a *qui tam* action because they brought the suit as *pro se* relators. The United States District Court for the Southern District of Iowa granted the motion to dismiss. However, the court held that as the relators were attorneys licensed to practice law before the court, they could bring the action *pro se*.

Consequently, the court granted the defendants' motion and dismissed the case in its entirety for failure to state a fraud claim with sufficient particularity.

U.S. ex rel. Putnam v. E. Idaho Reg'l Med. Center, 2009 WL 2901233 (D. Idaho Sept. 8, 2009)

The relator brought a *qui tam* action against the defendants, a regional medical center and several others, alleging that the defendants fraudulently billed Medicare and Medicaid. The government intervened. One defendant, a recovery center, settled with the plaintiffs. Two of the other defendants, a clinic and its president, moved to dismiss the complaint for lack of subject matter jurisdiction, contending the False Claims Act's public disclosure bar applied. The United States District Court for the District of Idaho denied the motion to dismiss. Relying on Ninth Circuit precedent, the district court held that the relator's faxes, letters, and telephone conversations with the Idaho Department of Health and Welfare (DHW) were not public disclosures under the FCA, and that a public disclosure does not occur when a relator discloses alleged fraud to a government agency. The court also concluded that the report generated by the subsequent DHW audit of the defendants' billing practices did not constitute a public disclosure, since none of DHW's findings were ever actually disclosed to the public. The court also noted that the U.S. Supreme Court will soon determine whether reports from state government audits, hearings and investigations even qualify as public disclosures at all, or whether that label only applies to reports generated by the federal government.

Although the two defendants conceded that DHW's report was never made available to the public, they argued that the relator's conversations with a DHW investigator constituted a public disclosure. However, the district court determined that the relator initiated those conversations and the subsequent audit and "reported

in detail about defendants' alleged fraud." Thus, the court concluded, the "Relator had independent knowledge about defendants'alleged fraud before DHW began its audit and was thus not an 'outsider' to DHW's audit. Accordingly, Relator did not learn about the alleged fraud from DHW, and DHW's communications with Relator could not have resulted in a public disclosure of Relator's *qui tam* allegations." The defendants also argued that public disclosures occurred when DHW discussed its audit with the defendants and their employees and independent contractors. Again, the district court, relying on Ninth Circuit precedent, rejected the defendants' argument, finding that "[w]hen confronted with similar disclosures, the Ninth Circuit has held that 'employees of a corporation later sued under the FCA' are not 'members of the public for purposes of that suit' and "that holding otherwise 'would run contrary to the purpose of the FCA, for it drastically curtails the ability of insiders to bring suit once the government becomes involved in the matter.'" The court noted that this rationale applies to the defendants' independent contractors as well, since, due to the nature of their jobs, those individuals had very real interests in maintaining the confidentiality of information regarding the defendants' billing practices, in order to safeguard their own licenses and reputations, and because they had considerable incentives to ensure that DHW's audit was resolved in favor of the defendants, since their continued work with the defendants was conditioned on the defendants' certification as Medicare providers.

Finally, the district court held that the relator's deposition testimony in a prior state court case did not constitute a public disclosure because the parties did not file the deposition transcript with the state court. The court concluded, "[a]ny disclosures Relator made in that deposition were therefore limited to the parties in the action and only theoretically available to members of the public." Consequently, the court denied the defendants' motion to dismiss.

U.S. ex rel. Duxbury v. Ortho Biotech Prods., L.P., 2009 WL 2450716 (1st Cir. Aug. 12, 2009)

Two relators, who were both previously employed by the defendant biopharmaceutical company, initiated a *qui tam* action against their former employer. The suit was initially filed by only one of the relators (Duxbury), and alleged a scheme of manipulation of the average wholesale price for the drug, illegal kickbacks and improper inducements to providers, and conspiracy. Duxbury's original complaint was later amended to add the second relator (McClellan)—who was alleged to have knowledge of the alleged fraud after Duxbury's employment with the defendant ended—and to add an allegation for improper off-label promotion of the drug. However, before Duxbury's complaint was filed, a consolidated MDL had already commenced, alleging industry-wide fraudulent reporting of average wholesale price and illegal kickbacks. Moreover, after Duxbury's original complaint was filed, but before McClellan was added as a second relator, yet another relator (Blair) filed a *qui tam* action against the defendant, alleging illegal kickbacks and inducements to providers, as well as improper off-label promotion of the drug. This third relator's complaint was voluntarily dismissed, once it was determined that he was not the first to file. The defendant moved to dismiss the two remaining relators' action, arguing that their average wholesale price and illegal kickback allegations had already been publicly disclosed in the MDL case. The district court agreed that those allegations had been publicly disclosed, but determined that Duxbury qualified for the "original source" exception to the public disclosure bar. However, the district court still ultimately dismissed these allegations, finding that the relators failed to plead the alleged fraud with particularly, as required by Federal Rule of Civil Procedure 9(b). The district court also found that McClellan's allegations were barred, both because there was no evidence that McClellan qualified as an original source of information regarding fraud that occurred after Duxbury left the defendant's company, and since his claims were asserted after the original complaint had been filed and were therefore barred by the first-to-file rule. In addition, the district court found that both relators' allegations of improper off-label promotion were barred under the first-to-file rule, because Blair was the first relator to raise those allegations. Thus, all of Duxbury and McClellan's claims were dismissed. The relators appealed the district court's rulings to the First Circuit.

Application of the Public Disclosure Bar

The First Circuit first discussed the public disclosure bar, and found that the district court's ruling was based on the notion that, in order to qualify as an original source, a relator must voluntarily provide his/her information to the government before filing his/her *qui tam* action. The defendants argued that the district court's ruling was incorrect and that the original source exception only applies when a relator informs the government of his/her allegations before those allegations are publicly disclosed by anyone, regardless of when the relator's *qui tam* suit is filed. They argued that the district court's interpretation is contrary to congressional intent, since it would preserve a relator's *qui tam* action even if that action was based on publicly disclosed information, as long as relator also had direct and independent knowledge of the fraud and alerted the government to his/her knowledge mere moments before filing his/her complaint. The First Circuit, however, agreed with the district court's interpretation of the rule, finding that it comports with the plain, unambiguous language of the statute.

The circuit court then determined that the district court correctly held that McClellan did not qualify as an original source, since the relators did not offer any evidence that McClellan had direct and independent knowledge of the defendant's alleged fraud or that he provided his information to the government prior to the filing of the original *qui tam* complaint. Thus, the First Circuit held that the claims for which only McClellan was alleged to have knowledge were properly dismissed.

The First Circuit, though, reversed the district court's dismissal of Duxbury's claims. The court determined that Duxbury was an original source of the allegations for which he had knowledge, and found that these allegations were also properly pled under Rule 9(b). The court determined that Duxbury was not required to identify particular false claims, but "could satisfy Rule 9(b) by providing 'factual or statistical evidence to strengthen the inference of fraud beyond possibility' without necessarily providing details as to each false claim." The court found that Duxbury's allegations that the defendant caused particular providers—whom he identified—to submit false Medicare and Medicaid claims met Rule 9(b)'s heightened pleading requirement, since Duxbury offered specific information regarding the allegedly false claims, including information regarding the dates and monetary amounts, and number of claims. In addition, the court held that Duxbury's allegations regarding improper inducements supported his allegations that the defendant knowingly caused providers to submit false claims.

Application of the First-to-File Bar

Finally, the First Circuit affirmed the district court's decision that both relators' claims for improper off-label promotion of the drug were barred by the FCA's first-to-file rule, since those allegations had already been raised in Blair's *qui tam* complaint.

U.S. ex rel. Rigsby v. State Farm Ins. Co., 2009 WL 2461733 (S.D. Miss. Aug. 10, 2009)

Following Hurricane Katrina, two relators—insurance adjusters of an adjusting firm—sued an insurance company, an engineering firm, and the adjusting firm they'd worked for, alleging FCA violations and FCA retaliation. Specifically, the relators alleged that the defendants conspired not to pay valid insurance claims by reducing the amount damage attributed to wind, since the government provided reimbursements for flood damage but not for wind damage. The government declined to intervene. The insurance company moved to dismiss the case for lack of subject matter jurisdiction, contending that the relators' claims were barred by the False Claims Act's public disclosure provision. In addition, the company moved to dismiss the relators' claims for lack of particularity and failure to state a claim. The defendant engineering firm moved to join in these motions. Moreover, the defendant insurance company moved for summary judgment on the relators' FCA retaliation claim.

The United States District Court for the Southern District of Mississippi converted the motions to dismiss into motions for summary judgment. The court rejected the public disclosure arguments, finding that one of the relators had direct and independent knowledge of the facts alleged in support of the amended complaint and, therefore, qualified as an original source. The court also rejected the defendants' arguments that the relators' complaint failed to state a claim and lacked particularity, as the court found that the relators' pleadings were sufficient to tell the defendants of the allegations against them and allow them to prepare a defense, and there were issues of material fact regarding the relators' allegations, which made summary judgment improper. However, the court granted the insurance company's motion for summary judgment on the relators' FCA retaliation

claim, since the relators were employed by the adjuster and could not have been fired by the insurance company. The court denied the motion to dismiss for lack of subject matter jurisdiction.

U.S. ex rel. Howard v. Urban Inv. Trust, Inc., 2009 WL 2252252 (N.D. Ill. July 29, 2009)

A relator sued her former employer—a real estate investment firm—as well as a related entity, and a group of individuals, alleging FCA violations, retaliation, and constructive discharge from employment. Specifically, the relator alleged that the defendants engaged in an embezzlement scheme involving the unlawful transfer of funds under a government contract. The defendant firm and two of the individual defendants moved to dismiss the complaint for lack of subject matter jurisdiction, pursuant to the FCA's public disclosure bar—these defendants argued that the relator's superiors disclosed the alleged misconduct to the appropriate government official, resulting in a public disclosure.

The relator did not dispute this argument and the court held that the relator's allegations had been previously publicly disclosed. Next, after reviewing the government's investigative report and an affidavit from the president of the defendant firm's subsidiary, the court determined that the information contained in those materials was substantially similar to the relator's allegations, as the report, the affidavit, and the relator's complaint implicated the same people, involved the same time period, and detailed similar activity of improper transfer of funds. Accordingly, the court held the relator's allegations were based on publicly disclosed information. Finally, the court determined that the assessed whether the relator qualified as an original source of the information on which her allegations were based. The defendants did not dispute that the relator had direct and independent knowledge of the alleged fraud, but argued that a relator can only be an original source if he/she had voluntarily notified the government of her allegations before filing her *qui tam* complaint, and that this relator could not be an original source, since her superiors had actually disclosed the pertinent information to the government. The court, however, noted that the relator alleged that she voluntarily initiated meetings with the government and voluntarily provided information and documents to government investigators. Thus, the court concluded that the relator met her burden of asserting subject matter jurisdiction, since her allegations were sufficient to support a conclusion that she qualified as an original source. The court accordingly denied the defendants' motion to dismiss the FCA claims for lack of subject matter jurisdiction.

U.S. ex rel. Little v. ENI Petroleum Co., Inc., 2009 WL 2223652 (W.D. Okla. July 23, 2009)

A relator brought a *qui tam* action against an energy company and its exploration division, alleging failure to pay royalties due to the government under oil production leases. The plaintiff specifically alleged the defendants improperly deducted transportation costs from the royalties they paid. The government declined to intervene. The defendants moved to dismiss for lack of subject matter jurisdiction, pursuant to the FCA's public disclosure bar. The United States District Court for the Western District of Oklahoma converted the defendants' motion to dismiss into a motion for summary judgment. The court noted that none of the disclosures relied on by the defendants involved oil companies improperly deducting transportation costs from the royalties due on oil production that they paid to the government. Instead, many of the disclosures involved royalties on gas production. Also, many of the disclosures related to proposed legislation involving the royalty in kind program. While these disclosures mentioned possible concerns regarding transportation costs, they did not pertain to improper deduction of transportation costs from royalties due to the government. Since the court found no substantial identity between the allegations and transactions in this case and the publicly disclosed allegations and transactions, it held the public disclosure bar did not apply and denied the defendants' motion accordingly.

Glaser v. Wound Care Consultants, Inc., 2009 WL 1885500 (7th Cir. July 2, 2009)

The plaintiff brought a *qui tam* action in the U.S. District Court for the Southern District of Indiana, alleging that a wound care service provider and its owner physicians overbilled Medicare and Medicaid by submitting fraudulent claims for payment. Although the relator in the case was a Medicaid recipient and received treatments from the defendant service provider, she was not familiar with the provider's billing practices, and only learned of the provider's alleged fraud when her attorney described it to her; her *qui tam* action relied solely on information she received from her attorney. The government declined to intervene in the case and the defendant moved to dismiss, pursuant to the FCA's public disclosure bar. The defendants argued that, prior to the relator's complaint being filed, the Centers for Medicare and Medicaid Services ("CMS") had alredy begin investigating their billing practices and had sent occasional correspondence to the defendant regarding billing and overpayment issues. The relator and her attorney responded that they were unaware of the government's investigation when they filed the *qui tam* complaint. Although they invoked the attorney-client privilege and refused to reveal the source of their information, the attorney stated that she learned about the defendant's billing practices more than a year before the government began its investigation. As a result, the relator argued that her complaint could not have been been

precluded by the False Claims Act's public disclosure bar, since the allegations in the complaint could not possibly have been "derived from" the government's information, and thus, could not have been "based upon" that information. The district court disagreed and dismissed the relator's complaint, reasoning that the relator could not demonstrate that her complaint was not based on the government's investigation, since she refused to reveal the source of her information regarding the defendant's billing practices. The relator appealed to the Seventh Circuit.

The circuit court first stated that a three-part inquiry is necessary when determining whether a *qui tam* complaint must be dismissed pursuant to the public disclosure bar. First, the court must decide whether the relator's allegations have been "publicly disclosed." Second it determines whether the relator's suit was "based upon" the public disclosure. And if the relator's allegations are based on publicly disclosed information, then the court takes the third step of determining whether the relator was the "original source" of that information.

Was there a public disclosure?

With respect to the first inquiry, the court found that the relator's allegations had been publicly disclosed, notwithstanding the fact that the government's information had been primarily disseminated only to the defendant, and not to the public at large. The plaintiff contended that mere governmental awareness of the defendant's wrongdoing did not constitute public disclosure. Furthermore, she contended the government must take affirmative steps to publicize the investigation if no wide dissemination of the allegations had occurred. The circuit court, however, noted that the text of the False Claims Act does not require that the government to take any affirmative steps to publicize its investigations, and concluded that for FCA purposes, the allegations of the defendant's fraud had been publicly disclosed, first when the government sent a letter to the defendant, demanding a repayment for the defendant's improper billing, and again when the government later directly informed the defendant of its ongoing investigation. The court reasoned that since CMS—the government agency charged with responsibility for overseeing Medicare and Medicaid—was already aware of the defendant's billing practices at the time the relator filed her *qui tam* action, the relator's complaint could not possibly further the FCA's purpose of exposing the fraud to the government. Therefore, the court concluded, the district court properly found that the relator's allegations had been publicly disclosed.

Were the relator's claims "based upon" the public disclosure?

Next, the Seventh Circuit held that the relator's allegations were "based upon" the publicly disclosed information. In 1999, in *U.S. v. Bank of Farmington*, the Seventh Circuit adopted the minority view that a *qui tam* action is "based upon" a public disclosure when it "depends essentially upon publicly disclosed information and is <u>actually derived from</u> such information." (emphasis added) The circuit court affirmed this interpretation in 2007, in *U.S. ex rel. Fowler v. Caremark RX, L.L.C.* Based on these rulings, the relator argued that her complaint could not possibly have been "based upon" the public disclosure, since the relator and her attorney were completely unaware of the government's investigation and therefore the *qui tam* complaint could have neither "depended essentially" nor have been "derived from" the public disclosure. However, the Seventh Circuit departed from its prior rulings and adopted the majority view, thereby expanding its interpretation of "based upon" such that *qui tam* allegations are "based upon" publicly disclosed information when the allegations are merely "substantially similar" to the publicly disclosed information. Applying the new standard, the court found that the relator's allegations were indeed substantially similar to information from the government's investigation, as both alleged the same practice of overbilling. Although the circuit court recognized that the relator's complaint included some allegations that were not present in the government's investigation, it still held that the relator's complaint was barred, finding that "'based upon" does not mean "solely based upon." As the circuit court determined that the relator's complaint was sufficiently "substantially similar" to the allegations in the government's investigation, it held that the public disclosure bar applied and deprived the court of subject matter jurisdiction over the relator's claims. Thus, the Seventh Circuit affirmed the district court's ruling.

Was the relator an "original source" of the allegations in her complaint?

Finally, the circuit court considered the third inquiry—whether or not the relator qualified for the FCA's "original source" exception to the public disclosure bar. The court held that she did not, finding that the relator did not have direct and independent knowledge of her allegations. The court found that the relator had no direct knowledge of the defendant's billing practices, since her allegations were based solely on information she acquired from her attorney, and since the relator and her attorney invoked the attorney-client privilege and refused to identify the source of the information contained in the *qui tam* complaint. Hence, the Seventh Circuit held the plaintiff failed to prove her independent knowledge of the alleged fraud and thusly did not qualify as an original source of her allegations and affirmed the district court's ruling.

The Seventh Circuit's rejection of the minority view with respect to the meaning of "based upon" leaves the Fourth Circuit as the only circuit to have considered this question and still currently apply the "derived from" standard. The Seventh Circuit stated that it reversed its position because it determined that the "derived from" standard improperly renders the third inquiry of the public disclosure bar—the "original source exception"—superfluous. The court determined that the original source exception is always extraneous whenever the "derived from" standard is applied, because: (1) when a court finds that the *qui tam* allegations <u>were</u> based upon a public disclosure, there will almost never be a need to then ask whether or not the relator has direct and independent knowledge of the allegations and qualifies for the original source exception; and (2) when the court finds that the allegations were not based upon a public disclosure, the relator's complaint will not be barred, regardless of whether or not the relator was an original source of the allegations. The court stated that it had previously placed too much significance on the plain language interpretation of "based upon," and referenced other instances of "poor drafting" within the FCA. The court also shared its belief that the "substantially similar" standard is more consistent with the FCA's dual objectives of encouraging knowledgeable relators to expose fraud, while discouraging relators without knowledge from bringing parasitic claims. As a result of this shift in interpretation, the Seventh Circuit overruled its prior decisions in *Bank of Farmington* and *Caremark*, to the extent that those decisions conflict with the court's new interpretation of "based upon."

See *U.S. ex rel. Pfeifer v. Ela Med., Inc.*, 2010 WL 1380167 (D. Colo. Mar. 31, 2010) at page 17.

See *U.S. ex rel. Feldman v. Van Gorp,* 2009 WL 4756486 (S.D.N.Y. Dec. 7, 2009) at page 10.

See *U.S. ex rel. Ven-A-Care v. Actavis Mid Atl. LLC,* 2009 WL 3171798 (D. Mass. Oct. 02, 2009) at page 114.

See *U.S., ex rel. Liotine v. CDW Gov't, Inc.*, 2009 WL 3156704 (S.D. Ill., Sept. 29, 2009) at page 137.

See *U.S. ex rel. Becker v. Tools & Metals, Inc.*, 2009 WL 2245207 (N.D. Tex. July 27, 2009) at page 19.

FALSE CLAIMS ACT RETALIATION CLAIMS

Johnson v. EG&G Defence Materials Inc., 2010 WL 2605092 (D. Utah June 24, 2010)

The plaintiff brought an action under the False Claims Act against her former employer, a government contractor responsible for chemical warfare agent disposal operations, alleging unlawful discharge from employment. She alleged that the defendant lost Army approval for its government property control systems, but later regained approval based on misrepresentations that it reinstated an adequate system. She further alleged that the defendant retaliated against her when she reported the misrepresentations to the defendant and expressed an intention to tell the Army. The defendant moved to dismiss the plaintiff's complaint, alleging that it was barred by the statute of limitations. The United States District Court for the District of Utah granted the defendant's motion. The court observed that an express statute of limitations for retaliation claims did not exist under the FCA, but applied the four year statute of limitations under Utah's common law claim of wrongful discharge in violation of public policy. Since the plaintiff's employment was terminated nearly five years before she filed her complaint, the court concluded that her complaint was time-barred. The plaintiff, however, argued that her claim did not accrue until she discovered the allegedly improper reasons for her termination, and that using this date for statute of limitations purposes, her complaint was timely filed. The court disagreed, though, and held that the statute of limitations began to run on the day the plaintiff learned of her injury and who caused it, which the court determined was the same day on which her employment was terminated. Thus, the court held that her complaint was time-barred and the complaint was dismissed.

Saunders v. Dist. of Columbia, 2010 WL 1909135 (D.D.C. May 13, 2010)

The plaintiff brought an action against her previous employer, the District of Columbia (DC), as well her supervisor and DC's CFO—sued both individually and in their official capacities. The plaintiff, who'd been terminated from her job as DC's Acting CFO, alleged that the defendants violated federal law by discriminating against her on the basis of her race and gender. She also alleged a violation of the FCA's anti-retaliation provision, accusing the defendants of re-assigning and demoting her and eventually terminating her employment in retaliation for her discovery and reporting of DC's numerous alleged deficiencies in contract procurement and lack of management and accounting for more than $70 million in federal funds.

The court was unable to determine whether the individual defendants were properly served with the plaintiff's complaint and ordered the plaintiff to file a notice "providing either proof of timely service as to the Individual Defendants or an explanation as to why service was not timely made." There was no dispute, however, that DC was properly served and DC subsequently moved to dismiss the plaintiff's FCA claims. DC argued that the plaintiff's FCA retaliation claim should be dismissed because the plaintiff failed to allege that she had engaged in any activity in furtherance of an FCA action. In addition, DC argued that the retaliation claim was time-barred under the FCA's statute of limitations.

The United States District Court for the District of Columbia quickly rejected DC's argument that the plaintiff failed to state a claim for retaliation under the FCA, as DC failed to respond to the plaintiff's arguments that her complaint properly pled all of the elements of an FCA retaliation claims and that she was not required to file a *qui tam* suit—or even contemplate doing so—in order to be protected under the FCA's anti-retaliation provision. As a result, the court denied DC's motion to dismiss for failure to state a claim with prejudice.

The court then addressed DC's argument that the plaintiff's retaliation claim was time-barred. The court first noted that the FCA does not provide an explicit statute of limitations period for retaliation claims, as confirmed by the Supreme Court in *Graham County Soil & Water Conservation Dist. V. U.S. ex rel. Wilson,* 545 U.S. 409 (2005). The court concluded that the appropriate statute of limitations period is determined by the most closely analogous state limitations period. The court granted the motion to dismiss the due process claim. The court declared that the issue is one of first impression, denied DC's motion to dismiss on that basis without prejudice and directed the parties to file supplemental briefing on the issue of which DC statutory provision (and its corresponding statute of limitations period) is most analogous to the FCA's anti-retaliation provision.

U.S. ex rel. Tetsuwari v. Fluor Fernald, Inc., 2010 WL 1849324 (S.D. Ohio May 5, 2010)

A relator brought a *qui tam* action against his previous employer, a company that conducted the clean-up of the remains of a uranium-processing facility under a contract with the Department of Energy, with oversight by the Environment Protection Agency and other agencies. The clean-up was conducted under a "balanced approach" in which the most dangerous highly radioactive materials were to be taken off site, while the much larger volume of lower radioactive materials were to be stored in a sealed on-site disposal facility. The relator alleged that the defendant failed to perform under the contract and made false statements and certifications in compliance reports to the government, in violation of the False Claims Act. Moreover, the relator alleged that the defendant retaliated against him and termi-

nated his employment when he reported the alleged contract violation and refused to sign compliance reports that he believed were false. The defendant countered that it did not breach its contract and denied liability, arguing that the EPA and DOE were fully aware of its conduct. The defendant further contended that relator's retaliation claim failed for lack of evidence and insisted that his employment was terminated as part of a planned workforce reduction, as the clean-up project was winding down. The relator filed a motion for partial summary judgment (on his fraud claims), and the defendant moved for summary judgment on all of the relator's claims.

The United States District Court for the Southern District of Ohio denied the relator's motion, and granted the defendant's motion. The court observed that there was no breach of the defendant's government contract and that the defendant had complied with all applicable regulations. The court also determined that the facts and evidence in the case showed that the clean-up efforts were highly regulated by EPA and that DOE was well aware of all the defendant's methodology and actions and found no basis for false claims or a breach of contract. Finally, the court held that the defendant terminated the relator's employment as a part of a planned workforce reduction and not as retaliation against him for being involved in any protected activities. The court relied on the fact that the defendant also terminated the employment of 46 other employees at the same time the relator was let go, including the relator's manager, to whom he complained about the defendant's alleged fraud. Consequently, the court denied the relator's motion for partial summary judgment and granted the defendant's motion for summary judgment.

