
False Claims Act & Qui Tam
Quarterly Review

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Edited by Cleveland Lawrence III
Taxpayers Against Fraud
TAF Education Fund

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

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

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

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A Practitioner's Update: Recent *Qui Tam* Fee Awards

Marc S. Raspanti, Martha S. Helmreich, and Sonia S. Shariff

FROM THE EDITOR

“Incentivizing integrity is the simple idea behind the False Claims Act, the most successful fraud-fighting law of the last quarter century . . . and the next.”

—Susan Strawn, President and CEO, Taxpayers Against Fraud Education Fund

It may be unfortunate that we sometimes need to “incentivize integrity,” but the idea is certainly not a new one. As we know, the founders of this country borrowed heavily from English law and one of the concepts they adopted was the idea of *qui tam* lawsuits—lawsuits that a person files on behalf of his/her government, which result in a reward if the lawsuit is successful. Early American laws are littered with examples of *qui tam* laws. The most famous American *qui tam* law is the federal False Claims Act, which rewards those who file successful lawsuits on behalf the government and thereby help the government recover funds that were stolen by means of fraud. While it comes as no surprise that big business interests often deride the False Claims Act as a bounty program for greedy, disgruntled employees, the fact remains that the federal government recovers billions of dollars each year due to cases filed by whistleblowers under the False Claims Act, and only a fraction of that money has been paid to whistleblowers as rewards. And let’s be clear: oftentimes whistleblowers must be incentivized to file *qui tam* lawsuits, because exposing fraud—especially massive fraud—is usually career suicide, often leaving unemployed whistleblowers and their attorneys to battle against huge corporations and their well-paid legal teams. Fortunately, incentivizing integrity hardly ever costs the taxpayer a dime. Since the False Claims Act allows the government to receive treble damages, the government is compensated for the damage it suffered before any reward to a whistleblower—a reward that is taxed, by the way—is ever paid.

But the concept of incentivizing integrity does not apply to whistleblowers alone. Of course, whistleblowers need attorneys to file “*qui tam*” lawsuits, and those attorneys—who almost always work on a contingency fee basis—must also be incentivized to expose fraud against the government and return money to the federal Treasury. The False Claims Act provides an incentive for such attorneys by specifying that, in successful cases, their reasonable attorneys’ fees will be paid. Once again, the taxpayers are not responsible for paying those attorneys’ fees. Instead, defendants who defrauded the government are required to cover those costs. But since the False Claims Act is about incentivizing integrity, whistleblowers and their attorneys are cautioned against filing frivolous lawsuits in hopes of receiving some financial windfall. If a whistleblower files a frivolous *qui tam* lawsuit, then he/she can be ordered to pay the defendants’ reasonable attorneys’ fees. In fact, this issue includes an article that discusses the False

Claims Act's attorneys' fees provisions, which explains how Congress chose to balance the desire for having whistleblowers come forward, against the desire not to fill up the courts with needless litigation.

So as various elements of corporate America continue to arrogantly flout the law and defraud the government—to all of our economic detriment—and as the people of the world react by forming new political parties and participating in “Occupy Wall Street” and other, similar protests, we should encourage whistleblowers and their attorneys to expose fraudulent schemes, even if they must be incentivized to do so. Simply put, rewarding whistleblowers makes sense. Just as it made sense back in the late 1700s, when our brand-new country was trying to find its way, it makes sense now, as our country again tries to find its way, during the most trying economic crisis of most of our lifetimes.

