False Claims Act & Qui Tam

Quarterly Review

Volume 60 • April 2011
Edited by Cleveland Lawrence III
Taxpayers Against Fraud
TAF Education Fund

ISBN 978-0-9824413-8-1

Published by
Taxpayers Against Fraud
TAF Education Fund
1220 19th Street NW, Suite 501
Washington, DC 20036
Phone (202) 296-4827
Fax (202) 296-4838

Printed in the United States of America

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*.

Taxpayers Against Fraud Education Fund
1220 19th Street NW
Suite 501
Washington, DC 20036
Phone (202) 296-4826
Fax (202) 296-4838
www.taf.org

TABLE OF CONTENTS

Lockheed Martin Inc.

St. Jude Medical Inc.

Young Adult Institute, Inc.

Fastenal Company

MSO Washington, Inc.

Seven Hospitals: Lakeland Regional Medical Center, Lakeland, Fla.; The Health Care Authority of Morgan County – City of Decatur dba Decatur General Hospital, Decatur, Ala.; St. Dominic-Jackson Memorial Hospital, Jackson, Miss.; Seton Medical Center, Austin, Texas; Greenville Memorial Hospital, Greenville, S.C.; Presbyterian Orthopaedic Hospital, Charlotte, N.C.; and The Health Care Authority of Lauderdale County and the City of Florence, Ala., dba the Coffee Health Group, fka Eliza Coffee Memorial Hospital

FROM THE EDITOR

"Rather fail with honor than succeed by fraud."
–Sophocles, Ancient Greek philosopher and playwright

If only more people and corporations agreed with Sophocles. . .

Unfortunately, for many, fraud has become the chosen path for success, and is now both a cause and a reflection of the crisis affecting the global economy. As the federal government debates the national debt and ponders various cost-cutting measures in attempts to balance the budget and avoid government shutdowns, much attention should be given to efforts to eliminate fraud, waste and abuse of government funds—including the use of whistleblowers who provide the government with inside information.

As I've mentioned in past issues, the federal government has been relying on whistleblowers for most of this country's history, beginning in 1863, when President Lincoln signed America's first False Claims Act statute into law. More recently, about half of the states have passed similar laws to protect their state treasuries, and the IRS and various other government agencies have followed suit. Recently, Congress directed the Securities Exchange Commission and the Commodity Futures Trading Commission to create dedicated whistleblower offices to investigate fraud whistleblower allegations of fraud—and to reward those whistleblowers whose information leads to recoveries for the government.

While it might seem that Wall Street and the business community would welcome these changes, which are designed to level the playing field and to protect the markets from illegal manipulation, that has not been the case. Instead, those who serve the interests of big business are strongly lobbying Congress to weaken these new whistleblower programs, and to make it more difficult for whistleblowers to get important, useful information about fraud schemes into the government's hands. These misguided efforts must fail, or we all will suffer. Now is the time to change the culture of fraud, and Taxpayers Against Fraud Education Fund is proud to lead the charge. Thanks for your continued support of our organization and I hope you enjoy this issue of our flagship publication.

All the best,
Cleveland Lawrence III

Recent False Claims Act & *Qui Tam* Decisions

JANUARY 1–MARCH 31, 2011

FALSE CLAIMS ACT LIABILITY

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

U.S. ex rel. Nehls, et al. v. Omnicare, Inc., 2011 WL 1059148 (N.D. Ill. Mar. 21, 2011)

A relator brought a *qui tam* action on behalf of the United States and the States of Florida and Illinois, alleging that a healthcare company and two individuals violated the False Claims Act, when the healthcare company submitted claims for Medicare and Medicaid reimbursements, even though the defendants had engaged in an illegal kickback scheme. Specifically, the relator alleged that the healthcare company provided the individual defendants with an illegal kickback when it purchased their interest in a pharmaceutical company, in exchange for long-term contracts with nursing homes owned or controlled by the individual defendants. The relator alleged that when the healthcare company submitted claims for Medicaid/ Medicare reimbursement for services provided to the individual defendants' nursing homes, it was required to certify its compliance with all laws and regulations related to the two healthcare programs, and that those certifications included the Anti-Kickback statute. The relator claims that the healthcare company's claims were false, because although the company had engaged in an illegal kickback scheme with the other defendants, it falsely certified its compliance with the Anti-Kickback statute. One of the individual defendants moved to dismiss the relator's complaint for failure to state a claim, arguing that the alleged false certifications were not material to the government's decision to pay the healthcare company's claims. The United States District Court for the Northern District of Illinois denied the motion.

The defendant argued that in order to plead the FCA's materiality element and maintain her *qui tam* claims, the relator must allege that the health care company's compliance with the anti-kickback statute was necessary to receive payment, either because the defendant company expressly agreed to such a requirement, or some statute or regulation makes payment conditional on compliance. The court held that the defendant's view of materiality under the False Claims Act was too restrictive, and noted that his argument had already been "flatly rejected" by the Seventh Circuit in *United States v. Rogan*, 517 F.3d 449 (7th Cir. 2008), which announced its view of FCA's materiality standard, saying that "a statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." Applying that standard, the court held the relator's complaint properly and sufficiently stated a claim under the False Claims Act, as it claimed that the defendants' alleged illegal

kickback scheme and subsequent false certifications of compliance to the federal and state governments were material to those government entities' reimbursement decisions. The defendant's motion to dismiss was denied.

U.S. v. Campbell, 2011 WL 43013 (D. N.J. Jan. 4, 2011)

The government filed an action under the False Claims Act against a doctor, alleging that he violated the Stark Law and the Anti-Kickback Statute by improperly referring patients to a hospital with which he had a financial relationship. The government alleged that the hospital needed a certain amount of cardiac procedures to remain a licensed trauma center, had failed to meet the required number in the previous year, and decided, as part of a recruitment initiative, hired the doctor on a part-time basis to help with teaching, lecturing, and researching. However, according to the government, the doctor also began improperly referring patients to the hospital for cardiac-related procedures, and that this became the primary service the doctor performed under his contract with the hospital. The doctor argued that when he was hired, hospital representatives assured him that his employment contract did not violate the law. However, a federal monitor performed an investigation and found that the hospital illegally paid cardiologists for patient referrals in order to maintain its cardiac surgery license. The hospital settled that case with the government. The government then filed its action against the doctor. The doctor, in turn, answered the complaint and also filed a third-party complaint against the hospital and two hospital representatives, as third party defendants. In his third-party complaint, the doctor pled contribution, indemnification, and damages for allegedly false representations concerning the legality of his employment contract. The government moved for partial summary judgment on the issue that the doctor presented false healthcare claims to the government for services rendered as a result of illegal financial relationships. The third-party defendants individually moved for summary judgment on the third party complaint. The United States District for New Jersey denied the government's motion, but granted the third-party defendants' motions.

The court began by examining the government's motion. The government alleged that the doctor's employment contract was a sham and that the doctor knowingly caused false claims to be submitted by improperly referring patients to the hospital. The doctor argued that he had a bona fide employment relationship exception to the kickback and self-referral laws, that he did not submit or cause the submission of any false claim, and that the treatment of his own patients at the hospital was not an unlawful referral. The government countered that there was no employment exception because the doctor failed to perform the majority of the services in the employment contract; therefore, the government argued that his compensation could not be considered commercially reasonable except as compensation for another—in this case, unlawful—purpose. The court examined the

employment contract and observed that there was no obligation for the doctor to meet the requirements of his contract, nor did he, so the amount he was paid could not be considered commercially reasonable for work performed. Hence, the court held that the doctor did not meet the bona fide employment exception because he did not satisfy the services requirements of the contract.

The court then examined the doctor's argument that he did not knowingly or recklessly submit false claims. The government argued that the doctor knew that false healthcare claims would be submitted to the government, or at the very least, he acted with reckless disregard of the truth or falsity of those claims. The court, though, held that the doctor's state of mind should not be decided on summary judgment and thus denied the government's summary judgment motion.

The court then examined the third-party defendants' motions. The doctor sought a judgment against the hospital and the two representatives jointly and severally for full contribution and/or indemnification, reimbursement of any and all damages, civil penalties, interest, costs, expenses, and attorney's fees regarding the government's claims against him, arguing that the third-party defendants negligently assured him that his employment contract was lawful and that he relied on this assurance. The doctor also alleged that the entire incident damaged his reputation and livelihood. The third-party defendants argued that FCA defendants cannot pursue claims for indemnification and contribution that are based on their liability under the FCA, or which have the same effect as offsetting FCA liability. The court agreed and held that the FCA does not provide for, or even speak of, a right to indemnification or contribution and that the legislative history of the FCA does not indicate that such a right may be implied. In addition, the court held that federal common law provides that a defendant found liable of FCA violations cannot pursue a claim that will offset liability or have the equivalent effect of contribution or indemnification. Accordingly, the third-party defendants' summary judgment motions were granted.

B. What Constitutes a False Claim

U.S. ex rel. Colucci v. Beth Israel Med. Ctr., 2011 WL 1226267 (S.D.N.Y. Mar. 31, 2011)

A relator brought a *qui tam* action against a teaching hospital and its three senior executives, alleging that the defendants submitted false claims to Medicare. Specifically, the relator alleged that the hospital acquired two non-teaching hospitals to manipulate the factors on which Medicare payments are based, and thereby fraudulently inflate its Medicare reimbursement payments. The relator alleged that the teaching hospital violated Medicare and Medicaid statutes and regulations by consolidating with the non-teaching hospitals, which were alleged to have had more Medicare patients with greater illnesses, resulting in increases in the defendant hospital's Medicare reimbursement rates—notwithstanding the fact that the hospitals remained separate in every other way, as they maintained separate facilities, doctors and staff. The defendants moved to dismiss the relator's complaint for failure to state a claim and failure to plead with particularity. The United States District Court for the Southern District of New York granted the defendants' motion.

Although the relator alleged that the defendants improperly consolidated provider numbers for teaching and non-teaching hospitals, the court noted that the *qui tam* complaint failed to point to any statute or regulation prohibiting such conduct and the relator conceded that no such regulation existed. The court concluded that the defendant hospital "took advantage of the uncertainty in the regulations to maximize its Medicare billing. This is not fraud." Consequently, the court held the relator failed to state a claim under the FCA. The relator's *qui tam* complaint was dismissed with prejudice.

U.S. ex rel. Jamison v. McKesson Corp., 2011 WL 1158945 (N.D. Miss. Mar. 28, 2011)

The United States brought an action under the False Claims Act against a nursing facilities management company (Beverly), its durable medical equipment supplier subsidiary (CSMS), as well as a Medicare billing agent and its parent company (McKesson). The government alleged that Beverly created CSMS as a sham durable medical equipment provider, so as to conceal improper kickback arrangements with McKesson for business referrals and discounts. The government further asserted that CSMS was obligated to satisfy twenty one Medicare "supplier standards," certified that it would do, and ultimately did not, and thus, all Medicare claims presented under CSMS's supplier number were false. All parties filed dispositive motions. The United States moved for summary judgment, claiming that there were no facts in dispute regarding the allegation that CSMS was knowingly created as a sham and thus, all of its claims were false. Beverly and CSMS also

moved for summary judgment, arguing that the government's claims were barred by *res judicata* and collateral estoppel, since the issue of whether or not CSMS satisfied the supplier standards had already been adjudicated by an administrative law judge, who determined that the Centers for Medicare and Medicaid Services "agreed that [CSMS] was in compliance with Medicare supplier standards." Moreover, Beverly and CSMS argued that the Government could not show that any of CSMS's claims was false, that they had knowledge of any falsity, or that any alleged falsity was material to the government. McKesson moved to dismiss all of the government's claims, on the basis of several of the same arguments that Beverly and CSMS had raised. The United States District Court for the Northern District of Mississippi granted the defendants' motions for partial summary judgment and denied the government's motion.

The court found that, as a matter of law, the government did not prove that the defendants submitted false claims or failed to meet the supplier standards. The court found that CSMS maintained a valid Medicare supplier number for all relevant periods, since CMS itself resolved these issues in CSMS's favor. Furthermore, CSMS rightfully relied on CMS's determination in good faith. As a result, CSMS entitled to the Medicare payments it received and its claims were not false. The court further concluded that the government's theory of FCA liability was premised on its own subjective interpretation of the defendants' duties and obligations, rather than on objective falsehoods, as the FCA requires. Consequently, the court held that the government's allegations did not satisfy the FCA's knowledge and falsity elements, and the defendants' motions were granted, while the government's motion was denied. The court made clear, however, that its ruling only covered the government's allegations regarding the supplier standards and did not resolve the allegations that the defendants submitted false claims based on violations of other laws and regulations, such as the anti-kickback statute.

U.S. ex rel. Freedman v. Suarez-Hoyos, 2011 WL 972585 (M.D. Fla. Mar. 18, 2011)

A relator brought a *qui tam* action against his former employer, a pathology laboratory (TPL), its owner (Suarez), and a dermatology institute and dermatologist (collectively Wasserman), alleging that the defendants violated the False Claims Act by upcoding on claims for Medicare reimbursement and by falsely certifying their compliance with applicable Medicare regulations, even though they were engaged in a kickback arrangement that violated the Anti-Kickback statute. The United States intervened in the relator's suit and defendants TPL/Suarez and Wasserman separately moved to dismiss for failure to state a claim and for failure to satisfy Rule 9(b). The United States District Court for the Middle District of Florida denied the defendants' motions.

The court first examined the motion to dismiss filed by Suarez and TPL, which argued that the allegations against them failed to meet the plausibility and particularity requirements of Rules 8 and 9 of the Federal Rules of Civil Procedure; that the plaintiffs improperly grouped the claims against them with claims against other defendants; that the complaint failed to allege that they acted willfully and with an intent to violate the AKS; and that the complaint failed to state a claim pursuant to a false certification theory of FCA liability. The court rejected the defendants' arguments. The court found that the government properly pled its claims, as it provided the date of the alleged kickback agreement, identified the parties, and described the substance, purpose, and manner in which the agreement was executed. The court also concluded that the detailed allegations of the agreement between the parties negated any argument that the defendants did not know that false claims were being submitted. Therefore, the court held that the government's allegations were sufficiently alleged. In addition, and without explanation, the court simply rejected the defendants' argument that the government improperly grouped the claims against these defendants with claims against other defendants, as it found nothing improper in that regard. With respect to the defendants' argument that the government failed to sufficiently describe the defendants' actions and agreement as willful and with the intent to violate the AKS, the court once again ruled against the defendants, holding that the plaintiffs' allegations properly described a FCA violation and that the government's implied false certification theory could be maintained, since compliance with the AKS was a prerequisite for Medicaid reimbursement. Thus, the court denied these defendants' motion in its entirety.

The court then examined the Wasserman defendants' separate motion to dismiss, in which those defendants raised additional arguments that the government failed to allege a factual basis for damages; that there was no remuneration violation under the AKS; that they did work entitling them to bill Medicaid; that the kickback allegations were time-barred; and that the plaintiffs and failed to allege a factual basis for patient evaluations and ATT. The court, looking to the complaint, quickly determined that the government's complaint properly and adequately addressed each of the alleged pleading deficiency issues, that the go that the government's complaint-in-intervention related-back to the date of the original *qui tam* complaint for statute of limitations purposes. Therefore, the Wasserman defendants' motion to dismiss was also denied in its entirety.

U.S. ex rel. Patton v. Shaw Servs., L.L.C., 2011 WL 924292 (5th Cir. Mar. 17, 2011)

A relator brought a *qui tam* action against a construction company that formerly employed him, alleging that the company violated the False Claims Act by submitting false claims and making false statements regarding work performed un-

der a construction project in Louisiana that was partially funded by the federal government—the relator contended that the defendant's work was "defective" and did not meet applicable building code requirements. The government declined to intervene in the *qui tam* case. In addition, the relator alleged that the defendant violated the False Claims Act by creating a hostile work environment and eventually terminating his employment in retaliation, after he reported the alleged fraud to the company and to federal and state agencies. The defendant moved to dismiss the relator's fraud claims, arguing that the relator failed to plead those claims with particularity, as required by Federal Rule of Civil Procedure 9(b). The defendant also moved to dismiss, or in the alternative, moved for partial summary judgment on the relator's retaliation claim, arguing that the relator failed to establish that his superiors were on notice that he was engaged in protected conduct under the False Claims Act, and terminated his employment in retaliation. The United States District Court for the Eastern District of Louisiana treated all of the defendant's motions as motions for summary judgment and ultimately granted those motions. The relator then appealed the district court's rulings to the Fifth Circuit. The Fifth Circuit affirmed the district court's decisions.

False Claims

The Fifth Circuit first examined the relator's fraud claims and the district court's ruling that the relator failed to show that the defendant violated the terms of its government contract or any applicable building code. The circuit court agreed with the district court's assessment, as it concluded that none of the authorities the relator relied upon to show the defendant's non-compliance and allegedly false claims and false statements were ever incorporated in the defendant's government contract. Thus, as the circuit court stated, "any failure to conform to the standards set forth in those materials was irrelevant to determining whether [the defendant] violated its obligations under the contract."

The appeals court further noted that even if the authorities the relator relied on created an issue of material fact regarding the defendant's compliance with the contract, the relator failed to satisfy the other elements of a fraud claim under the FCA. First, the circuit court concluded that the relator did not claim that the defendant falsely certified its compliance with any contract term or regulatory provision that was allegedly violated, nor did he allege that compliance with any such provision was a condition of payment under the contract. Since the relator could not identify any false certification made by the defendant, the circuit court determined that his allegations were based solely on speculation, and could not satisfy Rule 9(b)'s particularity requirements. Next, the court held that the relator failed to establish the FCA's scienter element, since he did not show that the defendant knowingly violated the FCA. The court stated that the relator "put forth unsubstantiated allegations that his supervisors admitted to employing substandard or improper construction practices, but these allegations are insufficient to create a genuine dispute as to whether [the defendant] knowingly or recklessly submitted false claims to the government." Consequently, the relator's fraud claims were dismissed and summary judgment was entered in favor of the defendant.

Retaliation

With respect to his retaliation claim, the relator argued that he repeatedly complained both internally and to federal and state government authorities about the defendant's alleged improper construction methods, and that his complaints constituted protected activity under the FCA. The circuit court, however, agreed with the district court that the relator's failed to provide any evidence of his internal complaints about fraud against the government, or any retaliation that resulted from those complaints. Instead, the Fifth Circuit held, the relator's evidence showed that he complained to the defendant about unsafe or improper construction methods, which are not protected activity under the FCA, since such complaints are not "in furtherance of" a *qui tam* action. In addition, the court noted that the relator failed to provide any evidence that the defendant was aware of his complaints to government authorities, and therefore, he could not show that any such complaints caused any retaliation he suffered. Accordingly, the circuit court held that the district court did not err in granting summary judgment in favor of the defendant on the retaliation claim, and that claim was also dismissed.

