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False Claims Act & Qui Tam  
**Quarterly Review**

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Edited by Cleveland Lawrence III  
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TAF Education Fund

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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 PRESIDENT

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**G**reetings! As the new President of Taxpayers Against Fraud Education Fund, I am delighted to introduce myself to you and to thank you for your continued support of TAFEF's flagship publication. As this edition is the first published during my tenure, I usurp the Editor's page for one time only. This excellent edition, as previously, was produced under the outstanding leadership of Editor-in-Chief Cleveland Lawrence III.

I have joined TAFEF at a propitious and challenging time. In this 25th anniversary year of the 1986 False Claims Act Amendments and the creation of Taxpayers Against Fraud, and 10th anniversary of the founding of TAF Education Fund, the need for fighting fraud has rarely been greater. Here in Washington and in statehouses across the country, verbal battles rage over budget deficits, taxes, and the funding of government programs. Overseas, hundreds of thousands of troops, fighting real battles, still rely on taxpayer-funded contractors to provide them with critical supplies and services. In these interesting times, we must work harder and smarter to ensure that when the government spends, it gets what it pays for, whether prescription drugs for our seniors, body armor for our troops, mortgage insurance or bank bailouts. We must also help ensure that taxes levied are in fact paid, and that new anti-fraud laws and regulations serve their purpose: to protect individuals and all of us against frauds that undermine the integrity of markets and the public fisc.

Luckily, I can report what you subscribers already know: the state of TAFEF is strong. Thanks to the talent and terrific leadership of my predecessor, Jeb White, on the FERA and PPACA amendments, the False Claims Act has never been stronger. Twenty-six states and the District of Columbia now have similar False Claims Act laws, and many more are debating bills in this session. State enforcement is more than heartening, with a Texas jury leading the charge in recently awarding \$170 million in a Medicaid fraud case, and with several state attorneys general intervening in whistleblower-initiated cases alleging state pension fund fraud.

The success of the False Claims Act has spurred Congress to strengthen whistleblower provisions in the SEC and CFTC arena, and TAFEF, under Cleveland's leadership as Director of Legal Education, has taken a lead role in working with those agencies to craft effective provisions. Cleve, of course, has also grown TAFEF's legal education programs, including this publication, assisted ably by our Public Interest Advocacy Fellow Ashley Tyson.

TAFEF also owes much thanks to Communications Director Patrick Burns, who can explain the most complex frauds in simple animal metaphors, and who keeps the media and public buzzing over False Claims Act successes. We are also blessed with

the talents of Membership Director Takeia Garner, who takes great care of members and staff alike.

Finally, TAFEF is strong because our members and donors are strong, proving every day the benefits of the False Claims Act in fighting fraud, as documented in these pages. Keep up the good work!

I look forward to the year ahead, and to your continued support of TAFEF. As always, the Quarterly Review welcomes your article submissions, ideas and comments.

Best regards,  
Susan Strawn

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# Recent False Claims Act & *Qui Tam* Decisions

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OCTOBER 1–DECEMBER 31, 2010



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# JURISDICTIONAL ISSUES

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

***U.S. ex rel. Joseph Piacentile v. Sanofi Synthelabo, Inc.*, 2010 WL 5466043 (D. N.J. Dec. 30, 2010)**

A relator brought a *qui tam* action against two pharmaceutical companies—Aventis and Sanofi—alleging that the defendants violated the False Claims Act by using improper means, such as free samples, and other kickbacks to physicians, in order to induce those physicians to prescribe the defendants’ drugs, thereby increasing the defendants’ profits and market share. The relator alleged that a false claim to the government was made whenever a physician or medical institution submitted a claim for reimbursement related to the off-label use of the defendants’ drugs. The relator also alleged a conspiracy and a claim under the FCA’s “reverse false claim” provision. The defendants moved to dismiss the relator’s complaint, arguing that the relator’s complaint failed to plead with particularity and failed to state a claim. Aventis also argued that the relator’s claims against it were barred by the FCA’s first-to-file rule. The United States District Court for the District of New Jersey granted the defendants’ motion.

### **First-to-File Rule**

The court began by analyzing whether the relator’s claims were barred by the first-to-file rule. Aventis had argued that the relator’s allegations were based on similar facts in a previously-filed FCA action. The relator argued that his complaint was not barred because the previously filed FCA action might still be dismissed. The court, however, found that, for purposes of the first-to-file bar, even complaints that are later dismissed have preclusive effect. The relator then argued that his complaint was different from the previously-filed complaint, because it incorporated various state law claims separate from the FCA claims. The court, though, found that the underlying facts were still the same and held that the relator’s claims against Aventis were barred by the first-to-file rule.

### **Pleading Fraud with Particularity**

The court then analyzed whether the relator pled fraud with sufficient particularity, and held that although the complaint identified the physicians who were given unlawful kickbacks, it made no mention of how the relator knew about off-label marketing or that false claims for reimbursement were actually presented to the government. The court found that the allegations made in the relator’s complaint were conclusory,

as they made no mention of the who, what, when, where and how of the defendants' alleged fraud scheme. The court also found that the complaint failed to plead the defendants' alleged conspiracy with particularity, since the complaint did not allege any meeting of the minds between the defendants and the doctors who prescribed their drugs. Moreover, the court held that the relator's reverse false claim was deficient and did not plead fraud with particularity, finding that the relator did not allege that the defendants had any existing obligation to return money or property to the government. The court held that the relator did not qualify for a relaxed pleading standard, since he could not show that the information necessary to cure his pleading deficiencies was exclusively in the defendants' possession.

Consequently, the relator's complaint was dismissed.

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

***U.S. ex rel. Sanches v. City of Crescent City, et al.*, 2010 WL 4696835 (N.D. Cal. Nov. 10, 2010)**

A relator brought a *qui tam* action against a city, the city's housing authority (CCHA), and the director of the housing authority, alleging that the defendants obtained and held in trust, money for the U.S. Department of Housing and Urban Development's (HUD) Section 8 housing program, in the form of vouchers that provided housing assistance to low-income families. The relator, who had previously served as the defendant city's finance director, alleged that pursuant to HUD regulations, administrative funds received by housing agencies are to be kept in separate trust accounts, and that housing agencies may be entitled to accumulate reserves to use for HUD-approved purposes. The relator further alleged that HUD imposed a cap that required administrative reserves not exceed 105% of administrative fees paid to housing agencies. The relator's *qui tam* suit alleged that the defendants violated the False Claims Act when CCHA was overpaid by HUD because CCHA and its director intentionally and knowingly submitted false reports certifying HUD compliance which caused HUD to make full payments of monthly administrative fees to CCHA that exceeded the 105% cap. The relator alleged that the excess funds were then reserved for improper, non-approved city purchases. The defendants moved to dismiss the relator's complaint, arguing that the transactions upon which the complaint was based had been publicly disclosed prior to the suit being filed, and she did not qualify as an original source of that information. In response, the relator argued that the documents the defendants relied on did not amount to a public disclosure, and even if her allegations had been previously publicly disclosed, she was an original source of the information. The United States District Court for the Northern District of California agreed with the defendants and granted the motion to dismiss.

### **Public Disclosure Bar**

The defendants argued that the information on which the relator's *qui tam* action was based had already been disclosed in a joint City Council and CCHA public meeting, as well as in a staff report that was made available to the public for that meeting. The relator countered that there had not been a public disclosure, because the documents referenced in her complaint were maintained in CCHA and HUD files and were not disclosed to the general public. The court held that information that was substantially similar to the relator's allegations of fraud had been publicly disclosed in the administrative city council meeting and in documents from the meeting that were made available to the public, before the relator's suit was filed. The court then addressed whether or not the relator qualified for the original source exception to the public disclosure

bar. The defendants argued that the relator was not an original source, because she was not hired as the city's finance director until after the City Council and CCHA meeting took place, and thus, she could not have played any role in the information being publicly disclosed. The relator responded by saying that she was an original source, because she had direct and independent knowledge of the fraud through her job, and she voluntarily disclosed that information to the government. The court, however, held that although the relator did disclose information regarding the alleged fraud to the government, she did so after the meeting in which the public disclosures were made occurred. Moreover, the court found that the relator did not have direct and independent knowledge of any information that had not already been publicly disclosed, and that her allegations "serve merely to republish the information already made public and do not add to what was already disclosed." Consequently, the court granted the defendant's motion to dismiss the relator's complaint.

### ***Goldberg v. Rush Univ. Med. Ctr.*, 2010 WL 4340455 (N.D. Ill. Nov. 2, 2010)**

Two relators filed a *qui tam* action against a university medical center, a group of independent orthopedic surgeons who had surgical privileges at the medical center and were university faculty members (MOR), a surgery center owned by the university, and other surgeons and doctors of the medical center. The relators alleged that the defendants failed to provide supervision over residents during surgical procedures and that the doctors fraudulently claimed that they were present at multiple procedures that occurred at the same time. Specifically, the relators alleged that the medical center and the surgery center knew that surgeries billed by MOR doctors were not being properly supervised, but they allowed the scheduling of concurrent surgeries to continue and obtained reimbursement from the government for surgeries they knew did not comply with Medicare regulations. The relators also alleged that the defendants conspired and participated in referral and kickback programs. The defendants filed two separate joint motions, with MOR and the individual doctors jointly moving to dismiss, and the university medical center and the surgery center jointly filing a separate motion to dismiss. Common to both motions was the defendants' assertion that the relators' complaint should be dismissed for lack of subject matter jurisdiction, as the defendants all asserted that the relators' allegations were based on publicly disclosed information and the relators were not original sources of the information. The United States District Court for the Northern District of Illinois granted the defendants' motions to dismiss. The court held that all the claims asserted by the relators had been previously disclosed in various administrative reports and in the news media. Additionally, the court held, and the relators conceded, that the relators did not qualify as original sources of the information because one relator did not properly notify the government prior to the filing of the *qui tam* suit, and the other relator did not have any independent knowledge of the allegations.

## Public Disclosure Bar

The court first analyzed whether the relators' allegations had been previously publicly disclosed. The defendants argued the relators' allegations had been publicly disclosed in government reports and in the news media. In support of its contentions the defendants offered a General Accounting Office audit report, an Office of Inspector General audit report, and several news reports. The court held that the audits were concerned with medical billing without sufficient "personal direction" and the practice of teaching physicians upcoding claims at 125 medical schools, including the defendant university medical center. The court relied on the Seventh Circuit's holding that the audit reports constituted an industry-wide public disclosure that barred *qui tam* actions against any implicated defendant. The relators argued that the MOR surgeons were not implicated by the audits, but the court disagreed and held that the relators' allegations against the MOR doctors were encompassed by the scope of the audits and the related news coverage. Therefore, the court held that the relators' allegations mirrored allegations of fraud already exposed in the audits and granted all the defendants' motions to dismiss.

### ***U.S. ex rel. DeKort v. Integrated Coast Guard Systems*, 2010 WL 4363379 (N.D. Tex. Oct. 27, 2010)**

A relator brought a *qui tam* action against a shipbuilding company, alleging that the defendant violated the False Claims Act by disregarding various design defects and falsely certifying that its boats met the Coast Guard's performance specifications. The defendant moved for summary judgment, arguing that the FCA's public disclosure bar deprived the district court of subject matter jurisdiction over the relator's complaint. The defendant argued that all of the relator's allegations were publicly disclosed in a Congressional hearing, in media reports, and/or by the Coast Guard itself. The relator countered, arguing that portions of his allegations were never publicly disclosed and that he was the original source of any public disclosures. The U.S. District Court for the Northern District of Texas disagreed with the relator, granted the defendant's motion, and dismissed the relator's claim for lack of subject matter jurisdiction.

## Public Disclosure Bar

The relator filed his *qui tam* action against two other defendants as well—both of which were not involved in the summary judgment motion at issue. One of these additional defendants employed the relator, and pursuant to his job duties, he was responsible for modernizing the C4ISR system in the shipbuilder's renovated boats. The relator had no responsibility for the hull, mechanical, or electrical renovation work done by the shipbuilder defendant. He filed his original complaint against his employer, solely on an alleged false claim related to installation of non-compliant C4ISR equipment. He

attended status conferences involving personnel from all 3 defendants and discussed various issues. At one such meeting, he learned about hull and shaft problems, which prompted him to amend his complaint and add allegations regarding these design defects. However, before the amended complaint was filed, the Coast Guard publicly announced the suspension of operations on the boats due to structural damage discovered in the hulls. After the amended complaint had been filed, the U.S. House of Representatives Committee on Transportation and Infrastructure held a hearing to examine the issues with the boats, which included extensive testimony about the hull and shaft. The defendant argued that the Congressional hearing disclosed every significant aspect of the relator's claim. The district court agreed, as it found that all the essential elements of the relator's fraud allegations were substantially similar to the publicly disclosed information, and all the relator had to do was infer that a fraud had occurred. This, the court, held, was sufficient to provide a basis for a public disclosure under the False Claims Act.

The defendant also argued that the defendant had no direct or independent knowledge of the design claim prior to the Congressional hearing and receipt of Coast Guard documents. The relator, however, claimed to qualify as an original source of the design defects because he filed his amended complaint before the Congressional hearing. The district court disagreed and found that, prior to the Congressional hearing, the relator had not alleged any design defects regarding hull, mechanical, or electrical renovation work, or any false certifications by the shipbuilder to the government regarding those issues—information that was publicly disclosed in the hearing. It was not until two years after that hearing that the relator first brought these additional design defect allegations. Consequently, all of the relator's design defect claims related to hull, mechanical, or electrical renovation work were dismissed.

### ***U.S. ex rel. Schumann v. AstraZeneca PLC*, 2010 WL 4025904 (E.D. Pa. Oct. 13, 2010)**

A relator brought a *qui tam* action against two pharmaceutical companies, Bristol-Myers-Squibb (BMS) and AstraZeneca (AZ), under state and federal law, alleging that the defendants entered into fraudulent agreements to sell their brand-named drugs and submitted false best price reports, causing the submission of false rebate claims to the government. Specifically, the relator alleged that the defendants paid kickbacks to purchasers of their products so that the actual prices of those products were misrepresented to the government, resulting in overpayments. The defendants filed separate motions to dismiss the relator's complaint. BMS argued that the complaint was based on publicly disclosed allegations and that the relator did not qualify as an original source of the information. Additionally, both BMS and AZ argued that the relator failed to state a claim and failed to plead fraud with particularity. The United States District Court for the Eastern District of Pennsylvania granted BMS's motion with prejudice and denied AZ's motion.