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Recent False Claims Act & *Qui Tam* Decisions

JULY 1, 2011–SEPTEMBER 30, 2011

FALSE CLAIMS ACT LIABILITY

A. What Constitutes a False Claim

***U.S. ex rel. Rigsby v. State Farm Fire and Cas. Co.*, 2011 WL 4590761 (S.D. Miss. Sept. 30, 2011)**

Two relators brought a *qui tam* action against several insurance and engineering companies, alleging that the defendants violated the False Claims Act and defrauded the National Flood Insurance Program (NFIP) after Hurricane Katrina by conspiring to illegally shift the insurance companies' responsibility to pay insurance claims for wind damage to the government, by mis-classifying wind damage as storm surge damage. As a result, the relator alleged, the defendants caused false claims to be presented to the NFIP. The United States declined to intervene in the relators' case. Eventually, the relators dismissed their claims against all but two of the defendants: insurer State Farm and engineering company Haag. Those two defendants moved for summary judgment, arguing that the relators failed to show that the flood claims at issue were actually false or that the defendants knew that they were false. Further, the defendants argued that the relators' reverse false claim allegation failed because that theory conflicted with the relator's other theory of liability—in essence, the defendants argued that their NFIP claims could not be both false claims and reverse false claims. The United States District Court for the Southern District of Mississippi granted the defendants' motion in part, dismissing the reverse false claim allegations, while allowing the relators to maintain their other FCA claims.

Direct FCA Claims

The relators' direct FCA claims alleged that, following the hurricane, State Farm paid one family—the McIntosh family—the full amount of their flood insurance policy (\$250,000) and then sought reimbursement from the federal government under the NFIP. The relators contended that State Farm's claim to the NFIP was false, because the actual flood damage sustained by the McIntosh family was only about \$130,000—far less than the \$250,000 the family received. The defendants argued the relators failed to adequately support their overpayment allegation. They asserted that, since the McIntosh family's home had already been repaired, the relators' insurance claims adjustment and repair cost expert's report, which estimated the family's property damage at no more than \$130,000 was irrelevant. The court, though, held the relators submitted sufficient evidence to create a genuine question of material fact regarding this issue and accordingly, denied the defendants' request for summary judgment on the basis that State Farm's claim was not actually false.

Next, the court considered the defendants' argument that the relators failed to show that they acted with the requisite scienter to submit false claims. The defendants argued that State Farm's claim to the federal government could not have been knowingly false because the Federal Emergency Management Agency was aware of State Farm's claims adjusting practices, and State Farm believed in good faith that the McIntosh claim was not false. The relators countered that State Farm's adjustment of the McIntosh family's flood claim did not comply with FEMA regulations—a contention the defendants strongly objected to—and that FEMA's alleged knowledge of State Farm's claims adjusting practices did not automatically preclude a showing of the defendants' scienter, since State Farm withheld material information from FEMA. The court found that it was not clear whether the adjusting procedure used by State Farm was appropriate or otherwise permitted by FEMA. Further, the court found that, given the verbal nature of a number of FEMA's alleged approvals of State Farm's claims adjustment practices and the centrality of those alleged approvals to the parties' dispute, it could not ascertain whether the defendants had FEMA approval to use the allegedly improper claims adjustment procedure. Further, the court held that even if State Farm was allowed to use that procedure for calculating flood damage, genuine issues of material fact remained regarding whether or not the defendants possessed the requisite state of mind to violate the FCA. Consequently, the court denied the defendants' summary judgment motion with respect to the scienter element.

Reverse False Claim

Finally, the court turned its attention to the relators' reverse false claim allegation. As an initial matter, the court noted that the relators themselves conceded that there was no reverse false claim, which warranted dismissal of that allegation. In addition, the defendants argued that summary judgment on any reverse false claim was required because the McIntosh claim submitted by State Farm could not represent both a direct false claim and a reverse false claim. The relators argued that because genuine issues of material fact existed as to whether the McIntosh claim was actually false, genuine issues of material fact also existed as to whether State Farm was liable under the reverse false claims provisions of the FCA. The court, though, determined that the relators failed to show that the defendants were under any statutory or regulatory obligation to repay money to the government that could give rise to a reverse false claim (as opposed to an obligation to merely reimburse the government for an overpayment on a direct claim. Accordingly, the court granted the defendants' motion for summary judgment with respect to the relators' reverse false claim allegation.