See *U.S. ex rel. Veltz v. Allegany Rehab. Assocs., Inc.*, 2011 WL 1042194 (W.D.N.Y. Mar. 18, 2011) at page 20.

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

U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co., 2011 WL 231767 (E.D. La. Jan. 24, 2011)

A relator brought a *qui tam* action against nine insurance companies, alleging that, following Hurricane Katrina, the defendants defrauded the government and reduced their obligation to pay claims under homeowners insurance policies, by improperly attributing damages to flooding, when in fact, those damages should have been attributed to wind or wind-driven rain. The United States District Court for the Eastern District of Louisiana dismissed the case in its entirety under the False Claims Act's first-to-file provision, as the court determined that an earlier case included similar claims. The relator appealed that decision to the Fifth Circuit, and the circuit court held that only claims against two of the defendants should have been barred, as the remaining defendants were not named in the earlier action. The appellate court reached this decision even though one of the two defendants had already been voluntarily dismissed from the earlier case. On remand, all of the remaining defendants moved for dismissal, arguing that the district court lacked jurisdiction over the relator's claims, pursuant to the FCA's public disclosure bar provision, because the relator's allegations were based on information that had been publicly disclosed and the relator was not an original source of that information. The district court, though, held that the relator had adequately pled that he was an original source of the information on which his complaint was based; he also satisfied Rule 9(b)'s pleading requirements. The relator then moved for leave to file a second amended complaint, to add a claim that the defendants also overstated the amount of flood damage—which allowed them to collect inflated fees due to their participation in the National Flood Insurance Program—and to assert that claim against the defendant who had been previously dismissed from the case. The court granted the relator's request. All of the defendants moved to dismiss the amended complaint, with the previously dismissed defendant again asserting the first-to-file rule and all of the defendants asserting the public disclosure bar.

First-to-File Bar

The defendant that was previously dismissed under the first-to-file bar again moved to dismiss the relator's new claims on that basis, arguing that the earlier, similar case still trumped the relator's complaint. The relator countered, arguing that the earlier case was no longer pending at the time he filed his amended complaint, and therefore, the first-to-file bar no longer applied. The court, though, applying the principles of *res judicata* and collateral estoppel, held that since this defendant had already been dismissed from the case on first-to-file grounds, and since the Fifth Circuit was aware that the defendant had already been voluntarily dismissed from that earlier case at the time it affirmed the district court's ruling, "the judgment of dismissal remain[ed] effective to preclude relitigation of the precise issue of jurisdiction that led to the dismissal." The court held that since the relator brought his original complaint against this defendant while a related action was pending, the relator's subsequent claims against that defendant were also barred by the first-to-file rule, stating that the relator "cannot argue that the dismissal frees it to rename [the defendant] by amendment because the Court cannot have jurisdiction over an amended complaint if it did not have jurisdiction when the original complaint was filed."

Public Disclosure Bar

The court dismissed the claims against the remaining defendants under the FCA's public disclosure bar. The defendants argued that the relator's claims were based on publicly disclosed information, and the relator was not an original source of that information, because he did not have direct and independent knowledge of the information and did not voluntarily provide any such information to the government before filing his *qui tam* action. The relator disagreed, noting that his attorney discussed the allegations with an Assistant U.S. Attorney and gave her a copy of the complaint a written disclosure statement before filing the *qui tam* action. The relator also received confirmation that these materials were delivered to the U.S Department of Justice. The defendants argued that these disclosures to the government were insufficient, since they occurred on the same day that the relator's *qui tam* complaint was filed.

Before analyzing the parties' arguments, the court noted that the relator "must demonstrate that the information contained in its pre-filing disclosure is sufficient to make it an original source," and observed that "[b]ecause the Court cannot acquire jurisdiction because of changed jurisdictional facts . . . the Court must look to the disclosures [the relator] made before it filed suit." When the court reviewed the relator's initial pre-filing disclosures to the government—both verbal and written—it determined that the relator's "original written disclosure contains absolutely no specific information as to" several of the named defendants, and thus was insufficient to establish the relator's status as an "original source" with respect to its allegations against those defendants. Consequently, the relator's allegations against those defendants were dismissed. The court also dismissed the relator's claims against the remaining defendants, as the relator conceded that it did not have a factual basis for asserting those claims, and thus, could not be an original source of any information on which those claims were based.

U.S. ex rel. Denenea v. Allstate Ins. Co., 2011 WL 231780 (E.D. La. Jan. 24, 2011)

A relator, who was also an attorney, brought a *qui tam* action against an insurance company. The relator's case arose out of the same circumstances as *U.S. ex rel. Branch Consultants, L.L.C., v. Allstate Ins. Co.*, which is discussed above. In the present case, the relator alleged that the insurance company defendant violated the False Claims Act by shifting losses from wind coverage to flood coverage, which reduced the amount the company had to pay homeowners, while increasing the amount paid out by the government. The defendant moved to dismiss on first-to-file, public disclosure, and particularity grounds. The United States District Court for the Eastern Division of Louisiana granted the motion and held the court lacked jurisdiction over the relator's claims, due to the FCA's first-to-file rule.

The court began its analysis by examining the jurisdictional facts and found that two cases with the same essential facts were pending against the defendant when the relator's *qui tam* complaint was filed. The relator argued that his suit was not barred, however, because the relators in the other cases agreed to consolidate their actions with his. The court, though, held that relators cannot avoid the first-to-file bar by consolidating claims with earlier actions. The relator then argued that his complaint differed from the other previous actions, since he alleged fraud with respect to different properties. The court's response was that adding these factual details was insufficient to avoid first-to-file bar. Finally, the relator argued that the allegations in one of the prior actions had been voluntarily dismissed, and thus could not bar his action. The court, though, noted that, at the time the relator filed his *qui tam* action, those voluntarily dismissed allegations were still pending, and therefore barred his action.

U.S. ex rel. Jones v. Collegiate Funding Servs., Inc., 2011 WL 129842 (E.D. Va. Jan. 12, 2011)

Two relators brought a *qui tam* action against a private commercial lender and its subsidiaries, alleging that the defendants—all of whom made post-secondary education loans under the Federal Family Education Loan Program (FFELP)—violated the False Claims Act by making false statements to the Department of Education. Specifically, the relators—who both previously worked as telemarketers for the commercial lender—alleged that the defendants improperly secured federally-guaranteed consolidation loans, and then falsely certified their compliance with applicable regulations when making claims to the government for reimbursement, after borrowers defaulted on those loans. The relators' claim was based on their allegations that, as part of the reimbursement process for federally-backed education loans, the defendants were required to certify to the Department of Education that the information in their claims was true and accurate, and

that the loans were made in accordance with federal law. The relators contended that the defendants' certifications to the Department of Education were false, and that the consolidation loans were not made in accordance with the law, because the defendants violated the Higher Education Act by: (1) entering into unlawful agreements with colleges and universities, whereby the commercial lender made payments to the schools in exchange for the schools' cooperation in steering students toward the commercial lender for loan consolidation services; (2) entering into improper agreements with schools to take over the schools' statutory duty to provide students with personalized exit loan counseling, and subsequently deceived students into believing that loan consolidation was for everyone; (3) using misleading direct mail solicitations to college students and graduates that appeared to come from the government; and (4) offering and making illegal bonus payments to employees based on the number of FFELP student loan applications they initiated. As a result of these four alleged improprieties, the relators alleged that all of the defendants' reimbursement claims involving these factual scenarios were false.

The defendants moved to dismiss the relators' complaint, arguing that the relators' claims arising from the first three allegations were based on prior public disclosures—namely, a series of news reports and the commercial lender's publicly-available SEC filings—and that the U.S. District Court for the Eastern District of Virginia did not have subject matter jurisdiction over the relators' complaint. In addition, the defendants argued that the relators did not plead their claims based on the fourth allegation with particularity, as required by Federal Rule of Civil Procedure 9(b). The defendants' arguments were based on the fact that the relators worked as telemarketers, and therefore were in no position to learn about the defendants' purported illegal activities, to process any loan consolidations, to provide any post-consolidation service, or to access information regarding the defendants' claims to the government. The matter was referred to a magistrate judge.

The magistrate judge recommended dismissal of the claims based on the first two allegations for lack of subject matter jurisdiction, finding that the relators failed to prove that their allegations were not derived from prior public disclosures. The magistrate held that there was subject matter jurisdiction over the remaining claims, but concluded that those claims were not properly pled and should also be dismissed. Consequently, the magistrate recommended dismissal of the relators' complaint in its entirety. Moreover, the magistrate concluded that allowing the relators to further amend the complaint would be futile, since the relators admitted that they did not have sufficient additional information to satisfy Rule 9(b)'s pleading requirements. The district court then considered the magistrate's recommendation.

The Public Disclosure Bar

The district court first considered the defendants' argument that the relators based claims on publicly disclosed information. The relators argued that the magistrate erred by determining that if the relators' knowledge did not come through their employment with the defendant commercial lender, then it must have come from a prior public disclosure. The court, though, held that the magistrate's conclusion was reasonable, since he considered all the facts acquired from the relators' work experience and observed that no further explanation was given as to how the relators learned additional information that was outside the scope of their positions as telemarketers.

The relators next argued that the SEC filings they relied on were not "administrative reports" capable of triggering the public disclosure bar. The court disagreed and held that the SEC filings can trigger the bar, since there is no requirement that administrative reports must be created by the government—according to the court, such reports may also be received by the government. In addition, the court mentioned that the defendants pointed to numerous other public disclosures which were indisputably sufficient to trigger the bar.

The relators then argued that the magistrate erred by finding that the relators failed to prove their allegations were not "based upon" the prior public disclosures. The relators argued that there were only three public disclosures published prior to the filing of their original complaint and that a prior public disclosure can only deprive a court of subject jurisdiction over a relator's claims if it discloses the allegation or transaction on which the relators' claims were actually based. The court disagreed and held the essential elements of the relators' allegations were clearly disclosed prior to the filing, stating that the public disclosure bar is not limited to circumstances in which a *qui tam* complaint is based on "a single comprehensive public disclosure which embraces "each and every element of the alleged fraud." The court determined that, taken together, the prior public disclosures provided enough information to the relators for them to use as a basis for their fraud allegations.

Having determined that the public disclosure bar had been trigger, the court turned its attention to the question of whether the relators qualified for the "original source" exception to the public disclosure bar. The relators argued they were original sources of the information supporting their claims. The court, though, found that the relators failed to provide any evidence of their direct and independent knowledge of the information upon which their allegations were based. The court made clear that it did not hold that "every relator in a *qui tam* action must affirmatively establish the source of his or her knowledge," but compelled the relators in this case to do so because the facts underlying their complaint had been previously publicly disclosed and the relators had no logical access to that information through their employment positions. The court hypothesized that the relators' attorneys may have supplemented the relators' complaint—perhaps without the relators' knowledge—with the publicly disclosed information, and when the relators could not provide an alternative explanation, the court concluded that they did not meet the standard for the False Claims Act's original source exception.

The court held that the bar did not apply to the relators' claims based on their third and fourth allegations jurisdiction was proper for fact patterns three and four. With respect to the relators' claims based on the third allegation—that the defendants used misleading advertising to deceive students into believing that they were receiving solictations from the government—the court held that it was plausible that even if though the relators were not involved with creating the advertisements, callers may have referenced them when speaking to the relators. With respect to the relators' claims based on the fourth allegation—that the defendants made improper bonus payments to employees, based on the number of student loan applications they process—the court held that the public disclosure bar did not apply, rejecting the defendants' only argument that those claims should be dismissed because they incorporated the first two allegations by reference. Instead, the court noted, the public disclosure bar is applied on a claim-by-claim basis, and there was no evidence that the bar applied to the relators' claims based on the fourth allegation. As a result, the court held that it had no subject matter jurisdiction over claims based on allegations one and two, and those claims were dismissed.

Rule 9(b)

The court then turned its attention to the question of whether or not the relators pled the remaining claims with sufficient particularity. The relators argued that the magistrate repeatedly misstated their allegations and erroneously determined that the relators had alleged that all of the defendants' claims to the government were false—not just those claims that arose from the four alleged factual scenarios listed above. However, the court held found that the magistrate fully grasped the scope of the relators' claims.

The relators also argued that they satisfied Rule 9(b) when making claims of false certifications, because they attached a blank FFELP claim form detailing the certifications the defendants were compelled to make when submitting claims for reimbursement, and they described the defendants' alleged Higher Education Act violations. The relators further argued that it was unnecessary for them to prove that the alleged false claims were actually presented to the government, since their claims were based on the defendants' alleging making false statements or causing false statements to be made in support of false claims. The court held that the relators misunderstood the FCA's liability provisions, noting that the relator did not allege that the defendants caused some third party to present false claims to the government, but that the defendants themselves had submitted false claims. As a result, the court held that the relators' submission of a blank FFELP document with no facts supporting that it was the basis of a false claim, did not satisfy the particularity requirement.

The relators further argued that they satisfied Rule 9(b) by pleading the defendants' alleged fraudulent scheme with particularity, even though they did not have evidence of the defendants' alleged false claims to the government. The court disagreed and held the relators were still required to plead supporting facts such as dates, defaults, payments, and specific information regarding claims for payment. The court noted that the magistrate "merely asked Relators for some facts from which the Court could reasonably infer that [the defendants] submitted at least one false claim," but the relators were unable to do so. While the court acknowledged that Rule 9(b) can, in some circumstances, be satisfied by pleading a fraudulent scheme with particularity, it stated that in such circumstances, relators must also provide some "reliable indicia that lead to a strong inference that claims were actually submitted." As the relators did not provide such information, the court concluded that their remaining claims were not pled with the requisite particularity, and those claims were dismissed.

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

U.S. ex rel. Davis v. Dist. of Columbia, 2011 WL 1126048 (D.D.C. Mar. 29, 2011)

A relator brought a *qui tam* action against the District of Columbia, alleging that the District submitted false Medicaid reimbursement claims for fiscal year 1998, because the District did not have the necessary documentation to support those claims. The relator claimed that he had knowledge of the District's improper practices because his firm had been contracted to collect data, maintain all necessary documentation and prepare the District's Medicaid reimbursement claims during the relevant period. The U.S. government declined to intervene in the relator's action. The United States District Court for the District of Columbia dismissed the relator's claim for treble damages, as the relator did not allege that the federal government suffered any damages. The court determined that before the relator's original action was filed, the Office of the District of Columbia Auditor issued a report that noted deficiencies in the District's record-keeping, which resulted in the District not maintaining sufficient documentation to support some of its Medicaid reimbursement claims for fiscal year 1998. Subsequently—but still before the relator's original *qui tam* action was filed—the Centers for Medicare and Medicaid Services conducted its own investigation and issued its own report, which ultimately resulted in the District repaying nearly $8 million to CMS for fiscal year 1998.

The relator file an amended complaint, re-alleging his fraud claims against the District and once again seeking treble damages, arguing that the government did suffer damages, as evidenced by the District's repayment to CMS. The relator then moved for summary judgment, while the District moved to dismiss the relator's complaint for lack of subject matter jurisdiction, or in the alternative, for summary judgment.

Public Disclosure Bar

The District moved to dismiss the relator's complaint, arguing that the *qui tam* action was based on publicly disclosed information—namely, the District's audit report—and thus, the court was without subject matter jurisdiction over the relator's claims. The court first concluded that the District report did fall within the FCA's definition of an "administrative report," and therefore was a public disclosure, for FCA purposes. As the court noted, although the FCA's public disclosure bar provision has been clarified, and only <u>federal</u> administrative reports can be deemed public disclosures, that change to the law was not retroactive, and does not apply to the relator's case, which was filed several years before the law was changed. Next, the court held that the relator's claims were based on the District's report, stating that the "audit report revealed the essence of plaintiff's fraud claim—that the fiscal year 1998 cost claim submitted by [the defendant] lacked supporting documentation."

The court then considered whether the relator could avoid the public disclosure bar by qualifying for the FCA's "original source" exception. The court held that he could not. Although the relator had direct and independent knowledge of the District's alleged fraud because of his job, and although he voluntarily informed the federal government of his qui tam allegations before filing suit under seal, the court concluded that he was not an "original source" for FCA purposes, because he did not provide the government with information regarding the alleged fraud before the public disclosure occurred. The court based its reasoning on the D.C. Circuit's decision in United States ex rel. Findley v. FPC-Baron Employees' Club, 105 F.3d 675 (D.C. Cir. 1997), which surmised that disclosure to the government prior to any public disclosure is required under the FCA, since the public disclosure bar is designed to incentivize relators to give the government "advance notice" of fraud schemes. The district court acknowledged that several other circuit courts have disagreed with the rationale announced in Findley, and impose no such requirement; the district court even recognized that the D.C. Circuit itself "has recently expressed some uncertainty" regarding this requirement. Nonetheless, the district court felt compelled to apply Findley, concluded that the relator did not notify the federal government of the District's alleged fraud prior to the public disclosure, and dismissed the qui tam action for lack of subject matter jurisdiction. Given that ruling, the court did not address either party's summary judgment motion.

U.S. ex rel. Black v. Health & Hosp. Corp. of Marion County, 2011 WL 1161737 (D. Md. Mar. 28, 2011)

A relator brought a *qui tam* action against a state municipal corporation that operated nursing homes, alleging that the defendant participated in a scheme whereby it fraudulently certified certain Medicaid expenditure documents in order to receive "federal matching" Medicaid funds to which it was not entitled. The defendant moved to dismiss for lack of subject matter jurisdiction, failure to state a claim and failure to plead with particularity. The United States District Court for the District of Maryland granted the motion to dismiss with prejudice.

The defendant argued that the relator's claims were barred by public disclosures—namely, several government reports and audits, congressional hearings, and CMS statements—and that he did not qualify for the "original source" exception to the bar. The court agreed, as it determined that these prior disclosures were sufficient to put the government on notice of the alleged fraudulent activity. The court also observed that the relator's claims merely echoed the public criticism of the Medicaid financing mechanisms at issue, which had been the subject of great debate within CMS and Congress. The court held that the relator's claims simply mirrored CMS's concerns regarding and that his complaint asserted no facts to prove that the defendant ever presented a false claim or made a false statement to the government in order to obtain Medicaid funds. Similarly, the court observed that the relator failed to provide any evidence for conspiracy to defraud the government. Further, the court noted that the relator acknowledged his lack of original and independent knowledge and relied on inference and guess work. As a result, the court held that it lacked the subject matter jurisdiction over the relator's claims.

In addition, the court agreed with the defendant that the relator's complaint was deficient and did not state or claim or plead fraud with particularity, since it did not plead the basic elements of fraud. Thus, the complaint was dismissed with prejudice.