BMS argued the relator's kickback and best price claims were substantially similar to allegations and transactions already publicly disclosed in other civil actions and that the relator did not qualify as an original source of the information on which those allegations were based. The court agreed and held that the civil actions already disclosed were sufficient to set the government on the trail of fraud before the relator's complaint had been filed. Additionally, the court held that the relator failed to qualify as an original source because he did not allege any direct and independent knowledge of the alleged fraud. The court found that he only alleged that he participated in contract negotiations, with no mention of how he obtained direct knowledge of the ultimate allegedly fraudulent conduct. As a result, the court granted BMS's motion.

The remaining defendant, AZ, had argued that the relator failed to plead the details of any individually submitted false claims or any facts demonstrating that its best price reports were false. The relator alleged that AZ set up an elaborate scheme to defraud the government through a series of sham contracts. He alleged the details of eleven agreements which included contract titles, payment amounts, the products involved, and the years during which these fraudulent agreements were in force. He also provided meeting dates and the names of the participants. The relator alleged that as a result of these inflated prices, the defendant caused the submission of false claims. The court held that the relator sufficiently alleged that the kickbacks resulted in the submission of false claims and the details of fraud involving sham agreements. As a result, the court denied AZ's motion to dismiss.

**See *U.S. v. Smith & Nephew, Inc.*, 2010 WL 4365467 (W.D. Tenn. Nov. 4, 2010) at page 24.**



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## FALSE CLAIMS ACT RETRALIATION CLAIMS

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***Mann v. Heckler & Koch Def., Inc.*, 2010 WL 5262729 (4th Cir. Dec. 27, 2010)**

The plaintiff brought an action against his former employer, a firearms dealer, alleging a violation of the False Claims Act's anti-retaliation provision. Specifically, he alleged that he was terminated from his job because he investigated and opposed the defendant's attempts to defraud the U.S. by submitting a bid to the U.S. to provide weapons that did not conform to various "statement of work" provisions. The relator also alleged state law violations, as well as an additional claim for retaliation under the FCA, based on the theory that the defendant further retaliated against him for filing his initial retaliation claim. The defendant argued that it did not defraud the U.S. because it explicitly stated in its bid that its weapons did not conform and that it would be able to provide missing components if it won the bid. The defendant also argued that the plaintiff was not terminated for any protected conduct under the FCA, but rather because of his involvement with an unlawful scheme to procure weapons for a small police force. The U.S. District Court for the Eastern District of Virginia granted the defendant's motion to dismiss the additional retaliation claim and granted the defendant's motion for summary judgment on all remaining claims, as it determined that the plaintiff never identified any instance of the defendant making a false statement or engaging in fraudulent conduct. The plaintiff appealed to the Fourth Circuit, which affirmed the district court's decision.

The circuit court found that the defendant submitted a bid free of false statements or efforts to camouflage any defects in its products. Even as the circuit court noted that the defendant's conduct was unconventional and may have violated the federal bidding regulations, it held that the defendant's actions were not fraudulent. As a result, the Fourth circuit held that the defendant's conduct toward the plaintiff fell outside the scope of the FCA's anti-retaliation provision, because there was no reasonable possibility that the defendant violated the FCA. The circuit court also rejected the plaintiff's argument that the act of filing a retaliation claim itself qualified as protected conduct under the FCA, regardless of the nature or merits of the underlying claim. The court held that the FCA was not meant to be used in this manner and that adopting this threshold would open the floodgates to FCA litigation having little or nothing to do with fraud; the court also noted that accepting the plaintiff's argument would lead to an infinite sequence of FCA claims, each one citing the filing of the previous claim as the protected conduct. Thus, the court affirmed the district court's judgment.

***Blackburn v. HQM of Riverview Health Care Ctr.*, 2010 WL 5393848 (W.D. Ky. Dec. 22, 2010)**

The plaintiff originally filed a *qui tam* action against her former employer, a corporation that runs nursing facilities, and the company's subsidiary, alleging that the defendants were involved in fraudulent billing practices and provided inadequate care to patients. She also alleged a violation of the False Claims Act's anti-retaliation provision, asserting that the defendants terminated her employment because she challenged the defendants' illegal practices and refused to lie to state surveyors during an inspection. The plaintiff later withdrew the fraudulent billing and patient care claims, leaving the retaliation claim. The defendants moved to dismiss that claim, arguing that the plaintiff's allegations did not satisfy the elements of a retaliation claim and that she was fired due to inadequate job performance. The United States District Court for the Western District of Kentucky granted the defendants' motion.

The court first analyzed whether the plaintiff's conduct fell within the FCA's definition of "protected conduct" and found that the allegations underlying the retaliation claim arose entirely from a state survey inspection. The court stated that "[g]enerally, an employee's investigation of his employer's non-compliance with federal or state regulations is insufficient to support a whistleblower claim, and concluded that the plaintiff's refusal to lie to a state survey inspector did not constitute protected conduct. The court then considered whether, if the employee had engaged in protected conduct, the plaintiff put her employer on notice of that conduct. The court held that the plaintiff's discussions with superiors about her refusal to lie to the state surveyor could not be deemed an investigation that would lead to false claim charges. As the court held that the plaintiff failed to allege two of the basic elements of a retaliation claim, it dismissed the plaintiff's complaint.

***Davis v. Point Park Univ.*, 2010 WL 4929104 (W.D. Pa. Nov. 30, 2010)**

The plaintiff brought an action against her former employer, a private non-profit university, as well as two individuals, alleging retaliation under the FCA and state law. Specifically, the plaintiff alleged that she told the defendants about accounting improprieties she found in compliance reports, but was told to keep quiet about it. She further alleged that she recommended an internal audit, which validated her suspicions, but was subsequently terminated from her job, purportedly due to restructuring. The plaintiff asserted that she was terminated because a separate federal audit was scheduled days later and due to her position in the university, she would have been compelled to share her information.

The defendants moved to dismiss the plaintiff's complaint for failure to state a claim. The United States District Court for the Western District of Pennsylvania granted the motion in part. The defendants argued that the plaintiff's complaint failed to allege that she was engaged in protected conduct and that she failed to place the defendant university on notice that she was contemplating filing a *qui tam* claim. Instead, the defendants argued that the plaintiff created an impression that her focus was to resolve any problems and that the internal investigation was within her job duties. In addition, the individual defendants asserted the defense that there was no individual liability under the FCA.

The plaintiff conceded that there was no liability for individual defendants pursuant to the FCA and agreed that the claims against those defendants be dismissed. The court then examined the university's protected conduct argument and found the plaintiff alleged that it was not the plaintiff's responsibility, but rather the responsibility of one of the individual defendants, to investigate compliance reports. Further, the court found that there was nothing to show that the plaintiff was acting within the scope of her normal duties when she discovered the alleged inaccuracies. Hence, the court held that the plaintiff was engaged in protected conduct, for FCA purposes. The court then examined the defendant's notice argument and found that the plaintiff implied, but nowhere clearly alleged, that she was fired to prevent her from cooperating with the federal auditors. The court also held that although the plaintiff did not allege that she ever gave a specific notification that she intended to pursue legal action, such express notification is not required under the FCA, when the plaintiff's conduct could reasonably lead to a viable FCA case. The court noted that the federal audit and the plaintiff's exposure should have put the defendants on notice of potential litigation. While the court held that the complaint could have been more explicit in certain respects, it concluded that it should not be dismissed as deficient.

***Turner v. DynMcDermott Petroleum Operations Co.*, 2010 WL 4363403 (E.D. La. Oct. 21, 2010)**

The plaintiff was the human resources director for the defendant, a petroleum company that had a government contract to manage the Strategic Petroleum Reserve. The plaintiff filed a separate *qui tam* action, alleging that one of the company's subcontractor's had overcharged its healthcare costs to the defendant company, which resulted in an overcharge to the government. In the present action, the plaintiff alleged that as a result of the *qui tam* action against its subcontractor, the defendant retaliated against him by reducing his yearly bonus, conducting an oppressive audit of his department, and eventually terminating his employment when he was unable to report to work in a timely manner following Hurricane Katrina. The defendant moved for summary judgment.

The United States District Court for the Eastern District of Louisiana granted the defendant's motion in part. First, the court analyzed the claim that the plaintiff's bonus was less than in previous years, and the reduction was retaliatory. The court held that a denial of a monetary perk did not constitute an adverse employment action and was wholly within the employer's discretion. Second, the court analyzed the claim that the audit of the relator's human resources department was retaliatory. The court held that the audit was performed after complaints to the finance department, and found that the plaintiff could not demonstrate that the audit was performed for a retaliatory reason. Finally, the court analyzed the plaintiff's claim that his termination was a retaliatory action. The defendant argued that the plaintiff was terminated because he was the only director who did not report to work after Hurricane Katrina. The plaintiff responded, arguing that his failure to report was a pre-text, and that he was actually terminated in retaliation for filing the *qui tam* suit. The court held that genuine issues of material fact existed with regard to this dispute, and therefore denied the defendant's motion for summary judgment on that issue alone.

**See *U.S. ex rel. Gatsiopoulos v. Kaplan Career Inst.*, 2010 WL 5392668 (S.D. Fla. Dec. 22, 2010) at page 35.**

**See *U.S. ex rel. Powell v. Am. InterContinental Univ. Inc.*, 2010 WL 4818536 (N.D. Ga. Nov. 22, 2010) at page 40.**

**See *U.S. v. Smith & Nephew, Inc.*, 2010 WL 4365467 (W.D. Tenn. Nov. 4, 2010) at page 24.**

**See *U.S. ex rel. Bierman v. Orthofix Intern., N.V.*, 2010 WL 4358380 (D. Mass. Nov. 4, 2010) at page 25.**

**See *U.S. ex rel. Hill v. Univ. Of Med.*, 2010 WL 4116966 (D.N.J. Oct. 18, 2010) at page 18.**

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# COMMON DEFENSES TO FCA ALLEGATIONS

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## A. Not Knowingly False

### ***U.S. v. Copeland*, 2010 WL 5394854 (E.D. Wash. Dec. 23, 2010)**

The United States brought an action against an auction company (LC) and its president, alleging violations of the False Claims Act. Specifically, the government alleged that the US Department of Agriculture provides low-income people with loans to purchase homes. When there's a default on any of those loans, the USDA is entitled to foreclose on the property and auction it to the highest bidder. With respect to the case at issue, the government asserted that the USDA hired a company (ABC) to conduct the foreclosures, and that ABC hired the defendants to conduct the auction. The government alleged that one of the defendants' employees colluded with bidders at two such auctions, and in exchange for payments, the employee submitted forms to ABC indicating that those bidders' high bids were less than they actually were. ABC, unaware of this employee's deceit, in turn transmitted the false information to the government, which approved the fraudulent sales. After the government conducted its own investigation and discovered the fraud, the employee pled guilty to bribery. The government then sued the defendants who employed him, and later moved for summary judgment on its claims of fraud. The government argued that the defendant company president could be held individually liable for false claims submitted by his employee on behalf of the corporation. The government also argued that corporate defendant was vicariously liable for any fraudulent misrepresentation in the bids and asked the court to pierce the corporate veil and to impose liability on the company's majority shareholder—*i.e.* the company's president. The United States District Court for the Eastern District of Washington granted the government's motion in part.

The court found that the defendant president conceded that the employee acted on behalf of the corporation, that it was foreseeable that the claims would be presented to the government, and that the government would not have approved the sales if it knew of the deceit. The court found that the defendant's knowledge of the fraud was the only triable issue. The court examined the two auctions separately. With respect to the first auction, the court found that mere weeks after the first auction, the president noticed a change in the employee's demeanor, but did nothing to investigate, even though, the president "was well aware that some bidders at foreclosure auctions attempt to collude with the auctioneer in an effort to obtain an unfair advantage." The government, however, investigated and found that the employee had changed bids in both auctions and had received money from the bidders in return. The court held that from the government's investigation, it was

undisputed that the employee caused the company to submit false information in the first auction. However, the court found that, given the totality of the information, the president may or may not have had a duty to investigate the employee's conduct regarding the first auction. Therefore, the court denied the government's summary judgment motion with respect to claims regarding the first auction.

The court then examined the second auction and found that, by the time of the second auction, the president should have been suspicious of the employee's increasingly strange behavior. The court noted that soon after the second auction, the employee became "an absolute basket case," that he began "acting paranoid," and that he was "constantly shaking." Moreover, when the president asked the employee about his erratic behavior, he responded by saying that it is "better you don't know." Eventually, the employee told the president that the president would need to fire the employee, although he did not say why. The court concluded that the president acted with reckless disregard for the accuracy of the information submitted to ABC (and in turn to the government) and as a result was accountable for knowing that the information to be submitted to the government from the second auction was false.

The court then examined the allegation that the defendant company was vicariously liable for the employee's fraudulent misrepresentations in the bids from both auctions. The court held that since the employee had apparent authority to make representations on behalf of the company, the company was vicariously liable for his fraudulent misrepresentations with respect to both bids. The court, though, declined to grant the government's request to pierce the corporate veil of the defendant company and to hold its majority shareholder liable. First, the court noted that this request might become moot, since the company's majority shareholder had already been found liable in his capacity as the company's president. Second, the court determined that the president had raised an issue of material fact with respect to whether or not he respected the company's separate identity, and therefore held that the veil piercing issue could not be decided on summary judgment.

### ***U.S. ex rel. Feldman v. Van Gorp*, 2010 WL 5094402 (S.D. N.Y. Dec. 9, 2010)**

A relator brought a *qui tam* action against a university and an individual, alleging that the defendants violated the False Claims Act by submitting false claims, through grant applications and renewals, in order to obtain federal grant funds from the National Institute of Health (NIH). A jury found the defendants liable for making false claims in various renewal applications for funds. The defendants then moved for judgment as a matter of law, or alternatively, for a new trial, arguing that the relator presented insufficient evidence in support of the verdict because there was no testimony from an NIH official with decision-making authority and the documentary evidence relied on by the relator was insufficient to show

that the alleged false statements were material to the government's decision to award the grant funds or that the defendants knowingly violated the FCA. The United States District Court for the Southern District of New York disagreed and held that the relator presented significant documentary evidence in the plain language of the NIH guidelines, which made it clear that renewals were material to the decision to receive funding. The court also held that NIH official testimony was not necessary when the jury received such unambiguous NIH guidelines. The court also found that the defendants acted knowingly, noting the testimony of the defendants' Chief Fellow who stated that, in accordance with the defendants' instructions, she drafted three renewals that misrepresented the university's activities. Additionally, there was testimony from other Fellows that misrepresentations were made and that the defendants knowingly made omissions on renewals. As a result, the court held that the jury had ample evidence to conclude that the defendants acted knowingly in making false statements. The defendants' motion for judgment as a matter of law was denied.