Bell v. Dean, 2010 WL 1856086 (M.D. Ala. May 4, 2010)

The plaintiff brought a claim under the anti-retaliation provision of the FCA against the trustees, the president, and the executive vice president of a state university, in both their official and individual capacities. The plaintiff alleged that he was employed by the defendants to apply to the federal government for grant funds under Title III of the Higher Education Act of 1965. The plaintiff further alleged that the defendants expressed a desire to use funds received from the Department of Education in an unauthorized manner and that when he expressed concerns about this and stated that he would report any improper use of the funds to the Secretary of Education, his employment was terminated. His FCA anti-retaliation lawsuit followed.

The defendants moved to dismiss the complaint for failure to state a claim. The United States District Court for the Middle District of Alabama granted the motion in part, dismissing the claims for money damages against the individuals sued in their official capacities on state sovereign immunity grounds as it held that the claims against those individuals in their official capacities were to be treated as

claims against the state. The court rejected the plaintiff's contention that the 2009 amendment to the FCA's anti-retaliation provision, which removed the language referring to potential defendants as "employers," reflected Congress's intent to broaden the reach of the provision to include state officials sued in their official capacities. Rather, the court held that the recent amendment could not limit a state's sovereign immunity in that manner without a clear statement by Congress.

The court next examined the substance of the plaintiff's retaliation claims and found that the complaint was unclear as to whether or not the defendants "instructed" the plaintiff to use federal government grant funds improperly, or merely "expressed a desire" that the funds be used in an improper way. Consequently, the court construed the defendants' motion to dismiss as a motion for a more definite statement and ordered the plaintiff to clarify his allegations. The court also observed that the complaint did not allege that the original Title III grant application was false, but rather that a question arose as to how to use the funds acquired under it. Moreover, the court found that the plaintiff failed to allege that FCA litigation was a distinct possibility when he was fired and that his complaint failed to allege a nexus between the defendants' alleged false claim and the alleged retaliation. Accordingly, the court directed the plaintiff to provide further briefing on the nexus between the alleged false claims and the adverse retaliation action as well.

U.S. ex rel. Abner v. Jewish Hosp. Health Care Serv. Inc., 2010 WL 1381816 (S.D. Ind. Mar. 31, 2010)

Two relators brought a *qui tam* action against two hospitals, alleging health care fraud. In addition, the two relators were previously employed by one of the hospitals and they each brought claims against that hospital for retaliation under the False Claims Act. That hospital moved for summary judgment on all of the relators' claims. The United States District Court for the Southern District of Indiana granted that motion.

With respect to the relators' allegations of fraud, the court held that the relators failed to present any evidence of fraudulent claims submitted to the government by the defendant. The court also noted that neither relator had access to information that would have allowed them to know whether bills they suspected were fraudulent were ever submitted to the government for reimbursement or whether the patients covered by those bills even received Medicare or Medicaid benefits. With respect to the retaliation claims, the court found that the relators were engaged in protected conduct, as they were both investigating inaccurate billing at their respective hospitals. However, the court also found that the relators could not prove that the defendant had knowledge of the protected conduct, since the relators only alleged that they discussed their concerns with one other co-worker, which, the court held, was insufficient to put that defendant hospital on notice that

the relatore were engaged in protected conduct. Moreover, the court held that the relators did not demonstrate that their respective terminations were as a result of the defendants' motivation against the protected conduct, but may have been due to behavioral problems. Therefore, the court granted the defendant's motion for summary judgment.

Laborde v. Rivera-Dueno, 2010 WL 1416010 (D.P.R. Mar. 31, 2010)

The plaintiff brought action against her former boss in both his personal and official capacities, alleging violations of the Fifth and Fourteenth Amendments, the FCA's anti-retaliation provision, and local laws. The plaintiff had been employed as the Director in the Office of Public Health Preparedness and Response (OPHPR) for the Puerto Rico Department of Health (PRDOH), which was funded by federal grants. The plaintiff observed that one of PRDOH's employees was reassigned to another department, but was still receiving a salary from federal funds, in contravention of the terms of the federal grants. The plaintiff raised her concerns with internal legal counsel and requested a meeting with the defendant, who was Acting Secretary of PRDOH, to advise him of the violation. The defendant did not accept the meeting. The plaintiff then contacted the Senior Public Health Advisor and reported the compliance irregularities. The plaintiff was terminated later that same day by the defendant on the alleged basis that she had negligently performed her job duties. This lawsuit followed.

The defendant moved to dismiss the suit in the United States District Court for the District of Puerto Rico. With respect to the plaintiff's FCA claims, the defendant argued that the plaintiff did not engage in protected conduct under the FCA, and that the defendant could not be liable in his individual capacity because a supervisor does not constitute an employer for the purposes of the FCA. The court denied the defendant's motion to dismiss the FCA claim, finding that the plaintiff had expressed her concerns about PRDOH's use of the federal grant money with several individuals within the PRDOH and that she had proceeded through various levels of authority, attempting to rectify the problems she perceived. These acts, the court held, constituted protected conduct and could have lead to an FCA action that the defendant could reasonably have anticipated. Moreover, the court rejected the defendant's argument that he could not be held liable under the FCA's anti-retaliation provision, since he was not the plaintiff's employer. The court observed that the 2009 amendments to the FCA, which modify the anti-retaliation provision, removed the word "employer" from the provision. Accordingly, the court held that "[i]n the absence of specific First Circuit guidance holding that individual liability does not exist in FCA retaliation claims, and in light of the fact that the persuasive authority on the issue relies upon an outdated version of the statute," the defendant's motion to dismiss would be denied.

U.S. ex rel. Patton v. Shaw Servs., LLC, 2010 WL 1254615 (E.D. La. Mar. 23, 2010)

A relator brought a *qui tam* action against his former employer, a construction company, alleging that the defendant presented false claims under a government contract and violated the False Claims Act's anti-retaliation provision. Specifically, the relator alleged that the defendant was contracted to work on a construction project at the Louisiana State Transportation Center—a project that was funded, in part, by the federal government. The relator further alleged that the defendant billed the government for defective work, that he complained to his supervisor, to human resources and to management, and that he was fired after he detailed the defects to a manager and requested that they be fixed. The government declined to intervene. The defendant moved to dismiss the retaliation claim, or alternatively, moved for partial summary judgment on that claim. The defendant also moved to dismiss the claim for fraud, arguing that the relator's complaint failed to state a claim. The United States District Court for the Eastern District of Louisiana treated both motions as motions for summary judgment because the defendant presented materials outside the pleadings.

With respect to the retaliation claim, the court held that the relator failed to establish the necessary elements, as he alleged that, prior to be terminated from his job, he complained to State of Louisiana and to federal government officials, and the defendant was aware of those complaints. The court further noted that "[a]lthough Plaintiff's complaint alleges that he made objections to certain methods employed at the project site, he generally does not allege when he objected, internally or otherwise, and where he provides specific dates, he fails to provide any support for his allegations. The complaints that Plaintiff alleges he made to management are unsupported apart from his own sworn declaration that they, in fact, occurred." This, the court held, was insufficient to overcome the defendant's summary judgment motion, which was supported by internal memoranda that discussed the circumstances of the relator's termination and did not mention any complaints he made regarding possible FCA violations until <u>after</u> he had been terminated from his job. The court was aware that the relator stated that he could possibly produce evidence to show that the defendant was aware that he was engaged in protected activity and retaliated against him as a result, but the court held that he should have produced that evidence when he opposed the defendant's summary judgment motion, rather than merely allude to it. Consequently, the court granted the defendant's summary judgment motion on the relator's retaliation claim.

The court also granted the defendant's motion to dismiss the relator's fraud claims—a motion that was also converted to a motion for summary judgment. The defendant had argued that the relator failed to state a claim because the defendant's work was not defective. The court noted that the relator's allegations of

defects were based on excerpts from two books on construction requirements—one from 1992 and another from 1958. The defendant convinced the court that it was not required to conform to the guidelines in these books, since the information in the books was not only out of date, but was also never incorporated into the defendant's government contract. In addition, the defendants showed that during the construction project, the Department of Transportation and Development had an architecture firm inspect the defendant's work on a weekly basis, and the firm's reports never indicated that the defendant's work was defective. The court again found that the defendant met its burden on summary judgment, and granted the defendant's motion.

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.

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

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

claim, finding that Rule 50(a) barred the argument because the defendant failed to raise it before the case went to the jury. In addition, the court found that there was no basis for a new trial. Finally, the court overruled the defendant's objections to the relator's inclusion of a legal assistant's time in calculating attorneys' fees, holding that the fees were reasonable in relation to the nature and complexity of the case.

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

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

Rost v. Pfizer, Inc., 2009 WL 3097231 (S.D.N.Y., Sept. 24, 2009)

The plaintiff sued his former employer and three of its executives, alleging FCA retaliation and violations of state law. The basis of the plaintiff's FCA retaliation claim was that the defendant company decided to terminate his provisional employment after the government declined to intervene in his *qui tam* suit against the defendants. The defendants moved for summary judgment, seeking dismissal of all claims. The plaintiff cross-moved for partial summary judgment regarding the defendants' attempt to reduce the amount of damages a jury could award, due to the plaintiff's alleged misconduct while working for the defendant. The United States District Court for the Southern District of New York granted the defendants' motion in its entirety and denied the plaintiff's motion as moot. The court held that the plaintiff failed to show that his complaints to the defendant regarding regulatory noncompliance involved false claims submitted to the government. Thus, the court held that his complaints to the defendant were not "protected activity" under the FCA. In addition, the court observed that the defendant company terminated the plaintiff's employment nearly two years after it first became aware of the *qui tam* suit and more than a year after he told that defendant of his discussions with federal regulators about the company's possible violations of federal law. Thus, the court held that the plaintiff did not provide facts showing a causal connection between any protected activity and his termination. Therefore, the court granted the defendants' motion and dismissed the plaintiff's FCA retaliation, as well as his state law claims. The court thus denied the plaintiff's cross-motion as moot.

U.S. ex rel. Leveski v. ITT Educ. Serv., Inc., 2009 WL 3079526 (S.D. Ind. Sept. 23, 2009)

The relator brought a *qui tam* action against her employer in the United States District Court for the Southern District of Indiana, alleging that the defendant violated the Higher Education Act's compensation ban, but falsely certified its compliance with the ban, resulting in a False Claims Act violation. The defendant contended that it had already defended against a prior case that raised similar claims, and thus the relator's case was barred by the FCA's first-to-file bar. The court noted that the prior case was not pending when the plaintiff filed his suit and therefore the first-to-file bar did not apply and the court had subject matter jurisdiction over the relator's claim. The defendant then argued that the relator's suit was barred by a settlement the relator entered into with the defendant to settle an employment dispute. The agreement released the defendant from all liability relating at all to her employment barred the suit. The court held that this provision did not bar the relator's suit because the relator's allegations were not related to her employment—the claims were derivative in nature and based on an obligation owed the government. Further, the defendant contended that the relator's allegations lacked particularity and failed to state a claim. The court determined that the relator's allegations could amount to an FCA violation, and therefore, her complaint did adequately state a claim. The relator argued that she did not need to plead her complaint with particularity. The court took this argument as an admission by the relator that her complaint did not meet Rule 9(b)'s pleading standard. However, the court noted that the relator's affidavit demonstrated that she had more information available to her and that she had offered to replead her allegations. Consequently, the court gave her an opportunity to file an amended complaint. Accordingly, the court granted the defendant's motion to dismiss without prejudice.

Kakeh v. United Planning Org., Inc., 2009 WL 2869995 (D.D.C. Sept. 9, 2009)

The plaintiff alleged several retaliation claims against his former employer, a non-profit organization that had contracted with the District of Columbia to manage two anti-poverty programs—programs that were largely funded by federal grant money. The plaintiff alleged that the applicable procedures in place required that whenever the grant money allocated to the defendant exceeded the defendant's needs, the defendant was required to notify the District of Columbia that it had a surplus, and either return the surplus funds or use them for allowable expenses. The plaintiff alleged that the defendant failed to satisfy this requirement, by using the grant money for improper expenditures. He stated that once he discovered this practice and reported it to the defendant's management, he was ordered to report the expenditures as legitimate. Instead, he alleged, he changed the designation for those expenditures from "allowable" to "unallowable" and contacted the appropriate D.C. government official who, with the plaintiff's assistance, launched a multi-agency investigation into the defendant's billing practices. The plaintiff alleged that soon after, he was informed that his employment with the defendant had been terminated. As a result of his termination, the plaintiff filed suit, alleging that the defendant violated the anti-retaliation provisions of both the federal and the District of Columbia's respective False Claims Act statutes, as well a claim under the District of Columbia Whistleblower Protection Act, a common law claim for wrongful discharge, and a claim for retaliation under the D.C. Human Rights Act.

The D.C. District Court granted the defendant's summary judgment motion with respect to the common law claim and the plaintiff dismissed the claim under the D.C. Human Rights Act. After a jury trial on the remaining claims, the defendant was found liable in the amount of $891,546, plus costs. Post-trial motions by both parties followed, with the defendant filing a motion for judgment as matter of law, as well as a motion to amend to amend, alter the judgment, or for new trial, or, alternatively for remittitur, and with the plaintiff moving to alter the judgment.

The Defendant's Motion for Judgment as a Matter of Law was Denied

The district court denied the defendant's motion for judgment as a matter of law, finding that the plaintiff presented sufficient evidence to demonstrate a violation of the Whistleblower Protection Act, which required him to show that: (1) he made a protected disclosure or refused to comply with an illegal order; (2) the defendant took adverse employment action against him; and (3) his protected disclosure or refusal to comply with an illegal order was a contributing factor to the defendant's decision to take adverse employment action against him. The court found that, notwithstanding whether or not the defendant's billing was lawful, the plaintiff's reports of his suspicions of possible fraud to his supervisors constituted a protected disclosure, as the plaintiff was not merely making suggestions to the defendant, but was expressing his actual, reasonable belief that the defendant was engaged in unlawful conduct. The court rejected the defendant's contention that the plaintiff did not use the necessary "magic words" to alert the defendant that he was making a protected disclosure. The court noted that even if the facts upon which the plaintiff's suspicions were based had been publicly disclosed, it was the plaintiff who was responsible for disclosing that information, which resulted in the government's investigation of the defendant's billing practices. The court also held that the defendant's management was at least partially responsible for the decision by the directors of the defendant's board to terminate the plaintiff's employment. As there was no dispute that the defendant took adverse employment action against the plaintiff, the court concluded that a reasonable jury could find that the defendant was liable under the Whistleblower Protection Act.

Similarly, the court found that the plaintiff offered sufficient evidence to support his federal and D.C. False Claims Act allegations, both of which required him to show that: (1) he engaged in a protected activity; (2) the defendant had knowledge of that activity; (3) the defendant terminated his employment; and (4) there was a causal link between his protected activity and his termination. The court determined that the plaintiff engaged in protected activity by expressing his belief that the defendant's billing practices were fraudulent. In addition, the court found that the plaintiff alleged that he believed that the defendant had instructed him to engage in unlawful billing and that he refused to comply. The court rejected the defendant's argument that the plaintiff did not explain why he refused to comply with orders, and left the defendant to believe that he was simply an insubordinate, disgruntled employee. In rejecting this argument, the court noted that the defendant was aware that the plaintiff was assisting the government's investigators, which was sufficient to allow a reasonable jury to conclude that the defendant was aware of the plaintiff's protected activity. The court also rejected the defendant's argument that the plaintiff failed to establish a causal link between his protected activity and his termination, noting that the plaintiff was the only employee in his department whose employment was terminated, and that his termination was announced only one day after the government visited the defendant's office to conduct its investigation. The court found that, based on these facts, a reasonable jury could find that the plaintiff's termination was linked to his protected activity.

As a result of these findings, the district court denied the defendant's motion for judgment as a matter of law and refused to set aside the jury's verdict.

The Defendant's Motion to Amend, for a New Trial, or for Remittitur was Granted in Part and Denied in Part

The district court calculated the defendant's liability in the amount of $891, 546 by adding the jury's three separate awards for back pay—one award under the Whistleblower Protection Act, one award under the D.C. False Claims Act, and one award under the federal False Claims Act—each of which amounted to $122,132, and adding that amount to the jury's three separate compensatory damages awards, each of which totaled $175, 050. The defendant argued that the jury's award was unclear, as the jury only calculated back pay and compensatory damages under the WPA, and then wrote "same" as the damages under the two FCA statutes. The court found that even though the defendant failed to object to the verdict form given to the jury and failed to request an instruction against duplicative awards, the evidence showed that the jury only intended to award the plaintiff one award for back pay and only one award for compensatory damages, noting that even the plaintiff acknowledged that he was only owed $122,132 in back pay. The court also determined that there was no evidentiary basis for upholding the original compensatory damages award, since the plaintiff had found other employment and had even received a slight increase in pay. Consequently, the court reduced the plaintiff's award to one $122,132 award for back pay and one $175,050 award for compensatory damages, and denied the defendant's requests for a new trial or remittitur as moot.

The Plaintiff's Motion to Alter or Amend the Judgment is Granted in Part and Denied in Part

The plaintiff argued that, by statute, his back pay award under the two False Claims Act statutes must be doubled. After reviewing both statutes, the court agreed, as it concluded that each provides that the plaintiff's relief "shall" included two times the employee's back pay. The court found that the use of the word "shall" created a mandatory duty and that the plaintiff was owed two times his back pay. The court then considered whether the plaintiff was entitled to two separate payments—one payment for twice his back pay under the federal FCA and a second payment for twice his back pay under the D.C. FCA. The court concluded that "[a]warding Plaintiff separate damages under the federal FCA and DCFCA would result in a duplicative recovery," and thus limited his award for back pay to $244,264.

Boze v. General Elec. Co., 2009 WL 2485394 (W.D. Ky. Aug. 11, 2009)

The plaintiffs, who were employees of the defendant company's military aircraft parts manufacturing plant, filed a lawsuit alleging FCA retaliation and supplemental state law claims of intentional infliction of emotional distress and invasion of privacy. The plaintiffs alleged that the defendant retaliated against them for testifying before a grand jury convened in conjunction with a *qui tam* action that seven of the plaintiffs' co-employees filed. The United States District Court for the Western District of Kentucky granted the defendant's motions for summary judgment. The court held that the evidence did not show that the defendant's employment actions—which amounted to requests for increased production, and staffing of additional supervisors and harassment from co-workers (but not supervisors)—were adverse, and that the plaintiffs failed to show a causal connection between those employment actions and their grand jury testimony.

U.S. ex rel. Marlar v. BWXT Y-12, L.L.C., 2009 WL 2195424 (E.D. Tenn. July 23, 2009)

The plaintiff brought a civil action against her former employer, the manager of a national security complex, alleging FCA retaliation. The defendant moved for summary judgment. The United States District Court for the Eastern District of Tennessee ruled that the plaintiff demonstrated sufficient evidence to establish a causal connection between her termination and her written complaints to the defendant's officials alleging illegal activity regarding the defendant's alleged improper recording of prescriptions, dispensing of controlled substances to patients without keeping any record on the patient's chart, and allowing prescription to be written by inappropriate persons. The court also found that the plaintiff presented sufficient evidence to create a dispute of material fact regarding the issue of whether or not her termination was based on a pretext. Lastly, the court held the plaintiff provided sufficient evidence to allow a fact finder to conclude she engaged in protected activity. Accordingly, it denied the defendant's motion for summary judgment.

See *Johnson v. The Univ. of Rochester Med. Ctr.,* 2010 WL 598655 (W.D.N.Y. Feb. 18, 2010), at p. 100.

See *U.S. ex rel. Suter v. National Rehab Partners Inc.,* 2009 WL 3151099 (D. Idaho Sept. 24, 2009), at page 67.

See *U.S. ex rel. Lockyer v. Haw. Pac. Health Group Plan for Employees, et al.,* 2009 WL 2700321 (9th Cir. Aug. 27, 2009) (unpublished) at page 72.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Not a Condition of Payment

See *U.S. v. Science Applications Int'l. Corp.*, 2009 WL 2929250 (D.D.C. Sept. 14, 2009), at page 68.

B. Not Filed Under Seal

See *U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 2009 WL 3353314 (E.D. La. Oct. 19, 2009) at page 31.

C. 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.

U.S. ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp., 2009 WL 3161828 (D. Colo. Sept. 30, 2009)

The relator, a government auditor, filed a *qui tam* action against the defendant, an oil and natural gas producer, alleging the use of false statements to underpay oil royalties. The government declined to intervene. The jury reached a verdict in the relator's favor and awarded $7,555,886.26 in damages. The defendant renewed its motion for judgment as a matter of law or alternatively for a new trial and for remittitur, arguing that no evidence existed to show that any of the defendant's employees had sufficient knowledge to make a knowingly false statement to the government. The United States District Court for the District of Colorado concluded that the evidence showed that the employees responsible for filling out the defendant's monthly reports for royalties did comprehend the leases and the regulations and knew that a customer provided services. However, these employees failed to change the oil valuation or royalty pricing to reflect the services provided. Thus, the court concluded that sufficient evidence existed for a jury to conclude that the defendant employees made knowingly false statements.

The court also rejected the defendant's argument that the government was aware of its failure to properly pay royalties. The court concluded that the government's knowledge was not so comprehensive as to vitiate the defendant's scienter, because the defendant did not produce any evidence showing the existence of an ongoing dialogue between the defendant and the government that was characterized by complete cooperation and exchange of information. Therefore, the court denied the defendant's motion for judgment as a matter of law or for a new trial. The court also denied the defendant's motion for remittitur and held that the jury

award of damages of approximately $7.5 million on leases involving payment of approximately $110 million neither shocked the court's conscience nor offended its sense of justice.

U.S. ex rel. Suter v. National Rehab Partners Inc., 2009 WL 3151099 (D. Idaho Sept. 24, 2009)

Former employees of the defendant, Magic Valley Regional Medical Center, brought a *qui tam* suit alleging that Magic Valley and one of its service providers, National Rehab Partners, Inc., submitted false claims for reimbursement of therapy services and violated state statutory law and common law. The relators also brought an FCA retaliation claim against Magic Valley. Magic Valley moved for summary judgment or summary adjudication regarding the claims alleging substantive FCA violations, arguing that the relators' claims were based upon alleged non-compliance with certain Medicare group therapy guidance manuals (as opposed to statutes and regulations), that the relators could not demonstrate that the defendants did not knowingly present false claims, that any alleged falsity was not material to the government's decision to pay, and that the public disclosure bar foreclosed subject matter jurisdiction over the relators' claims. The National Rehab Partners, Inc. moved to join in Magic Valley's motions. In addition, Magic Valley individually moved for summary judgment, asserting that the FCA's statute of limitations foreclosed the FCA retaliation claim.

The United States District Court for the District of Idaho noted that the relators alleged that employees of Magic Valley understood the group therapy rules, knew that Magic Valley's practices were non-compliance, and submitted false claims anyway. The defendants responded by asserting that they did not knowingly submit false claims to the government and that the Medicare guidance manuals were nonbinding and thus could not impose FCA liability. The court, however, concluded that Medicare guidance "constitutes an interpretive rule which may bind Medicare providers and form the basis for FCA liability." Thus, the relators were allowed to maintain their claims and the defendants' summary judgment motion was denied. The court further held that disputes of material fact existed regarding whether Magic Valley's interpretation of the applicable group therapy regulation was reasonable and regarding whether Magic Valley had certified compliance with regulations while knowing that the agency's interpretation of that regulation suggested non-compliance.

With respect to the issue of whether the defendants submitted false claims, the court held that the relators' allegations were sufficient, as they presented evidence of an individual patient and demonstrated that, despite evidence showing that the patient engaged only in group therapy, Magic Valley used the patient's therapy to qualify her for Medicare payments at a higher individual rate, even when such pay-

ments were non-compliant with applicable regulations. The court also determined that this evidence was sufficient to show materiality and accordingly denied the defendants' motion.

The court further held that the FCA's public disclosure bar did not prohibit the relators' claims, since the disclosure the defendants relied upon was a disclosure of the alleged fraud, by one of the relators, to an Idaho Medicaid Fraud Unit. The court held that such disclosures to government employees are not deemed "public" disclosures under the FCA.

With respect to the relators' claim against Magic Valley for retaliation, the district court first observed that the FCA's statute of limitations does not apply to retaliation claims, and that the limitations period of the most analogous state statute would apply. The court concluded that the Idaho Protection of Public Employees Act ("IPPEA")'s 180-day statute of limitation applied, and granted Magic Valley's motion to dismiss the relators' retaliation claims, since those claims were brought more than two years after the accrual of the relators' cause of action for retaliation.