U.S. ex rel. Veltz v. Allegany Rehab. Assocs., Inc., 2011 WL 1042194 (W.D.N.Y. Mar. 18, 2011)

A relator brought a *qui tam* action against his former employer, a rehabilitation center, alleging that the defendant violated the False Claims Act by submitting fraudulent Medicaid reimbursement claims. Specifically, the relator alleged that the defendant knowingly used faulty billing software that automatically up-coded Medicaid claims by replacing correctly-entered rate codes with incorrect ones. He also alleged that the defendant fraudulently billed Medicaid for non-reimbursable services and falsely certified its compliance with various Medicaid regulations, including staffing requirements. Moreover, the relator alleged that when he reported the alleged fraud to his superiors and to the defendant's board of directors, the defendant terminated his employment, in violation of the False Claims Act's anti-retaliation provision. The defendant moved for partial summary judgment on some of the relator's fraud claims, and the United States District Court for the Western District of New York granted the motion in part.

The relator had alleged that the defendant's improper billing scheme began in 1995, when Medicaid first required the defendant to transition to an electronic claims-submission system. He claimed that the defendant realized that its computer program was automatically changing billing codes—resulting in upcoding as well as downcoding—but that the company continued to use the program through 1999. The defendant argued that some of the relator's claims could not be maintained, since the New York State Department of Health (DOH) audited the defendant's Medicaid billing for the years 1993 through 1995, determined that the defendant had received more than $80,000 in overpayments and settled with the defendant for that amount. In addition, the defendant asserted that, pursuant to the False Claims Act's public disclosure bar, the court lacked subject matter jurisdiction over those claims, since the information on which those claims was based had been publicly disclosed in the DOH audit report before the relator's *qui tam* suit was filed. The court agreed with the defendant that the relator's upcoding allegations for the 1994 to 1995 period were precluded due to the public disclosure bar. The court determined that, pursuant to the version of the public disclosure

bar in effect at the time the *qui tam* suit was filed, the state audit report qualified as a public disclosure and the relator's allegations were based upon that disclosure. The court noted that the relator did not identify any claims contained in his *qui tam* complaint that were not also publicly disclosed in the audit. In addition, the court concluded that the relator did not qualify for the "original source" exception to the public disclosure bar, since he conceded that he did not have direct and independent knowledge of the defendant's alleged upcoding scheme. Consequently, the court granted the defendant's motion for summary judgment with respect to the relator's upcoding claims for 1994-1995.

The court then considered the relator's additional allegations of fraud through 1999. The defendant argued that the relator's claims were insufficient, since he could not show the defendant's fraudulent intent—the defendant contended that the computer issues were the result of inadvertent and innocent mistakes. The court held that this was an issue of material fact, and therefore denied the defendant's motion for summary judgment with respect to that issue. However, the court agreed with the defendant that the relator's false certification claim, which asserted that the defendant repeatedly failed to meet certain staffing requirements, yet certified to Medicaid that it was in compliance, was deficient. The court noted that the relator based this claim on a New York State regulation that discussed staffing ratios, as he alleged that the defendant was required to maintain a 10-to-1 staffing ratio. The court concluded that the regulation in question only required programs to "maintain an adequate and appropriate number of clinical staff members on site in proportion to the number of recipients on site," and that any mention of a 10-to-1 ratio was nothing more than a suggestion that such a ratio was presumptively acceptable. Thus, the court agreed with the defendant that the relator did not demonstrate that false certification of compliance with the New York law, and granted the defendant's summary judgment motion with respect to that claim.

U.S. ex rel. Lancaster v. Boeing Co., 2011 WL 888366 (N.D. Okla. Mar. 11, 2011)

A relator brought a *qui tam* action against her former employer, an aircraft manufacturer, alleging that the defendant had a logistics support contract (CLS) with the Air Force, essentially to act as the purchasing agent in obtaining repair and replacement parts for aircraft in the E-4 Program. The relator alleged that the contract required the defendant to use only FAA-certified parts in modifying and maintaining the aircraft but that the defendant failed to do so, but falsely certified that it had. The defendant moved for summary judgment, arguing that the court lacked subject matter jurisdiction over the relator's fraud claims, because of a prior public disclosure, and contending that the relator was not an original source of the information upon which her complaint was based. The United States District Court for the Northern District of Oklahoma granted the defendant's motion.

The court found that in 1992 the Air Force Office of Special Investigations (OSI) initiated an investigation into the defendant's repairs of the E-4 aircraft under the CLS contract, which focused on whether or not the defendant used certified parts to perform the repairs. The investigation involved a U.S. Attorney's office, which contemplated bringing criminal and civil charges against the defendant, and consisted of numerous interviews with employees of the defendant and its vendors, as well as the Department of Defense Office of Inspector General. Eventually, the Air Force determined that certified parts were not required for the repairs and the investigation ceased.

The defendant argued that this administrative investigation constituted a prior public disclosure, and the court agreed. The relator did not dispute this fact. The court then analyzed whether the alleged disclosure had been made public within the meaning of the FCA. The defendant argued that the investigation involved disclosures to a U.S. Attorney's Office, to employees of third parties, and to employees of the defendant who were not involved in the suspected fraud scheme. The relator argued that the disclosure of information to these groups was not "public" for False Claims Act purposes, because it was made from one government employee to another involved in the investigation. The court held that the disclosure to the U.S. Attorney's Office was "public" under the FCA, stating that "[d]isclosure of information to a competent public official about an alleged false claim against the government is 'public disclosure' within the meaning of §3730(e)(4)(A) when the official is 'authorized to act for or to represent the community on behalf of government.'" Moreover, the court determined that a "public" disclosure had occurred, since OSI and the U.S. Attorney's Office were separate agencies. In addition, the court held that public disclosures occurred during many of the interviews performed in the investigation, since many of the interviewees were not even aware of the purported scheme until they participated in the OSI interview process. Therefore, the court held that a public disclosure within the meaning of the FCA occurred.

Next, the court analyzed whether the relator's claims were based on the publicly disclosed information contained in the OSI investigative reports. The court found that the investigation examined the requirements of the CLS contract and revealed pre-existing and ongoing issues related to the defendant's compliance with quality assurance and FAA approved parts requirements. Further, the court found that the government, as a result of the investigation, had sufficient notice for future fraudulent conduct. The court concluded that since the relator's allegations were "substantially similar to" the revelations of the prior investigations, the relator's complaint was "based upon" the public disclosure.

Finally, the court analyzed whether the relator qualified for the FCA's "original source" exception to the public disclosure bar. The court found that the relator could not qualify for the original source exception, since she did not begin work-

ing for the defendant until 1996, and could not possibly have had direct and independent knowledge of the information on which her complaint was based, as the public disclosures were made in a 1992-1996 investigation. Therefore, the court granted the defendant's motion for summary judgment.

U.S. ex rel. Lisitza v. Johnson & Johnson, 2011 WL 673925 (D. Mass. Feb. 25, 2011)

Two relators brought a *qui tam* action in the U.S. District Court for the District of Massachusetts on behalf of the United States and several States, alleging that a pharmaceutical company and its subsidiaries unlawfully induced their former employer—a pharmacy services provider—to promote its branded drugs over cheaper alternatives. Specifically, the relators alleged that the defendant used the pharmacy services provider to funnel kickbacks (disguised as payments for physician data, grants, and sponsorship fees) to physicians and nursing homes to induce them to recommend the defendants' drugs to patients, instead of competitors' drugs. Further, the relators alleged that the drug company provided the pharmacy company with rebates on purchases of its drugs, as compensation for its role in the scheme. The relators further alleged that the defendants sought to cover up these rebates, as the reductions in price would have required the defendants to offer the federal and state governments the same "best price" when those drugs were purchased under Medicaid. The relators alleged that the defendants' improper scheme of kickbacks caused the pharmacy company to falsely certify that it had complied with applicable federal and state anti-kickback laws, thereby filing false claims for Medicaid and other government reimbursements. The federal government and several states moved to intervene, and realleged the relators' claims and added claims for conspiracy and unjust enrichment. The defendants moved to dismiss the complaint-in-intervention, arguing that the court did not have jurisdiction over the relators' claims, that the plaintiffs' false certification theory failed to state a claim, and that the fraud claims were not pled with particularity, as required by Federal Rule of Civil Procedure 9(b).

Public Disclosure Bar

The defendants argued that the court did not have jurisdiction over the relators' allegations, because their *qui tam* complaint was based upon information contained in a previously filed *qui tam* action and the relators did not qualify as "original sources" of the publicly disclosed information. The court observed that the two relators initially filed separate *qui tam* suits, which were eventually consolidated. The court noted that the first complaint "detail[ed] the alleged fraud," while the second complaint "simply add[ed] a sprinkle of factual garnish" to the first complaint. Thus, the court concluded, the second *qui tam* relator's suit was prohibited by the FCA's public disclosure bar.

The defendants argued that the "best price" allegations in the first *qui tam* complaint should also be dismissed on public disclosure grounds, directing the court to four previously-filed actions that purportedly alleged the same fraud scheme. The court agreed that the allegations in the first *qui tam* complaint had been previously publicly disclosed, and then turned its focus to the question of whether or not the first relator qualifed for the FCA's original source exception. The court determined that the relator did not qualify, since he could not show that he had direct and independent knowledge of the information on which his complaint was based. Thus, his best price fraud allegations were also dismissed.

Failure to State a Claim

The defendants argued that the rebates at issue were not unlawful because the discounts in price were properly disclosed and were appropriately reflected in the costs claimed. Therefore, they argued, the rebates fell within the safe harbor provision of the discount provision of the Anti-Kickback Statute. The court disagreed. After reviewing the FCA claims, the court found that the allegedly improper kickbacks—the data acquisition fees, grant awards, sponsorship fees, and other payments—did not fall within the safe harbor provision of the AKS, as the terms and conditions of the rebates were not disclosed to the government. In support of the plaintiffs' false certification theory, the court further held that AKS compliance was not merely a condition of participation in the federal health care programs, but it was also material to the government's decision to pay any claim for reimbursement that resulted from a kickback. Thus, the court rejected the defendants' argument that the plaintiffs failed to state a claim under the FCA.

Rule 9(b)

The defendants argued that the FCA claims were not pled with particularity and should be dismissed. The court, though, agreed with the plaintiffs that "where a defendant is alleged to have 'caused' a third party to file a false claim, the complaint need not 'provide details as to each false claim,'" but must allege "'a connecting causal link.'" The court determined that the plaintiffs' complaint adequately pled the alleged fraud scheme, as it "specifies the relevant time period, the manner in which the kickbacks were paid, and the claims alleged to be false that flowed from the various kickback schemes." Consequently, the court rejected the defendants' Rule 9(b) challenge.

State FCA Claims

The court then examined each of the state FCA claims and determined that several of those claims should be dismissed. Some of the claims had already been resolved through settlement agreements between the defendants and the affected state, while others were barred because either the state in question did not have a *qui tam* provision in effect at the time the alleged fraud against the state occurred or the relators otherwise did not have standing to pursue the claims on behalf of the state.

U.S. ex rel. Baltazar v. Warden, 2011 WL 559393 (7th Cir. Feb. 18, 2011)

A relator and chiropractor brought a *qui tam* action against her former employer—a healthcare firm—and its owner, alleging that they submitted fraudulent bills to Medicare and Medicaid. Specifically, the relator alleged that the defendants added unperformed services to her billing slips and upcoded services to receive higher reimbursements. The defendants moved to dismiss, arguing that the court did not have subject matter jurisdiction over the relator's complaint, because her allegations were based on prior public disclosures in several governmental reports and she did not qualify for the FCA's original source exception. The United States District Court for the Northern District of Illinois agreed with the defendants and granted the motion. The relator appealed the district court's ruling to the Seventh Circuit. The circuit court reversed the district court's decision as it found that the reports at issue did not make specific references to any medical practitioners or clinics, but rather were aimed at widespread Medicare fraud. The Seventh Circuit stated; "As far as we can tell, no court of appeals supports the view that a report documenting widespread false claims, but not attributing them to anyone in particular, blocks *qui tam* litigation against every member of the entire industry." Further, the appeals court found that the relator's complaint supplied vital facts that were not in the reports, but which were based on her personal knowledge about the defendants' practices. In addition, the court concluded that the relator had voluntarily provided the government with the information on which her complaint was based, because she alerted an Assistant U.S. Attorney that the *qui tam* suit was soon to be filed. As a result, the court held that the relator would have qualified as an original source, even if her *qui tam* allegations had been previously publicly disclosed. Consequently, the Seventh Circuit reversed and remanded the district court's decision.

U.S. ex rel. Davis v. District of Columbia, 2011 WL 611814 (D.C. Cir. Feb. 15, 2011)

A relator brought a *qui tam* action against the District of Columbia (DC) alleging that DC made false claims for Medicaid reimbursement and conspired to defraud the federal government. DC moved to dismiss the relator's claims for failure to state a claim, and for lack of subject matter jurisdiction, pursuant to the False Claims Act's public disclosure bar. The United States District Court for the District of Columbia granted the defendant's motion and denied the relator's motion for reconsideration. The relator appealed to the United States Court of Appeals for the District of Columbia Circuit, arguing that his allegations had not previous-

ly been publicly disclosed and alternatively, that he was an original source of the information upon which his claims were based. The circuit court, though, found that a Government Accountability Office report issued before the relator's complaint was filed included information regarding the alleged wrongdoing that was at the heart of the relator's complaint. Further, the court determined that the relator could not qualify for the original source exception to the public disclosure bar, because he did not provide the information to the government before the public disclosure occurred, or even before his *qui tam* complaint was filed. The appellate court also held that the district court did not abuse its discretion by denying his motion for reconsideration, since such motions "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." The appeals court found that the relator was given ample opportunities to produce additional evidence to the district court and did not do so. Thus, there was no abuse of discretion when the district court denied the motion for reconsideration. The district court's ruling was affirmed.

U.S. ex rel. Davis v. Prince, 2011 WL 63899 (E.D. Va. Jan. 5, 2011)

Two relators brought a *qui tam* action against five corporations and one individual, alleging that the defendants knowingly submitted false claims in connection with two governmental contracts—one contract with the Department of Homeland Security to provide security services in the aftermath of Hurricane Katrina, and a second contract with the Department of State to provide security services in Afghanistan and Iraq. The relators, who were employed as independent contractors by one or more of the defendants and the government, alleged that the defendants submitted invoices that were based on false personnel records, and that they used false documents to bill the government for unallowed expenses and worthless services. The defendants moved to dismiss the relators' complaint, arguing that the relators' claims were based on publicly disclosed information, and that the relators did not qualify as original sources of that information.

With respect to the Afghanistan/Iraq contract, the he United States District Court for the Eastern Division of Virginia addressed each of the relators' fraud claims individually. First, the relators alleged the defendants submitted false employment sheets, which resulted in the government overpaying for labor costs. The defendants asserted that a state audit had previously disclosed those allegations to the public. The court held that the audit could trigger the public disclosure bar, but concluded that it did not disclose any allegations of the fraud. Specifically, the court held the audit did not reveal that the employment sheets were actually submitted to the government, nor did it reveal the true facts from which one could infer that those sheets were inaccurate. Therefore, the court held that the public disclosure bar did not apply to those claims.

Second, the relators had alleged that the defendants defrauded the government by inflating the amount of reimbursements for travel and other expenses. The defendants referenced to two sections of the same state audit, claiming that the relators' allegations had been previously publicly disclosed. This time, the court concluded that the audit disclosed information upon which the relators' allegations of fraud were based. The relators argued that they did not actually derive any information in support of their complaint from the audit, but rather, from their own independent knowledge. The court accepted the relators' explanation, finding that the relators' employment position and the lack of similarity between the allegations and the audit report were significant proof that they had independent knowledge. Therefore, the public disclosure bar did not prevent them from bringing this claim either.

Third, the relators had alleged that the defendants defrauded the government by providing unqualified personnel. Again, the defendants argued that the relators' allegations were derived from documents already publicly disclosed. The court agreed and found numerous examples of similar allegations pertaining to unqualified personnel provided by the defendants. The court also found that the relators did not have any independent knowledge of these allegations, as they admitted that they did not read the contract, nor could they provide the source of their knowledge. The court held that since the relators did not have any knowledge of any critical facts regarding this claim, it was reasonable that the claim, at least in part, was derived from public disclosures. Therefore, that claim was barred.

Finally, the court examined the allegations against the individual defendant. The relators alleged that this defendant was liable for fraud because he personally participated in the fraudulent schemes relating to the contracts. The defendants argued that this claim should be barred because the allegations were derived from complaints filed by the relators' attorney in other suits. However, the court found this argument unpersuasive and held that none of the defendants' disclosures qualified as public disclosures because the content of the complaints did not reveal allegations of fraud. Therefore, the court found the public disclosure bar did not prevent the relators from bringing their claims against the individual defendant.

With respect to the Katrina contract, the court found that although the defendants cited numerous purported public disclosures, they did not identify any prior disclosures related to the Katrina contract. The defendants argued that the Katrina claims were nonetheless barred because they were combined with the Afghanistan/Iraq claims. The defendants argued that the complaint consisted of two counts and that each count depended on allegations relating to both contracts. In addition, they argued that even if the public disclosures related only to the Afghanistan/Iraq contract, each of the relators' claims was partly derived from public disclosures, and therefore, each claim must be dismissed in its entirety. The court disagreed and held that the allegations supporting each claim were not merged together and that public disclosures pertaining solely to the Afghanistan/Iraq

contract could not serve to prevent relators from prosecuting claims related to the Katrina contract. Since the court did not find that the allegations regarding the Katrina contract had been previously publicly disclosed, it denied the defendants' motion with respect to those claims.

See *U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 2011 WL 231767 (E.D. La. Jan. 24, 2011) at page 11.

See *U.S. ex rel. Jones v. Collegiate Funding Servs., Inc.*, 2011 WL 129842 (E.D. Va. Jan. 12, 2011) at page 13.

C. Section 3730(e)(1) Intramilitary Immunity

U.S. ex rel. Conover v. Anthony, 2011 WL 502082 (D. Md. Feb. 9, 2011)

A relator, who was an officer in the Maryland Air National Guard (MDANG), brought a *qui tam* action against twenty seven other MDANG members, alleging that the defendants—who stood to receive federal funds in the form of training pay and credits toward retirement pay—submitted false claims to the government for fly training that was never actually performed. The defendants moved to dismiss the relator's action for lack of subject matter jurisdiction, claiming that the relator's claims were barred under the FCA because the relator and all the defendants were protected by the FCA's intramilitary immunity provision, which "bars a former or present member of the armed forces from asserting a *qui tam* action against another member of the armed forces if the action arises out of that person's service in the armed forces." The relator argued that this provision did not extend to members of the National Guard when they were not in active service and that members of the MDANG were not members of the "armed forces," as required by the provision. The defendants argued that they were members of the armed forces due to their dual enlistment in both the MDANG and the federal National Guard. The United States District Court for the District of Maryland granted the defendants' motion. The court held that provision applied to the state National Guards and their members even when not called into active federal service. Further, the court found that the defendants were "performing inactive duty training required under federal law in accordance with regulations issued by the federal, not state, government. Moreover, their training was considered to be "in

Federal service as a Reserve of the Air Force" . . . , they were paid with federal funds, and they were considered federal employees . . . Thus, even though they were not actively called into federal service, the defendants were wearing their 'army hat' when they allegedly submitted false claims for payment to the government." As a result, the court dismissed the relator's complaint.