***U.S. v. Science Applications Int'l. Corp.*, 2010 WL 4909467 (D.C. Cir. Dec. 3, 2010)**

The United States brought an action in the United States District Court for the District of Columbia alleging that a major government contractor violated the False Claims Act by impliedly falsely certifying to the Nuclear Regulatory Commission (NRC) that it had no conflicting interests and would promptly report any potential conflicting relationships. Following jury trial, the defendant was found liable and the United States was awarded treble damages. The defendant then moved for judgment as a matter of law and in the alternative, sought a new trial. The defendant argued that it could not be held liable under the FCA, because its government contract did not designate compliance with the conflict of interest requirements at issue as express conditions for payment. The defendant also argued that various jury instructions were erroneous and prejudicial and that the government failed to prove that it suffered any damages. The district court rejected each argument and upheld the verdict and jury award. The defendant then appealed to the United States Court of Appeals for the District of Columbia Circuit, seeking judgment as a matter of law with respect to liability on all causes of action and with respect to FCA damages. It also alternatively urged the circuit court to vacate the district court's judgment and remand for a new trial on all claims. The circuit court vacated the judgment as to FCA liability and remanded for a new trial, holding that the district court's collective knowledge instruction conflicted with the FCA's scienter standard.

### **Scienter**

The circuit court first analyzed the implied false certification theory. The defendant argued that liability may attach under an implied false certification theory only where

a statute, regulation, or contractual provision made compliance with some requirement of an express condition precedent to payment. The appeals court disagreed and found that record evidence could have allowed the jury to conclude that there was an obligation to disclose any conflict of interest. However, the court still vacated and remanded for a new trial because it determined that the district court erroneously instructed the jury when it announced that corporations were liable for the collective knowledge of all employees and agents within the corporation, as long as those individuals obtained their knowledge while acting on behalf of the corporation. The circuit court held that the district court's instructions drew no distinction between the knowledge of corporate officers and that of potentially thousands of ordinary employees. The court found that the district court's instructions allowed the jury to find that the defendant knowingly submitted false claims for payment even if the jury concluded that no individual was simultaneously aware of the company's NRC contract and its relationships with other companies that violated the contract's conflict of interest provision. As the appeals court could find no other circuit in which the collective knowledge theory was applied to FCA cases, it vacated the district court's judgment and remanded for a new trial. The court of appeals also held that the jury instructions as to the damages were flawed.

### ***U.S. ex rel. Hill v. Univ. Of Med.*, 2010 WL 4116966 (D.N.J. Oct. 18, 2010)**

A relator brought a *qui tam* action against a medical university and two doctors, alleging that the defendants violated the False Claims Act by knowingly submitting fraudulent data to the National Institute of Health (NIH) in a grant application, that she reported her observations and suspicions of the fraud to numerous individuals and committees within the university, as well as to various governmental agencies, including the Office of Research Integrity (ORI) and a U.S. Attorneys' Office, and that, as a result of her actions, the defendants retaliated against her. Both the relator and the defendants moved for summary judgment. The United States District Court for the District of New Jersey granted the defendants' motion. The court concluded that the relator did not demonstrate that the defendants had the requisite knowledge or intent to submit false data to NIH, and that the relator's claims failed to meet the FCA's materiality requirements because the data the relator alleged had been fabricated was not integral to NIH's decision to approve the defendants' grant application. The court also held that the relator's retaliation claims failed to allege any kind of discriminatory or adverse employment claim, as she held the same title and salary she had before the allegations were made.

### **Knowledge Requirement**

The relator argued that the defendants knowingly submitted false reports, based on the accounts of eyewitnesses, the defendants' inability to replicate the experiments, and the statistical analysis of an expert. The court determined that one of the wit-

nesses upon whom the relator relied to corroborate her allegations had not yet been employed by the defendant university when the relator alleged that he witnessed the experiments. Therefore, he could not have observed, nor attempted to replicate, the results of the defendants' experiments. Next, the court examined the relator's claim that the defendants were unable to replicate data, and held that the fact that the results could not be replicated was likewise inapposite to relator's contention that the defendant knowingly submitted false and fraudulent data to the NIH. Finally, the court held that the statistical analysis by the relator's expert was performed after the ORI investigation, and therefore could not have contributed to the defendant's knowledge. Additionally, the court found that, subsequent to the relator's initial suspicions, three independent investigations were conducted—all of which rejected the relator's allegations. Thus, the court held that since the FCA's knowledge element was clearly lacking, it did not need to look any further at the underlying claim of scientific fraud.

## **Materiality**

The court also examined the materiality element and its relationship to the relator's claims of research misconduct. The relator had approached the defendants' research committee and even ORI to investigate the alleged fraud, and those investigations concluded that there was no cause to warrant further proceedings. The court observed that although the relator repeatedly alleged that the defendants were obliged to report their inability to replicate the results of the experiments, it was not actually a requirement. The ORI reports also concluded that the data which the plaintiff believed to have fabricated was not integral to the decision by the NIH to approve the grant application. As a result the evidence and claims presented failed to meet the FCA's materiality requirements.

## **Retaliation Claims**

The relator alleged that, as a result of her fraud claim, she was forced to share space with a colleague and was locked out of the larger laboratory to which she was accustomed to having access. She also alleged that she was shunned and excluded from meetings and otherwise humiliated. The court found that although her brief examined the standard for protected conduct, it did not address the fact that the defendant offered a plausible explanation for the change in laboratory access. Furthermore, the relator's exhibits demonstrated that the locks on the lab had been changed as a precautionary measure to investigate her allegations without the fear that she or anyone else would tamper with any results. Furthermore, the relator retained her title and salary and continued, to the best of the court's knowledge, to be employed by the defendant university. As a result, the court denied the relator's motion for summary judgment.

## B. Statute of Limitations

***U.S. ex rel. Frascella v. Oracle Corp.*, 2010 WL 4623793 (E.D. Va. Nov. 2, 2010)**

A relator brought a *qui tam* action against a software development corporation and its subsidiary. The government intervened in the action and three years after the relator's suit was filed, the government filed a separate complaint-in-intervention. The plaintiffs alleged that the defendants made false statements to the General Services Administration (GSA) in connection with a Multiple Award Schedule (MAS) contract that provided software products to various federal agencies. As part of the 16-month contract negotiation, GSA required the defendants to disclose their commercial pricing policies and sales practices, and reserved the right to audit their transactional data. The contract also included a Price Reductions Clause (PRC), which monitored customer prices and required the contractor to disclose price and discount changes and to offer the government the same.

The government alleged that the defendants failed to disclose discounts that were offered to many of their commercial customers, resulting in substantial overcharges to the government. Three months before the effective date of the contract, the GSA Office of Inspector General conducted a routine pre-award audit of the defendants, which concluded that, in light of discounts being offered to the defendants' commercial customers, "GSA is not being offered fair and reasonable prices." The government also alleged that the defendants consistently manipulated information regarding the sales of software licenses to commercial end users in order to evade their PRC reporting obligations. Finally, the government alleged that, three years into the contract, the defendants made false statements in order to fraudulently induce GSA to modify the contract.

The defendants moved to dismiss the government's complaint for failure to state a claim. Further, the defendants argued that all counts based upon the contract negotiations—which occurred nearly 10 years before the relator's *qui tam* action was filed—were barred by the applicable statutes of limitations, and that some of the claims based on PRC reporting and compliance obligations were also time-barred. The United States District Court Eastern Division agreed and granted the defendants' motion, as it held that the FCA's six year statute of limitations barred the plaintiffs' claims. The court noted that the FCA includes a relation-back provision that expressly provides that the filing of a relator's *qui tam* complaint tolls the statute of limitations for subsequent claims brought by the government that arise out of the same conduct, transaction, or occurrence. The government argued that the statute of limitations should be further tolled because the FCA provides for tolling when facts material to the action are not known and could not reasonably have been discovered by the government official "charged with responsibility to act in the circumstances." The government argued that only officials within the

Department of Justice could qualify as such responsible government officials, and that no DoJ official could have reasonably known about the alleged fraud until the *qui tam* action was filed and after the government completed its investigation and filed its complaint-in-intervention. According to the government, proper tolling of the statute of limitations would allow the government's complaint-in-intervention to reach back to the defendants' alleged conduct that occurred 13 years before. The court rejected this argument and instead agreed with the defendants that six-year statute of limitations applied, since the GSA OIG qualified as a responsible government official, and that the OIG's audit provided the government with enough information to start the clock on the statute of limitations. The court reasoned that after the audit was completed, the government possessed enough information to refuse to award the defendants the MAS contract.

Moreover, the court held that the FCA's six-year statute of limitations should not be extended to 10 years—which is permitted under the FCA in cases in which the government files a complaint within three years of the date on which the relevant material facts are known or should be known to the responsible government official. The court noted that the government did not file its complaint-in-intervention until 3 years and 3 months after the relator's *qui tam* complaint was filed. Consequently, the court held that any allegations of FCA violations occurring more than six years before the relator's complaint was filed were time-barred, and those claims were dismissed.



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# FEDERAL RULES OF CIVIL PROCEDURE

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

***U.S. ex rel. Davis v. Lockheed Martin Corp.*, 2010 WL 4607411  
(N.D. Tex. Nov. 15, 2010)**

A relator brought a *qui tam* action against his former employer, an aircraft manufacturer, alleging that the defendant had been awarded a government contract to manufacture fighter aircraft, but violated the False Claims Act by failing to follow internal and government guidelines in developing software included in the contract. The relator also alleged that the defendant retaliated against him because he raised concerns about the defendant's failure to comply with the government standards and its submission of false claims to the government for payment. Subsequently, the relator voluntarily resigned from the defendant company and signed a release agreement with respect to "any and all claims . . . connected in any way" with his employment and claims for "retaliation under any other federal, state, or local laws." The agreement, however, did not "waive rights or claims that may arise after" the date of the agreement. The defendant moved to dismiss the relator's complaint for lack of standing and for failure to plead with particularity, arguing that the relator's complaint was deficient because it was predicated on the assumption that every claim for payment submitted by the defendant was a false claim. The United States District Court for the Northern District of Texas granted the defendant's motion in part. The court concluded that the FCA does not provide a remedy for post-employment retaliation by a defendant and also held that the relator could not maintain his claim for any past retaliation, due to the release agreement he signed. However, with respect to the relator's fraud claim, the court held that the relator properly alleged that the defendant made false claims to the government for payment and provided sufficient details regarding descriptions and dates for several disputed services, and regarding the defendant's billing system to satisfy the particularity requirement and to overcome the defendant's motion to dismiss those claims.

***U.S. ex rel. Jones v. Brigham and Women's Hosp.*, 2010 WL  
4502079 (D. Mass. Nov. 10, 2010)**

A relator brought a *qui tam* action against two hospitals and two doctors, alleging that the group of defendants violated the False Claims Act by fraudulently certifying—both expressly and impliedly—compliance with relevant statutes and regulations when they applied for federal grant funds from the National Institutes

of Health in order to conduct research on Alzheimer's Disease. The relator also alleged that the defendants falsified scientific data and made misrepresentations in the grant application. Both sides moved for summary judgment. The United States District Court for the District of Massachusetts granted the defendants' motion. The court held the relator failed to articulate how the alleged falsified data related to false statements in the grant application, as the relator did not offer any evidence that the alleged false data was ever submitted as part of a grant application. Furthermore, the court noted that the basis for the relator's claim of falsified data concerned matters over which experts could disagree, and thus, was insufficient to support a claim that false statements were made. Ultimately, the court held that summary judgment in favor of the defendants was appropriate, because the relator failed to present sufficient evidence to support his claims. Therefore, the court held that there was no issue of material fact regarding the relator's claims, and summary judgment in favor of the defendants was proper.

***U.S. v. Smith & Nephew, Inc.*, 2010 WL 4365467 (W.D. Tenn. Nov. 4, 2010)**

A relator filed a *qui tam* action against a medical device provider, alleging that the defendant repeatedly sold and its products to the government in violation of the Federal Trade Agreements Act (TAA)—a federal law that restricts the government's purchases to products manufactured in the U.S. or in certain designated countries—by misrepresenting the products' country of manufacture. In addition, the relator, who had been employed by the defendant, alleged that he was unlawfully terminated from his job in retaliation for refusing to participate in the alleged fraud scheme and for attempting to put a stop to the defendant's allegedly illegal conduct. The defendant moved to dismiss the relator's complaint for failure to plead the fraud allegations with particularity and for lack of subject matter jurisdiction pursuant to the False Claims Act's public disclosure bar provision. The United States District Court for the Western District of Tennessee denied the motion.

The defendant asserted that the relator's complaint failed to plead the fraud scheme with particularity, arguing that the complaint merely speculated that the defendant submitted a false claim for payment to the government. The defendant relied upon the Sixth Circuit's holding in *U.S. ex rel. Bledsoe v. Community Health Sys., Inc.* to support its contention that a relator cannot satisfy Rule 9(b)'s heightened pleading requirement without alleging that specific false claims were submitted. The relator argued that his complaint alleged the defendant's fraud scheme with sufficient particularity, because the complaint demonstrated that it was reasonable to conclude that evidence in support of its allegations would likely be uncovered by further investigation or discovery. The court agreed with the relator, noting that the relator's complaint was based on first-hand knowledge and contained sufficient details regarding the alleged fraud scheme, including the contracts under which the alleg-

edly improper sales occurred and the items that were allegedly labeled falsely. The court held that the complaint provided satisfactory information which detailed the defendant's allegedly fraudulent conduct, and that the alleged fraud scheme was so expansive that requiring the relator to plead additional information "would demand an omniscience that cannot reasonably be expected of a relator's complaint." As a result, the court denied the defendant's motion to dismiss for failure to plead fraud with particularity and failure to state a claim.