U.S. v. Science Applications Int'l. Corp., 2009 WL 2929250 (D.D.C. Sept. 14, 2009)

The government sued a technical consultant for nuclear waste management, alleging that the defendant violated both the False Claims Act and District of Columbia law by failing to make required disclosures regarding its organizational conflicts of interest (OCIs), as was required by two government contracts the defendant entered into with Nuclear Regulatory Commission (NRC)—since the defendant's neutrality was critical to both government contracts, the defendant agreed not to enter into any contract with any organization that was "regulated by the NRC," as that might create a conflict of interest with its government contracts. The government alleged that the defendant disregarded this provision by repeatedly requesting payments under the contracts and by repeatedly certifying to the NRC that it had no OCIs, when, in fact, it did. A jury found that the defendant had knowingly violated the FCA by presenting false claims and making false statements to the government. The jury also found the defendant liable for breach of contract. The defendant moved for judgment as a matter of law or, alternatively, for a new trial, arguing that: (1) there was insufficient evidence to establish that the defendant knowingly violated the FCA; (2) that the defendant's claims were not objectively false; (3) that the government failed to prove its implied certification theory and could not establish that the payments to the defendant were conditioned on its OCI representations to NRC; (4) that the government failed to show that the defendant's alleged false statements were made with the intent and for the purpose of getting false claims made; (5) that the government suffered no damages as a result of the defendant's false claims; (6) that the government was improperly al-

lowed to argue that the defendant was obligated to disclose even the "appearance" of a conflict to NRC; and (7) that certain jury instructions regarding the defendant's disclosure obligations were erroneous. The district court rejected all of the defendant's arguments and allowed the jury's verdict to stand. The court's analysis of each of the defendant's arguments will be discussed in turn.

Scienter

The defendant argued that its motion should be granted because the evidence presented to the jury could not have reasonably established that the defendant had the requisite scienter to violate the FCA. This argument was based on three grounds: (1) that based on the defendant's interpretation of the contracts—which it argued were reasonable and in good faith—it did not knowingly present false claims or make false statements to the government; (2) that the government improperly relied on a "collective knowledge" theory of liability; and (3) that the government did not show that the defendant acted recklessly or with deliberate ignorance of the truth. The U.S. District Court for the District of Columbia rejected the defendant's arguments, denied their motion, and allowed the jury's verdict to stand.

The defendant first argued that based on its interpretation of is OCI obligations, it did not enter into any agreement with an organization that was "regulated by the NRC." The court agreed with the government that although certain work performed by DoE and its contractors is excluded from NRC regulation, "it does not follow that an entity which performs work outside the scope of the DOE exclusion can avoid NRC regulation for all purposes." The court noted that "[a] defendant's reasonable interpretation of an ambiguous regulation may well be a successful defense to an alleged FCA violation in appropriate cases," but determined that in this case, the government presented testimony and other evidence showing that the defendant knew that some of its business relationships created OCIs, even if the entities with whom the defendant worked also performed some work for DoE that was not subject to NRC regulation. The court held that this evidence was sufficient to allow the jury to reach its verdict. The court also noted that the defendant failed to show any error in the instructions provided to the jury, noting that the jury was instructed that the FCA does not require specific intent to defraud, but does require more than an honest mistake or mere negligence.

The court also rejected the defendant's second argument—that the jury should not have been allowed to consider the defendant's "collective knowledge" when determining scienter and that "general, factual information that is known within a company does not establish that the company 'knew' of a falsehood under the FCA." The defendant, relying on a footnote in a First Circuit opinion, had argued that intent could only be established by focusing on the knowledge of specific decision-makers, and not on collective knowledge. The district court, relying on its own precedent, responded and reiterated that "it is both appropriate and equitable to conclude that a company's fraudulent intent may be inferred from all of the circumstantial evidence including the company's collective knowledge." Thus, the court found no error in allowing the jury to consider the defendant's collective knowledge when determining whether the defendant's scienter.

Finally, the defendant argued that the jury's verdict court not be upheld because the evidence could not show that the defendant acted with reckless disregard or deliberate ignorance of the truth, since the defendant made diligent inquiry to ensure compliance with its OCI obligations" and designed and implemented an OCI compliance system In rejecting this argument, the district court relied on testimony showing that the defendant's OCI compliance system did not integrate some of the defendant's business relationships, had incomplete descriptions of the defendant's services and did not associate important words with descriptions. Consequently, the court held that there was sufficient evidence for the jury to find that the defendant acted with reckless disregard or deliberate ignorance of the truth.

Falsity

As noted above, the government presented evidence showing that the defendant was aware that it had entered into agreements with entities that were at least in part regulated by NRC, and even contracted with one company that had an NRC license. The government also produced evidence showing that the defendant's work on the government contracts at issue could have been biased by its relationships with these other NRC-regulated entities. The court concluded that this evidence was sufficient for the jury to find that the defendant had a conflict of interest that should have been disclosed to NRC.

Implied Certification

The defendant argued that its motion should be granted and that the government's implied certification theory failed, because the government could not show that payments under the contracts at issue were expressly conditioned on the defendant's OCI compliance. As a result, the defendant argued, its OCI representations could not impliedly certify compliance with that condition. In any event, the defendant argued that the jury was not properly instructed with respect to the implied certification theory. The district court first noted that the D.C. Circuit Court has never stated that an express condition is necessary before the implied certification theory can be asserted. Instead, the circuit court has only required that the misrepresentation or omission at issue be material to the government's decision to pay. The court held that the government's evidence was sufficient to show that by withholding key OCI information from NRC, the defendant impliedly certified its compliance with material contractual terms, giving rise to an FCA violation. As the jury was instructed on this materiality standard, the court held that the jury instructions regarding the implied certification theory were proper.

False Statements Made "To Get" False Claims Made

The defendant argued that, pursuant to the U.S. Supreme Court's ruling in *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, the government had to show that the defendant's false claims were made with the specific intent and for the specific purpose of getting false claims paid by the government. The court observed that the recently-enacted Fraud Enforcement and Recovery Act of 2009 (FERA) "legislatively overrules the holding of Allison Engine by amending the language of [the FCA], replacing the words 'to get' with the word 'material.'" The court also recognized that FERA provides that this amendment is retroactive and applies to "claims" pending on or before June 7, 2008—just before the Supreme Court's opinion was published. However, the district court agreed with the defendant that none of the defendant's "claims" to the government for payment were pending on June 7, 2008, and thus, FERA's retroactivity provision did not apply to those claims. In response the government argued that Congress' use of the word "claims" in FERA's retroactivity provision did not mean claims to the government for payment, but rather legal claims and causes of action upon which a complaint is based. The district court disagreed, noting that in a separate retroactivity provision of FERA Congress used the word "cases" to describe such actions.

The defendant's success was short-lived, however, as the court distinguished the facts in *Allison Engine* from the facts of this case, noting that in *Allison Engine*, the false statements were made to a third party, whereas in this case, the false statements were made directly to the government. The court also noted that the government presented evidence upon which the jury could have reasonably concluded that the defendant did in fact make those false statements for the purpose of getting the government to pay false claims. The court also determined that the jury instructions on this issue were proper, since even though the jury was instructed on the materiality standard, that instruction applied generally to FCA violations and not specifically to violations resulting from making false statements to get false claims paid. Thus, the court was ultimately unswayed by the defendant's argument.

Damages

The defendant argued that the value of its work on NRC's behalf was ignored, that its failure to disclose OCIs did not result in any actual damages to NRC, and that the instructions to the jury and the jury's subsequent verdict awarding damages were erroneous. The court rejected these arguments, noting that the jury was properly instructed to calculate as damages the amount that NRC paid to the defendant above and beyond what it would have paid, had it known about the defendant's conflicts of interest and that the jury's verdict reflected those instructions, as the jury believed the government's argument that the value of the defendant's work was irrelevant, since the defendant would have never been awarded the contracts with NRC and would have never received any payments under those contracts, had NRC known about the defendant's conflicts.

Defendant's Obligation to Disclose the "Appearance" of a Conflict

The defendant argued that, pursuant to its contracts with NRC, it was only required to disclose "actual" or "potential" conflicts of interest, but that the court erroneously allowed the government to argue that it was required to disclose "apparent" conflicts as well. The court noted that the D.C. Circuit court has previously used "potential" conflicts and "apparent" conflicts interchangeably, implying that it was reasonable for the government and the jury to do the same. The court also noted that the jury was properly instructed on this issue, as the jury instructions discuss "potential" conflicts. Moreover, the jury instructions specifically state that in the event that the jury observed a discrepancy between the law as described by counsel and the instructions they received from the judge, the instructions from the judge would take precedence. Thus, the court rejected this argument as well.

Jury Instructions Regarding the Defendant's Disclosure Obligations

Finally, the court held that the jury was properly instructed regarding the defendant's disclosure obligations to NRC. The defendant had argued that the instructions regarding the applicable NRC regulations were unclear and that the jury had not been properly instructed regarding the applicable contractual language that governed the defendant's obligations to NRC. The court concluded that no special instructions regarding the terms used in the NRC regulations were necessary, as the testimony showed that a "common sense" definition of those terms was applied throughout the trial. Furthermore, the court held that neither party was restricted from discussing the applicable contractual language throughout the trial and that the defendant could have reiterated the actual contractual language during its closing argument, but chose not to do so. The court held that any failure to include a specific instruction regarding the contractual language was, at most, harmless error.

U.S. ex rel. Lockyer v. Haw. Pac. Health Group Plan for Employees, et al., 2009 WL 2700321 (9th Cir. Aug. 27, 2009) (unpublished)

A relator sued his former employer and related parties—all health care entities—alleging that the defendants violated the False Claims Act by defrauding Medicare. The relator also sued for retaliation under the False Claims Act. The United States District Court for the District of Hawaii granted summary judgment in favor of the defendants on the relator's claims and the relator appealed the district court's decision to the Ninth Circuit. The circuit court noted that the evidence presented by the relator raised genuine issues of fact regarding whether the defendants violated Medicare's "incident to" rules. However, the court found that the relator's *qui tam* action could not survive summary judgment since the relator did not produce sufficient evidence to demonstrate that the defendants committed a <u>knowing</u> fraud. Instead, the Ninth Circuit found that the relator's evidence only suggested

that the defendants' noncompliance with the Medicare regulations stemmed from a good faith interpretation of the regulations or at worst, from negligence. With respect to the relator's retaliation claim, the circuit court also held that even if the relator acted under the belief that the defendants had committed fraud against the government, he did not present any evidence showing that the defendants were aware that he was investigating the defendants for fraud on the government or was otherwise engaged in protected conduct under the False Claims Act. Thus, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the defendants.

U.S. v. Khan, 2009 WL 2461031 (E.D. Mich. Aug. 5, 2009)

The government sued two individuals and their wives, alleging that the defendants violated the FCA by improperly filing for and receiving Medicare reimbursements on behalf of a pain management clinic. The lawsuit also included claims for unjust enrichment and payment by mistake. The two husbands had each earlier pled guilty to one count of health care fraud and the United States District Court for the Eastern District of Michigan entered a final judgment against each of them and awarded the government treble damages and statutory penalties. The government then settled its remaining claims with one of the wives. The government then moved for partial summary judgment against the remaining defendant wife. During his plea agreement hearing, this remaining wife's husband testified that she never performed any executive duties for the clinic and merely attended the clinic's board meetings. However, the government produced four exhibits showing this defendant's annual hours worked, her duties as the clinic's executive director, and a certification she signed for at least two of the clinic's cost reports, stating that those reports were correct to the best of her knowledge and belief. Based on this information, the court held that the each cost report was a false claim, that the remaining defendant knew that the cost reports were false, and that she assisted in causing these false claims to be presented to the government. Consequently, the court granted the government's motion for partial summary judgment on the FCA violations. The court again awarded treble damages and statutory penalties. Alternatively, the district court ruled that in the event that these amounts were later deemed legally unsustainable, then the government's motion for partial summary judgment for unjust enrichment and payment by mistake would be granted as well, with an award equaling the amount of the payroll checks the defendant wife endorsed and deposited.

U.S. ex rel. Longhi v Lithium Power Techs. Inc., 2009 WL 1959259 (5th Cir. July 9, 2009)

A relator brought a *qui tam* action against his former employer, a manufacturer of lithium-based batteries, and the company's president, alleging that the defendants

violated the False Claims Act by making false statements to the government in order to receive federal grant money intended for small businesses. The United States intervened in the case and the plaintiffs moved for summary judgment. The United States District Court for the Southern District of Texas granted the motion and calculated nearly $5 million in damages and penalties. The defendants moved for reconsideration of the judgment, which the district court denied, and the relator moved for statutory attorney's fees, which the district court granted. The defendants appealed these rulings to the Fifth Circuit.

On appeal, the defendants argued that the district court should not have granted the plaintiffs' summary judgment motion, because the allegedly false statements on which the plaintiffs' case was based were not false, not knowingly false, or not material to the government's decision to award the grants. In addition, the defendants asserted that the relator agreed to sell his stock in the defendants' company, in anticipation of being laid off, and that, as part of the stock sale agreement, the relator agreed not to sue the defendant company "for any other matter prior to the execution of" the sale, although his *qui tam* suit had been filed eleven days prior to the sale. The defendants also argued on appeal that the district court erred when it determined that they were liable for three times the full amount of the grant awards they received, even though the grant money was used to design and manufacture equipment that the government deemed satisfactory. Finally, the defendants argued that the district court's award of attorney's fees was in error, claiming that the relator's motion for fees failed to segregate non-compensable work performed by his attorneys in connection with claims that were eventually dismissed. The Fifth Circuit considered each of the defendants' arguments in turn, and affirmed all of the district court's rulings.

FCA Liability

The circuit court first distinguished this set of facts from the more traditional theories of False Claims Act liability—which involve false claims to the government for payment. Here, the court observed, the plaintiffs were asserting a fraudulent inducement theory of liability, arguing that the contract under which the government was to make payments (in the form of grant awards) was procured by fraud. The plaintiffs argued that, in their grant proposals, the defendants made numerous false statements regarding their qualifications, and those statements affected the government's grant selection process. In addition, the plaintiffs argued that even if the defendants did not have actual knowledge of the falsity of their statements, they were liable under the Act because they certainly had reckless disregard for the truth of those statements. The appeals court agreed with the plaintiffs and held that the plaintiffs demonstrated False Claims Act liability by showing: (1) that the defendants' statements were false; (2) that the defendants had the requisite knowledge of the falsity of those statements (either through actual knowledge, through deliberate ignorance of the truth or falsity of the statements, or through reckless disregard for the truth or falsity of the statements); (3) that, pursuant to the recently-amended False Claims Act (which applies the natural tendency test and only requires a showing that the allegedly false statement "had the potential to influence the government's decision, not that the false statements actually did so"), the defendants' false statements were material to the government's decision to award grants to the defendants; and (4) that, because of the defendants' false statements, the government awarded them about $1.6 million in grant funds. Thus, the Fifth Circuit affirmed the district court's ruling that the defendants violated the False Claims Act.

Damages calculation

The defendants argued that the damages should not have been awarded to the government since it did not suffer an injury. However, the circuit court affirmed the district court's award of treble damages, finding that, by awarding the grant funds, the government sought to receive the intangible benefit of fulfillment of the government's purpose to assist "eligible deserving small business," and that the defendants frustrated that purpose by "siphon[ing] off" funds that "should have gone to a better-qualified candidate." The appeals court ruled that "[i]n a case such as this, where there is no tangible benefit to the government and the intangible benefit is impossible to calculate, it is appropriate to value damages in the amount the government actually paid to the Defendants." Thus, the Fifth Circuit affirmed the district court's damages award.

The relator's release and indemnification violated public policy

The circuit court also affirmed the district court's refusal to enforce the relator's agreement to release the defendant company from all claims that arose prior to the execution of the stock sale agreement, finding that such agreements violate the public policy considerations underlying the False Claims Act—namely, the government's ability to receive information from relators that it otherwise would not obtain. The defendants contended the FCA did not bar the release and indemnification agreement because the relator's release did not prohibit the government from pursuing any of the claims in the action. The circuit court, though, noted that at the time the release was signed, the relator's *qui tam* action had already been filed, and that, by statute, the relator could not dismiss the action without the Attorney General's consent. Consequently, the Fifth Circuit affirmed the district court's ruling.

Award of attorney's fees

The defendants sought reversal of the district court's award of the relator's attorney's fees, arguing that the relator's attorney did not segregate the hours that were spent working on claims for which the relator was not the prevailing party. The Fifth Circuit, however, rejected the defendants' arguments and affirmed the district court's award of the relator's attorney's fees. The circuit court found that the district court did not abuse its discretion in that regard, and properly concluded that the relator's attorney did not include bills for duplicative efforts or unnecessary hours, and that all of the work done on the relator's behalf "arose from the same set of contracts, same actors, and the same illegal intent to defraud the government of money in violation of the FCA."

D. Laches

See *U.S. ex rel. Head v. Kane Co.*, 2009 WL 3765394 (D.D.C. Nov. 12, 2009) at page 79.

E. 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.

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

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

Laches as an Affirmative Defense

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

Counterclaims Dismissed As Void Against Public Policy

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

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

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

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

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

See *U.S. ex rel. Longhi v Lithium Power Techs. Inc.*, 2009 WL 1959259 (5th Cir. July 9, 2009) at page 73.

F. Sovereign Immunity

See *U.S. ex rel. Hixson v. Health Mgmt. Sys. Inc.*, 2009 WL 3003258 (S.D. Iowa Sept. 21, 2009) at page 36.

G. Statute of Limitations

U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc., 2010 WL 2487962 (D.C. Cir. June 22, 2010)

In 1995, the relator brought an action in the U.S. District Court for the District of Columbia against various construction companies and individuals, alleging a violation of the FCA. Specifically, the relator alleged that the defendants were part of a conspiracy to rig the bidding on USAID-funded sewer contracts in Egypt. The relator alleged that the defendant companies were a part of a price control club that would meet prior to bidding to discuss the bid for each contract and that the club would conspired with respect to who would enter bids and provided compensation to the others for over-bidding or for not bidding at all. The relator's complaint focused on his personal knowledge with one of the contracts—contract 20A. The government opened a criminal investigation into the alleged conspiracy and filed a motion to keep the relator's complaint sealed. In 2001, the government filed its own complaint-in-intervention; subsequently, the government's third amended complaint was filed in 2006. The government's complaint adopted the relator's claims and added claims regarding two new contracts that were characterized as a part of the same conspiracy. At trial, the jury found in the government's favor and awarded treble damages on all three contracts. The district court entered a judgment in accordance with that verdict.

The defendants then appealed to the DC Circuit Court, arguing, among other things, that the statute of limitations barred the plaintiffs' claims. The appeals court held that only the government's complaint-in-intervention could relate back to the relator's original complaint and that the statute of limitations had run on the two new contracts because they did not meet the standards for relation back, since the relator's original complaint did not refer to those contracts. The circuit court further held that the two new contracts did not arise from the same conduct, transaction, or occurrence as the original contract because the new contracts covered different time periods and projects, and the winning bidder had been selected from a different pool of bidders. The court found that the only similarity between contract 20A and the two new contracts was that all three contracts were funded by the USAID and related to sewer work in Egypt. Consequently, the circuit court vacated the judgment of the district court with respect to the two new contracts and affirmed the district court's judgment with respect to the claims concerning contract 20A.

Relation Back

After the district court reached its judgment on the three contracts, but before the defendants' appeal, Congress amended the FCA to expressly provide for relation back when the government files a complaint-in-intervention, following the filing of a relator's *qui tam* complaint. The defendants argued that the amended FCA statute could not constitutionally be applied to their case, stating that the law never intended the amendment to reach cases in which the government had already intervened. The defendants also urged the court not to allow the government's claims to relate back to the date of the relator's original complaint because the government delayed filing its own complaint and unsealing the relator's complaint until several years after the statute of limitations had run. The court rejected these arguments, noting that the amended statute expressly permitted relation back. The court also observed, however, that while the FCA allows the government's allegations to relate back to the relator's, so as to take advantage of the relator's earlier filing date, the statute does limit the claims the government may add. Thus, for statute of limitations purposes, the court allowed the government's claims concerning contract 20A to relate back to the date of the relator's *qui tam* complaint because the government's claims arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the relator's prior complaint.

However, since the relator's complaint did not include allegations about either of the other two contracts, the government's complaint-in-intervention, with respect to allegations regarding those contracts, could not relate back to the date of the relator's original complaint for statute of limitations purposes. The court noted that although the defendants were aware of the government's criminal investigation of similar conduct with respect to these other two contracts, the defendants never received notice of the government's claims concerning those contracts until the government's complaint was filed and amended.

Preemption

Three of the defendants also argued that the case should have been dismissed because the Foreign Assistance Act (FAA) preempts the FCA. The three defendants argued that the *qui tam* provision of the FCA conflicts with the lack of such a provision in the FAA, and that allowing the relator's FCA action to proceed would nullify the FAA's more restrictive remedial provision. The argument was rejected by the district court and affirmed by the circuit court, which held that both the statutes can co-exist and in cases that involved foreign aid the government could bring an action under either of the two statutes as both the statutes are overlapping with partial redundancy.

U.S. ex rel. Charles Jajdelski v. Kaplan Inc., 2010 WL 2326069 (D. Nev. June. 7, 2010)

A relator brought a *qui tam* action against his previous employer, the owner and operator of postsecondary educational and vocational institutions. The relator alleged that one of defendant's colleges violated the FCA by filing fraudulent student financial aid requests. The defendant moved to dismiss the relator's third amended complaint for failure to plead with particularity. The relator moved for a leave to amend to add a claim that the defendant offered improper compensation incentives. The relator also moved to sever and transfer. The government did not intervene.

The United States District Court for the District of Nevada granted the defendant's motion to dismiss, finding that the relator had failed to meet the pleading requirements, since the relator had not stated his allegations with sufficient specificity with respect to time, place, and identity of the parties to the alleged fraud. Further, the court held that the relator failed to allege that the defendant, as a successor to the college, had notice of the claims or actions which arose prior to the acquisition of the college or that the defendant continued to participate in the fraudulent activity.

The court treated the relator's motion for leave to file another amended complaint as a response to the defendant's motion to dismiss, and denied the relator's request, holding that a further amendment of the complaint would cause undue delay and was sought in bad faith for dilatory purposes. The court observed that the relator amended his complaint on four separate occasions over six years and until the present attempted motion, had never before mentioned an incentive compensation claim, which appeared to the court to be an attempt to make the relator's case appear similar to other cases against the defendant that already been transferred to another court. In addition, the court found that the relator's motion for leave to file an amended complaint was barred by the statute of limitations. Thus, the relator's motion for leave to file an amended complaint was denied. The court also denied the relator's motion to sever and transfer.

U.S. ex rel. Leveski v. ITT Educ. Serv., Inc., 2010 WL 1936118 (S.D. Ind. May 12, 2010)

A relator brought a *qui tam* action against her previous employer, an education service, alleging that the defendant violated the False Claims Act because it falsely certified compliance with the Higher Education Act, even though its compensatory practices violated the statute. Specifically, the relator alleged that the defendant improperly paid bonuses to student recruiters based on their enrollment activities while fraudulently signing program participation agreements (PPAs) certifying compliance with the HEA. The defendant moved to dismiss the relator's complaint, arguing that the complaint failed to state a claim, did not plead fraud with particularity, was filed after the statue of limitations period expired, and was negated by the government's prior investigation and settlement with the defendant.

The United States District Court for the Southern District of Indiana granted the defendant's motion in part and denied it in part. The court rejected the defendant's contention that the relator's complaint failed to state a claim because it alleged that the only factor the defendant considered for payment of bonuses was the number of students recruited or the number of students awarded financial aid—the court held that these allegations were sufficient to state a claims under the False Claims Act and survive the motion. The defendant also contended that

the relator's allegations did not satisfy Rule 9(b)'s heightened pleading requirements, but the court again disagreed and found that the relator's complaint pled the alleged fraud in a manner that put the defendant on notice of the relator's claims with an opportunity to respond. Moreover, the defendant contended that the FCA's six-year statute of limitations barred the relator's allegations. The relator countered, arguing that the statute's ten year statute of limitations period applied. The court, however, disagreed with the relator and held that the ten year period only applies in cases in which the government has intervened—the relator could not cite any caselaw to the contrary. Consequently, the court found that allegations of misconduct that occurred more than six years before the relator's complaint was filed were time barred, and dismissed those claims. Finally, the court refused to consider the defendant's argument that a prior settlement agreement it executed with the government negated the relator's claims. The court held that it was not proper to examine such outside evidence on a motion to dismiss, as those materials were better suited to a motion for summary judgment.

U.S. v. Sulzbach, 2010 WL 1531492 (S.D. Fla. Apr. 16, 2010)

The government brought an action against an in-house lawyer for a healthcare company, alleging False Claims Act violations. Specifically, the government alleged that the defendant's company had previously settled fraud allegations and that as part of the settlement, the company agreed to implement a corporate integrity program. The defendant was alleged to have overseen that program and she was required to, on an annual basis, sign sworn declarations assuring the government that the company was complying with the requirements of the federal healthcare programs. The government further alleged that some of the defendant's sworn declarations violated the FCA, since the defendant failed to report that her company had been violating the Stark Statute by billing Medicare for improper referrals. Years later, the government commenced its FCA suit. The parties filed cross-motions for summary judgment, with the defendant arguing that the government's claims against her were barred by the FCA's statute of limitations.