FALSE CLAIMS ACT RETALIATION CLAIMS

Haynes v. Poudre Valley Health Care, Inc., 2011 WL 1225590 (D. Colo. Mar. 31, 2011)

The plaintiff brought an action against her former employer, a hospital, alleging, among other things, retaliatory discharge under the FCA. The factual findings of the U.S. District Court for the District of Colorado showed that during the course of the plaintiff's employment, she was repeatedly warned about various performance issues, both verbally and in writing, and received several performance reviews indicating areas of growth and improvement. While the plaintiff disputed some of the factual circumstances surrounding some of these issues, she conceded that the discipline and performance reviews had occurred. At some point, another of the defendant's employees discovered an anonymous complaint letter that was to be faxed to the Colorado Department of Regulatory Agencies, alleging unethical and unsafe conduct by yet another employee. The complaint letter accused the other employee of fraud and misconduct, and identified the patients who were allegedly harmed. The defendant began an investigation and interviewed the plaintiff, who denied writing or attempting to fax the letter, although she agreed with the issues raised in the letter regarding the other employee. The defendant decided to suspend the plaintiff for a suspected violation of HIPAA. As the defendant continued its investigation, it discovered other misconduct by the plaintiff, and when she returned following her suspension, she was immediately terminated from her job for poor job performance—specifically the additional instances of misconduct, which included accessing a patient's files for no reason.

The plaintiff then argued that she was terminated for writing and attempting to fax the complaint letter—which she alleged exposed Medicare and Medicaid fraud—and claimed that her termination was in violation of the False Claims Act's anti-retaliation provision. The defendant eventually moved for summary judgment, arguing that the plaintiff failed to demonstrate that her actions were taken in furtherance of an FCA action, as the complaint letter did not mention Medicare or Medicaid fraud. The court agreed with the defendant, noting that the plaintiff's complaint letter did not put the defendant on notice of a possible FCA action against. Thus, the court granted summary judgment in favor of the defendant on the plaintiff's retaliation claim under the FCA.

U.S. ex rel. Schweizer v. Oce N. Am., Inc., 2011 WL 1097419 (D.D.C. Mar. 25, 2011)

A relator brought a *qui tam* action against her former employer and its affiliated companies. She alleged that the defendants held two contracts with the General Services Administration (GSA), under which they were to provide the federal government with printers and related products. She claimed that the defendants hired her as a GSA contracts manager and that she was responsible for daily management, oversight, and contract compliance regarding the two contracts. She alleged that during the course of her job, she observed that the defendants were committing fraud by failing to reflect commercial price discounts when negotiating contract modifications with GSA, as required by the contract. In addition, she alleged that the defendants falsely certified that certain products were manufactured in the Netherlands, when in fact, they were manufactured in China, in violation of the Trade agreements Act, which governed the contracts. She alleged that these practices violated the False Claims Act.

In addition to the fraud claims, the relator alleged that the defendants violated the False Claims Act by firing her from her job, in retaliation for her attempts to stop the fraud from continuing. She alleged that reported the fraud to the defendant's director of government contracting, and was told not to share the information with anyone outside the company; if she did, the defendants would "destroy" her. She further alleged that she reported the fraud to one of the defendant's vice presidents, as well as to the defendants' in-house and outside counsel, as directed by the defendants. Days later, she was suspended from her job without pay—soon after, she was terminated from her job, purportedly for unprofessional conduct and poor performance. Her termination letter also stated that she was fired for making unfounded allegations of fraud and criminal conduct against the director of government contracting to whom she'd first reported her concerns. The government intervened in the case and settled the fraud allegations, leaving only the retaliation claim. The defendants moved for summary judgment on that claim and the U.S. District Court for the District of Columbia granted that motion. The defendants also moved for their attorneys' fees and costs, but the court denied that motion.

With respect to the defendants' motion for summary judgment on the relator's retaliation claim, the court held that the relator did not do enough to put the defendants on notice of a potential *qui tam* action, since it was her job to investigate any non-compliance with the GSA contracts' terms. The court noted that while the relator conveyed her concerns to her supervisor, her job description required her to do so. Moreover, although she reported the alleged fraud to the defendants' counsel, she did so at the direction of the defendants, and not of her own accord. Thus, the court held, she did not put the defendants on notice that she had gone beyond the scope of her employment duties and was engaged in protected conduct

under the FCA's anti-retaliation provision, and summary judgment was entered in favor of the defendants on her retaliation claim.

With respect to the defendants' motion for attorneys' fees and costs, the court held that the defendants did not demonstrate that the relator's FCA action was "clearly frivolous" or was brought primarily for the purpose of harassing the defendants, given the relator's reasonable, good faith belief that litigating those claims would reveal fraud against the government. Furthermore, the court observed, the government intervened in the case and settled the fraud allegations. Finally, the court held, the relator's retaliation claim, was not brought frivolously either, even though her interpretation of the FCA's anti-retaliation provision was mistaken. Consequently, the court denied the defendants' motion for fees.

Kachaylo v. Brookfield Twp. Bd. Of Tr., 2011 WL 867585 (N.D. Ohio Mar. 9, 2011)

The plaintiff, a former lieutenant firefighter/paramedic and EMS operations officer, originally filed a *qui tam* action against his previous employer—a township—and several individuals, alleging that the defendants presented or caused to present numerous false claims for ambulance services to Medicaid and Medicare. The plaintiff also contended that the defendants terminated his employment because he challenged their illegal practices. He argued that, pursuant to the False Claims Act's anti-retaliation provision, he was entitled to reinstatement of his job with seniority status, twice the amount of back pay he lost with interest, and attorneys' fees. The defendants moved to dismiss the retaliation claim, arguing that the plaintiff's allegations did not satisfy the elements of a retaliation claim under the FCA, and for failure to state a claim. The United States District Court for the Northern District of Ohio granted the defendants' motion.

The court first analyzed whether the plaintiff's conduct fell within the FCA's definition of protected conduct. The complaint alleged that the plaintiff investigated and assisted a federal investigation of the defendant's allegedly false claims and that he engaged in other protected activities. In support of that allegation, the plaintiff stated that when asked to do so, he refused to instruct other paramedics to submit false claims to the federal government; he also stated that he informed the board of the township that one of the individual defendants was involved in the alleged fraud scheme and had already been debarred from participating in Medicare and Medicaid billing. The court held that such broad, conclusory allegations were insufficient to constitute protected conduct under the False Claims Act.

The court then analyzed whether the plaintiff ever put his employer on notice of any possible protected conduct he had engaged in. The court found that the plaintiff only informed the township's board of the individual defendant's debarment from Medicaid and Medicare billing, but not that false claims were being presented

to the government. The court declared: "While the notice [to one's employer] need not explicitly characterize a plaintiff's concerns as involving false claims against the government, there must be some reason for the employer to suspect that the plaintiff was contemplating a qui tam action or was assisting the government in an FCA investigation." The court found that the plaintiff failed to connect his alleged protected activity to any FCA claim or investigation, and therefore he did not put the defendants on notice of the distinct possibility that he might have intended to pursue a *qui tam* action.

Finally, the court analyzed whether the defendants discharged or otherwise discriminated against the plaintiff as a result of his participation in any possible protected activity. The court found that the plaintiff's complaint merely alleged that the defendants approved, condoned, and participated in retaliation against him. The court held that such a conclusory allegation was insufficient to show a causal connection between any protected activity and any retaliation. Accordingly, the plaintiff's retaliation claim was dismissed for failure to state a claim.

Molino v. Bast Servs., Inc., 2011 WL 841891 (N.D. Ill. Mar. 7, 2011)

The plaintiff originally brought an action against her former employer for wrongful termination and retaliation, under common law, the Illinois Whistleblower Act, the False Claims Act, and the Illinois Whistleblower Reward and Protection Act. After summary judgment was granted in her favor on each of her claims, she again moved for summary judgment to recover damages for, among other things, back pay with interest, emotional distress and other special damages, and attorneys' fees. The court granted her request for these damages.

The court first analyzed the plaintiff's back pay claims. The plaintiff—who eventually found new employment before judgment was entered in her case—sought to recover the difference between her current salary and she would have earned had she remained employed by the defendant from the date of her termination until the date of the judgment. The defendant argued that back pay should be calculated only until the plaintiff obtained her next job, rather than to the date of judgment. The court disagreed and held that the plaintiff must be made whole. Further, although the court found that the plaintiff had a duty to mitigate her damages by exercising reasonable diligence in finding new employment, the defendant did not submit any evidence on the issue of mitigation. Accordingly, the court held that, under the FCA and state whistleblower statutes, the plaintiff was fully entitled to double the amount of back pay, plus interest as calculated using the rates published by the U.S. Department of Labor.

The court then analyzed the plaintiff's request for emotional distress damages. The defendant argued that the plaintiff should not be entitled to emotional distress damages without medical evidence. The court, however, found that damages

for emotional distress could be based solely on the testimony of the plaintiff, and determined that the plaintiff suffered shock, confusion, panic, anxiety, stress, depression, loss of appetite followed by weight gain, severe sleeplessness, crying jags, humiliation, embarrassment, panic attacks, headaches and loss of self esteem and self worth. Further, the court found that the plaintiff's distress lasted for years, until she obtained her current job. As a result, the court awarded a reduced damage amount, which reflected similar case awards for emotional distress.

Finally, the court analyzed the plaintiff's request for reasonable attorneys' fees under the FCA. The plaintiff's attorneys reduced their request by 10 percent to reflect the fact that some of their work was related to claims against a co-defendant with whom the plaintiff settled. The defendant did not object to the number of hours the plaintiff's attorneys billed, but they objected to the hourly rates charged by the attorneys. The court found that the plaintiff had not provided any evidence of what comparably-skilled and experienced attorneys charged for similar employment litigation in Chicago, notwithstanding the fact that the plaintiff's attorneys included information on the rates they charged their clients. Ultimately, the court held that the plaintiff did not establish that her attorneys' market rates were reasonable and adjusted the attorneys' fees accordingly.

Sicilia v. Boeing Co., 2011 WL 252955 (W.D. Wash. Jan. 25, 2011)

The plaintiff brought an action against his former employer—the Boeing Company—alleging a violation of the anti-retaliation provision of the False Claims Act, as well as various other employment law claims. The plaintiff alleged that, as a result of a pending criminal investigation of the defendant's practices, the indictment of two of the defendant's former employees, and the fact that the government suspended the defendant from future government contracting, the defendant entered into an "Interim Administrative Agreement" with the government, in an attempt to restore its rights as a government contractor. In accordance with that agreement, the defendant hired the plaintiff to serve as an Ethics and Compliance Specialist. The plaintiff alleged that a year after the defendant entered into the interim agreement, the defendant hired a new compliance manager, and replaced her a few years later with another compliance manager. He alleged that he protested these changes and told several people within the company—including legal, finance and compliance officers—that if the company falsely certified to the government that it was in compliance with applicable regulations and the terms of the interim agreement, then it would be committing fraud and that he would be forced to report the fraud to the government. He alleged that the very next day, he received a poor performance review and subsequently went on medical leave. When he returned, he alleged that he had been removed from the company's compliance office, was given largely administrative duties involving the company's subsidiaries, and was eventually terminated from his job. The plaintiff alleged the

company took these actions in retaliation for his protests of the fraud scheme he observed and his notification to the company that he would report to any fraud to the government. The defendants moved for summary judgment on the plaintiff's claims. The United States District Court for the Western District of Washington granted the motion in part, dismissing the FCA retaliation claim, but allowing other claims to proceed.

FCA's Anti-Retaliation Provision

The plaintiff argued that he suffered retaliation as a result of his complaints about the defendant's compliance process. The court found that the plaintiff produced evidence that he had a good faith belief his former employer was defrauding the government, but the court determined that the plaintiff's argument failed because the alleged fraud was not actionable under the FCA. The court held the plaintiff failed to provide evidence that the defendant was required to certify compliance with either the terms of the interim agreement or some regulation. Moreover, since the plaintiff failed to identify any certification requirement, the court held that he could not show that the defendant's receipt of money from the government was contingent on any such certification. Finally, the court held that the plaintiff could not show that the defendant company knew that he was engaged in a protected activity, since there was a presumption that any complaints about non-compliance were made within the scope of his job duties and since the company received no clear notice from the plaintiff of any intent to pursue an FCA action. Therefore, the court granted the defendant's motion for summary judgment with respect to the FCA claim.

See *U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys.*, 2011 WL 1053366 (9th Cir. Mar. 24, 2011) at page 43.

See *U.S. ex rel. Patton v. Shaw Servs., L.L.C.*, 2011 WL 924292 (5th Cir. Mar. 17, 2011) at page 8.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Not Knowingly False

U.S. ex rel. Parato v. Unadilla Health Care Ctr., Inc., 2011 WL 1196067 (M.D. Ga. Mar. 28, 2011)

A relator brought a *qui tam* action against her former employer, a health care center (UHC), and its governing body, in which she alleged that the defendants falsely certified compliance with federal grant funding requirements on two federal grant applications, due to a conflict of interest. She also alleged a claim for retaliation under the FCA. Specifically, the relator alleged that, as part of their grant applications, the defendants were required to certify that they would "establish safeguards to prohibit employees from using their position for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain," but that the defendant company's interim CEO had an improper conflict of interest, due to his consulting relationship with a technology company from which his company purchased computer equipments and services. In addition, the relator alleged that she was terminated because she notified the company's board of her concerns. The defendants moved separately for summary judgment. The United States District Court for the Middle District of Georgia granted the defendants' motions with respect to the relator's fraud allegations. Additionally, the court granted the individual defendants' motions with respect to relator's retaliation claim, but denied the corporate defendant's motion with respect to that claim.

The court first addressed the relator's fraud allegation—that the defendants' falsely certified compliance with federal grant funding requirements. The court observed that the defendant company certified that it "will" comply with various requirements (including the conflict of interest provision), which amounted to a promise of future compliance. Thus, the court reasoned, the relator's claim was based on "promissory fraud." The court determined that such a statement could only give rise under the FCA if it was knowingly false at the time it was made, and the court held that the relator failed to show that the defendants had no intention of complying with the regulations when their grant applications were submitted—in fact, the court found that the interim CEO was not even employed by the company when the first grant application was submitted, so the certification of future compliance contained in that application could not have been knowingly false due to his alleged conflict of interest. Accordingly, the court granted the defendants' motions with respect to the relator's fraud allegations.

Next, the court analyzed the relator's retaliation claim and found that the corporate defendant, as the relator's employer, was the only proper defendant for that claim. Accordingly, the court granted summary judgment to the individual defendants with respect to that claim. The corporate defendant then argued that the relator—who served as the company's CEO—failed to put it on notice that she was acting in furtherance of an FCA action because discovering and reporting wrongdoing was part of her job. Additionally, the defendant argued that the relator was terminated because her allegations of fraud and wrongdoing were without merit, not because of retaliation. However, the court found that the relator's claims were sufficient to put the defendant on notice of a possible FCA action. Further, based on the relator's conduct and the subsequent meetings held by the board, the court held that there was an inference of causation between the relator's protected conduct and her termination. Accordingly, the court denied the defendant's motion with respect to the retaliation claim.

U.S. v. Caremark, Inc., 2011 WL 653183 (5th Cir. Feb. 24, 2011)

A relator filed a *qui tam* action on behalf of the United States and eight States, alleging that a pharmacy benefits management company and its subsidiaries committed a "reverse false claims" violation by unlawfully denying requests for reimbursements made by state Medicaid agencies. The government entities intervened and filed a complaint-in-intervention, in which they alleged that the defendants administer pharmacy benefits for its clients—some of whom are dual-eligible, as they are insured by both third parties and Medicaid. The government further alleged that under federal law, if a state Medicaid agency discovers that a Medicaid recipient is a dual-eligible, then the agency must seek reimbursement from the private insurer. The plaintiffs alleged that the defendants unlawfully denied requests for reimbursements made by state Medicaid agencies, resulting in the plaintiffs paying claims that should have been covered by the defendant. The United States District Court for the Western District of Texas disposed of all of the United States' FCA claims and entered several partial summary judgment orders against the state governments.

On appeal to the Fifth Circuit, the United States argued that the district court erred in holding that the defendants did not impair an obligation to the federal government when they denied reimbursement requests from the Medicaid agencies. The U.S. also argued that the district court erroneously held that the defendants did not make false statements to avoid making payments to the state Medicaid agencies and that its complaint-in-intervention did not relate back to the date of the relator's original complaint. The states also appealed the district court's ruling, arguing, among other things, that the district court erred in holding that: (1) *Caremark, Inc. v. Goetz*, 480 F.3d 779 (6th Cir. 2007), only established that Medicaid was the "payor of last resort"; (2) plan restrictions are not false state-

ments under the FCA if they exist in the client's plan; (3) the defendants' good faith confusion about the applicable law was legally relevant to the FCA element of falsity; and (4) the out-of-network, preauthorization, and "billed-submitted" examples of the defendants' denials of reimbursement requests were not false. The two appeals were consolidated. The Fifth Circuit affirmed the district court's ruling in part and reversed and remanded the ruling in part.

The U.S. appealed the district court's ruling that the defendants did not have any obligation to the federal government for denials of reimbursement requests that the defendants submitted to Medicaid agencies. The U.S. argued that since Medicaid is partially funded by the federal government, defrauding a state Medicaid agency is the same as defrauding the federal government, and that even if the defendants did not owe an "obligation" to the United States, by causing the state Medicaid agencies to make false statements to the federal government, the defendants still violated the FCA. The defendants countered, arguing that an obligation to a federally-funded entity was not the same as an obligation to the United States and the that the U.S. did not raise this issue in the district court. The Fifth Circuit found that if the defendants made false statements that an individual was not covered by a plan, then those false statements would cause the state Medicaid agencies to improperly pay for prescriptions and then seek reimbursement from the federal government rather than from the defendants. This in turn, would cause the state governments to receive federal funds to which they would not otherwise be entitled. The court held that if the U.S. could prove that the defendants knowingly made false statements, then they could be held liable under a reverse false claims theory. As a result, the court concluded that the district court erred in granting summary judgment to the defendants on that issue.

The circuit court then considered the question of whether or not, for statute of limitations purposes, the U.S. and States' complaint-in-intervention related back to the date on which the relator's *qui tam* complaint was filed. It noted that Congress resolved this issue when it enacted the Fraud Enforcement and Recovery Act, which specifically provides for relation back of the government's complaint-in-intervention.