The defendant also argued that the relator's complaint was based on prior public disclosures that it made when it voluntarily self-reported to various government agencies its failures to comply with federal procurement law. The relator argued that such self-reporting does not constitute a public disclosure under the False Claims Act. The court agreed and held that applying the public disclosure bar to defendants' self-reporting of fraud would reinstate the "government knowledge bar" that was specifically rejected by Congress when the public disclosure bar was first added to the FCA in 1986. Thus, the court held that the public disclosure bar did not apply.

Finally, the court analyzed the relator's retaliation claim. The defendant argued that the relator's actions were largely passive and that the relator did not undertake affirmative steps to report, investigate, or prevent any violations of the law. The defendant also argued that the relator's allegations did not constitute protected activity because they were at most reports to supervisors of potential regulatory violations. The court disagreed and held that the relator sufficiently demonstrated protected activity because his complaint alleged a series of actions he undertook to express his concerns to the defendant about their fraudulent conduct. As a result, the relator was allowed to maintain his retaliation claim.

***U.S. ex rel. Bierman v. Orthofix Intern., N.V.*, 2010 WL 4358380 (D. Mass. Nov. 4, 2010)**

A relator brought a *qui tam* action against his former employer—a medical device company—and its parent company, alleging numerous False Claims Act violations related to health care fraud. Additionally, the relator alleged a claim under the FCA against his former employer for retaliation and wrongful termination. The defendants moved to dismiss the relator's claims for, among other things, failure to plead with particularity. In a short opinion, the United States District Court of Massachusetts granted the motion in part. It found that the relator failed to plead the fraud scheme with particularity, as it determined that the relator's complaint only made general or conclusory allegations of fraud, and failed to provide specifics as to the time, place, persons involved, or the content of any alleged false representation. Therefore, the court dismissed all of the relator's fraud claims.

The court then examined the relator's retaliation claim and denied the defendants' motion to dismiss that claim. The court held that the relator's allegations that

he asked questions to his supervisors regarding the legality of the alleged fraud schemes constituted protected conduct under the FCA, about which the defendants had been put on notice. The relator also alleged that he had recently been praised for his job performance, but was later abruptly fired because he engaged in protected conduct. The relator further alleged that he was presented with a severance package and release that would have required him not to assist in any administrative or legal action brought by any state or federal agency and would not share any settlement or recovery of any type. The court held that these allegations provided a sufficient basis to conclude that the relator was fired due to protected conduct, and denied the employer defendant's motion to dismiss.

### ***U.S. ex rel. Steury v. Cardinal Health, Inc.*, 2010 WL 4276073 (5th Cir. Nov. 1, 2010)**

A relator filed a *qui tam* action, and a subsequent amended complaint, alleging that a group of medical manufacturers sold defective and potentially life-threatening equipment to United States Department of Veterans Affairs. A magistrate judge recommended dismissing the complaint because the relator failed to plead the fraud scheme with particularity as required by Federal Rule of Civil Procedure 9(b), but recommended that the relator be given an opportunity amend the complaint once more. The U.S. District Court for the Southern District of Texas adopted the magistrate's recommendation in full. However, that same day, the district court entered a final judgment, dismissing the relator's action. The relator appealed to the Fifth Circuit, arguing that she pled the fraud allegations with the requisite particularity and that the district court abused its discretion by denying her an opportunity to amend her complaint once more.

On appeal, the relator asserted that her amended complaint properly pled a fraud scheme in which the defendants made implied false certifications to the government that their products complied with the warranty of merchantability when they requested payment from the government for allegedly defective equipment. The Fifth Circuit first noted that it has not yet recognized the implied false certification theory of FCA liability, but ultimately ruled that that issue did not need to be resolved, because the relator's complaint did not provide a basis for an implied false certification. The Fifth Circuit agreed with the district court that unless the government conditions payment on a certification of compliance, a contractor's request for payment does not imply any certification of compliance. As the circuit court concluded that the relator failed to show that the government conditioned payment for the defendants' equipment on a certification of compliance with the warranty of merchantability, it affirmed the district court's dismissal of the relator's complaint. The court found support for its ruling in the Federal Acquisition Regulations (FAR), which the court determined allow the government to "accept (and pay) for [sic] noncompliant commercial items," and which offer the govern-

ment a wide range of remedies in the event that it receives noncompliant items from a contractor. The court noted that, pursuant to the FAR, the standard warranty clause in federal commercial acquisition contracts includes a warranty of merchantability, but those regulations condition payment on the government's acceptance of items, not on compliance with the warranty of merchantability. The Fifth Circuit declared: "Were private litigants able to pursue FCA claims whenever the Government acquired noncompliant commercial items, the Government's ability to pursue the range of remedies contemplated by the FAR would be substantially compromised." The court cautioned, however, that a defendant's knowing delivery of defective goods to the government can result in FCA liability if the government contract specifically conditions payment on a certification of compliance with the warranty of merchantability.

The Fifth Circuit also observed that although the district court granted the relator leave to amend her complaint, it nonetheless entered a final judgment before the time to amend the complaint expired. The circuit court held that the district court's entry of the final judgment was an abuse of discretion. As a result, the Fifth Circuit vacated the district court's decision and remanded the matter, directing the district court to provide the relator with ten days to file an amended complaint.

***Wagemann v. Doctor's Hosp. of Slidell, LLC*, 2010 WL 4340801  
(E.D. La. Oct. 26, 2010)**

A relator brought a *qui tam* action alleging Medicare fraud, against a hospital that had previously employed her, as well as a doctor. She alleged that she personally witnessed the defendants manipulating patients' medical records to unnecessarily extend hospitalization stays in order to receive additional funding. Further, she alleged that the defendants engaged in a conspiracy to defraud the government and instructed employees to falsify, alter, change, or ignore alterations to medical records, invoices, vouchers, and claims. The relator claimed that she informed the hospital's CEO of the alleged falsifications and was later terminated from her job. The defendants moved to dismiss the relator's complaint for failure to plead the alleged fraud scheme with particularity and for failure to state a claim. The United States District Court for the Eastern District of Louisiana denied the defendants' motion. The defendants argued that the relator failed to identify any false claim that was submitted to the government and that she only alleged a general scheme or methodology of fraud. The court disagreed and held that the available facts provided enough specificity and factual particularity to show the circumstances in which various fraudulent actions may have occurred. The court found that the relator explained who was involved with the operation of submitting false claims, provided a general overview of how the operation worked, and showed that the defendants acted with requisite intent of getting a false claim compensated by the government. Further, the court held that the relator sufficiently alleged that the

defendants conspired to submit billing records based on false hospital records which resulted in defrauding the government.

**See *U.S. ex rel. Joseph Piacentile v. Sanofi Synthelabo, Inc.*, 2010 WL 5466043 (D. N.J. Dec. 30, 2010) at page 3.**

**See *U.S. ex rel. DeCesare v. Americare In Home Nursing*, 2010 WL 5313315 (E.D. Va. Dec. 16, 2010) at page 36.**

**See *U.S. ex rel. Bierman v. Orthofix Intern., N.V.*, 2010 WL 4973635 (D. Mass. Dec. 8, 2010) at page 39.**

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

***U.S. ex rel. Wood v. Family Healthcare Network*, 2010 WL 5343289 (E.D. Cal. Dec. 20, 2010)**

A relator brought a *qui tam* action against a private health care center (HCC) and two of its employees (Foster & Webber), alleging that the defendants conspired to submit, and did in fact submit, fraudulent claims to the government by applying for grant funds to expand staff and hours. The relator also alleged a reverse false claim. Specifically, the relator alleged that the defendants' applications represented that additional staff was needed, that recruitment was already underway, and that the positions would be filled within 90 days of grant award. The government awarded two grants to the defendants. The relator alleged that the defendants, however, did not intend to hire the proposed staff, and that they submitted false progress reports in connection with the grants, which inflated the amount of "new users" they were servicing. The defendants moved to dismiss for failure to state a claim, arguing that the relator's complaint failed to differentiate between the defendants and did not indicate which of them made the allegedly false statements. The defendants also argued that the complaint failed to indicate what was actually false in the grant applications.

The United States District Court for the Eastern District of California denied the defendants' motion. The court found that the complaint contained sufficient factual allegations to state claims against the defendants. First, the court found that the complaint's allegations against the defendant employees properly alleged that they did not intend to hire the additional staff, as the court observed that the complaint alleged that during a meeting, Webber told another employee that the company did not have to adhere to the figures advanced in the grant applications, that he never intended to hire new staff or expand services, and that he intended to use the grant money to fund existing operational costs. The complaint also alleged that Foster said that the proposed staffing positions were not to be filled. The complaint further alleged that the staff proposed was never hired, that recruitment efforts were never undertaken, and that the hours of operation were never increased. Instead, the complaint alleged that as of eight months after the grant award, the number of employees had actually decreased. The court also held that the allegations were sufficient to hold HCC liable for the fraudulent acts of its employees, under an intent-to-benefit, an apparent-authority, or a managerial-capacity theory.

The court also denied the defendants' motion to dismiss the conspiracy claim, holding that the complaint properly alleged conspiracy through an agreement between Foster and Webber to submit misleading grant applications. It also identified the false representations in the applications, the reasons they were false, and

the purpose of the false representations. Finally, the court denied the defendants' motion to dismiss the reverse FCA claim, finding that the complaint alleged that HCC was required to submit a progress report and a yearly report after receiving the grants, and noting that the complaint sufficiently alleged that the progress reports for the grants contained false statements, and that the defendants manipulated the database system to fraudulently inflate the number of new patients. As a result, the court denied the defendants' motion to dismiss in its entirety.

***U.S. ex rel. Bender v. N. Am. Telecomms., Inc.*, 2010 WL 4365531 (D.D.C. Nov. 4, 2010)**

A relator brought a *qui tam* action against a telecommunications company (NATI), a technical service provider (CTSI), an electrical subcontractor (PAE), and four individuals. The relator, who was an electrician employed by NATI, alleged that NATI was contracted by the government to maintain four buildings, that CTSI took over the contract, and PAE—a subcontractor of CTSI—performed electrical work on the buildings. The relator alleged five violations of the FCA. Count I alleged that NATI and CTSI falsified service call response times in order to claim monthly bonuses provided for in the contract. Count II alleged that NATI and CTSI misrepresented non-reimbursable repairs as reimbursable repairs. Count III alleged that NATI, CTSI, and PAE charged the U.S. Department of Agriculture (USDA) for work performed by employees who did not possess the qualifications required by the contract. Count IV alleged that NATI and CTSI billed the USDA for overtime work that the contract excluded from overtime status. Finally, Count V alleged that NATI and CTSI misrepresented the amount of work they performed. The government declined to intervene. All of the defendants moved to dismiss the relator's complaint for failure to state a claim, although PAE filed a motion separate from the joint motion filed by the other defendants. The United States District Court for the District of Columbia granted the defendants' motions.

The court first analyzed the claims against defendant PAE. The relator alleged that PAE caused the submission of false claims in Counts I, II, and V. Additionally, the plaintiff alleged PAE used false records in the preparation of fraudulent claims submitted by others, knew of the fraudulent claims, and acted in deliberate ignorance of that knowledge in Counts III and IV. PAE argued that the relator failed to allege any facts relating to its alleged wrongdoing under Count I, II, IV and V. Further, PAE argued that in Count III, the relator failed to allege a knowing violation of the FCA and failed to identify any particular false claim. The court held that the relator merely alleged that NATI's fraudulent practices were continued by PAE employees, but did not provide dates or any other information regarding specific fraudulent claims allegedly submitted or prepared by PAE. The court held that Counts I, II, IV, and V did not address PAE's liability and dismissed those counts for failure to state a claim. With respect to the allegations against PAE in

Count III, the court held that the relator made specific allegations against PAE, but failed to identify the false claims submitted, the content of the false claims, and who was involved. Also, the court held that the relator did not allege that PAE knowingly caused CTSI to submit false claims to USDA. Thus, the court dismissed the claims in Count III against PAE for failure to state a claim and for failure to satisfy the particularity requirements.

The court then analyzed the claims against NATI, CTSI, and the four individual defendants. In Count I those defendants jointly argued that the relator's complaint failed to allege the content of any false claims, identify the employees who made them, state how many times or when the false claims were submitted, or describe any specific false bonus claims that were submitted. The court held that although the complaint described how the alleged scheme was carried out, it did not contain allegations related to specific claims submitted by any of the defendants. Therefore, the court dismissed Count I as to all the defendants for failure to state a claim. Similarly, in Count II the defendants argued the complaint failed to allege specific false claims, the dates of any such claims, or the employees who submitted them. The court agreed and held that the relator failed to allege any false claim with sufficient particularity and dismissed Count II as to all the defendants for failure to state a claim.

In Counts III, IV, and V the defendants argued the complaint did not contain any allegations that they actually submitted claims to the government. The court agreed, but more importantly held that the allegations amounted to breach of contract or common law fraud claims, and that the relator did not have standing to bring such causes of action under the FCA. Consequently, the court dismissed Counts III, IV, and V as to all the joint defendants for failure to state a claim.



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# LITIGATION DEVELOPMENTS

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## A. Calculating Damages and Civil Penalties

### ***U.S. v. United Techs. Corp.*, 2010 WL 4643244 (6th Cir. Nov. 18, 2010)**

The United States brought suit under the FCA alleging that United Technologies (UT) submitted falsified cost estimates in a bid to convince the Air Force to award UT a contract to build fighter jet engines. The U.S. District Court for the Southern District of Ohio held that the defendant was liable under the False Claims Act for 709 false claims, but concluded that the United States had suffered no damages, since the defendant's false cost estimates were offset by various subsequent warranty price reductions the United States had received as part of contract modifications. Those modifications also included changes to the defendant's liability, which had initially been unlimited, but was later capped. Both parties appealed the district court's decision to the Sixth Circuit, with the defendant appealing the district court's ruling on FCA liability and the United States appealing the court's damages ruling.

As to the liability claims, the district court concluded that the defendant violated two provisions of the FCA by knowingly presenting false claims to the government and knowingly making false statements in support of false claims. The Sixth Circuit Court had little trouble affirming the district court's ruling, as it found that the defendant made several false statements in its final bid proposal to the Air Force, which fraudulently induced the Air Force to contract with the defendant and to pay each of the invoices it received from the defendant, pursuant to the contract. Thus, while the invoices themselves may not have contained false information, the defendant's false statements during the negotiations process was material to the Air Force's decision to award the contract to the defendant, giving rise to FCA liability. The district court's liability determination was affirmed.