***U.S. ex rel. Davis v. Prince*, 2011 WL 2749188 (E.D. Va. July 13, 2011)**

Two relators brought a *qui tam* action against five corporations and one individual (the sole owner of one of the corporate defendants), alleging that the defendants violated the False Claims Act by knowingly submitting false claims in connection

with two governmental contracts—one contract with the Department of Homeland Security’s Federal Protective Service to provide security services at disaster relief sites in the aftermath of Hurricane Katrina, and another contract with the Department of State to provide security services in Iraq and Afghanistan. With respect to the Katrina contract, the relators alleged that they worked as independent contractors on the Katrina contract in several capacities and that one of the corporate defendants, BSC, submitted false invoices to the government and committed substantial billing fraud on that contract, by falsifying forms and inflating the services they provided and the number of hours they worked, by falsifying accounting records and paying employees and vendors for expenses that were not actually incurred and then billing the government for it, and by billing the government for worthless managerial services and failing to comply with contractual and legal obligations, such as ensuring that weapons were not distributed to felons or other persons disqualified from using them under the law.

The government declined to intervene in the relators’ action and the defendants moved for summary judgment on the relators’ claims regarding the Katrina contract, arguing that, even after discovery had ended, the relators could not support their allegations of fraud. The U.S. District Court for the Eastern District of Virginia agreed, noting that the relators failed to create an issue of disputed fact with respect to their allegations that the defendants knowingly submitted fraudulent invoices to the government. In fact, the court noted, at oral argument, the relators conceded that they had not met their burden with respect to the allegation that the defendants knowingly submitted falsified forms regarding the hours they worked and the services they provided to the government.

The court also determined that the relators failed to dispute the defendants’ contention that they did not submit any accounting records to the government in support of alleged cost expenditures. Finally, the district court considered the relators’ allegation that the defendants billed the government for worthless managerial services and failed to comply with contractual and statutory obligations. The defendants argued that they were not allowed to—and in fact, did not—bill for the types of services the relators alleged were fraudulent. The court, though, was not persuaded, noting that the Katrina contract included enough flexibility to allow the defendants to bill for the types of managerial services at issue, and that the defendants’ contention that they were simply precluded from billing for those services was insufficient to support summary judgment. However, the court concluded that even if the defendants had billed the government for the managerial services, they could not be held liable under the False Claims Act, since the managerial services terms of the contract terms were vague. The court relied on the testimony of the government’s contracting officer, who stated that the defendants were not responsible for monitoring weapons distribution, since the government was responsible for running background checks on the defendants’ security guards, and

since, due to exigent circumstances, the defendants were allowed to use security guards before the government had completed their background checks. The court concluded that while the defendants may not have provided the government with the necessary information to run background checks in a timely manner, such a failure amounted to no more than a breach of contract—not a violation of the False Claims Act. The court noted that, in their brief opposing the defendants' motion for summary judgment, the relators raised, for the first time, an argument that the defendants falsely certified their compliance with the Katrina contract's terms. The court recognized the false certification theory of FCA liability, but determined that since the relators' complaint did not allege this theory or the necessary facts in support of the theory, they could not raise it at the summary judgment stage.

Consequently, the court granted summary judgment in favor of the defendants on all of the relators' claims related to the Katrina contract.

***See U.S. ex rel. Hobbs v. MedQuest Assocs., Inc.*, 2011 WL 3703762 (M.D. Tenn. Aug. 23, 2011) at page 34.**

JURISDICTIONAL ISSUES

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

***U.S. ex rel. Howard v. Lockheed Martin Corp.*, 2011 WL 4348104 (S.D. Ohio Sept 16, 2011)**

Two relators (Howard and Wilson) initially brought a *qui tam* action in the U.S. District Court for the Southern District of Ohio, alleging that a manufacturer of fighter planes (Lockheed Martin Corp.) and five of its subcontractors violated the False Claims Act. While that case was still in its initial stages, two other relators (Harrison and Moss) filed a separate *qui tam* suit with similar claims against Lockheed in the U.S. District Court for the District of Georgia. When the government became aware of both suits, it sought leave of court and informed the two sets of relators about one another. Relators Harrison and Moss then moved to voluntarily dismiss their second-filed action, which was granted. Howard and Wilson then moved for leave to amend their complaint and add Harrison and Moss as co-relators in their case. The government did not oppose the motion and the Ohio district court granted the relators' request. The relators then filed an amended complaint, which was served on the defendants.