Next, the appeals court determined that the defendants did not make false statements when they rejected reimbursement requests based on out-of-network and preauthorization restrictions that were contained in a client's plan. The plaintiffs had argued that while the defendants' statements that they denied requests for reimbursement because the participants' plans did not have a paper claims provision were factually true, they still gave rise to FCA liability because the defendants were not legally permitted to deny those requests. The Fifth Circuit noted that the plaintiffs did not allege that the defendants made some false certification of compliance with the law, but merely alleged that they made false statements as a matter of fact. The court concluded that the defendants' statements were not in fact false, as they

correctly stated their reasons for denying the plaintiffs' requests for reimbursement. In affirming the district court's ruling on this issue, the Fifth Circuit noted that the district court concluded that the defendants' statements were not false since there was a legitimate good faith disagreement about the applicable law. However, the plaintiffs argued that the district court erred in applying the test announced in *Caremark, Inc. v. Goetz,* 480 F.3d 779 (6th Cir. 2007), because under *Goetz,* the defendants' reliance on out-of-network and preauthorization requirements are false as a matter of law. The court held that further factual development on this issue was necessary and remanded the matter to the district court, as it could not determine whether the preauthorization requirement functioned as a procedural roadblock to reimbursement or a substantive limitation on coverage.

U.S. ex rel. DeCesare v. Americare In Home Nursing, 2011 WL 607390 (E.D. Va. Feb. 10, 2011)

A relator brought a *qui tam* action on behalf of the United States and the Commonwealth of Virginia, against, among others, against two home health care agencies (MedStar and Americare), Americare's CEO (Ammirati) and Director of Nursing (Tatum), and a patient referral agency (VNSN), alleging that the defendants knowingly filed false claims, made false statements, conspired to submit the false claims, and violated other state laws. Specifically, the relator alleged that the home health care agencies paid kickbacks to VNSN in exchange for referrals and that VNSN refused to refer patients to agencies that did not pay kickbacks. Defendants MedStar, Ammirati, and Tatum moved to dismiss the rerlator's action, arguing that the relator's complaint failed to satisfy Rule 9(b)'s particularity requirements, that there was no conspiracy, that there was no scienter, and that the relator failed to state a claim. The United States District Court for the Eastern District of Virginia denied MedStar's motion, but granted Ammirati's and Tatum's.

MedStar argued that the relator's complaint failed to allege that it knew that its certifications falsely reported the absence of kickbacks. The court disagreed and found that the complaint presented evidence in the form of a letter sent from a attorney to MedStar, explaining its view that VNSN participants were violating the Anti-Kickback Statute. The court determined that the letter was sufficient to inform MedStar that VNSN could be violating the Anti-Kickback Statute, and that fact plausibly supported the relator's claim that MedStar disregarded the possibility that its subsequent certifications to the government were false. Consequently, the court held that the relator demonstrated MedStar's scienter. Likewise, the court found that the conspiracy allegation survived dismissal, as it noted that even after receiving the letter, the company knowingly continued to participate in the illegal referral program, which constituted its assent to the other parties' illegal agreement. Thus, MedStar's motion to dismiss was denied.

Ammirati and Tatum argued that the relator's complaint failed to show their liability because it did not implicate them in any conduct and it failed to plead any alleged fraud they engaged in with particularity. The relator argued that Ammirati and Tatum were liable for the false claims of their employer, Americare. The court found that the complaint did not contain any allegations of Ammirati and Tatum's actions besides a meeting which they attended to discuss a referral program. Further, the court found that the complaint failed to allege that Ammirati and Tatum had control over Americare's actions. Accordingly, the court held that the complaint did not implicate those two defendants in any fraudulent conduct, and the claims against those defendants were dismissed.

U.S. ex rel. Turner v. Michaelis Jackson & Assocs., L.L.C., 2011 WL 13510 (S.D. Ill. Jan. 4, 2011)

Two relators brought a *qui tam* action against their employer—an eye care practice—as well as an eye specialist, alleging that the defendants billed Medicare for procedures that were either never performed or were medically unnecessary. In particular, the relators alleged that the defendants submitted fraudulent bills for diagnostic procedures that were never performed, falsified medical records to receive payments for surgeries not performed, and fraudulently billed for follow-up visits outside of the accepted time frame. The defendants moved for summary judgment and for sanctions. The United States District Court for the Southern District of Illinois denied the defendants' motions.

The relators had hand-selected 200 patient records that they thought were most likely to show fraud, and the court randomly selected 25 of those as a probe sample. The court analyzed testimony offered by the relators from another employee who worked directly with the defendants as a tech—this employee did preliminary testing, and as a scribe, took notes during primary exams. The court found that the witness failed to recall whether any fraud occurred during examinations of the patients used as samples. Furthermore, the employee's testimony failed to identify date information, the name of the patient, or the amount billed for allegedly false claims. The witness also conceded that she had never acted as a tech during these patients' examinations and that she could not state with certainty whether any of their operations were medically necessary. As a result, the court held that the employee's testimony offered nothing to substantiate the relator's claims.

The court then analyzed the expert testimony and found that one of the doctors providing an expert opinion identified specific instances in which a patient never showed up in the office, yet there was documentation of a variety of tests having been conducted. The expert also found medical impossibilities surrounding the sample patient records. The court observed that it was difficult to judge whether the defendants were simply confused or whether they knowingly engaged in billing fraud. The expert also disagreed with the medical necessity of multiple procedures performed by the defendants. As a result, the court held that it was possible that the defendants billed Medicare for procedures that were not performed and which were unnecessary. Consequently, the court denied the defendants' motion. As the court held the relators' claims could be maintained, it denied defendants' motion for sanctions.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., 2011 WL 1053366 (9th Cir. Mar. 24, 2011)

A relator brought a *qui tam* action against her former employer, a technology company, and its parent company, alleging fraud and retaliation under the False Claims Act. Specifically, the relator alleged that the defendants entered into a contract with the Army that granted the government royalty-free usage of certain inventions developed in performance of the contract, as well as the right to require the defendant to license the use of those inventions to other parties on reasonable terms. The relator alleged that the defendants knowingly defrauded the government by failing to disclose new inventions which potentially led the government to other contractors for the same work—essentially paying for those technologies twice. The relator also alleged that she reported her concerns to her supervisor and asked for an audit or internal review, but that no corrective action was taken and she was later terminated. She stated that upon learning that she was to be terminated, she copied large amounts of data from the defendant's computers in anticipation of bringing a *qui tam* action. The government declined to intervene in the relator's suit and the relator pursued the action on her own.

During discovery, the defendant moved for summary judgment on the relator's fraud claims, following the relator's refusal to answer an interrogatory requesting that she "identify each specific provision of . . . the False Claims Act that you allege . . . that Defendant knowingly violated." The U.S. District Court for the District of Arizona granted that motion, dismissed the relator's fraud claims, and denied the relator leave to file his amended complaint, which the court deemed was too long to give a "short and plain statement" of her claim." In addition, with respect to the relator's retaliation claim, the defendant filed a counterclaim, alleging that the relator misappropriated its electronic documents and files in violation a confidentiality agreement she executed when she was first employed by the defendant. Both parties then sought summary judgment on the relator's retaliation claim and the defendant's counterclaim. The district court decided both issues in favor of the defendant. The defendant then moved for attorneys' fees, which the district court granted in part. The relator appealed all of the district court's rulings to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the decisions of the district court.

Pleading Fraud with Particularity

First, the circuit court reviewed the district court's dismissal of the relator's *qui tam* claim. The court determined that, despite having access to the defendants' records, the relator's *qui tam* complaint did not satisfy Rule 9(b)'s particularity requirement, as it did not identify a single false or fraudulent claim for payment and failed to identify the particular circumstances in which the defendants withheld necessary information from the government. The Ninth Circuit stated that "[t]his type of allegation, which identifies a general sort of fraudulent conduct but specifies no particular circumstances of any discrete fraudulent statement, is precisely what Rule 9(b) aims to preclude." Ultimately, the circuit court found that the relator's allegations read more like a breach of contract claim than a fraud claim under the FCA, and although the court recognized that the relator's complaint alleged "unsavory conduct," it held that "unsavory conduct is not, without more, actionable under the FCA." Accordingly, the Ninth Circuit held that the relator failed to plead her fraud claims with the requisite particularity and that the district court properly dismissed those claims.

The Ninth Circuit also affirmed the district court's decision to deny the relator's motion for leave to amend her *qui tam* complaint. First, the court found that amending the complaint would have been futile, since the relator's motion was brought after nearly 2 years of discovery. In addition, the circuit court agreed with the district court that the proposed amended complaint, which was more than 700 pages long, was unnecessarily lengthy and should not be accepted, as it reasoned that preparing an answer would likely be unduly burdensome for the defendant.

Retaliation

Next, the circuit court analyzed the relator's retaliation claim. The defendant argued that the relator had not engaged in protected conduct under the FCA, because the fraud she suspected was not actionable under the statute and thus, her investigations could not have reasonably led to a viable FCA action. In addition, the defendant argued that the relator's termination was not for a retaliatory reason, but rather was part of a corporate reorganization unrelated to her conduct—the defendant claimed that the official who decided to terminate the relator was unaware of her inquiries regarding alleged fraud. The relator countered, arguing that officials within the defendant's company who knew of her protected conduct could have influenced the official who decided to fire her. While the court found that evidence adduced by the relator established that the set of events as she described could conceivably have occurred, it determined that the relator failed to state facts sufficient to give rise to a reasonable inference that those event did in fact occur in the manner the relator described. Consequently, the circuit court affirmed the district court's decision to grant summary judgment in favor of the defendant on the retaliation claim.

Breach of Confidentiality Agreement

Next, the Ninth Circuit analyzed whether the district court abused its discretion in granting summary judgment to the defendant on its counterclaim for breach of the confidentiality agreement. The relator admitted that she breached the confidentiality agreement by removing the defendant's documents, but she urged not to enforce the agreement on public policy grounds that enforcement of such contracts against *qui tam* relators would allow defendants to shield themselves from FCA liability by preventing relators from disclosing information to the government in furtherance of an FCA action. The circuit court found some merit in the relator's position, but ultimately chose to enforce the confidentiality agreement, as it concluded that the relator failed to justify why removal of the documents was reasonably necessary to pursue an FCA claim. Further, the circuit court found that the relator's appropriation of files was overbroad and unreasonable, noting that she indiscriminately removed a vast number of the defendant's documents. The court held that her actions could not be sustained by reference to a public policy exception. Notably, the Ninth circuit did not completely reject the idea of a public policy exception that would protect relators who remove employers' documents—it reserved judgment on that issue—but the court held that any such exception would not apply in this relator's case, since she could not demonstrate why removing the documents at issue was reasonably necessary to pursuing her *qui tam* action. Accordingly, the Ninth Circuit affirmed the district court's grant of summary judgment on the defendant's counterclaim.

Award of Attorneys' Fees to Defendant

Finally, the Ninth Circuit affirmed the district court's award of attorney's fees to the defendant. The circuit court acknowledged that such awards might chill future relators from coming forward with fraud allegations, but cautioned that "relators and their attorneys are not free to engage in misconduct without consequences merely because those consequences might chill others." However, the court noted that the district court's ruling should not have such an effect on future relators, since the district court only granted the defendant attorneys' fees with respect to the counterclaim for breach of contract, and not with respect to the relator's *qui tam* action. The Ninth Circuit stated that it was "confident that future litigants will appreciate the difference," and thus, affirmed the district court's ruling.

U.S. ex rel. Wall v. Vista Hospice Care, Inc., 2011 WL 816632 (N.D. Tex. Mar. 9, 2011)

A relator brought a *qui tam* action on behalf of the federal government and five State government, alleging that her former employer—a healthcare provider—and its two subsidiaries violated federal and state False Claims Act statutes by submitting false claims for Medicare and Medicaid reimbursement. Specifically, the relator alleged that the defendants enrolled and sought reimbursements for

patients who were not eligible for hospice car; accepted and retained payments from the government for services that were not actually provided to hospice patients; provided illegal-kickbacks; and wrongfully terminated her employment. Both the federal government and the five states declined to intervene in the relator's suit. The defendants moved to dismiss the relator's complaint, arguing that the fraud allegations were not pled with particularity and failed to state a claim. The United States District Court for the Northern District of Texas granted the motion in part.

With respect to the allegation that the defendants sought reimbursements for ineligible patients, the defendants argued that the complaint was deficient to support the relator's claim that false claims were presented to Medicare and/or Medicaid or that false records were made or used in support of false claims. Although the court found that the relator specifically alleged that ineligible patients—identified by their initials—were admitted into hospice care, as well as the pertinent dates of the alleged fraud scheme, she did not identify which of the defendants' facilities the patients were admitted to, or any specific individuals who participated in the alleged fraud, or which patients were covered by Medicare or Medicaid. Consequently, the court held that the relator had not pled this claim with sufficient particularity, but granted her leave to amend her complaint.

The court then analyzed whether the relator's assertion that the defendants falsely certified that patients were eligible for hospice care, properly stated a claim under either a legal falsity or a factual falsity theory. Under the legal falsity theory, the relator had argued that the government conditioned reimbursement to hospice providers—such as the defendants—on certification of hospice eligibility. She alleged that the defendants falsely certified that patients' eligibility without first obtaining the necessary approval of its medical director or a physician's, or by forging those individuals' signatures on certification forms. The court determined that this allegation was sufficient to state a claim for legal falsity. Next, the court analyzed the relator's factual falsity theory. The factual falsity theory was based on the defendants' alleged submission of requests for payment for services that the defendants knew were not covered. The court, though, found that the relator did not state that the defendants submitted an incorrect description of the hospice services provided nor that they requested reimbursement for goods nor services never provided. Consequently, the court held that the relator had not properly pled her theory of factual falsity with sufficient particularity. Accordingly, the court granted the defendants' motion to dismiss that claim, but without prejudice.

The court then turned to the defendants' argument that the relator's complaint did not identify the "who, what, when, where, and how," with respect to the contention that the defendants accepted and retained payments from the government for services that were never actually provided. The court, though, found that the relator's allegations were sufficient, as the relator alleged that multiple patients—

identified by their initials—were denied certain services, identified the location, listed the pertinent dates, and detailed the fraud scheme, noting that the defendants fraudulently certified compliance with statutes and regulations requiring those services, and submitted false and fraudulent claims to the government for payment. The court rejected the defendants' argument that the relator's complaint was deficient because she did not allege who was involved in the alleged fraud or the specific false statements or records used to obtain reimbursements. The defendants also argued that the relator's complaint did not sufficiently plead that their allegedly false certifications of compliance were material to the government's decision to pay them, as they contended that the certifications of compliance were required as conditions of participation in the government's programs, but not as conditions of payment. The relator, though, argued that the Medicare forms the defendants completed conditioned payments on compliance with all applicable conditions of participation. The court, however, disagreed with the relator, stating: "[T]his Court does not read that form as mandating an extension of FCA liability to every statement certifying compliance with any Medicare statute or regulation relating to conditions of participation." Thus, although the court found that the relator's allegations that the defendants retained payments for services that never performed were sufficient to satisfy Rule 9(b), it ultimately held that those allegations were insufficient to state a claim under the False Claims Act. This claim was also dismissed without prejudice.

The court continued, next evaluating the relator's contention that the defendants provided illegal kickbacks to patients and families as a means to encourage them to enroll in hospice care, and also provided improper kickbacks to nursing home employees in exchange for patient referrals. With respect to this allegation, the defendants argued that the relator had not sufficiently stated that the defendants ever certified compliance with the anti-kickback statute. The court disagreed, and found that the relator sufficiently alleged an anti-kickback scheme and that the defendants signed reimbursement forms which required compliance with the anti-kickback statute. Therefore, the court denied the defendants' motion as to this allegation.

The court next addressed the relator's allegations under the various state False Claims Act statutes and quickly observed that the relator had no actual knowledge of fraud in states other than Texas, where she worked. Moreover, the court noted that the False Claims Act statute of one of the states (Indiana) was not yet in effect when the alleged fraud occurred, and thus, the relator could not maintain a claim under that state's FCA law. As a result, the relator was allowed to maintain only the state FCA claims brought under the Texas statute—the claims brought under the other four state FCA laws were dismissed, with the claims brought under Indiana's statute being dismissed with prejudice.

Finally, the court considered the relator's retaliation claim under the False Claims Act. After observing that the FCA did not provide a statute of limitations for retaliation claims, and after recognizing the Supreme Court's guidance that court's should look to the most closely analogous state law to determine the applicable limitations period, the court determined that the 180-day limitations period provided for under the Texas Whistleblower Act applied. Since the relator filed her retaliation claim almost two years after suffering the last alleged retaliatory act, the court determined that her retaliation claim was time-barred, and dismissed that claim with prejudice.

U.S. ex rel. Zemplenyi v. Group Health Coop., 2011 WL 814261 (W.D. Wash. Mar. 3, 2011)

A relator brought a *qui tam* action against several health care corporations—one of which was her former employer—alleging that the defendants submitted false Medicare claims by performing medically unnecessary cataract surgeries. The relator further claimed that she voiced her objections to her employer about the allegedly false claims and reported her concerns to a Medicare Compliance Officer, and that, as a result, her former employer retaliated against her and subjected her to a negative performance review. The relator then resigned, claiming that she had no other choice under the circumstances.

The defendants moved to dismiss the relator's claims, arguing that she failed to plead fraud with particularity and failed to state a claim. Further, the defendants argued that the relator's retaliation claim should be dismissed because the relator could not possibly have reasonably suspected that the defendants were submitting false claims. The United States District Court for the Western District of Washington granted the motion in part, as it dismissed the relator's fraud claims but allowed her retaliation claim to go forward.

With respect to the relator's fraud claim, the court found that the relator described the alleged scheme by discussing how the defendants stood to benefit from an increase in cataract surgeries. However, the court found that the scheme alleged could not be construed as a violation of the FCA because the defendants were paid a fixed rate per patient regardless of the number or type of service provided. As the court stated, "[u]nder such a system, it cannot be said that false claims are being made, since payments remain the same regardless of whether a surgery is performed or not. While Plaintiff puts forth that by incurring higher costs, Defendants may receive higher capitated payments for managed care beneficiaries in the future, it nonetheless remains the case that those costs are self-incurred, and the government continues to pay a flat rate. Defendants receive payments in a fixed amount per member, per month, and thus the government is not spending additional money when an individual surgery is performed." Moreover, even though the court found that the relator described six cases of unnecessary surgery, it found that the alleged conduct was not material to the government's decision to pay the monthly flat rate. Consequently, the court held that the relator's allegations of a fraud scheme were not sufficiently linked to a reliable indicia leading to an inference that false claims were submitted. The court dismissed the relator's fraud claims with prejudice.