With respect to the district court's damages calculation, the United States argued that the district court erred when it concluded that the defendant's conduct caused no damages. On appeal, the Sixth Circuit first analyzed the district court's calculation method and found that it subtracted the full amount of the defendant's warranty price reductions from its estimate of the government's damages without calculating the value of the new warranties, which included a cap on the defendant's liability to the United States. The court held that in order to calculate the difference between what the government paid and what it should have paid, the district court should have accounted for the diminished value of the new warranties (due the cap on the defendant's liability), since that resulted in the United States receiving far less, in terms of insurance for faulty engines, than it had originally bargained for.

Second, the circuit court, acknowledging that the terms of the contract changed over the years, determined that the district court failed to properly calculate the damages to the United States on a year-by-year basis, and instead incorrectly reduced the Government's damages over the course of the entire contract. As a result, the Sixth Circuit reversed the district court's ruling on the Government's damages, and remanded that matter to the district court, with instructions to "calculate what the government eventually paid each year, . . . what it should have paid each year based on what the government received, then take the difference between the two.

## B. False Certification of Compliance

***U.S. ex rel. Gatsiopoulos v. Kaplan Career Inst.*, 2010 WL 5392668 (S.D. Fla. Dec. 22, 2010)**

Two relators brought a *qui tam* action against their previous employer, a higher education service provider, and its subsidiary, alleging that the defendants did not comply with the requirements of the Higher Education Act (HEA), which requires schools that wish to receive financial aid to certify compliance with the HEA through a Program Participation Agreement (PPA). The relators alleged that the defendants violated the PPA by improperly providing compensation to school admissions representatives (which is prohibited under the HEA's "compensation ban"), by misrepresenting job placement rates in advertisements, and by advertising job placement rates without the state licensing requirements. Further, the relators alleged that in order to receive funding under the HEA, a program must have a graduation rate of at least 70%, and that the defendants manipulated the rate by encouraging instructors to change grades. The relators further alleged that the defendants coached students to enable them to pass a required entrance exam, which allowed unqualified students admittance into the school. Finally, one of the relators also alleged unlawful retaliation. The defendants moved to dismiss these claims for failure to plead fraud with particularity and for failure to state a claim. The United States District Court for the Southern District of Florida granted the motion in part.

The court first analyzed the relators' false certification allegation, which the defendants argued failed as a matter of law. The court disagreed and held that when an institution executes a PPA, agrees to comply with statutory and regulatory requirements, and submits or causes the submission of requests not in compliance with the requirements, there is a cause of action under the FCA. Further, the court found that the execution of the PPA was material to the government's decision to pay. Accordingly, the court dismissed the defendants' motion to dismiss for failure to state a claim.

The court then analyzed the relators' allegations of HEA violations. The defendants argued that the relators' claim based on the violation of the HEA's incentive compensation ban did not state a valid claim for relief. The court found the complaint specifically alleged that the defendants compensated representatives directly on their enrollment success and terminated them if they did not maintain their numbers. The defendants argued that such compensation was allowed as long as it was not based solely on enrollment success. The court disagreed with the defendants' argument and held the relators stated a valid claim for violation of the incentive compensation ban. Next, the defendants argued that the relators failed to allege that the defendants advertised using job placement rates and without the state licensing requirements. The court observed that under the HEA, an institu-

tion that advertised job placement rates as a means of attracting students must make available the statistics and that the complaint provided several examples of the defendants' manipulations of the job placement rates. However, the court held that the relators failed to allege that the defendants advertised using the job placement statistics because the relators did not provide any examples of actual advertisements placed by the defendants.

The defendants argued the relators' claim based on the requisite 70% graduation rate must be dismissed because the relators failed to allege that the rule applied to the defendants' program. The court agreed and held that the relators had not specified the programs which are required to meet the 70% rule and whether or not the defendants' program was included. Accordingly, the court granted the defendants' motion with respect to that claim. Further, the defendants argued that the relators' claims based on an admission exam should be dismissed because the relators failed to state a claim. The court agreed and held that the complaint failed to allege that "coaching" students for the test was a violation of the HEA. Therefore, the court granted the defendants' motion with respect to that claim as well.

The court then analyzed the relator's retaliation claim brought by one of the relators. The defendants argued that the relator failed to allege that she engaged in protected conduct and that she put the defendants on notice of possible FCA violations. The court disagreed and found that the complaint alleged that the relator complained to the defendants about unethical and illegal behavior and alleged that she would report this behavior to the Department of Education and the State Accreditation Board. Further, the court found that the relator was allegedly terminated shortly after providing the defendants' compliance manager with documents that established grade changing and false attendance records. The court held that the relator put the defendants on sufficient notice about her involvement in protected conduct and accordingly, the defendants' motion to dismiss the retaliation claim was denied.

### ***U.S. ex rel. DeCesare v. Americare In Home Nursing*, 2010 WL 5313315 (E.D. Va. Dec. 16, 2010)**

A relator brought a *qui tam* action against two home health care agencies (Med-Star and Americare), the CEO of Americare (Ammirati), and one referral agency and its executive director (VNSN), alleging that the defendants knowingly filed false claims, made false statements, conspired to submit the false claims, and violated various state laws. Specifically, the relator alleged that the home health care agencies paid kickbacks to VNSN in exchange for referrals and that VNSN would not refer patients to agencies who refused to pay kickbacks. The defendants moved to dismiss, in four separate motions, arguing that the complaint failed to meet the particularity requirement, that there was no conspiracy, and that the complaint

failed to state a claim. The United States District Court for the Eastern District of Virginia granted MedStar's and Ammirati's motions, but denied the others.

MedStar argued that the complaint did not plead fraud with particularity, as it failed to provide specifics as to who acted improperly and the amounts and dates of improper payments, and also failed to present examples of false claims being submitted to the government. The court held that the relator did not have to point to the specifics, because he alleged that every certification was false. MedStar also argued—and the court agreed—that the complaint failed to provide facts showing that the defendant knew of any wrongdoing, and thus, failed to satisfy the FCA's scienter requirement. The court also dismissed the conspiracy claim against MedStar, as it found that the complaint failed to show the existence of an agreement or that MedStar knowingly was a party to it.

Americare also argued that the complaint did not meet the particularity requirements. The court, as before, held that the relator alleged that every certification was false, which was sufficient to survive the motion to dismiss. Americare then argued that the complaint lacked a factual basis to show that it actually served patients referred by VNSN and billed the government for those services. The court disagreed, and held that the complaint alleged a theory of how the referral agency violated the kickback statute, that the defendant was a party to the scheme, and that the defendant submitted claims for reimbursement. Furthermore, the defendant argued that the state Medicaid program allegations failed to create liability. The court disagreed, and held that although these allegations may not have been as detailed or thorough as the federal Medicare allegations, they nonetheless fairly alleged the submission of fraudulent certifications by the defendant. Americare also argued that there could not be a conspiracy because the alleged conspirators sought legal advice and was told that their network was legal. Therefore, this defendant argued there could neither have been an agreement, nor any intent, to defraud the government. The court held that this argument failed because there was no proof of what facts were disclosed to counsel. The court held that the relator fairly alleged that this defendant attended meetings during which plans were discussed to charge fees for referrals made and to limit the number of providers that could participate in the plan. Finally, the defendant argued that the complaint characterized Medicare/Medicaid certifications of compliance with the anti-kickback statute as a condition of participation as opposed to a condition of payment by the government. The court disagreed and provided explicit sentences where the complaint properly alleged the materiality of the certifications. As a result, the court denied Americare's motion.

Defendant Ammirati—Americare's CEO—also moved to dismiss, and that motion was granted, as the court observed that this defendant's "name only appears once" in the relator's operative complaint, and that the relator did not "allege a single instance of *conduct* by Ammirati." Therefore, the court dismissed the claims against that defendant.

VNSN argued that the complaint failed to adequately allege causation because it did not allege VNSN's participation in the submission of false claims. The court disagreed and held that it was foreseeable to the defendants that, as a consequence of the referrals, Medicare/Medicaid claims would be filed. The court held that the complaint fairly alleged that the referrals made by the defendants caused the filing of false claims. The court further held that the scienter requirement was adequately pled because a VNSN executive invited the relator to a meeting at which the alleged fraud scheme was discussed. The defendants then argued that there was no allegation that a government agency made any payment based on their actions. The court held that the defendants misconstrued the FCA's materiality requirements and held that filing the allegedly false claims was material because the claims had a natural tendency toward causing reimbursements to be improperly paid. VNSN also argued that the complaint lacked particularity, but the court held that the complaint alleged that none of its referrals was legitimate and that its improper referrals caused false claims to be presented. In response to VNSN's contention that the relator's conspiracy claim deficient, the court held that there was a properly alleged conspiracy because the complaint alleged a meeting, run by a VNSN executive and attended by representatives of the providers, during which plans were laid out for an allegedly improper referral program. As a result, the court denied the VNSN's motion.

***U.S. ex rel. Bierman v. Orthofix Intern., N.V.*, 2010 WL 4973635 (D. Mass. Dec. 8, 2010)**

A relator brought a *qui tam* action against several medical device manufacturers, alleging that the defendants knowingly submitted false claims for Medicare reimbursement. By regulation, Medicare pays for the devices by either purchasing them or on a monthly rental basis. In the case of the defendants' devices, the purchase price was about ten times more than the rental price. The relator alleged that the defendants all completed Medicare Enrollment Applications, which required them to certify that they would comply with Medicare regulations, and that one such regulation, the Medicare Supplier Standard Regulation (SSR), required the defendants to inform beneficiaries of both the rental and purchase options for their devices. The relator—who operated a business that provides medical billing services to healthcare providers—alleged that both he and the defendants' beneficiaries were routinely told that the defendants' devices were only available for purchase and could not be rented, even though the devices were typically only to be used between three and six months and were programmed to deactivate after nine months. Thus, the relator argued, no rational patient would ever choose to purchase the devices instead of renting them, and no claim for purchase could ever be supported by medical necessity. Consequently, the relator alleged that all of the defendants' claims for Medicare reimbursements related to purchases of the devices were false. The relator also alleged the defendants violated the Anti-Kickback Statute by providing doctors with free devices in exchange for business, paying

commissions, and providing volume discounts. The defendants moved to dismiss the relator's claims for failure to state a claim and for failure to satisfy Federal Rule of Civil Procedure 9(b)'s particularity requirement. The United States District Court for the District of Massachusetts denied the defendants' motions.

The defendants argued the Medicare Enrollment Application certification was too broad to constitute an express certification of compliance with the SSR. The court disagreed and held that Medicare conditioned payment on the defendants' compliance with all applicable conditions of participation. The court further held that although the SSR was not explicitly listed in the enrollment application, it nonetheless was an applicable condition of participation by Medicare and is explicitly labeled as a condition of participation. As such, the court observed, "a false certification [regarding a condition or participation] would lead the government to make a payment it would not otherwise have made."

The court also held that the relator's complaint satisfied Rule 9(b), as it provided sufficient details of the alleged violations, including schedules of Medicare claims for reimbursement by each defendant, the number of claims, dates, and amounts paid. Thus, the court denied the defendants' motions to dismiss.

***U.S. v. Science Applications Int'l. Corp.*, 2010 WL 4909467 (D.C. Cir. Dec. 3, 2010)**

The United States brought an action in the United States District Court for the District of Columbia alleging that a major government contractor violated the False Claims Act by impliedly falsely certifying to the Nuclear Regulatory Commission (NRC) that it had no conflicting interests and would promptly report any potential conflicting relationships. Following jury trial, the defendant was found liable and the United States was awarded treble damages. The defendant then moved for judgment as a matter of law and in the alternative, sought a new trial. The defendant argued that it could not be held liable under the FCA, because its government contract did not designate compliance with the conflict of interest requirements at issue as express conditions for payment. The defendant also argued that various jury instructions were erroneous and prejudicial and that the government failed to prove that it suffered any damages. The district court rejected each argument and upheld the verdict and jury award. The defendant then appealed to the United States Court of Appeals for the District of Columbia Circuit, seeking judgment as a matter of law with respect to liability on all causes of action and with respect to FCA damages. It also alternatively urged the circuit court to vacate the district court's judgment and remand for a new trial on all claims. The circuit court vacated the judgment as to FCA liability and remanded for a new trial, holding that the district court's collective knowledge instruction conflicted with the FCA's scienter standard.

## Scienter

The circuit court first analyzed the implied false certification theory. The defendant argued that liability may attach under an implied false certification theory only where a statute, regulation, or contractual provision made compliance with some requirement of an express condition precedent to payment. The appeals court disagreed and found that record evidence could have allowed the jury to conclude that there was an obligation to disclose any conflict of interest. However, the court still vacated and remanded for a new trial because it determined that the district court erroneously instructed the jury when it announced that corporations were liable for the collective knowledge of all employees and agents within the corporation, as long as those individuals obtained their knowledge while acting on behalf of the corporation. The circuit court held that the district court's instructions drew no distinction between the knowledge of corporate officers and that of potentially thousands of ordinary employees. The court found that the district court's instructions allowed the jury to find that the defendant knowingly submitted false claims for payment even if the jury concluded that no individual was simultaneously aware of the company's NRC contract and its relationships with other companies that violated the contract's conflict of interest provision. As the appeals court could find no other circuit in which the collective knowledge theory was applied to FCA cases, it vacated the district court's judgment and remanded for a new trial. The court of appeals also held that the jury instructions as to the damages were flawed.

### ***U.S. ex rel. Powell v. Am. InterContinental Univ. Inc.*, 2010 WL 4818536 (N.D. Ga. Nov. 22, 2010)**

A group of relators brought a *qui tam* action against two educational institutes, alleging that the defendants knowingly made false statements in their "Program Participation Agreements" to the Department of Education regarding their compliance with, among other things, Title IV of the Higher Education Act. The United States District Court for the Northern District of Georgia previously denied the defendants' motion to dismiss and the defendants moved for reconsideration. The defendants also moved for certification for interlocutory appeal of the court's ruling regarding the legal sufficiency of predicated an FCA claim on false statements contained within program participation agreements; the defendants argued that there is a distinction between false statements regarding conditions of eligibility—for which, they argued, there is no FCA liability—and false statements regarding conditions of payments—for, which, they argued, there can be FCA liability. The defendants contended that statements contained in program participation agreements concern conditions of eligibility and as such, there can be no FCA liability for any false statements alleged by the relators. The court denied the defendants' motions.