While analyzing the defendant's statute of limitations defense, the court observed that the government pled that the defendant's last violation of the FCA took place in 1999. The court further noted that the FCA's statute of limitations provides for a period of no more than 6 years from the date on which the FCA violation occurs, or no more than 3 years after the date when the government knew or should have known of the violation, or, in any event no more than 10 years after the violation occurred. Moreover, the court recognized that, pursuant to the parties' December 14, 2006 agreement to toll the statute of limitations, the relevant date for statute of limitations purposes is December 13, 2003. The government tried to convince the court that it did not know about the defendant's FCA violations until December 2006, when, as part of the documentation produced in the case against the

defendant's company, the government first learned that the defendant herself had knowingly submitted false claims to the government by false certifying the company's compliance with the corporate integrity program and the Stark law. The court disagreed. The court found that, in 1997, an employee for the defendant's company filed a *qui tam* suit against the company, alleging FCA violations in part due to knowing violations of the Stark law, which resulted in a government investigation and eventual intervention in the case. The court determined that, as a result of that lawsuit and subsequent investigation, the government knew or should have known of the defendant's alleged FCA violations before the statute of limitations expired in 2003, particularly since, in the government's case against the company, the government made multiple statements accusing the defendant of knowingly making false certifications and asserting that the defendant's knowledge was imputed to the company. In fact, the court held that the government was aware of the defendant's alleged fraudulent conduct since May 2000.

Applying the law to these facts, the court stated: "The government cannot on one hand attempt to impute [the defendant]'s intentional fraudulent conduct to [her company] in order to hold [the company] liable, or to prove a waiver of the attorney-client privilege based upon a crime-fraud exception, and on the other hand now claim that they were unaware of [the defendant's] fraudulent intent." The court noted that although the government may not have had complete information at that early stage, it had enough information to form a belief that the defendant had violated the FCA. As the court stated, "[t]he limitations clock does not re-start every time a plaintiff learns of a new fact or 'better evidence' that supports its claim." Consequently, the court granted the defendant's summary judgment motion.

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 to the federal government. 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.

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

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

The government declined to intervene in the relator's case. The defendants moved for summary judgment, asserting that the statute of limitations barred the relator's claims. The United States District Court for the Eastern District of Pennsylvania granted the motion in part and denied it in part, holding that the FCA's six-year statute of limitations barred all of the relator's claims except one pertaining to a federal grant application filed by the defendant university in 2001. The court held that the date the defendant filed the allegedly false claims triggered the limitation period. In addition, it held that the tolling provision did not apply to private relators if the government did not intervene in the action.

Statute of Limitations and Tolling Under the FCA

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

What Constitutes a False Claim?

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

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

The government sued a health management company, its president and its owners under the FCA, charging that the defendants submitted fraudulent cost reports to Medicare, seeking reimbursement. Specifically, the complaint alleged that the defendants concealed the related-party relationship among them and did not list management fees on an "at cost" basis, as required by Medicare rules, resulting in overpayment by Medicare of approximately $6.3 million. In addition to recuperation of the overpayment, the government sought civil penalties for each violation and treble damages. The government also sued for unjust enrichment and payment by mistake. The defendants moved to dismiss, contending that the FCA's statute of limitations barred the suit. They claimed that the government did not sue within three years of the date that an official of the United States charged with the responsibility to act in the circumstances should have learned of the facts ma-

terial to the government's action. In response, the government asserted that it—in the form of the Justice Department—neither knew nor had reason to know of the facts material to the action until the case was first referred to the Criminal Division of the U.S. Attorney's Office, and that subsequent tolling agreements between the defendants and the government established the government's suit as timely. The United States District Court for the Middle District of Tennessee denied the defendants' motion to dismiss. The court agreed that, under the FCA, the "official of the United States charged with the responsibility to act in the circumstances" is a Justice Department official, but the court declined to decide whether that Justice Department official must be within DoJ's Civil Division. Consequently, the court found that the government did not know about the alleged fraud scheme until the case was first referred to the U.S. Attorney's Office.

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

See *U.S. v. Shelburne,* 2010 WL 2542054 (W.D. Va. June 24, 2010) at page 89.

See *U.S. ex rel. Ven-A-Care v. Actavis Mid Atl. LLC,* 2009 WL 3171798 (D. Mass. Oct. 02, 2009) at page 114.

See *U.S. ex rel. Dugan v. ADT Sec. Services, Inc.*, 2009 WL 3232080 (D. Md. Sept. 29, 2009), at page 35.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. v. Shelburne, 2010 WL 2542054 (W.D. Va. June 24, 2010)

In a prior criminal case, the defendant, a dentist, was convicted by a jury of various crimes related to a scheme to defraud Medicaid. As a result of his conviction, he was sentenced to prison, fined, and ordered to pay a certain amount of restitution. Following the criminal case, the Governments of the United States and the Commonwealth of Virginia brought the present civil action under their respective False Claims Act statutes, alleging that the dentist submitted false bills to Medicaid for dental services that were not performed, were unnecessary, or had been previously paid. The defendant, proceeding *pro se*, filed seven different motions to dismiss the government's FCA action. The United States District Court for the Western District of Virginia denied the defendant's motions.

First, the defendant moved to dismiss the complaint for failure to state a claim and failure to satisfy the pleading requirements of Federal Rule of Civil Procedure 9(b). The defendant contended that the government did not assert the "who, what, when, where and how" regarding the elements about the alleged presentment of false claims to government agents, and claimed that he only presented claims to government contractors who in turn paid his bills. The defendant also asserted that Virginia's Medicaid dental program was not a federal entity for FCA purposes and thus not governed by the federal FCA, since it is operated by the Commonwealth. The court disagreed and held that the government provided thirteen specific dates on which the defendant submitted false claims for Medicaid payments, the type of claim submitted, and the amount of the false claims sought. The court also acknowledged caselaw holding that the presentment of false claims to a state's Medicaid program is sufficient to satisfy the federal FCA's presentment requirement, and the court noted that both the federal and Virginia statutes impose liability when a defendant submits false claims to government contractors who are reimbursed with federal or state funds. Second, the court analyzed the defendant's motion to dismiss under the doctrine of laches. The defendant contended that under this doctrine, the court should dismiss the government's complaint because the government unreasonably delayed its civil suit. The court, though, rejected this argument and held that the defendant could not raise a defense of laches against a claim for monetary damages, as that defense only applies to equitable claims.

Third, the court analyzed the defendant's motion to dismiss on the grounds that the government's complaint was barred by the statute of limitations. The court observed that prior to the suit, the defendant and the government were in negotiations and executed a tolling agreement. The negotiations ultimately failed. Subsequently, the defendant alleged that the government's complaint was filed beyond the statute of limitations and that the tolling agreement was invalid because it lacked consideration. The government argued that the agreement had clear and definite terms and that its promise to delay litigation constituted consideration. The court agreed with the government and held the tolling agreement was validly executed in exchange for valuable consideration. The court held the statute of limitations did not bar the FCA claims. Fourth, the court analyzed the defendant's motion to dismiss under the double jeopardy clause of the Fifth Amendment. The government contented that its civil FCA lawsuit was permissible because civil penalties are not the same as criminal penalties. The court agreed and held the Fifth Amendment did not bar the government's complaint.

Fifth, the defendant contended that the government's complaint was barred by the doctrine of res judicata, arguing that the government was barred from litigating causes of action regarding his allegedly false Medicaid claims because those causes of action could have been offered at the criminal trial. The court held the defendant's prior health care fraud conviction did not serve as a bar to the present civil suit because the two proceedings did not involve the same cause of action. Finally, the court analyzed the defendant's motion to dismiss under collateral estoppel. The defendant argued the government was collaterally estopped from re-litigating the issue of restitution to his victims as result of his fraud. The court reserved judgment on this issue, as it held that the determination of collateral estoppel in an FCA case after a criminal case depended on the facts and that in the defendant's case the issue was not amenable to determination.

U.S. ex rel. Underwood v. Genentech Inc., 2010 WL 2253734 (E.D. Pa. June 2, 2010)

A relator brought a *qui tam* action against his previous employer, a biotechnology company, alleging, among other things, that the defendant illegally marketed off-label uses for its drug, Rituxan, and bribed doctors to prescribe Rituxan for off-label uses, resulting in health care providers submitting fraudulent Medicare and Medicare bills for off-label Rituxan prescriptions. While the relator's complaint remained under seal, the government investigated his claims for about six years before ultimately declining to intervene. During its investigation, the government collected about seven million documents. The relator then subpoenaed those documents in order to determine if he should proceed with his *qui tam* action or not. The government agreed to provide documents to the relator, except those documents collected directly from the defendant. The court then ordered that all the documents be provided to the relator, who then moved to amend his complaint to include the new information. The defendant opposed the relator's attempt to amend his complaint and objected to the relator's use of the documents it had produced to the government. The defendant also moved to dismiss the amended complaint for failure to plead fraud with particularity. The United States District Court for the Eastern District of Pennsylvania denied the defendant's motion to dismiss and granted the relator's motion to amend the complaint.

The court first addressed the defendant's motion to dismiss on Rule 9(b) grounds and the defendant's argument that the relator failed to identify a false claim actually submitted to the government for payment. The court determined that the scale of the alleged fraud was so large that submission of false claims could be presumed. More significantly, the court held that when third parties are alleged to have submitted false claims, relators need not plead specific instances of submitted claims. Instead, the complaint must be pled with particularity as a whole, and with precision and substantiation. The court then held that this relator did so, by describing the scheme in which the defendant allegedly bribed doctors to improperly prescribe Rituxan. Therefore, the defendant's motion to dismiss the relator's amended complaint was denied.

Although it was a moot point, since the court had denied the defendant's motion to dismiss, the court then considered the defendant's objection to the relator's use of documents provided to the government. The defendant argued that a relator's complaint must be judged on information possessed by the relator before discovery occurs and contended that a relator should not be allowed to discovery provided to the government by the defendant. The court held that the usage of all of the discovery was permissible in amending the complaint, and that there was no basis in law for preventing a relator from doing so, since such a rule would be a significant impediment to many *qui tam* cases. Thus, the court allowed the relator to amend his complaint and to include information the government received from the defendant and provided to the relator.

U.S. ex rel. Cox v. Gen. Dynamics Armament and Technical Prod. Inc., 2010 WL 2218614 (D. Neb. May 28, 2010)

A relator brought a *qui tam* action against an ammunition manufacturer, alleging that the defendant supplied defective parts and equipment to the government and knowingly submitted false claims, records, and statements to the government for payment for those parts and equipment. The relator, a quality assurance specialist, allegedly supervised the defendant's contractors to ensure quality. He identified seven products that he claimed to be nonconforming to contract requirements and standards and stated that he had first hand information of the alleged fraud and false claims made by the defendant.

The government declined to intervene. The defendant filed a motion to dismiss, contending that the relator failed to allege with particularity the presentment and knowledge of any claim for payment to the government concerning the allegedly defective products and parts. The U.S. District Court for the District of Nebraska granted the motion. The court held that the relator failed to provide details showing that claims for payment were made with respect to the alleged defective products and parts or that he had knowledge that the government was actually billed for a product that failed to pass inspection. Since the court found that the relator failed to provide any information about the alleged claim submissions, it dismissed the complaint with prejudice as to the relator and without prejudice as to the government. The court also denied the defendant's request for attorney fees.

U.S. ex rel. Lane v. Murfreesboro Dermatology Clinic, PLC, 2010 WL 1926131 (E.D. Tenn. May 12, 2010)

A relator brought a *qui tam* action against a dermatology clinic and an individual doctor, alleging that the defendants' billing patterns resulted in the submission of fraudulent claims to Medicare and Tenncare—the state of Tennessee's health insurance program. The relator alleged four separate fraudulent billing practices: (1) the submission of specimens removed from patients for pathology testing, regardless of whether a test was necessary; (2) designating all patients receiving cosmetic procedures as having an "irritated" condition, to circumvent the Medicare and Tenncare restrictions on payment for purely cosmetic procedures; (3) billing each contact that the defendant doctor had with a patient, regardless of duration, under a billing code only intended for longer doctor-patient interactions; and (4) designating a "Modifier -25" adjustment to each claim for a procedure, when the adjustment was only intended to be added to a claim where the procedure and a completely separate patient evaluation occurred on the same day.

The relator asserted that all four of these practices were indiscriminately followed for every patient who satisfied the particular circumstances. The relator also contended that when submitting claims to the state and federal governments, the defendant doctor certified compliance with the applicable program regulations and laws, which rendered all such claims false and resulted in violations of the False Claims Act. The government did not intervene in the relator's suit. The defendants moved to dismiss for failure to state a claim and failure to plead fraud with particularity. The relator responded to the motion and contemporaneously filed an affidavit, which contained facts not alleged in her complaint. She also moved for leave to amend her complaint. The defendants moved to strike the affidavit from consideration on the motion to dismiss.

The United States District Court for the Eastern District of Tennessee denied the defendants' motion to dismiss, granted the relator's motion for leave to amend her complaint, and denied the defendants' motion to strike as a moot. The court dismissed some of the relator's counts regarding the first alleged false billing practice, as the relator conceded that those counts had not been pled with particularity. Her remaining claims, however, were allowed to stand, as the court observed that although the relator did not identify specific details of the fraudulent schemes, it found that the information provided was sufficient to meet Rule 9(b)'s basic particularity requirements, since she pled the place and time period during which

the alleged schemes took place, the content of the claims, and the resulting injury. The court noted that the relator had been employed as a billing specialist for the defendant clinic, and claimed personal knowledge of the defendants' alleged fraud scheme. She alleged that she could not provide more detailed information in support of her complaint, because she no longer held that position. The court agreed and offered that even if she could have provided more detailed information, doing so may have violated the privacy regulations of HIPAA. Further, the court found that the relator had provided enough details to permit the defendants to fashion a responsive pleading addressing her claims. Furthermore, since the court granted the relator leave to amend her complaint, it held that even if the relator had failed to satisfy Rule 9(b)'s pleading requirements, dismissal of her complaint would not be the appropriate remedy. Accordingly, the court denied the defendants' motion to dismiss.

Finally, since the relator's proposed amended complaint contained essentially the same facts as her affidavit, the court denied the defendants' motion to strike the affidavit as moot.

U.S. ex rel. Laucirica v. Stryker Corp., 2010 WL 1798321 (W.D. Mich. May 3, 2010)

A relator brought a *qui tam* action against a medical technology corporation, its affiliate entity, and a doctor, alleging that the defendants were involved in a kickback scheme in which the doctor agreed to use the corporation's medical devices for Medicare patients in exchange for the corporation's agreement to fund the doctor's residents and research projects. Further, the relator alleged that in order to participate in the Medicare program, the defendants had to complete a supplier/provider application for the government, which required them to certify their compliance with all laws, regulations, and guidance concerning proper practices for Medicare participants. The relator alleged that the defendants' illegal kickback scheme resulted in false certifications of compliance to the government when they sought Medicare reimbursements. The government declined to intervene in the relator's suit, but reserved the right to do so at a later point. The defendants jointly moved to dismiss the relator's complaint for failure to plead fraud with particularity. The United States District Court for the Western District of Michigan granted the motion. The court found that the relator's complaint did not raise a reasonable expectation that discovery would reveal evidence of illegal conduct. The court observed that the relator's allegations were neutral and could support both legality and illegality, that the complaint did not allege the time or place of the alleged misrepresentation or any injury resulting from the alleged fraud, and that the relator failed to identify any specific payments by the defendant corporation or any particular use of products from that or any particular claim paid by the government. Rather, the court determined that the relator merely speculated that

the defendant doctor received or submitted claims to Medicare in violation of the FCA. Accordingly, the court granted the defendants' motion to dismiss for failure to plead with particularity. The court allowed the relator a period of 21 days to file an amended complaint.

U.S. ex rel. Burroughs v. Central Ark. Dev. Council, 2010 WL 1542532 (E.D. Ark. Apr. 19, 2010)

A relator brought a *qui tam* action against her former employer—a local development council—and several state officers, alleging that the development council provided childcare services for indigent children under a state-funded program, but knowingly conspired to defraud the government, knowingly mad false statements and statements and knowingly filed fraudulent Medicaid claims, because the program failed to hire qualified teachers, as required by the applicable state regulations governing childhood programs. She also alleged a claim for retaliation under the FCA against the development council. The government declined to intervene, but filed a statement of interest. The defendants all moved to dismiss the relator's complaint—with some defendants filing a joint motion and others doing so independently. The defendants argued that the FCA claims should be dismissed because the relator's complaint failed to state a claim, the suit was precluded by the FCA's public disclosure bar, the individual defendants were state officers and thus not "persons" subject to suit under the FCA, and the allegations did not satisfy the FCA's materiality requirement. The relator also moved to amend her complaint, following the 2009 amendments to the FCA. The United States District Court for the Eastern District of Arkansas granted the defendants' motions to dismiss and denied the relator's motion for leave to file an amended complaint.

The court concluded that, by its terms, the 2009 amendments to the False Claims Act only applied to "claims" that were pending as of June 7, 2008. The court then applied the definition of "claims" as used throughout the FCA, which defines the term as a request or demand to the government for money or property. Consequently, the court held that since no such "claims" were pending in the case, the amended FCA was not applicable to her case. Thus, her motion for leave to amend her complaint was denied.

Turning to the various arguments raised by the defendants as bases to dismiss the relator's complaint, the court first considered whether or not the complaint satisfied the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). The court concluded that it did not, stating that the relator "alleges that false claims were made by the Defendants but fails to give any details required under Rule 9(b) as to who submitted the claims, what day they were submitted, whether they were paid, and how Plaintiff, a teacher, became aware of the specific claims. There is [sic] no indicia of reliability in the Plaintiff's allegations." The court also held that the relator's primary allegation—that the defendants violated state law by failing to hire qualified teachers for the childcare program, and as a result, all of their Medicaid claims were false—was insufficient as a predicate for an FCA claim. The court noted that "funding under Medicaid is not conditioned upon day care teacher certification," and consequently, the relator's complaint failed to state a fraud claim under the FCA against any of the defendants. The court, however, allowed the relator to maintain her retaliation claim.

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 falsely-warranted 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 anes-

thesiology 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 de-

fendants 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.

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

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

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

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

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

The relator brought a *qui tam* action against his former employer—a school district—and its officials, alleging that the defendants applied for and subsequently received from the government, more than $2 million based on false and fraudulent

representations that they had hired qualified teachers and graduated individuals who took proper courses. The government declined to intervene. The defendants filed a motion to dismiss or in the alternative, for a more definite statement. The relator opposed the motion to dismiss and sought leave to amend his complaint. The court granted the defendants' motion to dismiss, finding that the relator's complaint "lacked the specificity necessary to meet the requirement of Rule 9(b)." The court then considered the relator's motion for leave to amend his complaint. The defendants contended that granting the relator's motion would be futile. They argued that the relator's former employer, although under the control of the school district, is a state agency and thus is not a person subject to a *qui tam* action. The court found that there must be a "fact specific inquiry" to determine what constitutes a state entity and held that it could not conduct such an inquiry at this stage. The defendants also challenged an additional claim that the relator was seeking to add to the amended complaint, which alleged deprivation of his due process rights in his termination. The court held that the relator could not add the claim, which was pending in state court, until he had exhausted his state court remedies. Next, the defendants contended that the relator's complaint failed to plead fraud with particularity and only contained "generalized time frames and non-fact specific assertions." However, the court found that the relator's proposed amended complaint alleged the timeframe, identified the individuals who allegedly made false representations about teachers and students, and alleged that defendants knew that the school awarded non-qualified students degrees, failed to report it and later changed reports to make student placement rates look better to help the school's accreditation. The court found that this was enough detail to inform the defendants of the factual "core" of the fraud claims. Thus, the court held that the proposed amended complaint gave the defendants sufficient notice of the claims that school officials were making false representations about students and teachers in order to obtain federal funds. Finally, the defendants argued that the proposed amended complaint failed to state a claim for which relief could be granted. However, the court found that the relator had alleged that the defendants entered into an agreement in order to receive federal funds, that the defendants intentionally violated that agreement, and that the defendants executed the agreement without any intention of carrying out all of the requirements. The court found that the agreement constituted conditions of payment and could support a viable claim for purposes of the FCA. In addition, the allegations were sufficient to support a retaliation claim under the FCA. Consequently, the United States District Court for the District of South Dakota granted the relator's motion for leave to file an amended complaint.

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

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

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

Application of Rule 9(b)

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

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

Application on FERA Amendments to the FCA

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

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

A relator brought a *qui tam* action against an aerospace manufacturing company, its affiliates, and a private equity firm, alleging that the defendants defrauded the government by submitting false claims for payment. In particular, the relator alleged that the defendants presented the government with airplane engine parts and falsely certified that the parts had been serviced according to certain specifications. The government declined to intervene in the case. The defendant firm moved to dismiss the relator's complaint for lack of personal jurisdiction and alternatively joined the remaining defendants' motion to dismiss for failure to state a claim and failure to plead fraud with particularity.

The United States District Court for the Western District of Oklahoma denied the defendant firm's motion to dismiss, holding that the FCA authorizes nationwide service of process, and that traditional long-arm jurisdictional analysis did not apply. Instead, the court used an inconvenience analysis and found that the forum was not so inconvenient as to infringe on the defendant's due process rights. The court then addressed the defendants' motion to dismiss for failure to state a claim. It found the relator's complaint failed to allege that: (1) the specifications at issue were required by statute or by the government contracts at issue; (2) the payment of the contracts was conditioned on the defendants' compliance with the specifi-

cations; or (3) the defendants' compliance with the specifications was material to the government's decision to pay. Finally, the court found that the complaint failed to plead fraud with particularity. The court observed that the complaint named five defendants but failed to individually identify which defendant made allegedly false representations, when any representations was made, or even whether the defendants actually submitted claims to the government. Thus, the court held the relator failed to plead fraud with particularity and granted the defendants' motion to dismiss.

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

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

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

The relator filed a *qui tam* action against several long-term-care facilities for mentally retarded adults. She alleged that the defendants billed Medicare, Medicaid, and the Social Security Administration for services that had not been performed. Additionally, the relator alleged that the defendant: (1) improperly billed the government for reimbursement after patients had died or during hospital absences; (2) used false records for reimbursement; (3) filed annual cost reports that included non-reimbursable expenses; (4) violated Medicare's anti-kickback provisions;

and (5) improperly discharged the relator for reporting violations of state and federal law. The government declined to intervene. The district court dismissed the relator's complaint for failure to plead her fraud allegations with particularity, as required by Fed.R.Civ.P. 9(b), and for failure to state a claim under the FCA. The relator appealed. In an unpublished decision, the Tenth Circuit affirmed the dismissal of the complaint, holding that the relator's complaint lacked particularity because she merely alleged in general terms a scheme to bill Medicaid in advance and failed to provide any details regarding the implementation of that plan. The court noted that the complaint failed to plead essential facts with particularity, such as the dates, patients, amount of goods or services billed, content and identification numbers of forms or bills submitted, individuals involved, and period of time during which the alleged fraud occurred. The appellate court further affirmed the dismissal of the relator's anti-kickback claims, finding that there was no allegation of any compensation made in exchange for referrals. Finally, the circuit court determined that the relator's claim for retaliation and improper discharge could not be maintained, as she did not allege that the defendants terminated her employment for acts in furtherance of an action under the FCA, and thus failed to meet the statutory requirement. Consequently, the circuit court affirmed the district court's dismissal.

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

The relator brought a *qui tam* action against a group of pharmaceutical companies, alleging that the defendants submitted false claims and statements to the Medicaid program, which resulted in overpayments. The government declined to intervene. The defendants jointly and individually moved to dismiss the relator's claims. The defendants first argued that the relator's allegations were prohibited under the FCA's public disclosure bar. The United States District Court for the District of Massachusetts, however, disagreed and held that the government reports upon which the defendants' motions were based, did not satisfy the public disclosure/original source rule. The court noted that the reports failed to specifically identify the defendants, drugs, individual manufacturers, or actual prices, and thus failed to satisfy the public disclosure rule, thereby giving the court subject matter jurisdiction.

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

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

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

U.S. ex rel. Walner v. NorthShore Univ. Healthsystem, 2009 WL 3055357 (N.D. Ill. Sept. 18, 2009)

The relator, a Medicare recipient, sued the defendants, a health system that operates three hospitals, and others, alleging that the defendants submitted false records to Medicare for payment. The relator, who was a patient of the health system, alleged FCA violations and other claims. In support of his allegations, the relator alleged that the health system misrepresented the severity of his medical condition so that his surgery would be covered by Medicare. The government declined to intervene. The defendants moved for dismissal of the FCA claims for lack of particularity. The United States District Court for the Northern District of Illinois granted the motion. The relator's claims under the FCA and for injunctive relief were dismissed without prejudice, as the district court held that the relator failed to plead each defendant's role in the alleged fraud, by omitting such facts as which defendant submitted allegedly false claims and the contents of those allegedly false claims. The relator contended that he could not give the court this information because he lacked access to the defendant's claims. However, the court observed that the relator had received enough information to be able to plead these facts with particularity, yet failed to even plead the specifics of his own surgery, including the date or the hospital. In addition, although the relator also alleged a conspiracy among the defendants, he failed to plead any of the specifics of that conspiracy, including "who agreed with whom, how they agreed, how they decided to file a false claim, who made the alleged misrepresentation, who filed the allegedly false claim, the method by which it was filed, and how much the payment was for." Thus, the court refused to relax the particularity requirement and dismissed the relator's FCA claims for failure to plead fraud with particularity.