The court then examined the relator's retaliation claim. With respect to this claim, the court found that the relator satisfied all the necessary pleading requirements, as she stated enough facts to support her contention that she reasonably believed that the defendants were committing fraud and investigated, she stated that she repeatedly expressed her concerns to her employer and filed reports about the alleged fraud, and she alleged that her former employer retaliated against her by subjecting her to negative performance reviews without an opportunity to respond. Therefore, the court held that the relator sufficiently alleged a retaliation claim and denied the motion to dismiss that claim.

U.S. ex rel. Huey v. Summit Healthcare Ass'n, Inc., 2011 WL 814898 (D. Ariz. Mar. 3, 2011)

A relator brought a *qui tam* action against his former employer, a hospital, as well as a company that provided management services to the hospitals, and one of the management company's executives, alleging that the defendant hospital violated the False Claims Act by conspiring to defraud the government, by submitting false Medicare claims that sought reimbursements for unnecessary services and for admitted patients who were ineligible for Medicare benefits, and by falsely certifying compliance with Medicare conditions of participation and the Medicare anti-kickback statute, even though the hospital illegally received referrals from a medical center and failed to properly supervise nurse anesthetists—in fact, the relator brought a separate claim alleging violations of the anti-kickback statute itself. He further alleged that the defendant management company informed the hospital of the billing issues, and that the management company's executive advised the hospital not to self-report the violations to the government, and instead, retain the improper overpayments. In addition, the relator alleged that he spoke with the hospital's compliance officer, who admitted that the problem had been going on for years, and further, that he reported the problems at hospital board meetings, but was ignored. Finally, he alleged that he was terminated from his job as a result of investigating the allegedly improper billing practices. The defendants separately moved to dismiss the relator's complaint for failure to state a claim and for failure to satisfy Rule 9(b)'s pleading requirements. The United States District Court for the District of Arizona granted the management company and individual defendants' motions, and granted the hospital's motion in part.

Rule 9(b)

The defendants argued that the relator failed to allege why any of the hospital's services were unnecessary, in light of a patient's complaints, symptoms, or illness. The defendants argued took issue with the sources relied upon by the relator and contended that the relator's allegations did not contain sufficient particularity, as it either did not identify the patients at issue as Medicare beneficiaries, did not demonstrate that the services in question were actually billed to Medicare, did not specify why the services were not reimbursable, and/or did not include specific dates or service. Notwithstanding these contentions, the court held that the relator's fraud allegations, taken as a whole, satisfied Rule 9(b)'s pleading requirements, since the relator offered details from several internal and external investigations and reports which allegedly identified pervasive issues with the defendant hospital's practices.

With respect to the relator's claim that the hospital falsely certified its compliance with Medicare Conditions of Participation and the Medicare anti-kickback statute, the court first noted the distinction between Medicare conditions of participation and Medicare conditions of payment. As the relator's allegations arose from alleged failures to meet conditions of Medicare participation, the court held that those claims were "insufficiently related to the government's payment decision to form the basis of an FCA claim." Moreover, the court held that these claims were conclusory and unsupported. As a result, these claims were dismissed for failure to meet the Rule 9(b)'s particularity requirements. The court also dismissed the relator's claim brought under the anti-kickback statute, noting that there is no private right of action under that statute.

Conspiracy

Next, the court considered the relator's claim that the defendants engaged in a conspiracy to defraud Medicare, when the management company executive and the hospital's board allegedly agreed not to self-report the alleged Medicare fraud to the government. In response, the management company executive argued that the intracorporate conspiracy doctrine protected him from liability, since he was engaged in a collaborative decision-making process and was acting within the scope of his duties as an agent of the corporate defendants. The court agreed and dismissed the conspiracy claim against the individual defendant. The court also dismissed the conspiracy claim against the defendant management company, noting that the relator only alleged that the company had knowledge of the hospital's false Medicare claims. The court held that such knowledge alone was insufficient to support a conspiracy claim. Since the conspiracy claims against the management company and its executive were dismissed, the court also dismissed the conspiracy claim against the hospital, since there was no other defendant with whom the hospital could have conspired.

Retaliation

Finally, the court examined the retaliation claim. The defendant hospital argued that the relator failed to show that he engaged in any protected activity. The court, though, observed that the relator alleged that he advised the defendant hospital's board of directors to address and investigate the Medicare billing and compliance issues, and warned the board of the potential for FCA liability. The court held that these activities were sufficient to constitute protected activity, and when coupled with the allegation that the hospital terminated his job in response, the relator's allegations were sufficient to state a claim for retaliation under the False Claims Act. Therefore, the court denied the defendant hospital's motion to dismiss the retaliation claim.

U.S. ex rel. Compton v. Circle B. Enters., Inc., 2011 WL 382758 (M.D. Ga. Feb. 3, 2011)

A relator brought a *qui tam* action against his former employer—a contractor—and several subcontractors and individuals, alleging that the defendants presented false claims to the government through a scheme that violated the Anti-Kickback Act. The United States District Court for the Middle Division of Georgia granted the defendants' motions to dismiss for failure to state a claim and for failure to plead fraud with particularity. However, the court allowed the relator to amend the complaint. The realtor did file an amended complaint, alleging that his employer contracted with the government to provide housing in disaster relief, contracted with subcontractors to fulfill the government contract obligations, but, due to concerns that the subcontractors would cut out the prime contractor and deal directly with the government on future contracts, the company agreed to pay the subcontractors rebates on each house, and these payments were passed on to the government. The relator further alleged that these agreements were not set forth in any written agreement, the payments were off the ledger books, and that the relator was told not tell anyone about the rebate payments. The relator alleged that compliance with the anti-kickback act was a condition that had to be met before the prime contractor could receive payment from the government and that providing these secret rebates caused false claims to be submitted to the government. The defendants moved to dismiss the relator's amended complaint, arguing that it did not correct the former complaint's deficiencies. This time, the court denied the motions, as it held that the amended complaint established plausible claims for relief and pled fraud with particularity.

The court found the amended complaint explained the alleged plan and that the relator alleged particular facts that made it plausible that the plan's terms were that the employer would provide payments to the subcontractors in exchange for their agreement not to contract directly with the government. The court also found that the relator identified who participated in the fraudulent scheme, what

was to be gained by the fraud, and when the fraudulent scheme went into place. The court held that the relator connected the fraudulent agreement to acts taken pursuant to the agreement by claiming to have first-hand knowledge that the employer made unrecorded payments and that the subcontractors accepted those payments. Further, the court held that the relator adequately pled the submission of false claims because he was personally responsible for ensuring that the invoices were submitted to the government and every invoice included the cost of the rebate payments.

U.S. ex rel. Assocs. Against Outlier Fraud v. Huron Consulting Group, Inc., 2011 WL 253259 (S.D.N.Y. Jan. 24, 2011)

A relator brought a *qui tam* action against two medical service corporations, alleging that the defendants violated the False Claims Act by submitting fraudulent Medicare outlier reimbursement forms. In its first amended complaint, the relator alleged that Medicare generally pays hospitals a fixed amount based on the average cost of treatment for a particular illness, but also provides additional payments for cost outliers in certain cases. The realtor further alleged that the defendants manipulated the cost-to-charge ratio for the outlier payments, which allowed them to receive triple the proper payment amount. The defendants moved to dismiss the relator's complaint and the United States District Court for the Southern District of New York granted the defendants' motion without prejudice. The relator was allowed to file a second amended complaint and the defendants filed new motions to dismiss, on the grounds that the relator's complaint failed to state a claim and failed to plead with particularity.

The court first noted that the "first flaw in the First Amended Complaint was its failure to adequately allege the basis of the relator's first hand knowledge." The court determined that the relator's second amended complaint cured this deficiency, as it alleged first-hand knowledge of the defendant's fraud scheme, acquired through an employee of a hospital who obtained information regarding the fraud through his personal eyewitness accounts and personal relationships. The relator also provided information regarding this individual came to learn of the alleged fraud, even listing the names of the employees who informed him of the fraud.

The court then noted that the "second deficiency of the First Amended Complaint was its failure to plead the fraud claims with the particularity required by Federal Rule of Civil Procedure 9(b). Again, the court held that the second amended complaint cured this deficiency, as the complaint included a chart with a sample of 421 Medicare outlier cases, which included dates of patient admission, length of stay, billing codes, account balances, and cost-to-charge ratio. The court held that, pursuant to the standard announced by the Fifth Circuit in *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 189 (5th Cir. 2009), the relator's chart provided "particular and reliable indicia that false bills were actually submitted as a result of the scheme." The court also agreed with the relator that the particularity requirement should be relaxed in this instance, because the relator was not in a position to plead more specific information. Thus, the court denied the defendants' motion to dismiss.

U.S. ex rel. Folliard v. Hewlett-Packard Co., 2011 WL 109570 (D. D.C. Jan. 11, 2011)

A relator brought a *qui tam* action against a technology company, alleging that it violated both the False Claims Act and the Trade Agreements Act, by knowingly mis-identifying the country of origin on certain of its products that were "likely" being sold to the government. The relator alleged that the Trade Agreements Act prohibited the government from purchasing products that originated in non-designated countries, and thus the defendants falsified this information in order to make sales. The defendant moved to dismiss the relator's complaint, arguing that the relator failed to identify any false claim submitted to the government, and failed to specify the date, content, products, or individuals involved in any such claims. The United States District Court for the District of Columbia granted the motion. The court held that the relator failed to identify any allegedly false claim to the government, and only relied on the general popularity of the defendants' products to form a belief that the government had been defrauded. However, the relator did not allege any facts that showed that the government ever purchased any of these products. Therefore, the motion was granted and the relator's complaint was dismissed.

See *U.S. ex rel. Lisitza v. Johnson & Johnson*, 2011 WL 673925 (D. Mass. Feb. 25, 2011) at page 23.

See *U.S. ex rel. Onnen v. Sioux Falls Indep. Sch. Dist. #49-5*, 2011 WL 691620 (D.S.D. Feb. 18, 2011) at page 67.

See *U.S. ex rel. Jones v. Collegiate Funding Servs., Inc.*, 2011 WL 129842 (E.D. Va. Jan. 12, 2011) at page 13.

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

U.S. ex rel. Bennett v. Boston Scientific Corp., 2011 WL 1231577 (S.D. Tex. Mar. 31, 2011)

A relator brought a *qui tam* action against her former employer—a manufacturer of medical devices—and one of the company's subsidiaries, alleging that the defendants violated the False Claims Act. Specifically, the defendants were accused of causing physicians and hospitals to submit false Medicare and Medicaid claims for reimbursement by improperly promoting one of their devices for an off-label use, instructing hospitals and physicians to "upcode" the procedures on claim forms, providing kickbacks. In addition, the relator alleged that the defendants violated the FCA's anti-retaliation provision by firing her. The government declined to intervene. The defendants moved to dismiss the relator's complaint for failure to plead with particularity and for failure to state a claim. The United States District Court for the Southern District of Texas granted the defendants' motion and granted the relator's motion for leave to amend her complaint.

Failure to Plead Fraud with Particularity

As an initial matter, the court noted that the relator argued for a relaxed pleading standard, stating that Rule 9(b) should be strictly applied, since the relator did not have access to certain information that would support her fraud allegations. The defendants countered, stating that they also did not have such information, since all billing and claims information would be in the possession of doctors, hospitals and government agencies. The court rejected the relator's argument, stating that "[t]here is no basis to relax the Rule 9(b) pleading standard on this ground under the applicable precedents." While the court agreed that relators who allege that defendants have caused third parties to submit false claims can satisfy Rule 9(b) "alleg[ing] either at least some false claims with particularity or . . . alleg[ing] both particular details of the scheme to submit false claims and reliable indicia that lead to a strong inference that false claims were actually submitted." However, the court held that the present relator's complaint was insufficient because the relator did not allege "'a representative sample' or even an 'instance of submission'" of a false claim, nor did the relator allege that "a specific physician or hospital submitted a false claim," that specific physicians and hospitals received the defendants' off-label promotions and/or illegal kickbacks, that specific physicians or hospitals were instructed to engage in improper upcoding, or the dates on which such misconduct occurred. The court held that the relator did not allege a sufficient factual basis for her assertions, and thus, did not satisfy Rule 9(b)'s requirements.

Failure to State a Claim

With respect to the relator's specific allegations of fraud, the court first analyzed the relator's claim that the defendants' off-label marketing of their device caused physicians and hospitals to submit false healthcare false. The relator argued that the claims were false because the use of the off-label use of the device could not have been "reasonable and necessary" or "medically necessary," since the device had ever received approval for the off-label use promoted by the defendants. However, the court found the complaint did not allege that the defendants concealed or misstated the limits of the FDA's approval with respect to the uses of the device. The court noted that Medicare contractors may approve coverage for such devices that and necessity decisions are made by individual physicians. The relator also argued that the off-label use of the device could not have been medically necessary because the use was considered experimental within the scientific community. The court, though, determined that off-label use of a drug is separate and distinct from medical necessity, noting that each state's Medicare carrier determines the conditions for coverage and reimbursement and that the relator failed to allege that any state denied coverage for the off-label use promoted by the defendants. Further, the court held that the relator's an allegation that a device's use is "experimental" is not the same as an allegation that a device's use is medically unnecessary. In short, the court concluded that "even if a drug or device manufacturer's marketing or promotion activities violate FDA regulations, that is insufficient to plead that the manufacturer caused physicians or hospitals to submit false claims for reimbursement." Consequently, the relator's allegations regarding off-label marketing were dismissed without prejudice.

The court then examined the relator's allegation that the defendants prepared sales presentations in which they "coached" and instructed doctors and hospitals to upcode certain procedures, so as to receive over-reimbursements from Medicare to which they were not entitled. The court held that this allegation failed to state a claim, since Medicare uses a Prospective Payment System that provides pre-determined reimbursement rates to healthcare providers. According to the court, these flat rates incentivize providers "to use lower-cost procedures to treat the diagnosis identified in the PPS code," and do not create an inference that, by using the defendants' device for an off-label use, providers knowingly submitted false claims to the government. The court held that the relator's upcoding allegation did not state a claim for relief, since she did not allege that the defendants and providers knowingly used the wrong code for procedures when billing Medicare. This claim was also dismissed without prejudice.

Next, the court analyzed the relator's allegations that the defendants provided illegal kickbacks in various forms to hospitals and physicians in order to induce them to purchase and use the defendants' device. Although the relator alleged that providers' compliance with the anti-kickback statute was a prerequisite to seeking reimbursement under Medicare, the court found that the relator never alleged that any such unlawful remuneration actually caused any physicians or hospitals to falsely certify compliance with the anti-kickback statute and, thereby submit false claims. Therefore, the court held that the relator failed to state a claim and the kickbacks claim was dismissed without prejudice.

Retaliation Claim

Finally, the court analyzed the relator's allegation that the defendants fired her in retaliation, after she challenged the legality of the defendants' marketing practices. The court found that the relator's allegations were only threadbare and that her factual allegations were insufficient. The court also noted that the relator's claim that she "challenged" the defendants' practices might not be sufficient to subject the defendants to liability for retaliation under the False Claims Act, as several other courts have required plaintiffs to do more, including investigate the alleged fraud, make specific reports or complaints to the employer, and tie the alleged wrongdoing to a scheme of fraud against the government. Therefore, the court also dismissed the relator's retaliation claim, without prejudice.

U.S. v. Carell, 2011 WL 1060669 (M.D. Tenn. Mar. 21, 2011)

The United States brought an action under the False Claims Act against a group of home health care entities, a health care management company and its owner (Carell), and another individual (Vining). The government alleged that the defendants defrauded the Medicare program by establishing Vining as the "sham owner" of the healthcare companies, while Vining and Carell agreed that Carell and his management company would actually have total control over the health care companies. The government contended that the purpose of this agreement was to evade a Medicare rule regarding cost reports; providers submit cost reports to Medicare in order to receive interim payments based on their estimated costs for providing services to Medicare patients. Pursuant to the rule at issue, when home health care companies submit cost reports to Medicare, the amount of their costs attributable to compensation paid to their owners is limited. However, this rule does not apply to costs attributable to fees paid to management companies. The United States claimed that, as a result of the defendants' improper agreement, eight cost reports filed by Vining, as the purported owner of the home health care companies, were false, as they included fraudulent costs for management fees, which were actually fees paid to the real owners—Carell and his company. Carell and his company filed separate motions for partial judgment on the pleadings, which the United States District Court for the Middle District of Tennessee considered. The court denied the defendants' motions.

The defendants essentially argued that the government failed to state a claim under the False Claims Act. First, they claimed that they never presented, or caused to be presented, any false statements to the government, since all Medicare cost reports are submitted to private parties that serve as Medicare intermediaries.

The court reviewed the decisions of various circuit courts, and determined that the False Claims Act does not necessarily require FCA defendants themselves to have presented false claims to the government, since causing someone else to present false claims is also actionable under the statute. The court rejected the defendants' argument and held that the government's allegation that the defendants "knowingly or with reckless disregard presented, or caused to be presented, false or fraudulent Cost Reports to receive reimbursement and that the United States suffered damages as a result of those submissions" was "sufficient to establish a plausible claim for relief."

The defendants also argued that the government did not state a claim that they were liable for making false statements with respect to false claims. They asserted that the FCA, as it was written at the time of the alleged fraud, only imposed liability upon those who made false statements with the intent that those statements would lead to false claims being paid by the government, and that their allegedly false statements were made to a Medicare intermediary, which made the payments to them. The court noted that after the government filed its complaint, this provision of the FCA was amended, making clear that the statute did not involve any requirement that defendants specific intend that their false statements defraud the government. While the court held that this amendment did not apply to the current case, it still found that the government stated a claim, stating that "[w]hile the Cost Reports were submitted to [the Medicare intermediary], those records undoubtedly were submitted with the intention that the Government, not [the intermediary], pay the claims."

Consequently, the court denied the defendants' motions for judgment on the pleadings.

U.S. ex rel. Raynor v. Nat'l Rural Utils. Co-op Fin. Corp., 2011 WL 976482 (D. Neb. Mar. 15, 2011)

A relator brought a *qui tam* action against a non-profit financial cooperative (CFC), an electric rural utilities cooperative association and its board, two international accounting firms, three credit rating agencies and several individuals, alleging that the group of defendants conspired to defraud and in fact did defraud the USDA's Rural Economic Development Loan and Grant Program, which is a program that is administered through the Federal Financing Bank (FFB) to provide funding to rural projects through local utility organizations. The relator alleged that, as a result of accounting fraud and false and misleading financial statements and SEC filings issued by CFC, the FFB purchased $3 billion in bonds issued by CFC under the program. Further, the relator alleged that CFC used the same fraudulent financial statements to induce the Federal Agricultural Mortgage Corporation (Farmer Mac) to invest in CFC, and that CFC also caused Farmer Mac to improp-

erly extended loans to CFC without authorization. The defendants separately moved to dismiss the relator's complaint for failure to state a claim, failure to plead with particularity, and for lack of subject matter jurisdiction. The United States District Court for the District of Nebraska granted the motions.