The court had originally determined that the relators met the heightened pleading standards of Rule 9(b). In their motion for reconsideration, the defendants argued that the court misapplied Rule 9(b) by not requiring the relators to plead specific details regarding the dates, frequency, or amounts of the alleged false claims at issue. The court noted that this same argument had been raised and rejected in the original motion to dismiss, as it held that the relators' allegations were sufficient to articulate the alleged fraud with requisite specificity. The defendants also argued that the court committed error by not requiring the relators to plead specific details regarding how they obtained firsthand knowledge of the alleged fraud scheme. The court observed that none of the cited authorities relied on by the defendants provided support for a rule requiring detailed pleading as to the source of a relator's knowledge. The court concluded: "Other than mere disagreements with the Court's ultimate result, Defendants offer no basis for reconsidering its previous rulings in this case," and denied the defendants' motion for reconsideration on that basis.

The court also denied the defendants motion for certification for interlocutory appeal, as it held that the defendants had not demonstrated a substantial difference of opinion as to whether courts should distinguish between conditions of eligibility for government funding and conditions of payment for purposes of a FCA claim. The court relied on authority from several circuit courts, which all recognized that false statements regarding an entities condition of eligibility to participate in federal financial aid programs can serve as the basis for FCA liability. The contrary district court authority cited by the defendants paled in comparison, both in number and in precedential value. Consequently, the court held that "the present case does not present a *substantial* difference of opinion as to whether courts should distinguish between conditions of eligibility for government funding and conditions of payment for purposes of a FCA claim." The defendants' motion for certification for interlocutory appeal was denied.

***U.S. ex rel. Sanchez-Smith v. AHS Tulsa Reg'l Med. Ctr.*, 2010 WL 4702270 (N.D. Okla. Nov. 10, 2010)**

Three relators brought a *qui tam* action against their former employer—a medical center—alleging that the defendant submitted numerous false Oklahoma Medicaid claims for inpatient psychiatric services. The relators noted that the defendant was issued two different provider numbers to be used for Medicaid billing: one provider number for patients classified as "acute," and a second provider number for patients classified as "residential." A minimum of 21 hours of total weekly therapy was required when billing for residential patients, while a total of 24 hours of weekly treatment was required for acute patients. Medicaid reimbursed at a higher rate for the acute classification. Among other things, the relators alleged that the defendant violated the False Claims Act by knowingly failing to meet

Medicaid’s weekly minimum total therapy hours requirements and misrepresenting the length of therapy sessions in order to receive improper reimbursements. For example, the relators alleged that the defendant conducted “drive-by” sessions, during which therapists would visit with patients for 10-15 minutes and then bill for an hour. The relators further alleged that the defendant was audited by the state and assessed partial per diem penalties for failing to provide the required number of therapy hours for specific patients. One of the defendant’s manager’s testified that acute and residential billing was bundled together and was based on occupancy, not hours of treatment, as required.

The relators relied upon two alternative theories of FCA liability: factual falsity and legal falsity. The factual falsity theory was based on the information included in the defendant’s Medicaid reimbursement claims, including the provider number the defendant listed for the services for which it was seeking reimbursement. As the court stated: “[r]elators’ theory tied to the provider numbers is simply that, by billing for acute or residential services while failing to comply with Oklahoma Medicaid’s active treatment requirements for each type of service, [the defendant] submitted a ‘factually’ false bill.” The relators’ legal falsity theory of liability was based on the notion that the defendant, by submitting claims to Oklahoma Medicaid, impliedly certified its compliance with the applicable rules and regulations, and those implied certifications were false.

The defendant moved for summary judgment on the relators’ claims, and the United States District Court for the Northern District of Oklahoma denied the motion.

### **Factual Falsity Theory of FCA Liability**

The court first addressed—and rejected—the relators’ factual falsity theory, observing that nothing on the defendant’s Medicaid claim forms was false on its face. The court noted that the relators did not allege that the defendant “knowingly used the acute provider number for patients preauthorized for residential care in order to receive a higher payment,” and that the provider numbers used did not appear to be false on their face. Similarly, the court rejected the relators’ contention that the defendant improperly billed Medicaid for services never provided. The court held that “in order to reach a jury on a factual falsity theory in the context of ‘bundled’ per diem Medicaid billing, a plaintiff must present facts amounting to (1) the provision of entirely ‘worthless services;’ or (2) at a minimum, the provision of grossly negligent services with regard to a particular standard of care or regulatory requirement.” The court held that the relators failed to satisfy either standard, as it determined that even though the defendant did not always meet the required number of therapy hours for its patients, no reasonable jury could determine that the services the defendant did provide were worthless. Furthermore, the court found no evidence that the patients’ overall bundled services were so deficient that a jury could conclude that any of the claims at issue

were false on their face based on the defendant's gross negligence. The court ultimately concluded that "[a]llowing this case to proceed in a factual falsity theory would stretch the FCA 'factual' falsity liability too far beyond its intended purpose of preventing misrepresentations of fact on claim forms." The court then turned its attention to the relators' implied false certification theory.

## Implied False Certification Theory of Liability

The court first noted that under an implied false certification theory of FCA liability, knowing regulatory violations can serve as the basis for false claims, "so long as the 'underlying contracts, statutes, or regulations themselves . . . make compliance a prerequisite to the government's payment.'" The defendant argued that it was entitled to summary judgment on relators' implied false certification theory, arguing that the neither the governing agreements nor the applicable Medicaid regulations conditioned payments from the government on compliance, and therefore, any failure to comply was not material to the government's decision to make Medicaid reimbursement payments to the defendant; the defendant argued that the applicable regulations only reflect condition of participation in the Medicaid program, not conditions of payment.

The court agreed that the agreements at issue did not condition payment on compliance with the therapy hours requirements, as the defendant was only required to certify that any service billed for was both medically necessary and actually provided. However, the court disagreed with the defendant's characterization of the applicable Medicaid regulations, and determined that those regulations were not merely conditions of participation. The court stated several reasons for this holding, including: (1) the regulations at issue are not labeled as conditions of participation under either Oklahoma or federal law; (2) the regulations include a "reimbursement" provision, and the court concluded that conditions of participation are not tied to reimbursement at all; (3) the fact that the regulations involve an "Inspection of Care Review" process that allows for monitoring of the Oklahoma Medicaid program does not automatically mean that the regulations are merely conditions of participation, since the purpose of the review process is not to determine eligibility to participate in the program, but rather to ensure that proper payments are being made—which is yet another link to reimbursements; (4) the regulations are entirely objective and easy to apply—either the required weekly therapy hours were met or they were not met—and do not require "any qualitative standard measuring the efficacy" of the therapy provided; and (5) the relators provided evidence from federal and state Medicaid officials that showed that if the government knew that the applicable regulations were not being followed, then the defendant's Medicaid reimbursement claims might have been denied.

The court also found that the relators presented sufficient evidence to create a question of fact that the defendant knowingly violated the minimum therapy requirements. As an example, the court referred to testimony evidence showing that the defendant instructed therapists to conduct improper "drive-by" sessions. The court also rejected the defendant's "government knowledge" argument, in which the defendant

claimed that there could be no FCA liability since the government conducted audits and was aware of any violations, but never instructed the defendant to change its billing practices or threatened to decertify the defendant as a Medicaid provider. The court, though, observed that the audit reports did not constitute the type of government knowledge of regulatory non-compliance that would entitle the defendant summary judgment.

Finally, with respect to materiality, the court held that the materiality element only requires plaintiffs to show that the government *may* not have made a payment had it known of a defendant's false claims; plaintiffs do not have to show conclusively that the government would not have made a payment. Since the relators provided testimonial evidence showing that the government may not have paid the defendant's claims, had it been aware of the failure to comply with the therapy hours requirements, the relators satisfied the materiality element.

Consequently, the court denied the defendant's summary judgment motion.

### ***U.S. ex rel. Jones v. Brigham and Women's Hosp.*, 2010 WL 4502079 (D. Mass. Nov. 10, 2010)**

A relator brought a *qui tam* action against two hospitals and two doctors, alleging that the group of defendants violated the False Claims Act by fraudulently certifying—both expressly and impliedly—compliance with relevant statutes and regulations when they applied for federal grant funds from the National Institutes of Health in order to conduct research on Alzheimer's Disease. The relator also alleged that the defendants falsified scientific data and made misrepresentations in the grant application. Both sides moved for summary judgment. The United States District Court for the District of Massachusetts granted the defendants' motion. The court held the relator failed to articulate how the alleged falsified data related to false statements in the grant application, as the relator did not offer any evidence that the alleged false data was ever submitted as part of a grant application. Furthermore, the court noted that the basis for the relator's claim of falsified data concerned matters over which experts could disagree, and thus, was insufficient to support a claim that false statements were made. Ultimately, the court held that summary judgment in favor of the defendants was appropriate, because the relator failed to present sufficient evidence to support his claims. Therefore, the court held that there was no issue of material fact regarding the relator's claims, and summary judgment in favor of the defendants was proper.

## C. FCA Seal

***U.S. ex rel. Summers v. LHC Group Inc.*, 2010 WL 3917058 (6th Cir. Oct. 4, 2010)**

A relator filed a *qui tam* complaint against her former employer, alleging that the defendant fraudulently and unnecessarily billed Medicare for health services. The defendant moved to dismiss, and the U.S. District Court for the Middle District of Tennessee granted the motion, as it found that the relator's failure to file her complaint under seal was a fatal deficiency that required dismissal with prejudice to the relator, but without prejudice to the United States. The relator, arguing that the district court applied an improper legal standard, appealed to the Sixth Circuit.

This was a case of first impression for the Sixth Circuit, which observed that the primary purpose of the FCA's seal requirement was to allow the government sufficient time to consider whether it would intervene in the relator's suit or not. The relator urged the appellate court to adopt the balancing test announced by the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, wherein the Ninth Circuit held that the FCA does not require dismissal of a *qui tam* case as a sanction for a relator's failure to comply with the seal provision. Instead, that court held that when the seal is broken, it becomes necessary to evaluate the balance between the purposes of *qui tam* actions and law enforcement needs, in light of the facts and circumstances of the case, by considering the harm the disclosure caused to the Government, the "relative severity" of the violation, and the presence or absence of good faith or willfulness on the relator's part.

The Sixth Circuit distinguished *Lujan*, noting that the complaint in that case was originally filed under seal, whereas the complaint in the instant case was never filed under seal. Rather than adopt the Ninth Circuit's balancing test, the Sixth Circuit announced a bright-line rule that "violations of the procedural requirements imposed on *qui tam* plaintiffs under the False Claims Act preclude such plaintiffs from asserting *qui tam* status." The court concluded that the Ninth Circuit's balancing test was "judicial overreach" in contravention of congressional intent, as it held that the FCA's sixty-day seal period reflects Congress' efforts to balance the various interests involved. Thus, the district court's ruling was affirmed and the relator's *qui tam* complaint was dismissed, with prejudice to the relator, but without prejudice to the Government.

## D. Vicarious Liability

***U.S. v. Universal Health Servs. Inc.*, 2010 WL 4323082 (W.D. Va. Oct. 31, 2010)**

Three relators originally brought a *qui tam* action against a juvenile psychiatric facility, its operator company, and their parent corporation, alleging that the defendants violated the federal False Claims Act (FCA) and the Commonwealth of Virginia's corresponding statute, the Virginia Fraud Against Taxpayers Act (VFATA) by submitting false or fraudulent claims in order to obtain Medicaid reimbursement. They also alleged retaliatory discharge and discrimination claims. The federal government and the state (collectively the "government") intervened and realigned the fraud claims in their own complaint. The defendants moved to dismiss all the claims against them, contending that the plaintiffs failed to state a claim and did not meet the pleading requirements. The United States District Court for the Western District of Virginia granted the motions in part. In particular, the court dismissed all claims against the parent corporation, Universal Health Services, (UHS), finding that there were not sufficient allegations tying the corporate parent to the alleged wrongdoing. The government and relators moved to amend their complaints in order to cure the defective allegations against UHS. The court denied the motions, as it determined that the proposed amended complaints did not sufficiently allege wrongdoing by UHS. The court held that the government's complaint still did not connect UHS to any submission of a false claim, and that there was no allegation that UHS used any of its control in the alleged fraud. Ultimately, the court held that the plaintiffs did not demonstrate why the corporate veil should be pierced, as it stated: "Even if UHS exercised significant supervision over [the juvenile facility], there still must be allegations that UHS abused the benefits of the corporate form in order to improperly insulate itself from violations of the FCA and VFATA committed by its subsidiaries. Because the Government has failed to provide such allegations, its amended complaint remains deficient to meet the requirements of Rule 8 and 9(b) on an alter ego theory." The court also held that UHS' alleged knowledge of its subsidiaries' fraud was not enough to pierce the corporate veil, noting that a parent's knowledge of a subsidiary's false claims and its failure to investigate the fraud do not provide a basis for imposing vicarious liability.

Likewise, the court denied the relators' motion to amend their complaint and bring retaliatory discharge and discrimination claims against UHS. The court held that the relators, who had all been employed by the subsidiary juvenile facility, had not adequately demonstrated that parent company UHS was their "employer," and subject to liability under the FCA and/or VFATA.

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# Judgments & Settlements

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OCTOBER 1–DECEMBER 31, 2010



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**St. John's Mercy Health Care and St. John's Health System, Inc.:**  
**(E.D. Mo. Dec. 30, 2010)**

St. John's Mercy Health Care and St. John's Health System, Inc. agreed to pay the United States \$2.2 million to settle allegations involving routine podiatry services provided by clinics at six St. John's hospitals in Missouri. St. John's allegedly submitted false claims or caused false claims to be submitted to Medicare and to the federal portion of the Missouri Medicaid program. From January 1, 2005 to March 31 2010, St. John's was alleged to have improperly billed the federal health care programs for services that were not covered or medically necessary. This settlement and the related investigation by the Department of Health and Human Services, Office of Inspector General was the result of a state-wide probe of podiatry services involving several hospitals and providers.

**Detroit Medical Center: (E.D. Mich. Dec. 30, 2010)**

Detroit Medical Center agreed to pay the United States \$30 million to settle allegations that it violated the False Claims Act, the Anti-Kickback statute and the Stark statute, by engaging in improper financial relationships with referring physicians. The medical center self-reported its violations to the government after discovering them while preparing for its sale to Vanguard Health Systems Inc. This case was handled by the Department of Justice's Civil Division, the US Attorney's Office for the Eastern District of Michigan, the Office of Inspector General of the Department of Health and Human Services, and the Centers for Medicare and Medicaid Services.