U.S. ex rel. Carter v. Halliburton Co., 2009 WL 2240331 (E.D. Va. July 23, 2009)

A relator brought a *qui tam* action against a logistics support provider, its companies, and a union, alleging FCA violations in connection with the defendants' work on a contract to provide support services to government camps during humanitarian assistance missions in various countries, including Iraq. These services included treatment and testing of water at government base camps throughout Iraq. The contract required the defendants to submit certain documentation in order to receive reimbursements for costs and payments of fees. According to the *qui tam* complaint, the relator, who was employed by one of the defendants, discovered that the defendants were submitting false claims to the government by making false certifications, omitting required information and making false statements to support their false claims. The relator allegedly made several complaints within the defendants' companies, but the defendants refused to take any action or to inform the government of their failures.

The United States District Court for the Central District of California granted the defendants' motion for transfer of venue to the United States District Court for the Eastern District of Virginia. The defendants then moved to dismiss the relator's complaint for failure to state a claim and for failure to plead fraud with particularity. The district court held that the relator successfully alleged that the defendants presented false claims for payment regarding their personnel in two Iraqi camps, since the complaint alleged the defendants knowingly presented false time cards to the government, the relator pled the time and place of the alleged misrepresentations, the persons who made the misrepresentations, and the contents of the misrepresentations, and the relator alleged that the time cards were material to the government's decision to pay the defendants. However, the court determined that the relator's similar allegations regarding other locations were not pled with particularity, since the defendant only extrapolated from his experiences with the two Iraqi camps in order to obtain discovery of the defendants' other sites—the court determined that the relator's actions were a fishing expedition. The court also dismissed the relator's allegation regarding the defendants' alleged omission of required information from their claims, finding that the form the defendants submitted to the government did not create any obligation for the defendants to disclose the information about which the relator complained. The relator's claims regarding false certification were also dismissed, as the court found that the relator failed to demonstrate that any express certification was required and the relator failed to allege that the contract conditioned the government's payment upon a certification of compliance. The court also held the relator's viable claims could be maintained against all defendants, even though three of the defendants were not parties to the contract with the government, since the relator pled fraud with particularity among all three defendants and the complaint contained allegations that listed the defendants individually. Accordingly, the court granted the defendants' motion in part. The court also denied the relator's motion to file a sur-reply because the defendants' reply did not introduce any new arguments.

U.S. ex rel. Elms v. Accenture LLP, 2009 WL 2189795 (4th Cir. July 22, 2009) (unpublished)

The plaintiff brought a *qui tam* action against his former employer, a consulting firm, alleging that the defendant submitted false claims under a cost-plus-fixed fee government contract by billing the government for full rates paid to a subcontractor even though the defendant received a 50% rebate or more from the subcontractor. The relator also alleged a claim for FCA retaliation and a claim under the Age Discrimination in Employment Act ("ADEA"). The government declined to intervene. The United States District Court for the District of Maryland granted the defendant's motion to dismiss for failure to state a claim, holding that the plaintiff failed to allege fraud with particularity and failed to allege sufficient facts to state an FCA retaliation claim. The court also dismissed the plaintiff's ADEA claim as time barred. The plaintiff appealed the dismissal of his FCA claims to the Fourth Circuit.

The circuit court held that the plaintiff failed to plead specifics of the defendant's allegedly fraudulent rebate scheme or billing practices that resulted in the submission of allegedly false claims. The appeals court found that the plaintiff failed to allege details of the alleged rebate and provided no detail regarding his conclusory

allegations of fraudulent billing practices. The court also held that the plaintiff failed to identify any of the defendant's employees who made the allegedly affirmative misrepresentations concerning its billing practice or receipt of rebates. Thus, the court held the plaintiff failed to plead fraud with particularity. While the plaintiff contended that the government and the defendant had possession of the evidence, the court held that this did not excuse the lack of particularity as the rule exists to prevent situations where the plaintiff learns all the facts through discovery. Thus the circuit court affirmed the district court's dismissal of the relator's substantive FCA claims. However, the court reversed the district court's ruling on the plaintiff's FCA retaliation claim, finding that the relator satisfied the notice pleading requirements with respect to this claim, because he alleged that he acted in furtherance of a *qui tam* suit, that the defendant knew of his actions, and that he was fired as a result of those actions. Accordingly, the court affirmed the district court's dismissal of the plaintiff's FCA claim for lack of particularity but reversed the dismissal of the FCA retaliation claim and remanded it to the district court.

U.S. ex rel. Wood v. Applied Research Assocs., Inc., 2009 WL 2143829 (2nd Cir. July 16, 2009) (unpublished)

The relator brought a *qui tam* action against various entities that were hired as consultants to assist the National Institute of Standards and Technology ("NIST") in its investigation into the collapse of the World Trade Center. The relator alleged that the defendants defrauded the government by presenting false claims for payment, by making false statements in support of those claims, and by avoiding their financial obligations to pay money to the Government. The relator's claims arose from her assertion that the defendants misled NIST and concealed the true cause of the destruction of the towers—namely, the use of directed energy weapons. The United States District Court for the Southern District of New York dismissed the complaint with prejudice pursuant to the False Claims Act's public disclosure bar and for failure to meet Federal Rule of Civil Procedure 9(b)'s heightened pleading requirements. The district court also denied the relator leave to further amend her complaint. The relator appealed the district court's rulings to the Second Circuit. The Second Circuit held that the relator's complaint failed to allege fraud with particularity and accordingly affirmed the district court's dismissal of the complaint. It also held the district court did not abuse its discretion in dismissing the complaint with prejudice, because the plaintiff failed to specify the additional particulars that she would provide. The court also denied two of the defendants' requests for attorney's fees.

Particularity Requirement

The Second Circuit addressed the Rule 9(b) issue first, noting the Supreme Court's recent decision in *Ashcroft v. Iqbal*, in which the Court held that legal conclusions—as opposed to facts – pled in a complaint are not to be accepted as true, and that a complaint that merely pleads the possibility of misconduct is insufficient to defeat a motion to dismiss. The court also determined that the relator was not entitled to a relaxed pleading standard, since she did not demonstrate that any of her allegations were based on information peculiarly within the defendants' knowledge. Applying these principles, the Second Circuit held that the district court properly dismissed the relator's claims. The circuit court held that the relator's reverse false claims allegation was properly dismissed because the relator failed to identify any financial obligation the defendants owed to the government and failed to specify any false statement or record used by the defendants to decrease any such obligation. The Second Circuit further held that relator's remaining allegations were properly dismissed because she failed to identify any allegedly false statement, false billing submission or example of an allegedly false claim by a particular defendant at a particular time. The court determined that the relator's allegations were only pled in general and conclusory terms, and alleged a scheme of fraud without alleging specific conduct and without attributing alleged conduct to specific defendants. Moreover, the court concluded that the relator's allegations that the defendants provided factually incorrect information regarding the collapse of the Twin Towers were insufficient to support an inference that the defendants knowingly violated the False Claims Act. Ultimately, the court held that the relator's allegations "are plainly insufficient under Rule 9(b)," and that her claims were properly dismissed. Since the Second Circuit was able to affirm the district court's dismissal of the relator's claims on Rule 9(b) grounds, it did not consider the public disclosure bar issue.

The Second Circuit also affirmed the district court's denial of the relator's motion to amend her complaint, finding that the district court properly acted within its discretion, since the relator only asserted that a second amended complaint would provide more detail and satisfy Rule 9(b), but still did not explain what additional information she would actually plead in an amended complaint.

Attorney's Fees

Following the dismissal of the relator's complaint, with prejudice, two of the defendants requested attorney's fees under the False Claims Act, and the district court denied their motion. The Second Circuit affirmed the district court's denial of those defendants' motions, finding that the district court did not abuse its discretion when it decided to warn, rather than sanction, the relator and her counsel.

See *U.S. ex rel. Folliard v. CDW Tech. Servs., Inc.*, 2010 WL 1541224 (D.D.C. Apr. 19, 2010) at page 124.

See *U.S. ex rel. Compton v. Circle B Enter., Inc.*, 2010 WL 942293 (M.D. Ga. Mar. 11, 2010), at page 26.

See *U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 2009 WL 3353314 (E.D. La. Oct. 19, 2009) at page 31.

See *U.S. ex rel. Hixson v. Health Mgmt. Sys. Inc.*, 2009 WL 3003258 (S.D. Iowa Sept. 21, 2009), at page 36.

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

U.S. ex rel. Wilkins v. United Health Group, Inc., 2010 WL 1931134 (D.N.J. May 13, 2010)

Two relators brought a *qui tam* action against their former employer—a healthcare service provider—and its subsidiaries, alleging violations of Medicare and Medicaid regulations and state law. The relators accused the defendants of falsely certifying compliance with the healthcare programs' regulations, providing kickbacks to doctors, and conspiring to defraud the government. The defendants moved to dismiss the relators' complaint for failure to state claim. The United States District Court for the District of New Jersey granted the defendants' motion and then declined to exercise jurisdiction over the state law claims.

The court found that the relators' false certification claim was deficient as a matter of law. The court found that the relators argued an express false certification theory of liability, but at times also argued an implied false certification theory. However, the court determined that the relators' allegations failed under both theories. The relators' express false certification theory failed because their complaint did not identify any claim alleged to have been submitted by the defendants to the government. The court found that without an allegation of an actual false claim, the relators' express false certification claim was legally insufficient; the court also found that applying the FERA amendments to the FCA's liability provisions could not save the relator's claim, since the amended provisions also require the identification of a claim. The court also found that the relators' implied false certification claim failed, as the complaint did not allege that the violation of any regulation was relevant to the government's payment of any of the defendants' claims—the court concluded that the relators failed to establish a nexus between the alleged false certifications and a funding decision. Consequently, the relator's fraud claims were dismissed.

In addition, the court found that relators failed to respond to the defendants' challenges to the conspiracy claims and that their complaint failed to allege an agreement to defraud the government. Thus, the conspiracy claim was dismissed as well. The court then declined to exercise jurisdiction over the remaining state law claims.

U.S. ex rel. Crennen v. Dell Mktg. L.P., 2010 WL 1713633 (D. Mass. Apr. 27, 2010)

A relator filed a *qui tam* action against various information technology vendors, alleging that the defendants misrepresented and falsely certified that their products complied with the Buy American Act (BAA) and Trade Agreements Act (TAA) in order to list them for sale on the federal procurement website, General Services Administration (GSA) Advantage!. The government declined to intervene. The defendants filed a motion to dismiss for failure to state a claim and for failure to plead the fraud allegations with particularity. The United States District Court for the District of Massachusetts granted the defendants' motions to dismiss. The court was able to easily dismiss the BAA claims with prejudice for failure to state a claim because the relator alleged that the defendants sold non-compliant "computers and computer peripherals and accessories, such as mice, keyboards, and monitors"—all items that are specifically excluded from the purview of the BAA.

With respect to the relator's TAA claims, the court found that the relator's complaint was deficient, as it did not plead facts sufficient to create a strong inference that a false claim was ever actually submitted to the government. The court observed that the relator's investigation revealed that some of the defendants' products were manufactured in non-designated countries—and thus were ineligible to be sold to the United States government—but the relator never alleged that any of those products were sold to the government, and thus, the complaint lacked any information that could establish a violation of the law. The court rejected the relator's contention that it was plausible that the defendants sold such products to the government, since the products were listed on the GSA Advantage! website. Instead, the court declared that the standard is particularity, not plausibility. The court also denied the relator's theory that a listing of a product for sale on a website is sufficient to constitute a "planned claim," even if no claim ever materialized. The court held that posting a false statement on a website in the expectation that a claim will be submitted does not trigger liability without pleading a claim or a "planned" claim. Consequently, the court dismissed the relator's TAA claims as well.

U.S. ex rel. Thomas v. Siemens AG, 2010 WL 1688582 (E.D. Pa. Apr. 23, 2010)

A relator brought a *qui tam* action against a medical solutions company (SMS), its parent corporation (SCO), and the parent's parent corporation (SAG), alleging that the defendants fraudulently induced the government to overpay for medical equipment. The relator also alleged that the defendants misrepresented the pricing discounts it gave to other customers and that these discounts were relied upon by the government in negotiating the price for goods it purchased from the defendants. Finally, the relator asserted a reverse false claim.

SMS and SCO filed a joint motion to dismiss the relator's second amended complaint for failure to state a claim. These defendants made a distinction between "contractual discounts" and "transactional discounts." They argued that the contractual discount is the best price given to private customers, but that when the

government solicits bids from multiple contractors, it does so at negotiated baselines prices and places contractors with acceptable bids on a list of qualified vendors. Then, once the government selects one of those vendors, it negotiates a final price based on volume and other factors. The contract discount, the defendants contended, establishes the price "ceiling," from which the government negotiates downward, resulting in a transactional discount that is often significantly greater than the contractual discount. SMS and SCO argued that the applicable regulations only required them to disclose the contractual discounts, and they complied with those regulations. SCO also argued that the relator failed to state a claim against it, since it was not involved in SMS's contracting process.

The United States District Court for the Eastern District of Pennsylvania granted the defendants' motion to dismiss in part, and denied it in part. The court dismissed all claims against SCO and SAG, finding that the claims against these two parent corporations could not be maintained. The court held that the relator failed to allege that SCO (SMS's parent corporation), played any meaningful role in the submission of SMS's allegedly false statements. In addition, the court held that SCO's parent company, SAG, had not been properly served with the relator's complaint, since the relator failed to serve the German defendant as required through the Hague Convention and he failed to establish that SCO was SAG's agent, for service of process purposes. The court noted that even if SAG had been properly served, the relator still failed to state a cause of action against it.

The court then evaluated the relator's remaining claims against SMS. On the issue of falsity, the court observed that a plain reading of the applicable forms and regulations suggests that bidders are required to disclose their "best discount," not merely their best "contractual discount." However, the court held that even if the defendants were not required to disclose their best transactional discount, the relator still had a basis for alleging a cause of action since he also alleged that the defendants provided the government with false information regarding their contractual discounts.

On the issue of materiality, the defendants argued that the relator failed to allege any facts showing that the government relied on false or missing information, and thus, the relator could not demonstrate that the government would have negotiated differently, had it known of the defendants' transactional discounts. The court again determined that a plain reading of the requirements suggests that transactional discounts were material to the government's decision to award contracts—why would the government ask for such information, the court inquired, unless it was material? However, the court refused to definitely decide the issue, stating that "[a]t the pleading stage, one cannot discern the government's motivation and its process."

On the issue of knowledge, the court held that the relator had stated a claim. Contrary to the defendants' characterization of the relator's allegations, the relator did not only allege that the defendants failed to disclose their transactional discounts to the government, but that they also provided false information to the government. The court held that these allegations were sufficient to plead the knowledge element of the relator's FCA claims.

The court, though, held that the relator failed to properly plead his reverse false claim cause of action. The court observed that the relator's reverse false claims allegations essentially allege that the defendants fraudulently induced the government to pay inflated prices, and then failed to refund the excess amounts the government had paid. The court determined that this allegation was duplicative of the relator's claim that the defendants made false statements to the government. Moreover, the court found that the relator failed to allege that the defendants failed to pay a "clear" obligation or liability to the government. The court then dismissed the reverse false claims cause of action on those bases.

U.S. ex rel. Folliard v. CDW Tech. Servs., Inc., 2010 WL 1541224 (D.D.C. Apr. 19, 2010)

A relator brought a *qui tam* action against an information technology corporation and its subsidiary company which sells its products—including sales to the federal government. The relator alleged that the defendants sold products and services to the federal government under two contracts: a Solution for Enterprise-Wide Procurement (SEWP) contract that was maintained by NASA and a GSA Advantage contract with the General Services Administration. The relator claimed that the defendants defrauded the government and violated the False Claims Act both by making false statements and by presenting false claims when they listed certain products for purchase by the government on the SEWP and GSA websites—products that, according to the relator, the defendants falsely certified originated in certain "designated countries" from whom the U.S. government makes purchases. The relator further alleged that, in reliance on the defendants' misrepresentations, the federal government purchased products that originated in non-designated countries. One and a half years after the relator filed his *qui tam* suit, the government still had not yet decided whether or not to intervene in the case, and the United States District Court for the District of Columbia ordered that the relator's complaint be unsealed. The defendants moved to dismiss, arguing that the relator's complaint failed to plead with particularity and failed to state a claim. The government filed a statement of interest, requesting that if any dismissal with prejudice was entered as to the relator, then the complaint should be dismissed without prejudice as to the government. The court granted the defendants' motion in part and denied it in part.

Instead of identifying specific false claims, the relator alleged that, in reliance on the defendants' misrepresentations, the government ultimately purchased 140 different products the defendant fraudulently listed on the SEWP website. The relator also alleged that the defendants fraudulently listed 11 products on the GSA website, but did not specifically allege which of those products the government purchased. These allegations, the relator argued, were sufficient to survive the defendants' motion to dismiss, since they allowed for the inference that the defendants must have presented false claims to the government—otherwise, the government would not have purchased the defendants' non-complying products. Not surprisingly, the defendants argued that the relator's allegation that they must have presented false claims to the government did not satisfy Rule 9(b)'s heightened pleading requirements, since the relator failed to identify any particular false claims that were presented to the government. The court, though, rejected that argument, stating: "Contrary to defendants' argument, 'a plaintiff need not allege the *existence* of a request for payment with particularity.' Rule 9(b) requires particularity only with respect to 'the circumstances *constituting* fraud.' Thus, only Rule 12(b)(6)'s general standards apply to the allegation regarding the existence of a request for payment, while Rule 9(b)'s particularity requirement 'applies to the [contention] that the request was *fraudulent*'" (internal citations omitted and all emphasis added by court).

Failure to State a Claim

After distinguishing between the requirements of Rule 12b(6) and Rule 9(b), the court held that the relator's allegations that the defendants presented false claims with respect to the SEWP contract were sufficient to survive the defendants' motion to dismiss, since the relator's allegations could lead to the reasonable inference that the defendants presented false claims to the government. However, since the relator failed to allege that the government purchased any of the defendants' allegedly non-complying products listed on the GSA website, the court held that it could not infer that false claims were presented under the GSA contract. Thus, those allegations were dismissed on Rule 12(b)(6) grounds.

The court applied a similar analysis with respect to the relator's allegations that the defendants made false statements that were material to the government's decision to pay their allegedly false claims. Consequently, the court held that the relator's allegations that the defendants made false statements under the SEWP contract could be maintained. But since the relator failed to allege that the government ever purchased non-complying products from the defendant under the GSA contract, he could not allege that any of the defendants' allegedly false statements regarding those products were material to the government's decision to make payments under the GSA contract. Thus, those allegations were dismissed.

Finally, the court dismissed the relator's conspiracy allegations, noting that the relator merely alleged that the defendants defrauded the government, but failed to allege that they ever conspired to do so.

Pleading Fraud with Particularity

The court held that the relator's allegations of FCA violations with respect to the SWEP contract had been pled with particularity, since the relator's complaint specified the defendants' allegedly false representations, identified the place and time period that those misrepresentations were made, alleged that the government purchased non-compliant products as a result of the defendants' fraud scheme. Although the relator did not identify the specific employee(s) within the defendants' companies who was alleged to have made false statements to the government, the court did not find that this omission amounted to a failure to meet Rule 9(b)'s standards, stating that "[b]ecause defendants are hardly disadvantaged by relator's failure to identify which of their *own* employees were responsible for country of origin labels on the SEWP website, the allegations about the SEWP listings 'give [] defendants sufficient information to allow for preparation of a response'"(internal citation omitted and emphasis in original). Finally, the court noted that since Rule 9(b) allows plaintiffs to plead knowledge generally, the relator did not have to plead with particularity that the defendants knowingly defrauded the government—his general averments of the defendants' knowledge were sufficient.

U.S. ex rel. Dekort v. Integrated Coast Guard Systems, 2010 WL 1330521 (N.D. Tex. April 5, 2010)

A relator brought a *qui tam* action against three defendants, Integrated Coast Guard Systems LLC (ICGS), Lockheed Martin Corporation (Lockheed), and Northrop Grumman Shipbuilding (Northrop), alleging that the defendants violated the False Claims Act under theories of fraud-in-the-inducement, false certification, conspiracy, and reverse false claims. All of the claims related to the conversion and modernization of eight 110-foot patrol boats to 123-foot patrol boats for the U.S. Coast Guard. Specifically, the relator alleged that defendants Lockheed and Northrop created ICGS in order to win a contract with the U.S. Coast Guard to modernize patrol boats. The relator further alleged that Lockheed and Northrop were members of ICGS and also served as first-tier subcontractors to ICGS on the Coast Guard contract. The relator, who was previously employed by Lockheed as an engineer, asserted that, as part of its proposal strategy, ICGS sought to replace "requirements" words like "will" and "shall" throughout the Coast Guard with "guidance" language, to allow ICGS unlimited latitude in performing under the contract.

IGCS was awarded the Coast Guard contract, and the guidance language it sought was later included. The relator alleged that the completed boats ICGS delivered to the Coast Guard had problems in numerous areas, including the control and communications systems, the hull, and the mechanical and electrical work. Nevertheless, he alleged that the defendants continued to invoice the government for the boats, while certifying that the boats met the contractual requirements. The Coast Guard eventually decommissioned all eight of the boats, primarily because

of the problems with the hull and with the mechanical and electrical systems. The relator also alleged that all of the defendants were jointly and severally liable for each other's actions and that ICGS's corporate veil should be pierced. To support this claim, he alleged that the defendants often referred to themselves as partners or as entities in a joint venture. Further, he noted that ICGS did not have any employees of its own and but was operated by Northrop and Lockheed employees, and that ICGS had inadequate capital, and borrowed heavily from the resources of the other defendants.

The United States District Court for the Northern District of Texas ordered the United States to announce whether or not it would intervene in the relator's suit. As the United States had not completed its investigation of the relator's allegations at the time of the court's order, the government declined to intervene, but reserved the right to intervene at a later time. The relator's complaint was then unsealed and served on each of the defendants, who all moved to dismiss the complaint on the grounds that the relator failed to satisfy Fed. R. Civ. P. 12(b)(6) and/or 9(b). Northrop also moved to dismiss on the basis of the FCA's public disclosure bar—a motion that the district court treated as a motion for summary judgment. In addition, all defendants moved to dismiss the allegation that they were jointly and severally liable for any wrongdoing.

Failure to State a Claim

The relator alleged that by persuading the Coast Guard to replace the terms "shall," "will," and "requirements" throughout the contract with ICGS with "guidance" language, the defendants violated the False Claims Act under a fraud-in-the-inducement theory. In particular, he alleged that the defendants fraudulently represented that the usage of guidance language in the contract would allow them to yield a superior product by giving ICGS greater flexibility in conducting the work. The defendants, in their respective motions to dismiss, however, each argued that the relator failed to state a claim, since their act of persuading the Coast Guard to adopt guidance language did not include an empirically false statement. Thus, there could be no fraud. The court agreed, and held that the alleged persuasion was general and relatively vague. The defendants also argued that persuading the Coast Guard to modify the contract was not material to its decision to award the contract to ICGS. Again, the court agreed, holding that the relator alleged no evidence that the Coast Guard was influenced by ICGS to award the contract due to the contract modifications—the court found such influence implausible, since the modification of the contract happened after the contract had been award to ICGS. Accordingly, the court granted the defendants' Rule 9(b) and 12(b)(6) motions, and dismissed the relator's fraud-in-the-inducement claim with prejudice.

The court then turned to the relator's contention that the defendants violated the FCA by falsely certified their compliance with the contract's specifications. Again, all of the defendants moved to dismiss these allegations under both Rule 12(b)(6) and 9(b), with each making five arguments, each of which will be addressed in turn.

First, the defendants argued that the relator failed to allege that payment to ICGS was conditioned on a certification of compliance. In response, the relator, who admitted that he was not in possession of all the pertinent contract documents, argued the certain certifications by the defendants were indeed necessary before the defendants would receive payment from the government under the Coast Guard contract. The court determined that the relator had sufficiently alleged enough to allow a reasonable inference that the defendants had violated the FCA by falsely certified compliance with their contract, and thus, the court denied the motions to dismiss on that basis.

Second, the defendants argued that one of the purported false certification documents—DD Form 250—could not be the basis for a FCA claim, since that document is signed by the government, not the contractor. The court found, however, that the DD Forms 250 were not submitted alone, but rather were submitted with other certifications documents that allegedly contained fraudulent statements. Because the two types of documents could be related, the court rejected by the defendants this argument as well.

Third, the defendants argued that some instances of noncompliance alleged by the relator could not support a FCA claim, because, in those instances, the alleged defects in the boats were actually in compliance with the contract and any alleged omissions by the defendants with respect to those supposed defects were not part of the government's decision to pay under the contract. In support of their argument, the defendants pointed to an Inspector General report attached to the relator's complaint that stated some of the alleged defects met the minimum contract requirements. The relator responded by arguing the report was only provided as background information. The court held that this type of issue should be resolved on the whole record and denied the defendants' motions on this basis. However, with respect to the relator's allegations of the defendants' alleged omissions, the court granted their motions to dismiss with prejudice, observing that the relator made no allegation that the defendants made false statements through omissions or that any alleged omissions were connected to the government's decision to pay.