The court found the realtor failed to state a claim because he failed to allege that CFC ever actually submitted a false claim to the government. Further, the court held that the *qui tam* complaint failed to explain how the claims were false, that any of CFC's allegedly false statements were material to the government's investment decisions, that the defendants knowingly presented false claims to the government, or that CFC ever actually received federal funds, since USDA merely guarantees FFB loans, and there was no allegation that CFC ever defaulted on one of those loans. The relator countered, arguing that Rule 9(b)'s particularity requirements did not apply, or in the alternative, that the heightened pleading standard should be relaxed in this case. The court declined to relax the pleading standard, though, and held that the relator's complaint was deficient, since it did not "allege the 'who, what, when, where, and how' of the fraud."

Finally, the court rejected the relator's conspiracy allegation, as it found that the *qui tam* complaint only stated that each of the defendants must have been aware of CFC's fraudulent activity. Furthermore, the court found that the complaint failed to indicate how CFC's allegedly fraudulent actions would have been material to the government's decision to issue loans. Consequently, the relator's complaint—which had already been amended twice—was dismissed with prejudice.

Abbott v. BP Exploration and Prod., Inc., 2011 WL 923504 (S.D. Tex. Mar. 15, 2011)

Two relators brought a *qui tam* action against a group of oil and gas exploration and production corporations, seeking to enjoin the defendants' ability to drill until their alleged lack of compliance with environmental and safety regulations was corrected. Specifically, the relators alleged that the defendants falsely certified to the Department of Interior (DOI) that they were in compliance with the Outer Continental Shelf Lands Act (OCSLA) and all regulations issued pursuant to the Act—requirements, the relators alleged, was included as part of five leases the government issued to the defendants to drill, develop, and produce oil and gas resources. The relators alleged that the defendants knowingly submitted, and then attempted to fraudulently conceal, false documents certifying compliance with these regulations, when in fact the defendants violated OCSLA by failing to adhere to various safety and environmental regulations. The defendants moved to dismiss the relators' complaint for failure to state a claim and for failure to plead fraud with particularity. Further, the defendants sought to dismiss the relators' claim for injunctive relief under the OCSLA. The United States District Court for the Southern District of Texas denied the defendants' motions.

Failure to State a Claim

The defendants argued that the relators' fraud claims under the FCA should be dismissed for failure to state a claim because the relators did not plead that a false claim for money or property was presented to the government. Alternatively, they argued that their alleged post-lease regulatory non-compliance could not serve as a basis for a claim under the FCA. The court found that the right to extract oil and gas was predicated upon the defendants' compliance with the leases' contractual provisions, and that since the leases did not grant the defendants a fee simple ownership of the oil and gas, the defendants could not exercise its rights to drill until they received the necessary permits and approvals—which the relators alleged were fraudulently acquired. The defendants argued that any misrepresentation in such permits could not have been false certifications, because the permits were submitted after the issuance of leases. The court, however, found that the defendants misconstrued the relationship between leases and permits, and held that the defendants' rights under the leases were expressly conditioned on their obtaining certain government permits to ensure the safety and efficacy of any drilling and production activities, and that the defendants violated the lease terms by making misrepresentations that ultimately rendered the leases void. Further, the court held that the defendants' alleged fraudulent inducement was material to the government's decision to permit them to operate. Thus, the defendants' motion to dismiss the relators' FCA claims for failure to state a claim was denied.

Failure to Plead Fraud with Particularity

The defendants then argued that the relators failed to plead the alleged fraud with particularity. The court, though, found that the relators provided a specific description of the alleged chain of events, including specific dates, people involved, emails received, and meetings attended. The court found that the relators effectively identified the defendants' signatory and the government's approval based on the defendants' certification. Therefore, the court found the relators' allegations successfully established that the defendants lacked the requisite documents necessary to support their earlier certifications of compliance. Accordingly, the court held the relators had pled their fraud claim with sufficient particularity. The defendants' motion to dismiss the *qui tam* complaint for failure to plead fraud with particularity was denied.

Claim for Injunctive Relief

Finally, the court analyzed the relators' claim for injunctive relief, due to the alleged violations of the OCSLA. The court denied the defendants' motion to dismiss, as it determined that the DOI was not an indispensable party, the relators had standing to bring the claim, and the relators stated a permissible claim for injunctive relief.

U.S. v. Dialysis Clinic, Inc., 2011 WL 167246 (N.D.N.Y. Jan. 19, 2011)

A relator brought a state and federal *qui tam* action against his former employer, a dialysis treatment center, alleging that the defendant submitted false claims to Medicare, Medicaid, and the Veterans' Administration, by falsely certifying its compliance with Medicare and other programs, while violating regulatory requirements that resulted in compromised patient care. The defendants moved to dismiss the relator's action, for failure to plead with particularity and failure to state a claim. The realtor filed a cross-motion for leave to file a second amended complaint. In response, the defendant filed a second motion to dismiss for lack of subject matter jurisdiction. The United States District Court for the Northern District of New York granted the relator's cross-motion, holding that there was no undue delay or prejudice to the defendant in allowing the relator to amend his complaint. However, after examining and applying the federal FCA, the court also granted the defendant's motions in part.

The court began by examining the motion to dismiss for lack of subject matter jurisdiction. The defendant argued that the relator's allegations were based on information that was previously publicly disclosed in an audit report by the New York State Office of the Medicaid Inspector General, that consisted of a random sample of 200 services with Medicaid payments and revealed missing documentation, documents not signed by licensed health professionals, incomplete treatment, and failure to explain medical benefits. The realtor conceded that the report had been publicly disclosed, but argued that his allegations were different from the information included in the report, that nothing in the report pertained to patient treatment, nursing practices, and safety regulations, and that his allegations were based on his own personal observations. The court held the allegations were distinct and separate theories of liability that were not based upon or referenced in the audit report, and the defendant's motion to dismiss for lack of subject matter jurisdiction was denied.

The court then examined the defendant's argument that the relator's complaint did not satisfy Rule 9(b)'s particularity requirement. The defendant argued that the complaint lacked sufficient detail about the dates, amounts, and employees involved with the submission of any false claims. While the court observed that the relator provided 16 examples of alleged violations of patient safety, it found the complaint contained imprecise references to routine and systematic violations of Medicare and failed to identify any specific fraudulent claim that was submitted to the government. The relator responded that even though no specific claim was identified, the complaint gave the defendant adequate notice of the allegations. The court, though, held that since the relator failed to identify a single bill submitted in relation to any of the examples, the *qui tam* complaint did not plead the alleged fraud scheme with particularity, and granted the defendant's motion to

dismiss on that basis. The court noted that the relator was not entitled to a relaxed pleading standard because the facts alleged did not support a strong inference of fraud. As the relator's complaint did not plead the alleged fraud scheme with particularity, it was dismissed.

Finally, the court examined the defendant's argument that the relator's complaint failed to state a claim under the FCA, under both express and implied false certification theories. The relator argued that the Medicare enrollment form the defendant completed made compliance with regulations a precondition of government payment. Specifically, the relator argued that by executing the form, the defendant expressly certified that it would comply with all conditions of participation as a prerequisite to Medicare payment. The defendant, however, argued that the Medicare enrollment form was not a claim for payment, but was merely an agreement to comply in the future with applicable laws and regulations. The court disagreed with the defendant's argument, but nonetheless held that the relator's express certification claim failed, since the relator did not identify any fraudulent claim for payment submitted by defendant to the government. The court then examined the implied false certification. The realtor argued that the defendant submitted claim forms and therefore attested, by implication, to its compliance with all applicable statutes and regulations. The court held that the statutes the relator cited established conditions of participation, but were not conditions of payment, as they were not prerequisites to receiving reimbursement from the government. Therefore, while a violation of these statutes and regulations could result in the termination of a facility's participation in the program, it could not constitute conditions to government payment. Consequently, the court granted the defendant's motion to dismiss for failure to state a claim.

All of the relator's claims under state FCA statutes were dismissed for the same reasons.

A. Bankruptcy and Automatic Stay Issues

U.S. ex rel. Kolbeck v. Point Blank Solutions, Inc., 2011 WL 325898 (E.D. Va. Feb. 1, 2011)

A relator brought a *qui tam* action against two corporations and three individuals. The government declined to intervene. The relator voluntarily dismissed the individual defendants. The two corporate defendants filed for bankruptcy and the bankruptcy court stayed the *qui tam* action as to these two defendants, pursuant to the automatic stay provision of the bankruptcy code. The question presented was whether a *qui tam* action in which the government declined to intervene was nonetheless an action or proceeding "by a governmental unit" so as to fall within the statutory governmental police powers exception to the automatic stay provision. The U.S. District Court for the Eastern District of Virginia concluded that the matter was properly stayed by the bankruptcy court against the two defendants.

The court determined that the application of the governmental police powers exception to the automatic stay provision depends on the party conducting the proceedings. When the government intervenes in a *qui tam* action, it has the primary responsibility of prosecuting the action and the action would appropriately proceed as an exception to the automatic stay. However, the court found nowhere in the statutory definition of "governmental unit" any reference to a private citizen or entity acting on behalf of the government. Thus, the court found that when a relator conducts a *qui tam* action without intervention by the government, enforcing the automatic stay is appropriate, since such actions fall outside the scope of the governmental police powers exception.

B. Calculating Damages and Civil Penalties

See *U.S. v. Karron*, 2011 WL 1126578 (S.D.N.Y. Mar. 23, 2011) on page 66.

C. Costs and Attorney's Fees

U.S. ex rel. Feldman v. Van Gorp, 2011 WL 651829 (S.D.N.Y. Feb. 9, 2011)

A relator brought a *qui tam* action against an individual and a medical college. Following a trial, the jury returned a verdict in favor of the relator on three of his FCA five claims. The relator then moved for an award of attorneys' fees and expenses. The United States District Court for the Southern District of New York granted the motion in part.

The defendants did not object to the reasonableness of the attorney rates or hours expended. They did, however, object to the requested fees for travel time, arguing that because the relator hired counsel from Philadelphia rather than New York, he should not be entitled to attorneys' fees for travel time. The court found that a reasonable client would have chosen New York counsel in order to prevent unnecessary travel costs, and held that the relator could not receive attorneys' fees for most of the claimed time spent traveling. The court did, however, approve attorneys' fees for travel time for recording depositions. The court also reduced the lodestar for one of the attorneys' travel time, finding that the attorney failed to verify his travel time entries.

The defendant then argued that the sum which the relator sought to recover for attorneys' costs excessive, as it was almost the same as the amount recovered as damages on the FCA claims. The court examined whether the relator's partial success required a downward adjustment, but ultimately held that the relator's successful and unsuccessful claims were interrelated and could not be segregated neatly. Therefore, the court declined to subtract the expenses related to the unsuccessful claims from the lodestar and held the ratio of attorneys' fees to the damages in the case was within the acceptable limits and should not be reduced by the percentage of unsuccessful claims simply because damages were low. However, the court found that an overall 15% reduction in the lodestar was warranted.

Finally, the defendant objected to the amount of costs claimed to have been incurred by the relator's attorneys. The court held that the relator was not entitled to recover travel costs for the same reasons as to the recovery of attorneys' fee for travel time. However, once again, the court reimbursed for travel costs associated with depositions. Next, the defendant argued that the relator's photocopying and reproduction costs were taxable under the fee-shifting provision of 28 USC § 1920 and that the relator provided insufficient details as to which photocopying costs were taxable. The court disagreed and held fee shifting statues permit recovery of costs beyond those considered taxable. Moreover, it held that the relator submitted a detailed accounting of its photocopying costs, which was sufficient to support an award of copying costs. The court also determined that the relator's personal expenses were reasonable and entitled to compensation.

See *U.S. ex rel. Schweizer v. Oce N. Am., Inc.,* 2011 WL 1097419 (D.D.C. Mar. 25, 2011) at page 32.

D. *Res Judicata* and Collateral Estoppel

U.S. v. Karron, 2011 WL 1126578 (S.D.N.Y. Mar. 23, 2011)

The United States brought a suit under the False Claims Act against the president of a medical technology company. The government alleged that the defendant submitted grant applications to the National Institutes of Standards and Technology to develop computer applications that would generate 3-D models that would assist in medical procedures, including surgeries and creating prosthetics. The government further alleged that once the defendant was awarded the grant, she was required to make various certifications regarding how the grant funds were being used. Following a routine audit, the government alleged that the defendant and her company were found not to be in compliance with the terms of the grant and that federal funds had been used improperly. As a result, the government then suspended the defendant's grant funding. Years later, the defendant was criminally convicted for misapplying the federal grant money. She was imprisoned and ordered to pay restitution. She appealed her conviction to the U.S. Court of Appeals for the Second Circuit, which upheld the verdict and sentencing. The United States then filed its civil action under the False Claims Act and later moved for summary judgment on those claims.

The government argued that the defendant was estopped from contesting civil liability, due to her prior criminal conviction for intentionally misapplying federal funds. The government relied on both the common law doctrine of collateral estoppel, as well as an FCA provision that precludes those convicted of fraud or making false statements from denying liability for making false statements in subsequent, related civil proceedings. The defendant disagreed and argued that summary judgment was not proper.

The U.S. District Court for the Southern District of New York agreed with the government that the defendant was precluded from contesting civil liability under the False Claims Act, since her criminal conviction was a final judgment; both the criminal and civil proceedings stemmed from the same conduct and the defendant had a full opportunity to litigate those issues during the criminal proceedings; the jury in the criminal case specifically found that the defendant intended to misapply federal funds (which satisfied the FCA's scienter requirement); and the defendant's fraudulent conduct was proven to satisfy the FCA's materiality requirement (since upon learning of the fraud, the government suspended the defendant's grant funding and eventually prosecuted her). The court also agreed with the government's calculation of damages, and concluded that, since the government did not receive any benefit from its relationship with the defendant and her company, it was entitled to three times the amount of the grant funds she received, minus the restitution that had already been paid. However, the court disagreed with the government's calculation of statutory penalties under the FCA. While the government sought statutory penalties for twenty alleged false statements, based on all of the certifications made by the defendant, the court held that the government only made generalized allegations of false statements in its civil complaint. Since only one document reflecting a false statement by the defendant had been used during the criminal proceedings, the court granted the government a statutory penalty with respect to that single false statement, but held that summary judgment with respect to the other alleged false statements was not proper.

U.S. ex rel. Onnen v. Sioux Falls Indep. Sch. Dist. #49-5, 2011 WL 691620 (D.S.D. Feb. 18, 2011)

The relator, a registrar for the Southeast Technical Institute (STI), alleged that he was wrongfully terminated from his job. After the city school board approved the decision, the relator appealed to the state circuit court, arguing that the termination was arbitrary, unreasonable, and violated public policy. The court affirmed the decision of the school board and held that the relator was terminated for no reason other than his incompetence as a registrar. The relator also brought a *qui tam* action against the school district, a local government agency and several individuals, alleging that the defendants applied for and received money from the government based on false and fraudulent representations that STI was graduating qualified individuals and that qualified teachers were being hired. The complaint was dismissed for failing to plead fraud with particularity. The relator amended and alleged that in order to receive financial aid, the defendants falsely certified compliance with the Program Participation Agreement (PPA) with the Department of Education (DOE). The relator also alleged that his employment was terminated in retaliation of his investigation and reporting of the alleged fraud. The defendants moved to dismiss for failure to meet pleading requirements and failure to state a claim. The relator also moved for sanctions. The United States District Court for the District of South Dakota granted the defendants' motion in part and denied the relator's motion for sanctions.

The individual defendants moved for dismissal of the claims asserted against them in their individual capacities. The court observed that the relator alleged that the individual defendants knew about the false claims, but did not advise the government "for to do so would endanger their funding." The court held that, read liberally, this allegation was sufficient to avoid dismissal of the defendants in their individual capacities.

The defendants then argued that the relator failed to plead fraud with particularity and failed to state a claim because he did not attach a copy of STI's PPA, which was integral to that defendant's receipt of federal funds. The relator responded that he could not attach a copy of the PPA to the Amended Complaint because he did not have it. Further, the realtor alleged that through his work he gained

personal knowledge of the requirements of all PPAs. The court held that the complaint alleged violations of the PPA with sufficient particularity to place the defendants on notice of the alleged violations even without a copy of the PPA attached, and thus rejected the defendants' argument that the relator failed to plead fraud with particularity.

Res Judicata

The defendants then argued the relator's FCA claims were barred by the doctrine of *res judicata* and collateral estoppel, claiming that he had a full and fair opportunity to litigate the issues in his prior state court proceedings. The court began by examining whether or not the issues were identical. The court distinguished the relator's personal cause of action under the anti-retaliation provision of the FCA from his *qui tam* claim that the defendants falsely certified compliance to receive federal funds and noted that the resolution of personal employment litigation does not preclude a qui tam action, since it is often impractical and impossible to pursue both the claims in one suit, due to the procedural differences between personal and *qui tam* litigations.

The court first analyzed the relator's FCA retaliation claim and determined that that claim was precluded, since the state court specifically held that the sole reason for the relator's termination was his incompetence as registrar. The state court explicitly stated that the relator failed to prove that he was a whistleblower or that the school terminated him in retaliation for whistleblowing. Thus, all for requirements of *res judicata* were present, as the claim of termination in retaliation in the state court action was identical to the present claim; there had been a final judgment on the merits in the prior action regarding that claim; the parties to the retaliation claim were the same; and the relator was given fair opportunity to litigate the alleged whistleblowing and retaliation claims in the state court proceeding. Accordingly, the court held that under the doctrine of *res judicata,* the relator was barred from re-litigating his retaliation claims.

The court then analyzed the relator's FCA claim. The defendants argued that although the relator's federal lawsuit advanced a different legal theory and a different remedy than in his state court case, the causes of action were the same. The court disagreed and found that the relator's appeal to the state court focused on the legality of his termination, while the *qui tam* action focused on whether the defendants falsely certified compliance with the PPA in order to receive federal funds. The court found that the relator's fraud claims were not precluded under the doctrine of *res judicata,* since the issues in the federal FCA suit and the state employment suit were not the same; the parties were not the same or in privity, since the government had no involvement in the state proceeding; and there was no opportunity for the relator to litigate the *qui tam* issues in the state court case, since the relator had to wait for the government's decision to intervene and only had 90 days to appeal the school board's decision. Ultimately, the court held that none of the claims in the relator's *qui tam* action could have or should have been joined in his administrative appeal of the school board's termination decision. Therefore, the court denied the defendants' motions to dismiss the *qui tam* claim.