**John D. Archbold Memorial Hospital Inc.: (N.D. Ga. Dec. 22, 2010)**

John D. Archbold Memorial Hospital Inc. agreed to pay the United States \$13.9 million to settle allegations that it submitted false claims to Georgia's Medicaid program. From November 2002 to July 2008, the hospital was alleged to have made false representations to the Georgia Department of Community Health. The hospital received millions of dollars in Medicaid Upper Payment Limit (UPL) program funds and Disproportionate Share Hospital (DSH) funds, to which it was not entitled. The civil settlement resolves a *qui tam* lawsuit filed by Wesley Simms, M.D. Simms will receive \$695,151 as his share of the federal government's recovery.

**Ray A. Silao, M.D.: (D. Ariz. Dec. 22, 2010)**

Ray A. Silao, M.D., a physician practicing in Yuma, Ariz., agreed to pay the United States \$92,000 to settle allegations that he submitted false claims to Medicare. Dr. Silao allegedly falsely billed Medicare for Thoracic Electrical Bioimpedance (TEB) tests by falsely representing that the patients receiving the tests met applicable Medicare coverage requirements.

**Dey Inc. et al: (D. Mass. Dec. 20, 2010)**

Dey Inc., Dey Pharma L.P. (formerly known as Dey, L.P.) and Dey L.P. Inc. agreed to pay \$280 million to settle False Claims Act allegations that the companies engaged in a scheme to report false and inflated prices for several pharmaceutical products, including: Albuterol Sulfate, Albuterol MDI, Cromolyn Sodium and Ipratropium Bromide. This settlement was the result of a False Claims Act *qui tam* action filed by Ven-A-Care of the Florida Keys Inc. and its principals. Ven-A-Care was represented by TAFEF member Jim Breen of The Breen Law Firm, P.A. The Ven-A-Care whistleblowers will receive a \$67.2 million share of the federal government's recovery.

**Elan Corporation, PLC and Eisai Company, Ltd.: (D. Mass. Dec. 15, 2010)**

Irish pharmaceutical manufacturer Elan Corporation, PLC and Japanese pharmaceutical company Eisai Company, Ltd. have agreed to pay the United States a combined \$214.5 million to settle allegations involving off-label marketing of the anti-seizure medication Zonegran. Elan has also agreed to enter into a Corporate Integrity Agreement with OIG-HHS. The companies allegedly violated Federal and State False Claims statutes, the Federal Food, Drug, and Cosmetic Act, and the Medicare-Medicaid Anti-Kickback Act. The companies were alleged to have illegally promoted Zonegran and to have caused false claims to be submitted to government health care programs for a variety of uses that were not medically accepted and therefore not covered by the programs. This settlement resolves a *qui tam* suit filed by Dr. Lee Chartock, a Massachusetts physician. Chartock was represented by TAFEF members Suzanne E. Durrell and Robert M. Thomas, Jr. He will receive over \$10 million from the federal share of the civil recovery.

**Northrop Grumman Corporation: (C.D. Cal. Dec. 8, 2010)**

Northrop Grumman Corporation has agreed to pay the United States \$5.21 million to settle allegations that, from 1998 to 2002, it violated the False Claims Act by developing and implementing the Advance Topcoat System for the Air Force's B-2 bomber, but failed to fully disclose cohesion problems with the system to the Air Force.

**Johnson & Johnson: (Pa. Dec. 7, 2010)**

Johnson & Johnson was ordered to pay over \$51 million in damages and penalties after a Pennsylvania judge found that the company falsely reported the prices of its drugs. The company knowingly manipulated the average wholesale prices of its drugs and engaged in misconduct when marketing the drugs to pharmacists. Johnson & Johnson will repay more than \$45 million to Medicaid and the Pharmaceutical As-

sistance Contract for the Elderly (PACE) program, and will also pay more than \$6.5 million in civil penalties.

### **Kos Pharmaceuticals: (M.D. La. Dec. 7, 2010)**

Kos Pharmaceuticals, a subsidiary of Abbott Laboratories, agreed to pay the United States \$41 million to resolve criminal and civil charges associated with the cholesterol drugs Advicor and Niaspan. In addition to the monetary settlement, Kos agreed to enter into a Deferred Prosecution Agreement. Kos was accused of knowingly causing the submission of false or fraudulent claims for payment to federal healthcare programs, as well as offering to pay medical professionals illegal kickbacks. This settlement resolves two *qui tam* lawsuits filed by former Kos employees—Nanci Johnson, Therese Lalcebrinc, and Ruth Westover filed a *qui tam* action in March 2004 in the United States District Court for Eastern District of Wisconsin, and Amanda Cash and Kimberly Scullin filed a separate *qui tam* action in the United States District Court for the Western District of Louisiana. The relators will split a \$6.4 million share of the federal recovery. TAFEF member Mary Louise Cohen of Phillips & Cohen, LLP represented relators Cash and Scullin.

### **Abbott Laboratories Inc., B. Braun Medical Inc. and Roxane Laboratories: (D. Fla. Dec. 7, 2010)**

Abbott Laboratories Inc., B. Braun Medical Inc., Roxane Laboratories Inc. (Boehringer Ingelheim Roxane Inc.) and affiliated entities have agreed to pay the United States \$421 million to settle allegations that the companies violated the False Claims Act by knowingly reporting false and inflated prices for numerous pharmaceutical products.

Roxane agreed to pay \$280 million to resolve claims against it and related entities: Roxane Laboratories Inc., Boehringer Ingelheim Corp. and Boehringer Ingelheim Pharmaceuticals Inc. Roxane allegedly reported false prices for the following drugs: Azathioprine, Diclofenac Sodium, Furosemide, Hydromorphone, Ipratropium Bromide, Oramorph SR, Roxanol, Roxicodone and Sodium Polystyrene Sulfonate. Abbott agreed to pay \$126.5 million to resolve the claims related to dextrose solutions, sodium chloride solutions, sterile water and vancomycin. B. Braun Medical Inc., an American subsidiary of B. Braun Melsungen AG, agreed to pay \$14,744,000 to resolve allegations involving 49 of its pharmaceutical products.

This settlement resolves a *qui tam* suit filed by relator Ven-A-Care of the Florida Keys Inc., which was represented by TAFEF member Jim Breen of The Breen Law Firm, P.A. Ven-A-Care will receive an \$88.4 million share of the federal recovery.

**Ronald T. Lim: (E.D. Cal. Dec. 3, 2010)**

Ronald T. Lim agreed to pay the United States \$175,000 to settle allegations that he violated the Controlled Substances Act and the False Claims Act at his three pharmacies: Lim's Family Pharmacy, Susanville Family Pharmacy and Lim's Shasta Lake Pharmacy. Lim allegedly submitted or caused to be submitted false claims for payment to Medicare and the California Medicaid Program for drugs that were not dispensed to beneficiaries.

**Matthew Stevens and Michelle Dahlberg: (D. Idaho Dec. 2, 2010)**

Speech therapists Matthew Stevens, Michelle Dahlberg, their speech therapy businesses, and three hospitals in Eastern Idaho agreed to pay the United States \$2.425 million to settle allegations that they used unqualified aides when delivering speech therapy services to outpatients of Eastern Idaho Regional Medical Center, Madison Memorial Hospital, and Idaho Falls Recovery Center. This settlement resolves a 2007 *qui tam* suit filed by Jennifer Putnam, who will receive a \$364,425 share of the federal recovery. Putnam was represented by TAFEF member Michael Hirst of the Hirst Law Group.

**Remedi Seniorcare: (D. Md. Dec. 1, 2010)**

Woodhaven Pharmacy Services, Inc. (dba Remedi Seniorcare) agreed to pay the United States \$1,279,575 to settle allegations that, from January 2006 through December 2007, its drug recycling program violated the False Claims Act, as the company fraudulently billed Medicare Part D, Medicaid, the Federal Employees Health Benefit Plan and TRICARE for prescriptions that were returned by assisted living facilities, but then re-dispensed to other nursing home and assisted living patients. Remedi also was alleged to have illegally distributed misbranded and adulterated drugs. This settlement resolves a 2009 *qui tam* suit brought by Barbara Dianne Thompson, who will receive a \$191,000 share of the federal recovery. Thompson was represented by TAFEF members from the Nolan & Auerbach law firm. In addition to the civil settlement, Remedi agreed to enter into a five Corporate Integrity Agreement with the Office of the Inspector General, U.S. Department of Health and Human Services.

**Dey, Inc.: (Ky. Nov. 29, 2010)**

Dey, Inc. agreed to pay \$3.5 million to resolve allegations that it reported inflated average wholesale prices on certain drugs used to treat asthma and chronic obstructive pulmonary disease, thereby causing the Kentucky Medicaid program to pay substantially more for Dey's drugs than Kentucky pharmacists. The drugs involved include various inhalation drugs manufactured and marketed by Dey such as Albuterol, Cromolyn Sodium, and Ipratropium Bromide.

**CDI Corporation: (S.D. Ohio Nov. 24, 2010)**

CDI Corporation agreed to pay the United States \$1.95 million to resolve False Claims Act allegations that from January 15, 2001 to December 31, 2001 the company wrongfully charged employees' labor costs to purchase orders that would be reimbursed by the U.S. military. The *qui tam* suit was filed in the federal district court in Cincinnati by Vicki Lanich, a former CDI employee. Lanich will receive a \$360,750 share of the federal recovery.

**Dr. Walter Janke, Lalita Janke, and Medical Resources LLC: (S.D. Fla. Nov. 24, 2010)**

Dr. Walter Janke, Lalita Janke, and Vero Beach-based primary care provider Medical Resources LLC, have agreed to pay the United States \$22.6 million to settle allegations that they defrauded the federal Medicare program by submitting false diagnosis codes that increased the severity of patient diagnoses and resulted in increased Medicare payments.

**John Carlo Inc. and Angelo Iafrate Construction Company: (E.D. Mich. Nov. 19, 2010)**

Two Michigan construction companies—John Carlo Inc. and Angelo Iafrate Construction Company—agreed to pay the United States \$1.407 million to settle allegations that they falsely claimed to have used Disadvantaged Business Enterprises for part of the work on a federally-funded construction project at Detroit Wayne County Metropolitan Airport. In addition to the monetary settlement, Angelo Iafrate Construction agreed to enter into a separate administrative agreement with the Department of Transportation.

**American Grocers, Inc.: (S.D. Tex. Nov. 19, 2010)**

American Grocers, Inc. and company owner Samir Itani agreed to pay \$13.2 million to settle False Claims Act allegations that they changed expiration dates and forged accompanying documentation in order to ship food products that were past or near their expiration dates to United States troops stationed in the Middle East. The 2005 *qui tam* suit was brought by Debbie Pallares, a former employee of the company. Pallares was represented by TAFEF members Joel Androphy and Sarah Frazier, along with Kathryn Nelson, all of the law firm Berg & Androphy.

**Sentient Medical Systems: (D. Conn. Nov. 17, 2010)**

Surgical Monitoring Systems, Inc. (dba Sentient Medical Systems) and former CEO, Jeffrey H. Owen, agreed to pay the United States \$2,768,795 to resolve allegations

that, from 2003 through 2008, they violated the False Claims Act by improperly billing Medicare for an excessive number of monitoring hours and for services provided to multiple patients at the same time.

### **Four Student Aid Lenders: (E.D. Va. Nov. 17, 2010)**

Four student aid lenders have agreed to pay the United States a total of \$57.75 million to settle allegations that they violated the False Claims Act by improperly inflating their entitlement to certain interest rate subsidies from the U.S. Department of Education. Nelnet Inc. and Nelnet Educational Loan Funding Inc. agreed to pay \$47 million. Southwest Student Services Corp. agreed to pay \$5 million. Brazos Higher Education Authority and Brazos Higher Education Service Corp. agreed to pay \$4 million. Panhandle Plains Higher Education Authority and Panhandle Plains Management and Servicing Corp. agreed to pay \$1.75 million. The *qui tam* suit was filed by Dr. Jon H. Oberg, a former employee of the Department of Education. Oberg, who was represented by TAFEF members Scott Oswald, Dave Scher and Jason M. Zuckerman of The Employment Law Group, will receive a reward of \$16.65 million.

### **Ameritox, Ltd.: (M.D. Fla. Nov. 16, 2010)**

Ameritox, Ltd., a Texas-based drug-testing company, has agreed to pay the United States \$16.3 million to settle allegations that it paid kickbacks to providers to induce them to refer Medicare business. Of the total settlement amount, the federal government will receive \$15,486,000, with the remaining amount of \$814,000 split among various states. Ameritox also agreed to enter into a 5-year Corporate Integrity Agreement with the Department of Health & Human Services Office of Inspector General. The settlement is the result of a *qui tam* lawsuit filed by Debra Maul, a former Ameritox senior sales representative. Maul will receive a \$3.4 million share of the federal recovery.

### **Johnson & Johnson and Ortho-McNeil Janssen: (La. Nov. 11, 2010)**

Johnson & Johnson and Ortho-McNeil Janssen were ordered to pay the State of Louisiana \$257.7 million after a jury returned a verdict against the companies for defrauding the state Medicaid system. The companies made misleading claims about the safety of the antipsychotic drug Risperdal and minimized the drug's links to diabetes. The jury found that the company committed 35,542 violations of the state's Medical Assistance Programs Integrity Law and imposed a penalty of \$7,250 for each violation.

### **Bradford Regional Medical Center: (W.D. Pa. Nov. 10, 2010)**

A federal judge ruled that Bradford Regional Medical Center faces over \$20 million in potential damages and millions more in penalties for violating the False Claims Act and the Anti-Kickback Statute. A jury will determine whether or not they violated

the Stark Act. The Medical Center allegedly submitted improper claims to Medicare based upon referrals from physicians that the hospital had a prohibited financial relationship. This prohibited relationship involved Dr. Peter Vaccaro and Dr. Kamran Saleh and their medical practice, V&S Medical Associates, LLC. This case was filed by four relators who worked as members of the Medical Center staff. The relators were represented by TAFEF members G. Mark Simpson of Simpson Law Firm, LLC and Andrew M. Stone of Stone Law Firm LLC.