Fourth, the defendants argued that since the government knew about all the instances of alleged noncompliance, there could be no liability. The court, though, noted that the FCA's "government knowledge bar" was repealed in 1986, and therefore, the government's "knowledge of a contractor's wrongdoing is no longer an automatic defense to an FCA action." The court concluded that the issue of whether or not the government had enough knowledge of the defendants' alleged wrongdoing so as to absolve the defendants of liability was a factual determination that could not be reached at the motion to dismiss stage. Thus, the court denied the defendants' motions on that basis.

Finally, the defendants challenged the relator's veil-piercing argument, with Lockheed and Northrop arguing that they could not be held responsible for any acts or omissions by the other under the ICGS contract. The court agreed, noting that ICGS was registered as an LLC, and not as a joint venture or partnership, and noting that the relator did not allege estoppel or any other theory that would allow for joint and several liability. Thus, the court dismissed, with prejudice, the joint liability allegations against Lockheed and dismissed, with prejudice, those same allegations against Northrop as well. However, the court allowed the relator to maintain his alter-ego allegations against ICGS. With respect to these allegations the court applied the list of factors developed by the Fifth Circuit to determine when an alter-ego situation exists. The court found that several of those factors weighed in the relator's favor, including the facts that the relator alleged that ICGS had no employees of its own but was operated by Lockheed and Northrop employers; ICGS's board was dominated by Lockheed and Northrop board members; ICGS was funded by Lockheed and Northrop; ICGS had no business other than the Coast Guard contract; and ICGS was grossly undercapitalized and its daily operations were not kept separate from those of Lockheed and Northrop. Consequently, the court held that the relator's alter-ego allegations against ICGS could withstand ICGS's motion to dismiss

The court was not persuaded by the defendants' Rule 9(b) arguments with respect to the relator's false certification claims.

Sua Sponte Dismissals

Sua sponte, the court also dismissed the relator's allegations of conspiracy and reverse false claims. With respect to the conspiracy allegation, the court found that the relator failed to satisfy Rule 9(b) as he did not allege an unlawful agreement among alleged co-conspirators nor did he allege any overt acts taken in furtherance of an alleged conspiracy. Likewise, the court held that the relator's reverse false claims allegations could not be maintained, as the relator did not the defendants improperly reduced any liability to the government and did not allege that any false statements were made in order to decrease any obligation to the government; rather, the court determined that the relator's allegations described instances in which the defendants were alleged to have submitted false claims in order to receive payment from the government. Hence, the court dismissed the reverse false claim allegations as well but gave the relator leave to respond.

Public Disclosure Bar

Defendant Northrop separately moved to dismiss the relator's complaint on subject matter jurisdiction grounds, citing the FCA's public disclosure bar. Northrop argued that the "essential elements" of the relator's allegations of false certifications regarding the hull and mechanical and electrical work had been previously publicly disclosed in press releases, congressional testimony, Coast Guard documents, and reports from the U.S. Government Accountability Office. The court disagreed and found that while the publicly disclosed information generally disclosed the alleged boat defects, they did not disclose the "allegations" and "transactions" upon which relator's claims were based. The court noted that "the crux of Relator's *qui tam* action is presentment of false statements, and use of false records to get claims paid by the government in connection with the [Coast Guard contract]," and that these elements had not been publicly disclosed prior to the filing of the relator's complaint. Accordingly, the court denied Northrop's converted summary judgment motion.

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 professional 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 over-commitment 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.

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

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

fraud, alleged all pertinent details regarding the transactions at issue (including the amounts, dates of travel, etc.), and identified one of the defendant's employees with whom he allegedly spoke with regarding the transactions. Consequently, the court denied the defendant's motion to dismiss.

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

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

U.S., ex rel. Liotine v. CDW Gov't, Inc., 2009 WL 3156704 (S.D. Ill., Sept. 29, 2009)

The relator sued his ex-employer, alleging FCA violations and retaliation. The case was unsealed, although the government stated that it had not finished its investigation of the relator's claims and had not determined whether it would undertake any future action against the defendant. The defendant moved to dismiss the claim regarding FCA violations for lack of particularity and lack of subject matter jurisdiction, contending that the public disclosure bar applied. The United States District Court for the Southern District of Illinois denied the defendant's motion to dismiss. The court held that the relator's claim was pled with particularity, as the complaint alleged that the defendant's sales representatives and sales managers took part in the fraud and named specific representatives and managers. The court also observed that the relator identified specific items by brand for which the defendant allegedly submitted false claims. The relator also provided examples of specific false claims and included details such as the specific items shipped, the recipient of the items, the time frame for shipment, and the issues of fraud associated with the claims. The court also observed that the relator had alleged that the defendant sent invoices that over-billed the government, had the wrong shipping rate, were for non-trade compliant products, and for products the defendant was not authorized to sell. The relator's allegations were based on personal knowledge as a witness to actual false claims. Thus, the court held the plaintiff pled fraud with particularity.

The defendant argued that a university publication had previously publicly disclosed the relator's allegations. The court held that since the document at issue was an internal publication of the university, it did not qualify as "news media" under the FCA. The court further concluded that the publication contained nothing that revealed the fraudulent scheme in the manner outlined in the relator's complaint. Thus, the court held that the university publication did not constitute a public disclosure that could deprive the court of subject matter jurisdiction over the relator's claims. The defendant also argued that a public disclosure resulted from its voluntary disclosure of inadvertent mistakes to the government. However, the court concluded that those disclosures did not occur during an administrative investigation or even during an informal inquiry. Thus, the court held that no public disclosure flowed from the defendant's voluntary disclosure to the government.

The court accordingly denied the defendant's motion.

U.S. ex rel. Yannacopoulos v. General Dynamics, 2009 WL 2147844 (N.D. Ill. July 16, 2009)

The relator brought a *qui tam* action against a defense industry contractor and an advanced technology company, alleging that the defendants submitted false claims in connection with a contract with the Defense Security Assistance Agency ("DSAA") to sell F-16 fighter aircraft to Greece. The United States District Court for the Northern District of Illinois first granted the defendant contractor's motion for summary judgment on all claims that alleged liability based on an implied certification theory and granted summary judgment on the claim that the defendants deleted a contract clause without telling the DSAA, in violation of the express certification that it would notify the DSAA of any changes in the contract when they took effect. The relator moved the court to reconsider, and the court agreed to reconsider the ruling on the express certification issue. The defendant contractor then moved to renew its motion for summary judgment on the express certification claim, which the court construed as a motion to reconsider. The defendants separately moved for

summary judgment on all remaining claims against them and the court ultimately granted the motions for summary judgment and the defendant contractor's motion to reconsider. The court determined that the relator's allegations could not support an FCA violation because the defendants' contract was a fixed-price contract, and the defendants' alleged misconduct would not have affected the amount of funds the defendants received under the contract. In addition, the court determined that the defendants generally complied with the terms of the contract and that since the contract was executed by sophisticated parties, after years of negotiation, there was no need to re-write the terms of the agreement.

See *U.S. ex rel. Westmoreland v. Amgen, Inc.*, 2010 WL 1634315 (D. Mass. Apr. 23, 2010) at page 15.

See *U.S. ex rel. Kirk v. Schindler Elevator Corp.*, 2010 WL 1292143 (2nd Cir. Apr. 6, 2010) at page 21.

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 Fraud Enforcement and Recovery Act of 2009 (FERA)

U.S. ex rel. Westrick v. Second Chance Body Armor, Inc., 2010 WL 1753378 (D.D.C. May 04, 2010)

A relator brought a *qui tam* action against a manufacturer of body armors, one of the manufacturer's suppliers, other related entities, and several individuals, alleging FCA violations and other common law claims. The defendant manufacturer and supplier had entered into a contract whereby the supplier would provide its synthetic fiber, Zylon, for use by the manufacturer in bullet proof vests—many of which were sold to various federal and state military and law enforcement agencies. The relator alleged that the Zylon fiber was defective as it degraded more rapidly than the defendants disclosed to their customers and that the defendants continued selling the fiber and the vests with knowledge of the degradation problems. The government intervened and filed a complaint alleging that the defendants knowingly made false statements in order to get false claims paid by the government. The defendants moved to dismiss, and the U.S. District Court for the District of Columbia denied their motions. The defendant supplier filed a motion for reconsideration. This defendant noted that liability provisions of the False Claims Act were recently amended, as part of the Fraud Enforcement and Recovery Act of 2009 (FERA). However, the supplier argued that the district court erred in applying FERA's amended FCA provisions, contending that the amendments did not apply retroactivity to this case, since the retroactivity language states that the amended FCA provisions apply to any claims that were pending as of June 7, 2008, and there were no pending claims for payment on that date.

The district court ultimately held that the word "claims" as used in FERA's retroactivity provision means claims under the FCA—requests to the government for payment or property—not claims in the sense of civil actions filed under the FCA. Consequently, the court agreed with the supplier and held that the district court erred when it applied the amended FCA liability provisions. However, the court still denied the supplier's motion for reconsideration, finding that the government's complaint still alleged a cognizable claim even under the unamended FCA. The court noted that the government still alleged that the defendant knowingly misrepresented and concealed facts and created false records that in part caused the other defendants to submit false claims to the government. The court observed that these allegations were sufficient to plead that the supplier violated the unamended FCA. Accordingly, the supplier's motion for reconsideration was denied.

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

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

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

See *U.S. ex rel. Putnam v. E. Idaho Reg'l Med. Ctr.*, 2009 WL 3806337 (D. Idaho Mar. 10, 2010), at p. 33.

See *Hopper v. Solvay Pharm., Inc.,* 2009 WL 4429519 (11th Cir. Dec. 04, 2009) at page 110.

See *U.S. v. Science Applications Int'l. Corp.*, 2009 WL 2929250 (D.D.C. Sept. 14, 2009), at page 68.

C. Calculating Damages and Civil Penalties

U.S. ex rel. Bahrani v. Conagra, Inc., et al., 2009 WL 2766805 (D. Colo. Aug. 28, 2009)

A relator filed a *qui tam* action against a packaged foods company and its subsidiaries, alleging that these defendants violated the "reverse false claims" provision of the False Claims Act by altering more than 10,000 meat and hide export certificates without obtaining necessary replacement certificates from the government, thereby depriving the government of replacement certificate fees. The United States District Court for the District of Colorado granted the defendants' motion for summary judgment, and the Tenth Circuit reversed that decision and the case was remanded, and bifurcated into two jury trials—one trial regarding meat export certificates and a second trial regarding hide export certificates. In the meat export certificate case, the jury found that the relator was not an original source of his allegations, and his claims were dismissed for lack of subject matter jurisdiction, pursuant to the False Claims Act's public disclosure bar. In the trial on hide export certificates, the relator alleged over 1,000 false claims, but the jury only found the defendants liable for knowingly making significant alterations to hide certificates on five occasions, amounting to $107.50 in actual damages to the government. After the district court trebled those damages and added civil penalties, the total award amounted to $27,822.50. Pursuant to the False Claims Act's fee-shifting provision, the relator moved for attorney's fees or costs—which amounted to approximately $3.5 million. The defendants opposed this motion, arguing that the relator was not the prevailing party and should not recover these costs since he could only prove $107.50 of actual damages to the government—far less than the approximately $50 million to $115 million in damages that his complaint asserted. The defendants also filed a cross-motion seeking recovery of their attorneys' fees and costs related to the claims regarding meat export certificates—costs that totaled $1.2 million. The defendants argued that those claims were frivolous, and thus qualified for fee-shifting in the defendants' favor under the False Claims Act.

The district court referred the motions to a magistrate judge for report and recommendation. The magistrate judge noted that although the relator achieved only a minimal amount of success, the False Claims Act's fee-shifting provision applies. However, the magistrate also noted that the language of the statute's fee-shifting provision only requires that the relator recover "reasonable" and "necessarily incurred" expenses. The magistrate then looked to the application of various other fee-shifting provisions and observed that one of the factors for determining the "reasonableness" of expenses is "the amount involved and the result obtained," and that, when a plaintiff's victory is small or *de minimis*, he/she may only be eligible to receive minimal fees, or, in some cases, no fees at all. While the relator prevailed on a legal issue of some significance by proving five occasions of significant knowing

alteration of hide certificates, the magistrate found that the litigation spanned almost a decade and did not serve a significant public purpose, as it did not vindicate any civil rights or punish any pervasive illegal conduct. Thus, the magistrate judge concluded that "the only reasonable award to Relator is one-third of the amount he ultimately recovered [$27,822.50], or $9,274.16," and recommended an award in that amount to the district court.

The magistrate further recommended that the defendants' cross-motion for costs related to the meat export certificates be denied, since the jury's determination that the relator was not an original source of those allegations did not mean that the claims themselves were clearly frivolous, unreasonable, or groundless.

The district court adopted the magistrate's recommendation in its entirety.

See *U.S. ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, 2009 WL 3161828 (D. Colo. Sept. 30, 2009), at page 66.

See *Kakeh v. United Planning Org., Inc.*, 2009 WL 2869995 (D.D.C. Sept. 9, 2009), at page 58.

See *U.S. ex rel. Lamberts v. Stokes*, 2009 WL 2147017 (W.D. Mich. July 15, 2009), at page 158.

See *U.S. ex rel. Longhi v. Lithium Power Techs. Inc.*, 2009 WL 1959259 (5th Cir. July 9, 2009) at page 73.

D. Costs and Attorney's Fees

Thompson v. Quorum Health Resources, LLC, 2010 WL 2044542 (W.D. Ky. May 21, 2010)

The plaintiff brought an action against his former employer, a healthcare management company, alleging a violation of the False Claims Act's anti-retaliation provision. A jury found in favor of the plaintiff. The plaintiff then filed a petition for an award of attorney's fees and costs, as well as pre- and post-judgment interest on his damage awards. The defendant opposed the plaintiff's motion, arguing that the attorney's fee range exceeded the reasonable limit and that the hours claimed should be reduced. Further, the defendant asserted that the plaintiff's recoverable costs were limited by 28 U.S.C. Section 1920 and that claimed videography costs were not reasonable. The United States District Court for the Western District of Kentucky granted the plaintiff's motion in part and denied it in part.

With respect to the plaintiff's request for attorney's fees, the court decided to reduce the plaintiff's claim, finding that the hourly rate charged by the plaintiff's attorney and the attorney's associate was excessive, due to a lack of evidence to the contrary. As a result, the court reduced the attorneys' respective hourly billing rates. The court also observed that although the attorney and the associate had separate billing record sheets, the narrative portions of both sets of billing records were nearly identical, which made it impossible for the court to tell whether the hours billed were duplicative or excessive. Hence, the court reduced the attorneys' hours by 25%.

With respect to the plaintiff's request for costs, the court agreed with the defendant that 28 U.S.C. § 1920 limits the types of costs available to the plaintiff. The court rejected the plaintiff's argument that the government did not intend for 28 U.S.C. § 1920 to limit the litigation costs available to plaintiff's in FCA retaliation cases. As a result, the court held that the plaintiff could not recover for his experts' retainers, reports, time and services, for travel and mileage costs he and his legal team incurred, or for attorney-client working meals, computer research, office supplies, postage, photocopies, phone, fax, and other miscellaneous fees. The court did, however, allow the plaintiff's claims for witnesses' travel expenses, as well as for deposition transcripts and videography services.

Finally, with respect to the plaintiff's request for pre- and post-judgment interest, the court held that pre-judgment interest on the award of double back pay would be at a rate of 8% and also held that the plaintiff was entitled to post-judgment interest, based on the Treasury bill yield interest rate.

U.S. ex rel. Ubl v. IIF Data Solutions, 2010 WL 1726767 (E.D. Va. Apr. 28, 2010)

A relator brought a *qui tam* action against his former employer and the company's president. The defendants prevailed at trial and then moved for attorneys' fees and expenses under False Claims Act section 3730(d)(4), which allows defendants to recover their fees and expenses when a relator's *qui tam* suit is "clearly frivolous, clearly vexatious, or brought primarily for the purpose of harassment." The United States District Court for the Eastern District of Virginia found that the relator's allegations proved consistently baseless with regard to the objective falsity and scienter elements of his FCA claims. In addition, the court noted that the relator's allegations were based solely on personal opinion, supposition and speculation which were all without support, and which rendered his claims clearly frivolous or vexatious under section 3730(d)(4). The court concluded that this was the rare case in which, when the evidence in record was viewed objectively, the relator's claims had no reasonable chance of success. Consequently, the court awarded attorneys' fees to the defendants. However, the court denied the defendants' other expenses for hotel stays, finding that those expenses were not reasonable as most of the attorneys stayed close to the court and for the others, cheaper alternatives were available.

In reaching this determination, the court applied the 12 factors set forth in Johnson v. Ga. Highway Express, Inc., 488 F.2d. 714 (5th Cir. 1974). The court also relied on the "Laffey Matrix," announced in Laffey v. Northwest Airlines, Inc., 572 F.Supp. 354, 371 (D.D.C. 1983) for guidance in determining the proper market rates for the legal fees requested. The court noted that there are two versions of this Matrix, and used the Adjusted Laffey Matrix. The court also took into account the pay table used in a similar case, Grissom v. The Mills Corp., 549 F.3d 313, 320 (4th Cir. 2008), which involved complex civil litigation and reputable attorneys practicing in the Northern Virginia market. The court evaluated each attorney's fee individually and ascertained a reasonable fee bearing in mind each of the resources, but giving the greatest heed to the guidance in Grissom.

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.

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

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

To determine whether or not to grant attorney's fees on the breach of contract counterclaim, the court examined the merits of the relator's defense, avoidable expense, and several other factors. The relator argued that she was privileged to take documents in violation of her employment contract for discovery purposes, in order to prove her *qui tam* claim against the defendant. However, the court found that in removing the documents she was not cooperating in a government investigation, reporting fraud, or preserving evidence. Instead, the court found that the relator obtained the documents without regard to whether they pertained to the specific claims she intended to bring. In addition, the court found that there was no basis

for the relator to believe that the defendant was destroying, altering, or falsifying documents. Based on this and other factors, the court awarded the defendant attorney fees but reduced them do to extreme hardship of the relator. Concerning the retaliation claim, the court declined to award fees to the defendant. The defendants alleged that the relator did not sue in good faith because she had previously claimed that defendant terminated her in retaliation for reporting workplace violence. The court, however, noted that relators might have had a good reason not to tell employers of their intent to sue under the FCA. The court further found that this did not indicate that the relator brought the claim in bad faith and held that a retaliation claim's lack of merit is not, by itself, grounds for sanctions. Lastly, the court held that no fees would be awarded as a sanction against the relator's attorneys for the *qui tam* proceeding. The court denied this request because the filing of a complaint cannot be the basis for sanctions and if the court were to award a fee based on the pursuit of the *qui tam* action it would contravene that principle. In addition, the court found that the defendants failed to show the extent that any sanctionable actions enlarged its expense beyond what it would have been required to spend in the course of good faith litigation. Therefore, the court granted in part and denied in part defendant's motion for award of attorney's fees.

See *U.S. ex rel. Wood v. Applied Research Assocs.*, Inc., 2009 WL 2143829 (2nd Cir. July 16, 2009) (unpublished) at page 118.

See *U.S. ex rel. Longhi v Lithium Power Techs. Inc.*, 2009 WL 1959259 (5th Cir. July 9, 2009) at page 73.

E. 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.

See *U.S. ex rel. Underwood v. Genentech Inc.*, 2010 WL 2253734 (E.D. Pa. June 2, 2010) at page 90.

F. FCA Seal

American Civil Liberties Union v. Holder, 2009 WL 2596641 (E.D. Va. Aug. 21, 2009)

The plaintiffs—three non-profit organizations—filed a lawsuit challenging the constitutionality of the False Claims Act's seal provisions, which require all relators to file their *qui tam* actions under seal and to only provide a copy of their sealed complaints to the Government, so that the Government can investigate the relator's allegations in secret. By statute, the government is given an initial 60-day period in which to investigate relators' allegations, but that period can be extended by court order. The plaintiffs asserted that the FCA's seal provisions are unconstitutional, arguing among other things that the provisions: (1) unconstitutionally "deny access to information of paramount public interest," and thus violate the public's First Amendment right of access to information; (2) are "content-based" restrictions that gag relators from speaking about the cases they've filed, in violation of those relators' First Amendment rights; and (3) "infringe[] on a court's inherent authority to decide on a case-by-case basis whether a particular FCA action should be hidden from public scrutiny and thus violate[] the separation of powers." The defendants, the United States Attorney General and the Clerk of Court for the Eastern District of Virginia, each sued in their official capacities, moved to dismiss the plaintiffs' complaint for lack of subject-matter jurisdiction and for failure to state a claim. Taxpayers Against Fraud Education Fund filed an *amicus curiae* brief in support of the defendants.

The United States District Court for the Eastern District of Virginia allowed the plaintiffs to bring a facial challenge to the FCA's seal provision, since the plaintiffs argued that the seal provisions are unconstitutional in every application, because the 60-day mandatory seal is imposed in every FCA case, without exception. However, the court held that the FCA is not an access statute because its seal provisions do not regulate access to information law enforcement possesses. Instead, the seal provisions temporarily limit public access to a complaint, which is simply a court pleading. The court noted that sealed *qui tam* complaints merely set forth the relator's allegations and relief sought, inform the court of the grounds for jurisdiction, notify the government of the fraud allegations, and initiate the government's inquiry into those allegations. Although these are important procedural steps under the FCA, they do not adjudicate substantive rights. The court also observed sealed *qui tam* complaints do not serve as substitutes for trial, since the adversarial litigation process commences only after the unsealing of the complaint and service on the defendant. In addition, the court further found that public access to such complaints could tip off targets of government investigations and lead to the loss of evidence. As a result of these findings, the court rejected the plaintiffs' right of access argument and held that no First Amendment right of access to sealed *qui tam* complaints exists. The court also held that the common law presumption of access does not warrant the unsealing of *qui tam* complaints because the FCA's seal provisions are narrowly tailored to the compelling governmental interest of protecting ongoing law enforcement operations.

Moreover, citing TAFEF's *amicus* brief, the court held that the plaintiffs lacked standing to even raise their arguments that the FCA's seal provisions impermissibly restricted relators' free speech, since none of the plaintiffs could allege a close relationship with relators, none could demonstrate any participation in any specific FCA case, and none could identify any specific relator who contended that the seal provisions violated his/her free speech rights. The plaintiffs claimed derivative standing based upon their alleged inability to communicate with relators who had been allegedly gagged by the FCA's seal provisions. The court rejected this argument, though, finding that the FCA's seal provisions are not a content-based restriction on speech because the seal merely prevents the disclosure of the <u>existence</u> of *qui tam* suit, not the facts upon which the allegations are based. In addition, the court held that although a relator who disclosed the existence of a sealed *qui tam* action could face the dismissal of his/her case and the attendant loss of a right to share in the government's recovery, the FCA does not contain a civil or criminal sanction for relators who disclose the <u>factual allegations</u> of fraud, and therefore, the FCA's seal provisions are not a prior restraint on speech.

The plaintiffs also argued that the seal provisions violate separation of powers because they deprive the federal courts of the ability to make sealing decisions on a case-by-case basis. The court also rejected that argument, finding that the FCA merely requires that *qui tam* complaints and their corresponding dockets be placed under seal, which is nothing more than a ministerial act; the seal provisions do not require a judge to perform a non-judicial act or to sign any order without deliberating. In addition, the court found that the "good cause" standard for extending the seal period builds case-by-case judicial review into every *qui tam* case. Thus, the court granted the defendants' motion to dismiss.

G. 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.**

H. Parallel Criminal Proceedings

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

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

I. *Pro Se* Relators

See *U.S. ex rel. Hixson v. Health Mgmt. Sys. Inc.*, 2009 WL 3003258 (S.D. Iowa Sept. 21, 2009), at page 36.

J. *Res Judicata* and Collateral Estoppel

U.S. v. Edelstein, 2009 WL 2982884 (E.D. Ky. Sept. 16, 2009)

The government sued the defendants, a pharmacy, its owner, the owner's wife, and an employee, alleging conspiracy to obtain payment for false or fraudulent Medicaid claims and other common law claims. In particular, the government alleged that the defendants knowingly presented false reimbursement claims for sample drugs to Medicaid and the state's Passport health plan, based on certifications of compliance with state and federal laws. The employee defendant moved for summary judgment, arguing that since he was not a Medicaid provider, he was unable to receive reimbursement through Medicaid and was not bound by the provider agreement. The United States District Court for Eastern District of Kentucky denied this motion and held that the FCA broadly prohibited the submission of false claims and associated false statements not only by any person—not merely by Medicaid providers. The government moved for summary judgment against all four of the defendants, arguing that the pharmacy owner and employee were estopped from denying liability under the FCA action because they had pled guilty in an earlier criminal action for violating the Prescription Drug Marketing Act. The court denied the government's motion against the pharmacy, pharmacy owner and employee, since none of the essential elements of the prior criminal action involved fraud or false statements. Thus, those defendants were not estopped from denying the essential elements of the FCA claims against them. The court also denied the government's motion for summary judgment against the owner's wife, as the government did not provide sufficient evidence in support of its assertion that she physically assisted in selling the prescription drug samples.