Defendant Lockheed moved to dismiss the relators' amended complaint under Federal Rules of Civil Procedure 8, 9(b), and 12(b)(6). The district court granted the motion in part. Only days later, Lockheed filed a second motion to dismiss, this time arguing that the relators' action was precluded by the FCA's first-to-file rule. Lockheed argued that the two sets of relators' original complaints alleged fraud allegations that were based on the same facts, and therefore, Howard and Wilson's first-filed complaint precluded Harrison and Moss from being added as co-relators. Lockheed noted that if the second set of relators had filed their complaint in the same Ohio district court, then that court would have automatically dismissed the complaint under the first-to-file rule; they argued that the same result was required, now that the second set of relators was attempting to join the first-filed case. The United States District Court for the Southern District of Ohio denied Lockheed's motion.

First-to-File Rule

The original two relators argued that the first-to-file rule bars anyone except the Government from intervening in or file a related action that is based on the same underlying facts as a pending *qui tam* action, and that the addition of new parties does not constitute the type of "intervention" prohibited by the rule—the relators argued that for purposes of the first-to-file rule, "intervention" is defined under Federal Rule of

Civil Procedure 24, and thus, the first-to-file rule did not bar the addition of new relators, which is accomplished under Rule 15. Additionally, the relators argued that the first-to-file rule is designed to eliminate duplicative litigation, but since the second-filed complaint was voluntarily dismissed and was no longer pending, there was no duplicative litigation and thus, the first-to-file rule could not apply. The court agreed with the relators' arguments and also determined that policy considerations weigh in favor of the relators—the court observed that the Government informed the two sets of relators about each other and did not oppose their motion to join forces, and that Lockheed was not subject to potential multiple or inconsistent judgments and was therefore not prejudiced by the addition of the second set of relators to the first relators' suit. Consequently, the court denied Lockheed's motion to dismiss.

***U.S. ex rel. Torres v. Kaplan Higher Educ. Corp.*, 2011 WL 3704707 (S.D. Fla. Aug. 23, 2011)**

A relator brought a *qui tam* action against his former employer, a higher education service provider, alleging violations of the False Claims Act. Specifically, the relator alleged that the defendant's claims for federal financial aid funds were false, because the defendant submitted those claims with the knowledge that it was not eligible to receive such funding, due to its noncompliance with the Higher Education Act's (HEA) incentive compensation ban—the incentive compensation ban prohibits institutions from basing bonuses and other incentive compensation to admissions and student aid employees on those employees' success in securing student enrollments and/or financial aid. Furthermore, the relator alleged that the defendant conditioned the continued employment of its directors of admissions on the number of students they recruited. Not only did the relator allege that the defendant's claims for financial aid funds were false, but he also alleged that the defendant caused its students and their lenders to submit false claims to the government, since only students attending eligible institutions can receive federal financial aid funds. The defendant moved to dismiss the relator's complaint for failure to state a claim and for failure to plead with particularity; the defendant also contended that the relator's claims were barred by the FCA's first-to-file rule. The United States District Court for the Southern District of Florida granted the defendant's motion. The court held that the relator failed state a claim under the FCA and that he filed claims that were precluded by the first-to-file rule.