E. Seal/Service Issues

American Civil Liberties Union, et al. v. Holder, et al., 2011 WL 1108252 (4th Cir. Mar. 28, 2011)

The American Civil Liberties Union, joined by OMB Watch and the Government Accountability Project, filed a complaint in the United States District Court for the Eastern District of Virginia against the U.S. Attorney General and the clerk of the district court. The plaintiffs made a facial constitutional challenge to the seal provisions of the False Claims Act, arguing that those provisions violate the public's First Amendment right of access to judicial proceedings; that the provisions gag *qui tam* relators from speaking about their cases, in violation of their First Amendment rights; and that the provisions allow Congress, and not the courts to decide whether *qui tam* complaints should be sealed, in violation of separation of powers principles. The district court rejected all of the plaintiffs' arguments and dismissed their complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The plaintiffs appealed the district court's decision to the U.S. Court of Appeals for the Fourth Circuit, and the circuit court affirmed the district court's decision.

Right of Access to Judicial Proceedings

The Fourth Circuit first examined whether or not the First Amendment provides a right of access to sealed *qui tam* complaints. The court observed that the First Amendment does provide a right of access—although not absolute—to criminal trials and certain criminal proceedings, and that most circuit courts—including the Fourth Circuit—recognize such a right with respect to aspects of civil cases, even though the Supreme Court has not addressed that issue. The circuit court, though, ultimately determined that it was not necessary to resolve whether or not any right of access to aspects of criminal proceedings extends to sealed *qui tam* complaints. The court concluded that even if such a right exists, the First Amendment allows for narrowly-tailored denials of access when it serves a compelling government interest, and that the FCA's seal provision fits those criteria. First, the court held that the United States has a compelling interest in protecting the integrity of fraud investigations and that the FCA's seal provision was added to serve that interest. Next, the court held that the seal provision is narrowly-tailored, since: (1) "Congress crafted a detailed process for initiating and pursuing a qui tam complaint under the FCA, including a narrow window of time (i.e., 60 days) in which the seal provisions are mandatory;" (2) the seal provisions mandate judicial review once the statutory 60-day period expires, and the United States can only extend the seal upon a showing of good cause to the court; and (3) the seal only restricts relators from publicly discussing the fact that a *qui tam* suit was filed, but allows them to disclose the existence of the fraud if they choose to do so. Consequently, the Fourth Circuit affirmed the district court's dismissal of the right of access claim.

Gag on *Qui Tam* Relators

The Fourth Circuit addressed the appellants' second argument—that the FCA's seal provision violates the First Amendment by gagging relators from speaking about their *qui tam* complaints. The appellants were not relators seeking to speak about sealed *qui tam* cases, so they sought standing to raise this argument by contending that they were "willing listeners" available to relators who would discuss their *qui tam* complaints with them, but for the FCA seal provision. The appellants, though, could not identify any *qui tam* relator who fit this description. Thus, the court held that the appellants didn't have standing to bring their "willing speaker" claim and affirmed the district court's dismissal of that claim.

Separation of Powers

Finally, the Fourth Circuit considered the appellants' third argument—that the FCA's seal provision infringes on the power of federal district courts by requiring that all *qui tam* complaints be filed under seal, without any opportunity for a judicial assessment of whether or not sealing is necessary. The circuit court observed that the federal district courts enjoy three types of inherent power: (1) core powers under Article III of the Constitution; (2) those powers that are "necessary to the exercise of all others;" and (3) those powers that are "reasonably useful to achieve justice." The court concluded that the FCA's seal provision does not impact the first category, as that category relates to the judiciary's power to decide all cases over which it has jurisdiction, without Congressional interference in dictating the results of particular cases. The court concluded that the seal likely reaches the third, and possibly also the second categories. In either case, the court held, the seal provisions do not violate Constitutional separation of powers principles, since they are a proper subject of congressional legislation and do not intrude on 'the zone of judicial self-administration to such a degree as to prevent the judiciary from accomplishing its constitutionally assigned functions." As a result, the Fourth Circuit affirmed the district court's dismissal of the separation of powers claim.

Judgments & Settlements

JANUARY 1–MARCH 31, 2011

Merck & Co., Schering Corp. and Warrick Pharmaceuticals Corp.: (W.D. Wis. March 28, 2011)

Merck & Co., Schering Corp. and Warrick Pharmaceuticals Corp. agreed to pay the State of Wisconsin $4.2 million to resolve allegations that the companies defrauded the Wisconsin Medicaid program by reporting false prices to inflate sales and alter reimbursement formulas. Under the terms of the settlement agreement, the companies agreed to pay $3.7 million in restitution and $550,000 in costs and fees.

Occidental Petroleum Corporation, Occidental Oil and Gas Corporation, and OXY USA Inc.: (E.D. Tex. March 22, 2011)

Occidental Petroleum Corporation, Occidental Oil and Gas Corporation, and OXY USA Inc. agreed to pay the United States $2.05 million plus interest to settle allegations that the companies violated the False Claims Act by knowingly underpaying royalties owed on natural gas produced from federal leases. This settlement is the result of a *qui tam* action filed by Harold Wright, who is now deceased. Mr. Wright's heirs will receive his relator's share award of $91,000 plus interest.

Kellum Family Medical Practice Associates: (W.D. Tex. March 21, 2011)

Kellum Family Practice Associates, two of its principal physicians, and two employees agreed to pay the United States $1.5 million and agreed to enter into a Corporate Integrity Agreement with the Department of Health and Human Services Office of the Inspector General to settle a False Claims Act *qui tam* action, in which the company was alleged to have employed unlicensed personnel to treat Medicare, Medicaid and Tricare patients. The *qui tam* action was filed by Julie Hajek Stewart, a former medical assistant at the company. Stewart will receive $250,000 of the recovery.

Medline Industries, Inc. and The Medline Foundation: (N.D. Ill. March 11, 2011)

Medline Industries, Inc. and The Medline Foundation agreed to pay the United States $85 million to settle allegations that they violated the False Claims Act by paying kickbacks to hospitals and other health care providers that purchased company products under Medicare and Medicaid. This settlement resolves a *qui tam* action filed by Sean Mason, a former company employee. Mason, who was represented by attorneys from Milberg LLP, Marek Law Office PC, Williams Montgomery & John Ltd and Clifford Law Offices PC. will receive $23,375,000 (27.5%) of the settlement amount as his relator's share.

AstraZeneca Pharmaceuticals LP and AstraZeneca LP: (March 10, 2011)

AstraZeneca agreed to pay $68.5 million as part of a multistate settlement involving allegations that the company promoted its psychiatric drug Seroquel for unapproved uses. While the drug was approved for treating schizophrenia and bipolar disorder, AstraZeneca promoted the drug for non-approved uses, including for dementia, Alzheimer's, post traumatic stress disorder, depression and anxiety. The settlement funds will be shared by 37 states and the District of Columbia.

Avaya Inc. and CIT Group, Inc: (C.D. Cal. March 2, 2011)

Avaya Inc. and CIT Group, Inc agreed to pay the United States more than $16.5 million to resolve allegations that the companies overcharged federal and state government agencies for the lease and purchase of desktop telephone systems. Between the mid-1990s and 2006, Avaya, a New Jersey telecommunications company, allegedly knowingly billed hundreds of agencies and collected payments for phone systems that did not work and billed its government customers and received payments for phone systems that were no longer in use. CIT Group, Inc., a New York-based financial services company, allegedly later bought some of Avaya's customer accounts and then knowingly continued the improper billing practices. Avaya agreed to pay $13,481,791 and CIT agreed to pay $3,111,400. California, Delaware, Florida, Illinois, Nevada, Tennessee; the Commonwealths of Massachusetts, Virginia; and the District of Columbia will share in the settlement. The settlement resolves a False Claims Act *qui tam* action that was filed in 2004 by two former Avaya employees, Mauro Vosilla and Steven Rossow. Vosilla and Rossow will share the relators' award of $3.3 million.

Blue Cross Blue Shield of Illinois: (N.D. Ill. Feb. 24, 2011)

Blue Cross Blue Shield of Illinois agreed to pay the United States and the State of Illinois $25 million to settle False Claims Act allegations that the company denied nursing care coverage for sick children and fraudulently shifted the cost of such care to the state and federal Medicaid programs. Under the settlement agreement, the company will pay the State of Illinois $14.25 million and the United States $9.5 million. The company also agreed to pay $1.25 million to the State of Illinois to resolve consumer fraud allegations.

Innovative Resources Group, LLC (dba APS Healthcare Midwest): (N.D. Ga. Feb. 22, 2011)

APS Healthcare Midwest agreed to pay the United States and the State of Georgia a total $13 million to settle a False Claims Act *qui tam* action that alleged that APS submitted false claims to Medicaid, through the Georgia Department of Community Health, for specialty services related to disease management and case management that were not provided. As part of the settlement agreement, APS agreed to enter into a Corporate Integrity Agreement with the Department of Health and Human Services, Office of Inspector General. The relator in this case, Michael Claeys, was represented by TAF member Julie Bracker of Bothwell Bracker & Vann.

Alaska DigiTel LLC: (D. Ak. Feb. 22, 2011)

General Communication Inc. (GCI) agreed to pay the United States $1,556,075 to settle a False Claims Act *qui tam* action involving Alaska DigiTel LLC, a former Alaska limited liability company that is now owned by GCI. The *qui tam* suit alleged that, between January 1, 2004 and August 31, 2008, Alaska DigiTel submitted false claims for ineligible subscribers to the Federal Communications Commission's (FCC) Low Income Support Program.

Catholic Healthcare West: (E.D. Cal. Feb. 18, 2011)

Catholic Healthcare West agreed to pay the United States $9.1 million to settle allegations that seven of its hospitals—Community Hospital of San Bernardino, California; St. Bernadine Medical Center in San Bernardino, California; St. Elizabeth Community Hospital in Red Bluff, California; O'Connor Hospital in San Jose, California; Seton Medical Center in Daly City, California; St. Joseph's Hospital and Medical Center in Phoenix, Arizona; and St. John's Regional Medical Center in Oxnard, California—violated the False Claims Act by committing Medicare fraud. Three of the hospitals allegedly received overpayments due to Medicare processing errors, but did not return the funds when the errors were discovered; three other hospitals allegedly submitted inflated costs for their home health agencies and were subsequently overpaid; and one hospital claimed entitlement to additional funds for treating a high percentage of patients with end-stage renal disease for several years, including a period for which it was not eligible.

Pharmacia Corporation: (N.Y. Sup. Ct. Feb. 18, 2011)

Pharmacia Corporation agreed to pay $2.5 million to the New York Medicaid program and to the Elderly Pharmaceutical Insurance Coverage Program (EPIC) to settle allegations related to inflated drug costs. The State of New York alleged that Pharmacia intentionally reported false and inflated prices for its products, causing New York's Medicaid Program and the EPIC program to pay higher prices for Pharmacia's prescription drugs. Pharmacia also agreed to reimburse the state for the $50,000 costs of its investigation.

Cheyenne Vision Clinic, P.C.: (D.S.D. Feb. 14, 2011)

Cheyenne Vision Clinic, P.C. agreed to pay the United States $235,000 to settle False Claims Act allegations that the company improperly billed the federal government and the Wyoming Medicaid program for extended color vision exams for which the company did not have the required equipment.

Senior Care Group Inc.: (W.D.N.C. Feb. 10, 2011)

Senior Care Group Inc. agreed to pay the United States $953,375 and to enter into a five-year corporate integrity agreement to settle allegations that the company defrauded the Medicare program by billing Medicare for unnecessary services provided by the company's rehabilitation contractor, Evergreen Rehabilitation LLC. This settlement follows a multi-year investigation carried out by the U.S. Department of Health and Human Services Office of Inspector General and the Federal Bureau of Investigation.

Actavis Mid-Atlantic LLC and Actavls Elizabeth LLC: (Texas Feb. 1, 2011)

Actavis Mid-Atlantic LLC and Actavis Elizabeth were ordered by a Texas jury to pay the United States and the State of Texas $170.3 million for overcharging the state Medicaid program. This verdict resolves a False Claims Act *qui tam* action filed by Ven-A-Care of the Florida Keys Inc., which was represented by TAFEF members Jim Breen of The Breen Law Firm PA; Jarrett Anderson of Anderson LLC; John Clark of Goode Casseb Jones Riklin Choate & Watson PC; the Law Office of Glenn Grossenbacher; and Prichard Hawkins McFarland & Young.

CareSource, CareSource Management Group Co. and CareSource USA Holding Co.: (S.D. Ohio Feb. 1, 2011)

CareSource, CareSource Management Group Co. and CareSource USA Holding Co. agreed to pay the United States and the state of Ohio $26 million to resolve allegations that they defrauded Medicaid by submitting false data and by receiving reimbursements for health care services that were not provided, including screening, assessment, and case management services for adults and children with special health care needs. This settlement resolves a False Claims Act *qui tam* action filed by Laura Rupert and Robin Herzog, two former CareSource employees. Rupert and Herzog will receive a $3.1 million share of the federal recovery. The relators were represented by TAFEF members Brian Kenney and Pam Brecht of Kenney & McCafferty as well as TAFEF members Rick Morgan and Mary Jones of Morgan Verkamp.

Oracle America Inc.: (E.D. Ark. Jan. 31, 2011)

Oracle America Inc. agreed to pay the United States $46 million to resolve allegations that Sun Microsystems Inc., a corporation that merged with Oracle in 2010, violated the False Claims Act and the Anti-Kickback Act by submitting false claims and causing others to submit false claims to the General Services Administration (GSA) and to other federal agencies, and by paying illegal kickbacks to systems integrator companies. This settlement resolves a False Claims Act *qui tam* action filed in 2004 by Norman Rille and Neal Roberts, who were represented by TAFEF members Ron and Von Packard of Packard, Packard & Johnson.

N.I. Teijin Shoji Co. Ltd.: (Jan. 25, 2011)

N.I. Teijin Shoji Co. Ltd. and American subsidiary N.I. Teijin Shoji (USA) Inc. agreed to pay the United States $1.5 million to resolve potential False Claims Act allegations involving the companies' importation and sale of Zylon fiber—a key ballistic material in bulletproof vests that has been alleged to be defective due to concerns that the fiber degrades quickly over time and that this degradation renders bulletproof vests containing woven Zylon fiber unfit for use.

Lockheed Martin Inc.: (S.D. Miss. Jan. 24, 2011)

Lockheed Martin Inc. agreed to pay the United States $2 million to settle allegations that the company conspired to submit false claims under a contract with the General Services Administration (GSA) in support of the Naval Oceanographic Major Shared Resource Center (NAVO MSRC). This settlement resolves a False Claims Act *qui tam* action filed in 2009 by David Magee, a former employee at the NAVO MSRC. Magee, who was represented by TAFEF members Jim Helmer, Paul Martins and Rob Rice of Helmer, Martins, Rice & Popham, along with co-counsel, Gary Galiher, Rick DeRobertis and Dale Saito of Galiher DeRobertis Ono, will receive a $560,000 share of the federal recovery.

St. Jude Medical Inc.: (D. Mass. Jan. 20, 2011)

St. Jude Medical Inc. agreed to pay the United States $16 million to resolve allegations that the company violated the False Claims Act and the Anti-kickback Act by knowingly and intentionally using post-market studies and a patient registry as means to pay kickbacks to induce participating physicians to implant St. Jude pacemakers and implantable cardioverter defibrillators (ICDs) in their patients. This settlement resolves a False Claims Act *qui tam* action filed by Charles Donigian, a former St. Jude technician. Donigan who was represented by TAFEF members from Nolan & Auerbach; Thomas & Associates; and the Law Office of Suzanne E. Durrell, will receive a $2.64 million share of the total recovery amount.

Young Adult Institute, Inc.: (S.D.N.Y. Jan. 18, 2011)

Young Adult Institute, Inc. agreed to pay the United States and the State of New York $18 million to settle allegations that, from 1999 through 2010, the company submitted false consolidated fiscal reports that inflated the costs of certain residential facilities as a means to receive Medicaid funding to which it was not entitled. Company officials Philip H. Levy and Karen Wegmann, as well as former CEO Joel M. Levy, were also allegedly involved in the fraudulent scheme. Of the settlement amount, the State of New York will receive $10.8 million and the United States will receive the remainder. This settlement was the result of a False Claims Act *qui tam* action filed by Richard Faden, a former budget director for the company. Faden was represented by TAFEF member David Koenigsberg of Menz Bonner & Komar LLP and Bruce Menken of Beranbaum Menken LLP.

Fastenal Company: (W.D. Mo. Jan. 13, 2011)

Fastenal Company, a Minnesota-based national hardware store distributor, agreed to pay the United States $6.25 million to resolve allegations that the company violated the False Claims Act by failing to meet its obligations under a contract with the General Services Administration's Multiple Award Schedule. Specifically, the company allegedly failed to provide complete information about its commercial sales practices, overcharged government customers, and knowingly sold products to the government that were manufactured in countries that do not have trade agreements with the United States, in violation of the Trade Agreements Act. The investigation into Fastenal's activities was prompted by a post-award audit conducted by the GSA Office of Inspector General.

MSO Washington, Inc.: (W.D. Wash. Jan. 7, 2011)

MSO Washington, Inc. and MSO's owner, Charles Plunkett, agreed to pay the United States $565,000 to settle allegations that, between January 1, 2002 and continuing through the present, MSO submitted false claims to Medicare and Medicaid by upcoding for services, and by seeking reimbursement for medically unnecessary services, for services lacking proper documentation, and for services that were never rendered. In addition to the settlement amount, MSO and Plunkett agreed to enter into a five-year Corporate Integrity Agreement with the Office of Inspector General of the Department of Health and Human Services.

Seven Hospitals: (W.D. N.Y. Jan. 4, 2011)

Seven hospitals agreed to pay the United States more than $6.3 million to settle allegations that they submitted false claims to Medicare related to kyphoplasty procedures performed between 2000 and 2008, by performing the procedures on an in-patient basis to increase their Medicare billings. The hospitals involved in the settlement include: Lakeland Regional Medical Center, Lakeland, Fla. ($1,660,134.49); The Health Care Authority of Morgan County—City of Decatur dba Decatur General Hospital, Decatur, Ala. ($537,892.88); St. Dominic-Jackson Memorial Hospital, Jackson, Miss. ($555,949.35); Seton Medical Center, Austin, Texas ($1,232,955.91); Greenville Memorial Hospital, Greenville, S.C. ($1,026,764.01); Presbyterian Orthopaedic Hospital, Charlotte, N.C.($637,872.57); and The Health Care Authority of Lauderdale County and the City of Florence, Ala., dba the Coffee Health Group, fka Eliza Coffee Memorial Hospital ($676,038.00). This settlement resolves a 2008 False Claims Act *qui tam* action filed in Buffalo, New York by Craig Patrick and Charles Bates, who will receive a $1.1 million share of the federal recovery. The relators were represented by TAFEF member Mary Louise Cohen of Phillips & Cohen.