U.S. ex rel. Lamberts v. Stokes, 2009 WL 2147017 (W.D. Mich. July 15, 2009)

The relator brought a *qui tam* action against a medical practitioner and his professional corporation, alleging submission of false claims to Medicare and common law claims of fraud and unjust enrichment. The government intervened in part and filed an amended complaint-in-intervention. The government then moved for partial summary judgment on all counts of its complaint, arguing that the defendant practitioner's prior conviction for multiple counts of health care fraud estopped the defendants from denying liability under the FCA and on the common law claims. The government requested statutory penalties and treble damages. The United States District Court for the Western District of Michigan held that the government established all four elements of issue preclusion, since (1) the prior action involved the same fraudulent scheme of up-coding claims and billing for services not performed; (2) the sentencing hearing decided the extent of loss to Medicare due to the scheme and the amount of restitution the defendant practi-

tioner owed the victims; (3) the final judgment included the restitution order; and (4) the defendant practitioner had the opportunity in the prior action to retain a statistician to present expert testimony and to cross-examine the government's expert. Thus, the court held, the defendant practitioner had a full and fair opportunity to litigate the issue of restitution during the sentencing hearing. The defendants argued that estoppel applied only to the fraudulent billings that were part of the counts for which the practitioner was convicted, but the court refused to limit estoppel in this way, since the jury in the prior case had been instructed that the government had to prove the defendant practitioner devised a scheme to commit health care fraud, and the evidence showed an ongoing fraudulent scheme. The court also determined that the imposition of the maximum statutory penalty for each of those fraudulent billings was reasonable, due to the large amount of false claims. Accordingly, the court granted the government's motion for partial summary judgment, awarded treble damages for all the false claims and the maximum statutory penalty for each of the seventeen billings.

See *U.S. ex rel. Resnick v. Weill Medical College of Cornell University*, 2010 WL 476707 (S.D.N.Y. Jan. 21, 2010) at page 135.

See *U.S. ex rel. Schaefer v. Conti Med. Concepts, Inc.*, 2009 WL 5104149 (W.D. Ky. Dec. 17, 2009) at page 9.

K. 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

JULY 1, 2009–JUNE 30, 2010

University of Chicago Medical Center: (N.D. Ill. June 29, 2010)

The University of Chicago Medical Center agreed to pay $7 million to settle allegations that it overcrowded babies in its Neonatal Intensive Care Unit (NICU). From 1997 to 2005, the Medical Center allegedly sought reimbursement from the Illinois Medicaid program for care provided to babies in its Wyler Children's Hospital on days when the NICU exceeded Illinois state regulations on bed spacing and capacity. The Medical Center allegedly engaged in the practice of double-bunking—putting two infants in a bed space designed for only one infant—which caused overcrowded and unsafe conditions and resulted in the outbreak of serious infections in the unit. Donald Raymer and Michael Grosche, former Medical Center nurses, filed a *qui tam* suit in 2003, making these allegations and Illinois Attorney General Lisa Madigan formally joined the case in 2005. The relators will receive a share of about $1.4 million of the government's recovery. About $5.1 million of the settlement will go to clinics that provide prenatal and maternal medical care for low-income women. The remaining $500,000 will go to the Centers for Medicare and Medicaid Services. Public Interest Division Chief Paul Gaynor, Special Litigation Bureau Chief Carl Bergetz, and Assistant Attorneys General Malini Rao and T. Patrick Murray handled the case for Madigan's Special Litigation Bureau. The relators were represented by TAF members Steve Cohen and BethAnne Yeager of the Cohen Law Group.

Northrop Grumman Systems Corporation: (C.D. Cal. June 23, 2010)

Defense contractor Northrop Grumman Systems Corporation agreed to pay the United States $12.5 million to settle allegations that from November 1998 until February 2007, it knowingly submitted false claims to a number of government agencies. Northrop allegedly submitted false claims regarding electronic parts supplied for navigation systems for military aircraft, military submarines and for certain equipment used in space. The settlement agreement resolves claims made in a *qui tam* suit filed in May 2006 against Northrop in the U.S. District Court for the Central District of California by realtor Allen Davis. Davis, a former quality assurance manager at Northrop's Navigation Systems Division facility in Salt Lake City, will receive a relator's share of $2,375,000. TAF members Eric R. Havian and Claire M. Sylvia of Phillips & Cohen LLP's San Francisco office represented the relator.

The case was investigated as part of a National Procurement Fraud Initiative. In addition, the case was handled jointly by the Justice Department's Civil Division and the U.S. Attorney's Office in Los Angeles. These offices received assistance from the Defense Criminal Investigative Service, the Naval Criminal Investigative Service, the Army Criminal Investigative Division, the Air Force Office of Special Investigations, the NASA Office of the Inspector General, and the Defense Contract Audit Agency, Regional Investigative Services Division.

Lawrence Jaeger: (S.D.N.Y. June 10, 2010)

Lawrence D. Jaeger, a doctor of osteopathic medicine with the Community Medical and Dermatology Center and Advanced Dermatology of New York (CMDC), agreed to pay the United States and the State of New York $2.75 million to settle allegations that he violated the False Claims Act by submitting false claims to Medicare, Medicaid and the New York Medicaid program. Jaeger allegedly submitted false claims to Medicare for services with higher reimbursement rates and fraudulently obtained a certification from the New York State Department of Health that allowed him to receive more than five times his usual Medicaid reimbursement. Of the total settlement amount of $2.75 million, Jaeger is required to pay $2,674,000 under state and federal Medicaid claims and $76,000 under federal Medicare claims.

This case was among the first filed under the New York False Claims Act. TAF members Cliff Johnson of Pigott Reeves Johnson and Andrew Campanelli of Campanelli & Associates, P.C. represented the relator. For the government, the case was handled by Assistant U.S. Attorney Kathleen A. Zebrowski and Special Assistant Attorney General Jacob Bergman and the Southern District of New York's Civil Frauds Unit and the Medicaid Fraud Control Unit of the New York State Office of the Attorney General investigated the case.

Cochlear Americas: (D. Colo. June 9, 2010)

Cochlear Americas, a cochlear implant manufacturer based in Colorado, agreed to pay the United States $880,000 plus $70,000 in legal fees to settle allegations that the company violated the Anti-Kickback Act and the False Claims Act by illegally paying physicians to prescribe devices manufactured by Cochlear Americas to Medicare and Medicaid patients. The violations, alleged to have occurred from 1998 to 2003, were brought in a 2004 *qui tam* suit filed by Brenda March, a former vice president and a director at Cochlear Americas. The United States intervened in the lawsuit in January 2007. Ms. March will receive a 20% relator's share of the government's recovery, amounting to $176,000.

According to the Department of Justice, the settlement was a result of a coordinated effort among the Commercial Litigation Branch of the Department of Justice's Civil Division, the United States Attorney's Office for the District of Colorado's Affirmative Civil Enforcement Unit, and the United States Department of Health and Human Services' Office of Counsel to the Inspector General and Office of Investigations.

St. Jude Medical Inc.: (N.D. Ohio June 4, 2010)

St. Jude Medical Inc., a Minnesota-based heart device manufacturer, agreed to pay the United States over $3.7 million to settle allegations that it violated the False Claims Act by paying illegal kickbacks to two hospitals to secure business related to heart-devices. The two hospitals, Ohio-based Parma Community General Hospital and Kentucky-based Norton Healthcare, agreed to pay $40,000 and $133,300 respectively in addition to St. Jude's settlement amount. The United States alleged that the kickbacks caused the submission of false claims to federal health care programs. Relator Jerry Hudson, who was represented by TAF member Warner Mendenhall of The Law Offices of Warner D. Mendenhall, will receive a $640,050 share of the government's recovery. The investigation was handled by the Justice Department's Civil Division, the U.S. Attorney's Office for the Northern District of Ohio, U.S. Department of Health and Human Services' Office of Inspector General and the Federal Bureau of Investigations.

Metropolitan Ambulance & First-Aid Corp., et al.: (E.D.N.Y. June 4, 2010)

Metropolitan Ambulance & First Aid Corp. (now SEZ Metro Corp.), Metro North Ambulance Corp. (now SEZ North Corp.), Big Apple Ambulance Service Inc. (formerly United Ambulance), and company president Steve Zakheim agreed to pay the United States $2.85 million to settle allegations of fraud. The government alleged that the defendants used falsified records to appeal a Medicare program refund demand. Medicare demanded that the companies return millions of dollars that had been paid for allegedly medically unnecessary ambulance trips. These allegations were made by a relator, Larry Kaplan, a former chief financial officer for one of the companies, in a *qui tam* case. Mr. Kaplan will receive a relator's share of $618,450. The investigation, litigation, and settlement are the result of a coordinated effort by the Civil Division of the Department of Justice, the Federal Bureau of Investigation, the Department of Health and Human Services' Office of Inspector General, and the U.S. Attorney's Office for the Eastern District of New York.

Actavis Group: (Idaho May 28, 2010)

Actavis MidAtlantic LLC and Actavis Elizabeth, LLC, formerly known as Alpharma USPD Inc. and Purepac Pharmaceutical Co., agreed to pay the State of Idaho more than $1.2 million to settle allegations of misreporting average wholesale prices for prescriptions. The two companies were alleged to have knowingly set, reported and maintained altered prices for pharmaceutical products they manufactured, marketed, distributed and sold from January 1993 through May 2010 and misreported average wholesale prices for prescription drugs, which led the state to overspend on reimbursements through Medicaid. In addition, the companies allegedly used the artificial spread between the false prices and the actual acquisition costs to promote their drugs to their customers. The companies admitted no wrongdoing or liability in the agreement.

Intercare Health Systems Inc.: (C.D. Cal. May 27, 2010)

Intercare Health Systems Inc., formerly City of Angels Medical Center, entered into a consent judgment with the United States and the State of California for $10 million to resolve allegations that they violated the False Claims Act and the Anti-Kickback Statute. From August 2004 through April 2008, City of Angels Medical Center allegedly paid illegal bribes to patient recruiters employed at homeless shelters to encourage referrals of Medicare and Medi-Cal patients. According to the Department of Justice, the investigation and civil lawsuit were handled collaboratively by the Civil Division of the Department of Justice, the U.S. Attorney's Office for the Central District of California, the Attorney General's Office of the State of California and the Office of Inspector General of the U.S. Department of Health and Human Services.

Bell Helicopter Textron Inc.: May 26, 2010

Bell Helicopter Textron Inc., a Texas-based aircraft company, agreed to pay the United States $3.7 million to resolve civil claims regarding overcharges to the U.S. government. This amount brings the company's total settlement to over $16.5 million, as Bell, in 2004, originally notified the Department of Defense's Inspector General that the company's billing of the costs of certain subcontracts, work transfers, and other transactions with its subsidiaries, divisions, and affiliated companies had resulted in overcharges to the government, and in 2006, the company paid the government $12,851,248 and submitted a report describing the company's conduct and the financial impact on the government. Bell later submitted additional reports detailing similar intra-company transactions with Bell Helicopter Textron Canada Limited that resulted in overcharges. The investigation of this case was led by the Procurement Fraud Task Force.

EMC Corporation: (E.D. Va. May 25, 2010)

EMC Corporation, a Massachusetts-based information technology company, agreed to pay the United States $83.5 million to settle allegations that it violated the False Claims Act by providing false pricing information to the General Services Administration (GSA). The Department of Justices reports EMC allegedly misrepresented its commercial pricing practices to gain higher contracts with the GSA. EMC also allegedly violated the federal anti-kickback statute by paying kickbacks to consulting companies that recommended EMC products to the government.

The *qui tam* suit (*United States of America ex rel. Rille and Roberts v. EMC Corporation*, Civil Action 1:09-cv-00628 (E.D. Va.)) was filed originally in the Eastern District of Arkansas in December 2006 by Norman Rille, a former partner at PricewaterhouseCoopers and Neal Roberts, a former senior manager at Accenture. The case was handled by the Justice Department's Civil Division and the U.S. Attorney for the Eastern District of Virginia, with the assistance of the General Services Administration Office of the Inspector General, the Department of Energy Office of the Inspector General, the U.S. Postal Service Office of the Inspector General, the Defense Criminal Investigative Service, and the Treasury Department's Inspector General for Tax Administration.

Health Alliance of Greater Cincinnati: (S.D. Ohio May 21, 2010)

The Health Alliance of Greater Cincinnati and one of its former member hospitals, The Christ Hospital, agreed to pay the United States $108 million to settle allegations that they violated the Anti-Kickback Statute and the False Claims Act by paying illegal remunerations to doctors in exchange for referring cardiac patients to The Christ Hospital in a "pay-to-play scheme". Relator Dr. Harry Fry, a cardiologist who formerly worked at The Christ Hospital, will receive a $23.5 million share of the government's recovery. Acting U.S. Attorney William E. Hunt represented the government. The settlement was a result of a coordinated effort among the Justice Department's Civil Division, the U.S. Attorney's Office for the Southern District of Ohio, the Office of the Inspector General of the U.S. Department of Health and Human Services, the FBI, and the Center for Medicare and Medicaid Services.

Nine Hospitals—Ball Memorial Hospital, Muncie, Ind.; Bethesda Memorial Hospital, Boynton Beach, Fla.; Bloomington Hospital, Bloomington, Ind.; Genesys Regional Medical Center, Grand Blanc, Mich.; Huntsville Hospital, dba The Health Care Authority of the City of Huntsville, Huntsville, Ala.; Palmetto Health dba Palmetto Health Baptist Hospital, Columbia, S.C.; St. Elizabeth Medical Center, Utica, N.Y.; St. Mary's of Michigan Hospital, Saginaw, Mich.; and United Hospital, St. Paul, Minn. (Kyphon): (W.D.N.Y. May 17, 2010)

Nine hospitals agreed to pay the United States more than $9.4 million to settle allegations that the health care facilities submitted false claims to Medicare. The settlement resolves allegations that the hospitals, which are located in Alabama, Indiana, Florida, Michigan, South Carolina, New York and Minnesota, overcharged Medicare between the years 2000 and 2008 when performing kyphoplasty, a minimally-invasive medical procedure used to treat certain spinal fractures. The hospitals allegedly performed the procedure on an in-patient basis rather that the less costly out-patient in order to increase their Medicare billings.

Relators Craig Patrick and Charles Bates III will receive a total share of $1.5 million. Patrick is a former reimbursement manager for Kyphon and Bates is a former regional sales manager for Kyphon. This settlement follows the settlements that the government reached in 2009 with nine other hospitals for alleged kyphoplasty-related Medicare fraud claims, as well as the government's May 2008 settlement with Medtronic Spine LLC, corporate successor to Kyphon Inc.

Chugach Management Services Inc.: (W.D. Wash. May 11, 2010)

Chugach Management Services Inc., an Anchorage-based Alaska Native corporation, agreed to pay the government $822,000 to settle alleged that the company violated the False Claims Act by overbilling on four fencing projects at Joint Base Lewis-McChord. The government alleged that Chugach overbilled the government after substituting cheaper, lighter steel for more expensive, heavier steel used in the construction of security fences. The civil settlement requires Chugach to pay twice the amount of the overbilling that resulted from the substitution of the lighter steel. Chugach has not admitted any wrongdoing as part of the civil settlement. The investigation was handled by the Department of Defense, Office of Inspector General and the Defense Criminal Investigation Service and the settlement was handled by Assistant U.S. Attorneys Peter Winn and Kayla Stahman.

Ciena Capital LLC: (N.D Ga. May 6, 2010)

Ciena Capital LLC agreed to pay $26.3 million to settle fraud allegations related to small business lending practices. Ciena and subsidiary Business Loan Center (BLC), submitted claims for payment on loans they originated, underwrote, and serviced. The settlement includes a credit for over $18 million which had already been paid to the Small Business Administration. The settlement also resolves allegations that Ciena's parent company, Allied Capital Corporation, is liable for the acts of its subsidiaries. The *qui tam* suit was filed by James R. Brickman and Greenlight Capital Inc. TAF member Mark Kleiman represented Greenlight. Brickman and Greenlight will receive $4.3 million, or a 16.4% share of the government's recovery. The case was handled by Assistant United States Attorneys Gerald S. Sachs and Amy Berne. The settlement was handled by the United States Attorney's Office for the Northern District of Georgia, the Commercial Litigation Branch of the Civil Division for the Department of Justice, the U.S. Small Business Administration, the Office of Inspector General and Office of General Counsel, and the United States Attorney's Office for the Southern District of New York.

Additionally, former BLC Executive Vice President Patrick Harrington pled guilty to conspiracy to defraud the government and was sentenced to 10 years in prison for his prominent role in the fraudulent loan scheme.

Novartis Vaccines & Diagnostics and Chiron Corporation: (N.D. Cal. May 2, 2010)

Novartis Vaccines and Diagnostics Inc. and Novartis Pharmaceuticals Corporation agreed to pay the United States and various states a combined $72.5 million to resolve allegations that the companies—and predecessor Chiron Corporation—caused false claims to be submitted to federal health care programs for certain off-label uses of TOBI, a drug used to treat some cystic fibrosis patients. According to the Department of Justice, the settlement resolves allegations of fraud during the period of January 1, 2001 to July 31, 2006.

The settlement resolves a *qui tam* suit brought by former Chiron employees Robert Lalley, Courtney Davis, and Williams Manos. The three relators will receive a combined award of $7.825 million. Rene P. Tatro of Tatro Tekosky Sadwick LLP and Richard Doyle of Janssen Doyle LLP represented the relators.

The settlement was a result of a coordinated effort among: the Defense Criminal Investigative Service; the Commercial Litigation Branch of the Department of Justice's Civil Division; the U.S. Attorney's Office for the Northern District of California; the U.S. Department of Health and Human Services' Office of Inspector General; the Office of Personnel Management, Office of Inspector General, the Department of Veterans' Affairs, Office of Inspector General; the Federal Bureau of Investigation; the Food and Drug Administration; and the National Association of Medicaid Fraud Control Units.

Ortho-McNeil Pharmaceutical LLC and Ortho-McNeil-Janssen Pharmaceuticals Inc.: (D. Mass. April 29, 2010)

Johnson and Johnson subsidiaries Ortho-McNeil Pharmaceutical LLC and Ortho-McNeil-Janssen Pharmaceuticals Inc. agreed to pay over $81 million to settle criminal and civil liability in connection with off-label promotion of the epilepsy drug Topamax. The complaint alleges that the companies violated the False Claims Acts through an off label marketing and kickback scheme involving aggressive and improper promotion of numerous unapproved off-label uses of Topamax and payments of illegal kickbacks to health care providers in order to induce them to prescribe Topamax.

The civil settlement resolves two *qui tam* suits filed in the District of Massachusetts: *United States ex rel. Maher, et al. v. Ortho-McNeil Pharmaceutical*, and *United States ex rel. Spivack v. Johnson & Johnson and Ortho-McNeil Pharmaceutical, Inc.* Relators Angela Maher, Anastasia Savka-Klovski and Dr. Gary R. Spivack will receive a total share of $9 million. TAF members David L. Haron and Monica P. Navarro of Frank, Haron, Weiner and Navarro represented Ms. Maher and Ms. Savka-Klovski. TAF members Erika Kelton and Larry Zoglin from the firm Phillips & Cohen LLP represented Mr. Spivack.

The federal government will receive over $50 million and an additional amount of over $24 million will be allocated for the state Medicaid share. Ortho-McNeil has also agreed to plead guilty to a misdemeanor and pay a $6.14 million criminal fine. In Addition, Ortho-McNeil-Janssen Pharmaceuticals has agreed to enter into a corporate integrity agreement with the Office of Inspector General of the Department of Health and Human Services.

The Civil Division of the Department of Justice and the U.S. Attorney's Office for the District of Massachusetts prosecuted the criminal case and handled the civil lawsuit, with assistance from the National Association of Medicaid Fraud Control Units and the offices of various state Attorneys General.

Schwarz Pharma Inc.: (D. Mass. and S.D. Tex. April 29, 2010)

Schwarz Pharma Inc. agreed to pay the United States $22 million to settle allegations that the company misrepresented the regulatory status of two unapproved drugs—Deponit and Hyoscyamine Sulfate Extended Release—that did not qualify for coverage under federal health care programs and that the company failed to advise the Centers for Medicare and Medicaid Services that these unapproved drugs did not qualify for coverage under federal health care programs.

The settlement resolves allegations raised against Schwarz in two separate multi-defendant whistleblower actions: *United States ex rel. Constance Conrad v. Schwarz Pharma, et al.* (D. Mass.) and *United States ex rel. James Conrad v. Schwarz Pharma et al.*, (S.D. Tex.). The federal government will receive $12,243,836. The two relators, Constance Conrad and James Conrad will receive a total award of $1,836,575. TAF members Marcella Auerbach and Kenneth Nolan of Nolan & Auerbach, P.A. represented the relators.

The case was investigated by the Department of Justice's Civil Division, the U.S. Attorneys' Offices for the District of Massachusetts and the Southern District of Texas, and the Office of Inspector General of the Department of Health and Human Services.

AstraZeneca: (E.D. Pa. April 27, 2010)

AstraZeneca LP and AstaZeneca Pharmaceuticals LP agreed to pay the United States and various states $520 million to settle allegations that the companies illegally marketed the anti-psychotic drug Seroquel. According to the Department of Justice, between January 2001 and December 2006, AstraZeneca violated the Anti-Kickback Act and the False Claims Act by illegally promoting the drug to psychiatrists and other physicians for certain off-label uses that were not approved by the Food and Drug Administration.

The settlement agreement resolves a *qui tam* suit brought by realtors James Wetta and Stephan Kruszewski. The relators will receive a combined share of over $45 million of the government's recovery. Kruszewski was represented by TAF members Brian Kenney and Tavy Deming of Kenney & McCafferty, along with William Leonard of Obermayer, Rebmann, Maxwell & Hippel. Wetta was represented by TAF members

Stefan Sheller and Brian J. McCormick, Jr. of Sheller, P.C.

In addition to the civil FCA settlement agreement, Astrazeneca agreed to enter into a five-year Corporate Integrity Agreement with the Office of Inspector General of the Department of Health and Human Services.

According to the Department of Justice, the civil settlement was reached by the U.S. Attorney's Office for the Eastern District of Pennsylvania and the Commercial Litigation Branch of the Justice Department's Civil Division, and the investigation was handled by the Department of Health and Human Services' Office of Inspector General, the U.S. Postal Service's Office of Inspector General and the Food and Drug Administration's Office of Criminal Investigations.

Learning Tree International Inc.: (April 7, 2010)

Learning Tree International Inc., a Virginia-based IT and management training firm, agreed to pay the United States $4.5 million to settle allegations that the company improperly invoiced federal agencies and retained money paid for information technology training courses that were not provided. According to the Department of Justice, the matter was investigated by the General Service Administration Office of Inspector General, the Department of Agriculture Office of Inspector General, the Department of Commerce Office of Inspector General, and the Department of Justice, Civil Division.

Eli Lilly and Co.: (Louisiana April 7, 2010)

Eli Lilly and Co., an Indianapolis-based pharmaceutical company, agreed to pay the State of Louisiana $20 million to settle allegations the company promoted unapproved off-label uses of its anti-psychotic drug, Zyprexa. Louisiana is the 11th out of 13 states to settle lawsuits against Eli Lilly over similar allegations. About $17 million of the settlement will go into the state's general fund and about $3 million will go toward reimbursement of the state's Medicaid fund. Eli Lilly also agreed to pay the attorney fees of the private attorneys hired by the state to handle the case.

Chevron USA, Inc.: (E.D. Tex. April 5, 2010)

Mobil Natural Gas Inc., Mobil Exploration & Producing US Inc. and affiliates agreed to pay the United States $32.2 million to resolve claims that between March 1988 and November 1999, they knowingly underpaid royalties owed for pumping natural gas produced from federal and American Indian leases. The heirs of deceased relator Harold Wright will receive a $975,000 share of the settlement. According to the Department of Justice, the investigation and settlement of *U.S. ex rel. Wright v. Chevron USA, Inc. et al.*, from the U.S. District Court for the Eastern District of Texas, was handled by the U.S. Attorney for the Eastern District of Texas and the Civil Division of the Department of Justice, the Department of the Interior's Office of Inspector General, Minerals Management Service, and Office of the Solicitor.

Somerset Industries, Inc.: (E.D. Pa. April 2, 2010)

Somerset Industries, Inc, a privately-owned, Pennsylvania-based wholesale food distributor, agreed to pay $150,000 to resolve allegations that the company intentionally and deceptively defrauded the United States on food products sold to the Bureau of Prisons. According to the Department of Justice, from 2002 through 2007, Somerset concealed, mislabeled, and altered packaging of certain food products sold to the Bureau of Prisons. The relator, a former Somerset employee, will receive an award of $30,000. Assistant Special Agent-in-Charge Joseph G. Barlow and Forensic Auditor Joseph E. Libertz for the Office of Inspector General, United States Department of Justice handled the investigation. The case was handled by Assistant United States Attorney Joel M. Sweet. Attorney Brian A. Gordon represented the relator.