Failure to State a Claim

The court first considered the relator's allegation that the defendant improperly based the continuing employment of its admissions directors on their ability to recruit students. The defendant argued that its policy of requiring a minimum level of performance to retain employment does not violate the HEA incentive compensation ban,

which only prohibits “bonuses, commissions, and other incentive payments.” The court agreed and held that the incentive compensation ban does not cover such personnel decisions. Thus, the court granted the defendant’s motion to dismiss claims based on the relator’s allegation that the defendant based continuing employment on student recruitment.

First-to-File Bar

The court then held that the relator’s remaining claims were precluded by the FCA’s first-to-file bar, which prohibits *qui tam* suits that are based on the same underlying facts as another pending *qui tam* action. The court determined that the relator’s claims were related to a previously filed suit that also alleged that the defendant failed to comply with the HEA’s incentive compensation ban. The court stated that “[w]hile the allegations in the complaints are not exactly the same, the core facts are,” and the court observed that both complaints alleged violations of the FCA based on the defendant’s alleged noncompliance with the HEA. The court further observed that both complaints alleged that the defendant provided trips as compensation to high performing admissions representatives, with both complaints specifically mentioning trips to Puerto Rico. Both complaints also referred to high-performing admissions representatives achieving “President Club” status and admissions representatives losing their jobs if they failed to meet certain recruitment goals. The court held that both complaints alleged a fraud scheme in which the defendant’s claims for financial aid funds included a false certification to the government that the defendant had complied with the HEA’s incentive payment ban. The court stated that the present relator failed to provide any additional details in his complaint, and thus, his claims were barred by the first-to-file rule.

The relator had argued that his complaint did allege completely new claims, as only his complaint alleged that the defendant caused the government to pay false claims that were presented by private banks for interest subsidies, special allowance payments and default claims when students failed to repay private loans. However, the court observed that these fraud claims were ultimately based on the fact that the defendant was ineligible to participate in the federal financial aid program because it did not comply with the ban on incentive compensation. The court held that simply alleging additional facts as to how the fraud occurred did not avoid the first-to-file bar. The relator’s complaint was dismissed with prejudice.

***U.S. ex rel. Folliard v. Synnex Corp.*, 2011 WL 2836372 (D.D.C. July 19, 2011)**

A relator brought a *qui tam* action against eight technology companies alleging they knowingly misrepresented the country of origin of certain products to be sold on the government website (GSA). Specifically, the relator alleged the defendants misrepresented and falsely certified that their products complied with the Trade

Agreement Act (TAA). Defendants Synnex, Emtec, GovConnection, GTSI and Force3 moved to dismiss, arguing the relator failed to plead fraud with particularity, failed to state a claim and was barred by the first-to-file rule. Defendants GovPlace and Govt. Acq., moved to dismiss for failure to plead fraud with particularity and for failure to state a claim. Defendant HP moved to dismiss under the first-to-file rule and on *res judicata* grounds. The United States District Court for the District of Columbia granted the motions to dismiss pursuant to the first-to-file rule. The court also denied defendants GovPlace and Govt. Acq.'s motions. Further, the court considered moot defendant HP's motion to dismiss on *res judicata* grounds in light of its dismissal under the first-to-file rule.

The court began by analyzing whether the claim was barred by the first-to-file rule. The court found a previous litigation revealed the same facts and alleged the same claims as the relator. Further, the court found the previous complaint supplied enough information for the government to begin an investigation that would reveal the facts alleged by the relator in this case. The court also found the relator's complaint did not incorporate any material elements different from those in the complaint of the previous litigation. The relator argued that since the previous complaint was dismissed for failure to plead with particularity, the FCA's first-to-file bar could not be applied. The court observed that the primary purpose of the heightened pleading standard for dismissal was deterrence and not preclusion, noting that although the previous case did not plead facts strong enough to overcome Rule 9(b), the pleading was still sufficient to enable the government to uncover related frauds. Accordingly, the court granted the defendants' motions to dismiss on first-to-file grounds.