### **CFP Group: (Va. Nov. 10, 2010)**

Virginia contractor CFP Group and company president Roberto Clark have agreed to pay the United States \$150,000 to settle allegations they violated the False Claims Act by making false statements to the Small Business Administration to obtain certification as a Historically Underutilized Business Zone (HUBZone) company, and then using that certification to wrongfully obtain a contract with the Department of Veterans Affairs to install fire alarms systems.

### **Hewlett-Packard Corporation: (N.D. Tex. and S.D. Tex. Nov. 10, 2010)**

The Hewlett-Packard Corporation agreed to pay the United States \$16.25 million to settle two *qui tam* lawsuits, alleging that the company violated the competitive bidding rules of the Federal Communications Commission's E-Rate Program. The first lawsuit was filed in Dallas, Texas by Dan Cain and Pamela Tingley, who were represented by TAFEF members Brian Kenney and Brian McCafferty of Kenney & McCafferty. The second lawsuit was filed in Houston, Texas by Dave Richardson and Dave Gillis. Cain and Tingley will receive an award of \$1,424,969, while Richardson and Gillis will receive \$796,280.

### **St. Joseph Medical Center: (D. Md. Nov. 9, 2010)**

St. Joseph Medical Center in Towson, Md. agreed to pay the United States \$22 million to settle allegations that it violated the False Claims Act, the Anti-Kickback Act, and the Stark Law when it entered into a series of professional services contracts with MidAtlantic Cardiovascular Associates (MACVA). From January 1, 1996 to January 1, 2006, St. Joseph's allegedly paid various forms of illegal remuneration to MACVA to induce referrals of patients insured by federal health care programs for cardiac procedures. In addition to the monetary settlement agreement, St. Joseph's agreed to enter into a Corporate Integrity Agreement with the Department of Health and Human Services, Office of Inspector General. This settlement resolves a *qui tam* suit brought by relators, Stephen D. Lincoln, M.D., Peter Horneffer, M.D., and Garth McDonald, M.D. The relators, who were represented by TAFEF member J. Stephen Simms of Simms Showers LLP and co-counsel Bill Gately and Al Brault, were cardiac surgeons who practiced together as members of Cardiac Surgery Associates in Baltimore.

**Mylan Inc.: (D. Mass. Nov. 8, 2010)**

Mylan Inc., a Pennsylvania pharmaceutical manufacturer, agreed to pay the Commonwealth of Massachusetts \$2.6 million to settle a state False Claims Act case, alleging that Mylan, through its wholly-owned subsidiary, Mylan Pharmaceuticals Inc., reported false and inflated prices to drug industry price reporting services, which caused the Massachusetts Medicaid Program to pay inflated amounts for ingredient costs on prescriptions for Medicaid recipients. The settlement resolves claims associated with certain drugs Mylan manufactured and sold between 1998 and 2003, including Clozapine, Phenytoin Sodium and Lorazepam.

**The Louis Berger Group, Inc.: (D. Md. Nov. 5, 2010)**

The Louis Berger Group Inc., a New Jersey-based engineering consulting company, agreed to pay the United States \$69.3 million to resolve criminal and civil fraud charges. The company agreed to pay \$46.5 million to resolve civil claims, \$4.1 to settle other contractual disputes and \$18.7 million in criminal penalties. In addition to the civil settlement agreement, the company agreed to a Deferred Prosecution Agreement with the US Attorney's Office in the District of New Jersey and an Administrative Agreement with the USAID. From at least 1999 through August 2007, the company was alleged to have knowingly overbilled the U.S. government in connection with international contracts for work on behalf of the United States Agency for International Development (USAID) and the U.S. Department of Defense.

This settlement resolves a 2006 *qui tam* suit brought by Harold Salomon, a former senior financial analyst/auditor for Louis Berger in New Jersey. Salomon was represented by TAFEF members Peter W. Chatfield and Tim McCormack, of the Phillips & Cohen law firm.

**Simi Valley Hospital: (C.D. Cal. Nov. 3, 2010)**

Simi Valley Hospital agreed to pay the United States \$5.15 million to resolve allegations that it filed fraudulent claims with Medicare. This settlement is the result of a 2001 *qui tam* suit filed by Timothy Field, a former hospital director. Field alleged that the hospital's Behavioral Medicine Services unit knowingly submitted false claims to Medicare for chemical dependency and psychiatric patient services performed between 1991 and 1997. The hospital also allegedly paid a medical director \$12,000 each month to work on a nonexistent program.

**Rocky Mountain Instrument Company: (D. Colo. Oct. 29, 2010)**

Rocky Mountain Instrument Company (RMI), a Colorado-based optical components maker, has agreed to pay the United States \$1 million to settle False Claims Act allegations that the company caused prime defense contractors to submit false claims for payment to the Pentagon and engaged in the illegal export of sensitive technical data. In a related case, RMI pled guilty to the associated charges and agreed to a forfeiture of \$1 million and five years of probation. This case was handled by TAFEF member Claire Sylvia of Phillips & Cohen LLP.

**Platinum One Contracting: (Md. Oct. 29, 2010)**

Platinum One Contracting, company president Anthony Wright, Capitol Contractors, and its president Vernon J. Smith III, have agreed to pay the United States \$200,000 to settle claims that they used false statements to obtain contracts from the Department of Defense. The contracts had been set aside for companies that qualified for the Small Business Administration's 8(a) business development program, and the Historically Underutilized Business Zone (HUBZone) program. Platinum One was alleged to have falsely represented that they were owned and controlled by a socially and economically disadvantaged individual, and falsely represented that their principal office was located in a designated HUBZone.

**GlaxoSmithKline, PLC: (D. Mass. Oct. 26, 2010)**

GlaxoSmithKline (GSK) agreed to pay the United States a total \$750 million to settle a False Claims Act *qui tam* action. In addition, SB Pharmco Puerto Rico Inc., a subsidiary of GSK, agreed to plead guilty to charges related to the manufacture and distribution of certain adulterated drugs made at GSK's manufacturing facility in Cidra, Puerto Rico. Of the \$750 million settlement amount, \$150 million will resolve a criminal fine and the remaining \$600 million will settle civil FCA charges. This settlement involved charges related to product contamination and dosage irregularities affecting the drugs: Paxil, Avandia, Avandament, Coreg, Bactroban, Abreva, Cimetidine, Compazine, Denavir, Dyazide, Thorazine, Stelazine, Ecotrin, Tagamet, Relafen, Kytril, Factive, Dyrenium, and Albenza.

This case arose from a 2004 *qui tam* suit filed in Massachusetts by Cheryl D. Eckard, a former manager of quality assurance for GSK. Eckard will receive a \$96 million share (22%) of the federal recovery. Eckard was represented by TAFEF members Neil Getnick, Peggy Finerty and Leslie Ann Skillen of Getnick & Getnick LLP.

### **The Boeing Company: (C.D. Cal. Oct. 26, 2010)**

The Boeing Company agreed to pay the United States \$4 million to settle allegations that the company unlawfully inflated the price it charged the Air Force to manufacture the Towed Decoy System for the B-1 bomber. The government alleged that Boeing provided inaccurate and incomplete information to Air Force contract negotiators and failed to disclose that it had previously been able to manufacture the TDS at lower costs by outsourcing much of the work to outside vendors and subcontractors.

### **State Street Bank: (Cal. Oct. 26, 2010)**

State Street Bank agreed to pay the Washington State Investment Board (WSIB) in Olympia \$11.7 million to resolve a contract dispute over the pricing of foreign exchange transactions. State Street Bank is WSIB's former master custodian. The settlement was the direct result of an internal investigation by the state prompted by two state false claims act suits filed against State Street in California.

### **ELA Medical, Inc: (S.D. Fla. Oct. 25, 2010)**

Sorin Group subsidiary, ELA Medical, Inc., agreed to pay the United States \$10 million to settle two False Claims Act cases involving an alleged massive billing and kickback fraud scheme in which ELA submitted false statements and claims to Medicare from 2002 through 2005, paid kickbacks to medical providers, and submitted false certifications of medical necessity. One of the FCA cases was brought by former ELA employee Tania Lee, a certified cardio-vascular Technical Services Representative, in 2006. Lee was represented by Jon May of May & Cohen, P.A., and TAFEF member Benedict P. Kuehne of Law Office of Benedict P. Kuehne, P.A.

### **Quicksort, Inc., Quicksort LA Inc., and Quicksort Sacramento Inc.: (E.D. Cal. Oct. 20, 2010)**

Quicksort, Inc., Quicksort LA Inc., and Quicksort Sacramento Inc. have agreed to pay the United States \$4.2 million in damages and penalties to settle False Claims Act allegations. The three mailing companies allegedly misrepresented the pre-sort level of mail submitted to the U.S. Postal Service, allowing the companies to receive discounted postage rates. These claims were investigated by the U.S. Postal Inspection Service and the settlement was handled by the Commercial Litigation Branch of the Justice Department's Civil Division and the U.S. Attorney's Office for the Eastern District of California.

**McKesson Corporation: (D. Mass. Oct. 18, 2010)**

Pharmaceutical distributor McKesson Corporation agreed to pay the United States and the state of Connecticut a total of \$24 million to settle allegations that it artificially inflated the average wholesale prices for over 400 pharmaceuticals, which created a larger spread between the cost paid by the state Medicaid program and the actual charges to the retailers. The alleged fraud affected the Connecticut Medicaid program, the Connecticut Pharmaceutical Assistance Contract to the Elderly and the Disabled (ConPACE) and the Connecticut AIDS Assistance Program (CADAP). Of the settlement amount, \$9 million will reimburse Connecticut's state Medicaid program, \$3 million will reimburse ConnPACE, and \$700,000 will reimburse CADAP. An additional \$9 million will be attributed to the federal share of Connecticut's Medicaid program.

**Dr. Howard Goldstein and SSM St. Charles Clinic Medical Group: (E.D. Mo. Oct. 12, 2010)**

Dr. Howard Goldstein agreed to pay the United States and the State of Missouri \$830,329 to resolve allegations that he falsely billed Missouri's Medicaid program by upcoding his Medicaid reimbursement records. Goldstein's former employer, SSM St. Charles Clinic Medical Group, Inc., and related corporation, SSM Healthcare Corp., agreed to pay the United States an additional \$865,812 for Goldstein's false charges to Medicare. In addition, Goldstein agreed to be excluded from participation in the Medicare program for a period of five years and pleaded guilty to federal felony charges involving false statements he made to the Federal Bureau of Investigation during an investigation of his billings.

**Northwest Mobile Services, LLC: (D. Or. Oct. 8, 2010)**

Northwest Mobile Services, LLC agreed to pay the United States \$950,000 to resolve allegations that, from January 1, 2003 to July 31, 2007, the company submitted fraudulent claims for payment to Medicare for services that were provided by x-ray technicians that did not meet the educational and licensing qualifications required by Medicare.

**Edward J. Quinn, MD: (D. Ariz. Oct. 7, 2010)**

Arizona cardiologist Edward J. Quinn has agreed to pay the United States \$395,000 to settle allegations that he submitted false claims to Medicare by improperly billing for uncovered thoracic electrical bioimpedance tests. The government alleged that between 2004 and 2008, Quinn falsely billed Medicare for the tests when his patients did not meet any of the applicable Medicare coverage requirements. In addition to the settlement agreement, Quinn agreed to enter into a Corporate Integrity Agreement with the Department of Health and Human Services.

**Forty Pharmaceutical Companies: (D. Haw. Oct. 6, 2010)**

Forty pharmaceutical companies have agreed to pay the State of Hawaii more than \$82 million to resolve allegations relating to the marketing and sale of prescription drugs and the companies' reporting of average wholesale prices. The companies allegedly published inflated prices for prescription drugs, which caused the overpayment of millions of dollars in drug costs.

The majority of the settlement amount will come from fewer than half of the involved companies. Merck Sharp & Dohme Corp. (formerly known as Merck & Co., Inc.) will pay \$28 million. AstraZeneca Pharmaceuticals, LP, AstraZeneca LP, GlaxoSmithKline LLC (formerly known as SmithKline Beecham Corporation, dba GlaxoSmithKline), and Novartis Pharmaceuticals Corporation will collectively pay \$10 million. Pfizer, Inc. and Pharmacia Corporation will collectively pay \$8.2 million. Teva Pharmaceuticals USA, Inc., Barr Laboratories, Inc., Ivax Corporation, Ivax Pharmaceuticals, Inc., and Sicor Pharmaceuticals, Inc. will collectively pay \$6.5 million. Johnson & Johnson, Janssen Pharmaceutical Products, LP, Ortho Biotech Products, LP, McNeil-PPC, Inc., and Centocor, Inc. will collectively pay \$5.2 million.

**Christus Health Systems: (C.D. Cal. Oct. 6, 2010)**

Christus Health Systems, a Texas-based hospital chain, agreed to pay the United States \$970,987 to settle a False Claims Act *qui tam* action involving Medicare fraud. From 1988 through 2001, the company allegedly billed Medicare for ineligible costs and expenses and failed to disclose overpayments. This civil settlement resolves a 1998 *qui tam* action filed by Mark Razin, an employee of Healthcare Financial Advisors Inc.—a company that worked with hospitals on their cost reports to maximize Medicare reimbursement. Razin was represented by TAFEF member Mary A. Inman, a San Francisco attorney with Phillips & Cohen LLP.

**Dartmouth College: (D. Vt. Oct. 4, 2010)**

Dartmouth College agreed to pay the United States \$275,000 to settle False Claims Act allegations that employees of the college engaged in improper conduct with respect to six contracts between the College and the Veterans Affairs Medical Center in White River Junction, Vermont. The alleged improper conduct was discovered in late 2004 after the Department of Veterans Affairs Office of Inspector General conducted a routine audit of contracts at the VA Hospital. Prior to the settlement, the College returned \$604,000 in contract funds to the government following an investigation associated with the VA audit.

**CSI Engineering and CSI Design Build: (Md. Oct. 1, 2010)**

CSI Engineering, CSI Design Build, and company president Debdas Ghosal, have agreed to pay the United States \$200,000 to settle claims that they used false statements to obtain contracts from several government agencies, including the Army, the Department of Labor, the Department of Homeland Security, and the Smithsonian Institution. These contracts had been set aside for companies that qualified for the Small Business Administration's Historically Underutilized Business Zone (HUBZone) program. In order to receive these contracts, CSI Design Build allegedly falsely represented to the SBA and other government agencies that it maintained its principal office in a designated HUBZone location in Maryland when it actually operated as part of CSI Engineering, which was not located in a HUBZone.