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.

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.

Alpharma Inc.: (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.

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.

Robert Wood Johnson University Hospital Hamilton: (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.

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.

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.

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.

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.

<u>Eon Labs., Inc.</u>: (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.

<u>Mercy Hospital (Mercy Medical Center) – Massachusetts</u>: (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.

<u>Eli Lilly – Arkansas</u>: (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.

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.

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.

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.

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.

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.

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.

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.

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.

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

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

St. John Health System: December 22, 2009

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

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

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

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

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

University of Phoenix: December 15, 2009

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Trinitas Regional Medical Center: November 18, 2009

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

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

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

Kent Robinson, Acting U.S. Attorney for the District of Oregon, along with DOJ Civil Division and HHS OIG handled the case.

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

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

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

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

Diebold Information and Security Systems, LLC: November 3, 2009

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Kyphoplasty: Sept. 29, 2009

Six hospitals in Indiana and Alabama have agreed to pay the United States more than $8 million to settle allegations that they overcharged Medicare each time they performed kyphoplasty, a minimally-invasive procedure used to treat certain spinal fractures that often are due to osteoporosis. The procedure can be performed safely as an out-patient surgery, but the hospitals performed the procedure on an in-patient basis in order to increase their Medicare billings. The settlements with these Indiana and Alabama facilities follow the government's June 2009 settlement with three Minnesota hospitals for alleged kyphoplasty-related Medicare fraud claims, as well as the government's May 2008 settlement with Medtronic Spine LLC, corporate successor to Kyphon Inc. Medtronic Spine paid $75 million to settle allegations that it defrauded Medicare by counseling hospital providers to perform kyphoplasty procedures as an in-patient procedure. Craig Patrick, a former reimbursement manager for Kyphon, and Charles Bates, a former regional sales manager, filed the original *qui tam* suit in 2008. The settlements awarded them a relator's share of $1.4 million. TAF members, Tim McCormack and Matthew Smith of Phillips and Cohen represented the relators. The Indiana hospitals include St. Francis Hospital in Beech Grove, Deaconess Hospital in Evansville and St. John's Hospital System in Anderson. The hospitals have agreed to pay the United States $3,158,629, $2,110,034 and $826,256, respectively. The Alabama hospitals include St. Vincent's East Hospital and St. Vincent's Birmingham Hospital, both located in Birmingham, and Providence Hospital, located in Mobile. These facilities have agreed to pay the United States $1,459,395, $422,748 and $381,713, respectively. The settlements were a result of a coordinated effort between the Commercial Litigation Branch of the DOJ Civil Division, the U.S. Attorney's Office for the Western District of New York, and the Department of Health and Human Services' Office of Inspector General and Office of Counsel to the Inspector General.

Dey, L.P.: (Utah Sept. 18, 2009)

Drug manufacturer Dey, L.P. agreed to pay $1 million to resolve allegations that it overcharged Utah's Medicaid program. Dey allegedly manipulated the drug prices that Medicaid uses to determine reimbursement amounts to pharmacies and then marketed the difference in price between the reported prices and the actual prices as a means of convincing pharmacies that its products were more profitable than competing products. Dey did not admit any wrongdoing in the settlement.

Pinkerton Government Services, Inc.: (E.D. La. Sept. 18, 2009)

Pinkerton Government Services, Inc. (PGS) (a subsidiary of Securitas Security Services, USA, Inc.) agreed to pay the United States $1,016,500 to resolve allegations that it improperly billed self-insurance benefits costs under its contract to provide security services at Department of Energy installations. Under its contract, PGS was reimbursed for all costs, including costs of providing health insurance to its employees, by the Department of Energy. The Government alleged that, from April 2002 through the end of its contract, PGS improperly billed for costs of health insurance under its parent company's self-insurance program without first obtaining approval for these costs in accordance with its contract. The Government alleged that as a result of PGS's failure to seek approval for its self-insurance healthcare costs, the United States was overcharged. The two relators who initiated the suit received a relator's share of $172,805.

Advanced Spine and Pain Management Center: (D. Nev. Sept. 2, 2009)

Las Vegas pain management center Advanced Spine and Pain Management Center, along with five of its health care professionals, agreed to pay the United States $167,000 to resolve allegations that they defrauded Medicare. The suit alleged that between 2000 and 2009, Advanced Spine submitted Medicare claims for Vertebral Axial Decompression (VAX-D), even though that procedure is not covered by Medicare and has been characterized by the Department of Health and Human Services as "not medically reasonable and necessary under any circumstances." The defendants allegedly used codes for other services covered by Medicare in order to disguise the fact that they were providing non-covered services. HHS-OIG investigated the case. Assistant United States Attorney Roger Wenthe handled the case on behalf of the U.S. Attorney's Office.

Pfizer: Sept. 2, 2009

Pfizer Inc. and its subsidiary Pharmacia & Upjohn Company Inc. (Pfizer) agreed to pay state and federal governments $2.3 billion—the largest health care fraud settlement in history. Of the total settlement, $1.3 billion was a criminal fine and $1 billion was a civil settlement under the False Claims Act. The FCA settlement provided $668,514,830 for the federal Government and $331,485,170 for the states. Pharmacia & Upjohn Company Inc. pleaded guilty to a felony violation of the Food, Drug and Cosmetic Act for misbranding Bextra, an anti-inflammatory drug, with the intent to defraud or mislead. The settlement arises from a series of whistleblower suits alleging that Pfizer illegally promoted a number of prescription drugs. The company marketed these drugs for "off-label" uses which had not been approved by the FDA. As a result, Pfizer caused false claims to be submitted to government health care programs for uses that were not medically accepted indications and were therefore not covered by those programs. The settlement also resolves allegations that Pfizer paid kickbacks to health care providers to induce them to prescribe the company's drugs.

The U.S. Attorney's offices for the District of Massachusetts, the Eastern District of Pennsylvania, and the Eastern District of Kentucky, and the Civil Division of the Department of Justice handled these cases. The U.S. Attorney's Office for the District of Massachusetts led the criminal investigation regarding Bextra. The investigation was conducted by the Office of Inspector General for the Department of Health and Human Services, the FBI, the Defense Criminal Investigative Service, the Office of Criminal Investigations for the Food and Drug Administration, the Veterans' Administration's Office of Criminal Investigations, the Office of the Inspector General for the Office of Personnel Management, the Office of the Inspector General for the United States Postal Service, the National Association of Medicaid Fraud Control Units, and the offices of various state Attorneys General.

The settlement provided $102 million for the six relators and their attorneys. Relator John Kopchinski brought off-label marketing allegations regarding Bextra (Bextra-related allegations accounted for $1.8 billion of the total); TAF member Erika Kelton (Phillips and Cohen) represented Mr. Kopchinski, and his relator's share was $51.5 million. Relator Dr. Stefan Kruszewski brought allegations regarding the off-label marketing of Geodon; he was represented by TAF members Brian Kenney and Tavy Deming (Kenney, Egan McCafferty & Young) along with W. Scott Simmer and Thomas J. Poulin (Blank Rome), and his relator's share was $29 million. Relator Ronald Rainero brought off-label allegations regarding Zyvox, was represented by Stephen A. Sheller, James J. Pepper, and Brian J. McCormick (Sheller P.C.), and received a relator's share of $9.3 million. Relator Glenn DeMott brought off-label allegations regarding Geodon, Lyrica, Relpax, Celebrex, Bextra, and Depo-provera and got a $7.4 million relator's share. Relator Dana Spencer, who was represented by William Hoyle, received a $2.7 million relator's share. Relator Blair Collins, represented by Boston attorneys Suzanne E. Durrell, Robert M. Thomas, Jr. and Rory Delaney, received a $2.35 million relator's share for bringing kickback allegations regarding Lipitor, Norvasc, Viagra, Zithromax, and Zyrtec. Multiple state FCA cases against Pfizer are still pending.

Covenant Medical Center: (N.D. Iowa Aug. 25, 2009)

Covenant Medical Center, in Waterloo, Iowa, agreed to pay the United States $4.5 million to resolve allegations that it submitted false claims to Medicare by having financial relationships with five physicians in violation of the Stark Law. Covenant was allegedly giving physicians who referred patients to Covenant compensation far above market value. As a result, those doctors were among the highest paid hospital-employed physicians in the country. The Justice Department's Civil Division and the United States Attorney's Office for the Northern District of Iowa jointly handled this case. The Office of the Inspector General for the Department of Health and Human Services provided investigative assistance.

East Coast Fruit Co.: (S.D. Ga. Aug. 18, 2009)

East Coast Fruit Co., through its successor company R & J 123 Inc. of Georgia, agreed to pay the United States $685,000 to settle allegations that it overcharged the Department of Defense pursuant to its contract to supply fruit and vegetables to DOD facilities in South Carolina. The Government alleged that East Coast Fruit submitted inflated invoices to the DOD between June and December of 2007, in violation of the False Claims Act. Special Agent Clifford E. Currington of the Defense Criminal Investigative Service, Senior Auditor Keith Melville of the Defense Contract Audit Agency investigated the matter. Assistant United States Attorneys Shannon Heath Statkus and Kenneth D. Crowder represented the Government.

Dynamics Research Corporation: (D. Mass. Aug. 13, 2009)

Dynamics Research Corporation (DRC), an Andover, MA defense contractor, agreed to pay the United States more than $15 million plus interest to settle allegations that two of its former executives engaged in a fraudulent kickback scheme in connection with two technical services contracts with the Air Force. The contracts required DRC's employees to certify that neither they nor their spouses had financial interests that would interfere with their ability to deliver unbiased advice while performing the contracts. According to the settlement, Paul Arguin and Victor Garber, two former vice presidents in charge of the project, steered Air Force contracts for computer equipment and services to companies owned by themselves, Mr. Arguin's wife and others in exchange for kickbacks and inflated contract prices that produced windfall profits for them between 1997 and 2000. The United States filed a civil suit seeking damages and penalties under the Anti-Kickback Act, the False Claims Act, and for breach of contract. Mr. Arguin and Mr. Garber pleaded guilty to conspiring to defraud the government. Both received prison sentences and were ordered to pay restitution. The DOJ Civil Division, along with the Defense Criminal Investigative Service, the Air Force Office of Special Investigations, the General Services Administration's Office of Inspector General, and the Defense Contract Audit Agency conducted the investigation.

Noel R. Botsch: (Missouri Aug. 13, 2009)

Noel R. Botsch, owner of Special Design Health Care, a pharmacy headquartered in Cape Girardeau, MO, agreed to pay more than $3.9 million to Missouri, Illinois, and the federal Government to resolve allegations of Medicaid fraud. Between 2002 and 2005, Botsch allegedly double-billed Medicaid and submitted false Medicaid claims for payment. The settlement is the result of a joint state and federal investigation involving Missouri's Medicaid Fraud Control Unit and the federal Office of the Inspector General.

Boeing Co.: (W.D. Tex. Aug. 13, 2009)

Boeing agreed to pay the United States $25 million to resolve allegations that the company performed defective work on the entire KC-10 Extender fleet, which is a mainstay of the Air Force's aerial refueling fleet. Boeing agreed to pay $18.4 in cash and to perform $6.6 million worth of repair work. Former Boeing employees Anthony Rico and Fernando de la Garza filed the *qui tam* suit, which alleged that Boeing defectively installed insulation blanket kits in KC-10 aircraft, and that it overcharged the Government for the kits. During the subsequent investigation, government auditors found that Boeing had inflated estimates of the number of hours needed to perform the blanket kit work and had charged an excessive hourly rate for the work. The settlement provided relator's share of $2,625,000 to Rico and de la Garza. Assistant U.S. Attorney Harold Brown Jr. negotiated the settlement for the Government. TAF members Glenn Grossenbacher, Gary Groseenbacher, John Clark, Rosemarie Alvarado, and Leo Alvarado represented the relator.

William and Marie King; King & Associates; SouthernCare, Inc.: (N.D. Ala. Aug. 7, 2009)

William "Bill" King Jr., Marie King, King & Associates, Inc., and SouthernCare, Inc. agreed to pay approximately $1.4 million to resolve allegations that they defrauded Medicare. SouthernCare, d/b/a King & Associates, provided consulting services to skilled nursing facilities in Alabama and in other southeastern states. Medicare guidelines state that only payments made to physicians for their services on utilization review ("UR") committees are allowable as cost claims for a skilled nursing facility. However, according to the complaint, the Kings and their respective companies caused certain of their skilled nursing facility clients to present claims which overstated the amount of work performed by physicians. Those false claims increased the Medicare reimbursement to these clients, resulting in losses of over $740,000 to Medicare. The Kings also face criminal prosecution. A former accountant for a company that prepared cost reports for the skilled nursing facilities that had been clients of SouthernCare filed the *qui tam* suit and was awarded 19% of the recovery. In addition, the Kings and their companies agreed to pay attorney's fees and costs totaling $36,273.50. TAF members at the firm of Hare, Wynn, Newell & Newton, LLP represented the relator. The HHS Office of the Inspector General and the FBI investigated the case. Assistant United States Attorney Lloyd Peeples represented the United States in both the civil and criminal matters.

Quest Diagnostics: Aug. 6, 2009

Quest Diagnostics and its former subsidiary Nichols Institute Diagnostics (NID) entered into a $12.4 million settlement with the National Association of Medicaid Fraud Control Units. The settlement is a follow-up to the April 2009 resolution of federal allegations arising from a *qui tam* suit regarding faulty diagnostic tests that NID manufactured, marketed and sold to laboratories during 2000-2006. The test kits, used to determine whether patients suffering from end stage renal disease also had overactive parathyroid glands, frequently resulted in false positive results. This portion of the recovery correlates to the amount that state Medicaid programs paid for all of the allegedly inaccurate NID tests. The National Association of Medicaid Fraud Control Units conducted the settlement negotiations on behalf of the participating states, with representatives of the New York, New Jersey, California, and Oregon Medicaid Fraud Control Units leading the effort.

Computer Assets Inc.: (D.N.M. July 30, 2009)

Computer Assets, Inc. and its principals, Abraham and Damon Salazar, agreed to pay $350,000 and to surrender up to $35 million in pending E-Rate applications in order to settle allegations that the company violated the False Claims Act in connection with the Federal Communications Commission's E-Rate program. Former employee John Lyons brought a *qui tam* suit alleging that Computer Assets engaged in non-competitive billing practices, billed for installing excess and unnecessary networking cable, and in some instances billed twice for the same work. The settlement awarded Mr. Lyons a relator's share of $77,000 (22%). DOJ's Civil Division, in coordination with the FCC's Office of the Inspector General, investigated the case.

Baxter Healthcare Corporation: July 27, 2009 (Illinois FCA)

Prescription drug manufacturer Baxter Healthcare Corporation agreed to pay Illinois $6.8 million to resolve allegations that it inflated the Average Wholesale Prices (AWP) in setting the rates for Medicaid reimbursements. As a result of Baxter's alleged fraud, the state of Illinois overpaid for drugs prescribed to Medicaid patients. The settlement covers more than two dozen Baxter drugs.

Boston Clinical: July 27, 2009

Boston Clinical Laboratories, Inc. ("Boston Clinical") agreed to settle Medicare fraud allegations by paying $615,000 to the Massachusetts Medicaid program and $14,000 to the federal Medicaid program, and by agreeing to enter a program to insure compliance with state and federal Medicare regulations. The settlement stems from allegations that the lab received reimbursements for urine drug screens that were improperly ordered. Boston Clinical did not admit or deny the allegations. The case was investigated by Joseph Shea and Timothy Johnson of Massachusetts's Medicaid Fraud Division and was prosecuted by Assistant Attorney General Toby Unger, also of the Medicaid Fraud Division.

Tulare Healthcare: (C.D. Cal. July 27, 2009)

Tulare Local Healthcare District, Tulare District Healthcare System and Tulare District Hospital ("Tulare") agreed to pay more than $2.4 million to settle allegations that they violated the Stark Law, the Anti-Kickback Statute, and the FCA. The settlement stems from a *qui tam* suit that Mary Lucy Reimche, Tulare's former CFO, filed in 2006. According to Reimche's complaint, Tulare Healthcare provided prohibited remuneration to physicians who referred Medicare patients to Tulare Healthcare. The doctors who allegedly received prohibited remuneration from 2001 through 2007 were given rental arrangements at below-market rates, were able to purchase commercial real estate lots at below market value, and had debts forgiven. TAF member Michael Hirst represented the relator, who received a $500,000 relator's share. HHS-OIG investigated the case.

Dr. Gabriel DeCandido: (M.D. Fla. July 17, 2009)

Florida physician Dr. Gabriel DeCandido agreed to pay the federal Government $1.7 million to settle allegations that he defrauded Medicare. Dr. DeCandido also entered into a Corporate Integrity Agreement. The settlement arises from a *qui tam* suit filed by relator Michael Flanery, who was received a relator's share of $306,000 (18%). Dr. DeCandido allegedly billed Medicare for services he did not provide and for higher levels of service than he actually rendered to patients. TAF members Kevin Darken and Barry A. Cohen, of Cohen, Foster & Romine, represented the relator.

The State of New York and New York City (Speech Therapy): July 17, 2009

The State of New York and New York City entered into $540 million settlement to resolve allegations that they knowingly submitted, or caused to be submitted, false claims for reimbursement for school-based health care services, primarily speech therapy and transportation, provided to Medicaid-eligible children. New York State will pay its $440 million share over time, partly in cash and partly by releasing outstanding claims to payment. New York State also entered into a three-year Program Compliance Agreement with CMS to ensure that services are properly delivered and billed in the future. New York City will pay $100 million of the settlement. The settlement resolves allegations that between 1990 and 2001, the state of New York knowingly failed to provide proper guidance to the districts and counties outlining the requirements for a service to be covered by the Medicaid program, failed to monitor the districts and counties for compliance as required by the program, and passed on claims to the federal Government for services it knew were not covered or properly documented. As a result, the United States paid a larger share of New York's Medicaid costs. Most of the fraudulent claims arose from the state's speech therapy program. HHS-OIG found that, contrary to federal Medicaid rules, many speech services were not provided by or under the direction of a speech pathologist who was either certified by the American Speech-Language-Hearing Association (ASHA) or who had equivalent education and work experience. The agency also found that there was insufficient documentation to verify that the transportation services paid for by Medicaid were actually provided by New York's programs. The settlement arises from a *qui tam* suit filed in 1998. The relator, a school-based speech therapist, was awarded a relator's share of $10 million. TAF member David Koeningsberg, of Menz, Bonner & Komar, represented the relator. Judith Rabinowitz, Assistant Director of the U.S. Department of Justice's Civil Division Commercial Litigation Branch (Fraud Section) and Fraud Section Trial Attorneys David T. Cohen and Carol L. Wallack handled the case for the Government. HHS-OIG conducted the investigation.

Endoscopic Technologies Inc: (S.D. Tex. July 14, 2009)

Medical device manufacturer Endoscopic Technologies Inc. (Estech) agreed to pay $1.4 million to the United States to resolve allegations of improper marketing of its surgical ablation devices. Estech allegedly promoted its devices to treat atrial fibrillation—a use for which the FDA has not given approval. In addition, Estech allegedly promoted expensive heart surgeries using the company's devices when less invasive alternatives were appropriate and available, advised hospitals to up-code surgical procedures using the company's devices to inflate Medicare reimbursements, and paid kickbacks to healthcare providers that used Estech's devices. The settlement included a share of $200,000 for the relator, identified as Jane Doe. The settlement was the result of a coordinated effort by the U.S. Attorney's Office for the Southern District of Texas, DOJ Civil Division, HHS OIG, and the FDA Office of Chief Counsel.

Joby George: (D. Conn. July 10, 2009)

New Jersey pharmacist Joby George agreed to pay the U.S. $344,805 to resolve civil allegations that he knowingly submitted fraudulent claims to Medicaid and Medicare. George is alleged to have submitted claims to Medicaid for prescription drugs that he never dispensed and to have submitted claims for brand name drugs to Medicaid when he actually dispensed cheaper generic drugs. George also allegedly improperly submitted claims to Medicare for certain prescription narcotics that he dispensed to an individual while accepting cash payments from the same individual for additional quantities of those drugs. George also pleaded guilty to criminal charges stemming from the same actions, and faces up to 10 years imprisonment and a fine of up to $250,000. In addition, he agreed to surrender all of his pharmacist licenses. The FBI, FDA, Drug Enforcement Administration, and HHS jointly investigated the case. Assistant United States Attorneys William M. Brown, Jr. and Richard M. Molot, along with Auditor Kevin A. Saunders prosecuted the case.

St. John Health System: (E.D. Mich. July 8, 2009)

St. John Health System agreed to pay Michigan and the United States $822,000 to resolve allegations that it defrauded Medicaid. According to the complaint, between 2002 and 2008, St. John submitted claims to the Medicaid program for dental or oral/maxillofacial care on behalf of three health care professionals, when in fact resident dentists were performing those services without the attending professional present during key procedures. Two former employees, Ms. Hoepner and Dr. Pink, filed the *qui tam* suit. They were awarded $135,630 as their relators' share, and their attorneys, Monica P. Navarro, Louis C. Szura and Maro E. Bush of Frank, Haron, Weiner and Navarro (Troy, Michigan), received $54,910 from the defendants for attorneys' fees and costs. Assistant U.S. Attorney Joan E. Hartman, (E.D. Mich.) and Michigan Assistant Attorney General Elizabeth Valentine, Health Fraud Division, represented the Government.

Louisiana State University Health Science Center: (W.D. La. July 1, 2009)

Louisiana State University Health Science Center in Shreveport (LSUHSC-S) agreed to pay $706,678 to settle allegations that it defrauded the federal Medicare program by billing for medical services that were never provided. William Overdyke, a former teaching physician in the LSU orthopedic department, and Susan Belgard Hodnett, a registered nurse, filed a *qui tam* suit under the False Claims Act, alleging that between 1995 and 2005, LSUHSC-S routinely submitted claims for payment to Medicare Part B on behalf of teaching physicians who claimed to have assisted orthopedic residents during surgery when in fact they were not present for the procedures. A subsequent federal investigation found the allegations to be meritorious, and the United States intervened in suit. The settlement included a relators' share of $141,335 (about 20%) to Overdyke and Hodnett. Patrick Jackson represented the relators. Assistant United States Attorney Alec G. Alexander and Investigator Chris Knighton (Western District of Louisiana) and Special Agent Barbara Alleman (HHS OIG) jointly investigated and prosecuted the case.

Yale-New Haven Hospital: (D. Conn. July 1, 2009)

Yale-New Haven Hospital agreed to pay the federal Government $885,953 to resolve allegations that it billed the Medicare program for medically unnecessary inpatient hospital admissions in relation to Gamma Knife stereotatic radiosurgery procedures. The hospital allegedly billed Medicare for inpatient admissions and overnight stays when these procedures could have been performed safely on an outpatient basis. In April of 2006, the hospital received a letter from Qualidigm, the Medicare Quality Improvement Organization, notifying the hospital that there was a lack of medical necessity to support one patient's inpatient admission for a Gamma Knife surgical procedure. The hospital then performed an internal review and voluntarily notified

HHS-OIG of the improper billing and offered to refund Medicare for improper inpatient admissions between April 2002 and April 2006. The hospital subsequently refunded $2,356,702 to Medicare. A subsequent government investigation found that the hospital had also improperly charged Medicare for the same procedures between April 1, 1998 and March 31, 2002. The most recent settlement covers those dates. The hospital cooperated with the investigation and did not admit liability in the settlement. HHS OIG investigated the matter. Assistant United States Attorney Richard M. Molot along with Auditor Kevin A. Saunders prosecuted the case.

Beazer Homes USA Inc.: (W.D.N.C. July 1, 2009)

Beazer Homes USA Inc. and with Beazer Mortgage Corp. (collectively Beazer) resolved allegations that they conducted fraudulent mortgage activities in relation to federally insured mortgages. Beazer agreed to pay the United States $5 million and to pay up to $48 million to victimized private homeowners. Beazer Mortgage Corp. made Federal Housing Administration (FHA) insured mortgage loans for the purchase of homes built by Beazer Homes USA Inc. and is alleged to have fraudulently and improperly: 1) required purchasers to pay "interest discount points" at closing, but then kept the cash and failed to reduce interest rates; 2) provided cash "gifts" to home purchasers through certain charities, so purchasers could come up with minimum required down payments, with assurances that the "gifts" would not need to be repaid, and then increased home purchase prices to offset the amount of the gifts; 3) obscured which of its branches made defaulting mortgage loans to avoid FHA detection of excessive default rates; and 4) ignored "stated income" requirements in making loans to unqualified purchasers. Through these means, Beazer induced unqualified home buyers to enter into improperly inflated FHA-insured mortgages, and after some of the resulting mortgages defaulted, the FHA was required to pay the inflated claims, as well as the cost of handling defaulted properties. The settlement was reached in conjunction with a Deferred Prosecution Agreement (DPA) between the companies and the U.S. Attorney's Office for the Western District of North Carolina.