The court then analyzed whether the relator failed to plead fraud with particularity. The court found the relator provided sufficient evidence pertaining to products that were allegedly misrepresented as TAA compliant and were the subject of procurement orders placed on specific dates through the GSA website. The court held these facts created a strong inference that a false claim was submitted. The defendants argued the relator failed to provide the names of individuals involved in the fraudulent scheme. The court agreed but held that this mere fact was not sufficient to merit dismissal. Accordingly, the court held the relator stated a valid claim and met the heightened pleading standards.

***See U.S. ex rel. Nowak v. Medtronic, Inc.*, 2011 WL 3208007 (D. Mass. July 27, 2011) at page 17.**

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

***U.S. ex rel. Repko v. Guthrie Clinic, P.C.*, 2011 WL 3875987 (M.D. Pa. Sept. 1, 2011)**

A relator brought a *qui tam* action in the United States District Court for the Middle District of Pennsylvania, alleging that four healthcare service providers (GC, GHC, RPH and GH) and an individual violated the False Claims Act, among other laws. Specific to the alleged FCA violations, the relator alleged that, over a period of years, an improper financial relationship existed between the various defendants, by which defendant GC (a clinic) provided referrals to the other defendants (two affiliated healthcare companies, a hospital, and a doctor) in exchange for millions of dollars in financial benefits. The relator alleged that these financial relationships violated the Stark law and the Anti-Kickback law, and resulted in the presenting false Medicare and Medicaid claims to the government—the claims were false because they allegedly included the defendants’ false certification of compliance with all Medicare and Medicaid regulations, including prohibitions against Stark law violations. The defendants moved to dismiss the relator’s complaint, arguing that, pursuant to the FCA’s public disclosure bar provision, the court did not have subject matter jurisdiction over the relator’s claims.

Public Disclosure Bar

The defendants argued that the FCA’s public disclosure bar precluded the relator’s complaint, because the relator based his allegations of improper financial relationships on information that had been previously publicly disclosed—citing various IRS forms and bond statements, information gleaned from prior civil and criminal proceedings, and information listed on various publicly-available websites. However, the relator argued that his allegations had not been previously publicly disclosed and asserted that even if they had been, any such disclosures would not preclude him from filing his *qui tam* action, since his fraud claim was based on the defendants’ alleged false certifications of compliance with applicable Medicare/Medicaid regulations disclosures, and those certifications had not been previously revealed in any public disclosure. The court then considered each of the purported sources of public disclosures in turn.

First, the court analyzed whether the relator’s complaint was based on information disclosed in earlier civil litigation. The defendants claimed that, before the relator filed his complaint, defendant GC engaged in at least two civil proceedings in which defendant GC’s financial relationships were at issue and investigated. The court agreed, and held that, due to the prior litigation, the relator’s claims of improper relationships between GC and the other defendants had been publicly disclosed before the relator filed his *qui tam* action.

Second, the court examined whether information contained on publicly-available websites fell within the public disclosure bar's "news media" category, noting that the defendants had argued that the relator's allegations were based on information disclosed on four websites that disclosed financial information about the defendants, including filings with the IRS. The court found that though websites are not traditional news sources, they serve the same purpose as newspapers or radio broadcasts—namely, providing the general public with access to information—and are easily accessible by anyone. Thus, the court concluded, websites *could* qualify as public disclosures. The court then considered whether the relator's allegations had been publicly disclosed through the websites in question. Again, the court concluded that the allegations of improper financial relationships had been publicly disclosed, since the websites included information regarding various transactions between and among the defendants that the relator claimed were improper.

Third, the court analyzed whether the alleged illegal referrals by GC had also been previously publicly disclosed, and again, the court held that they had been, observing that defendant GC's website—which was publicly-accessible—included information about the company's "in-house referrals," which was sufficient to publicly disclose the defendants' alleged improper referrals scheme.

Having found that the relator's factual claims had been previously publicly disclosed, the court turned its attention to the question of whether or not the relator based his claims on public disclosures. The relator argued that he did not, since his fraud allegations hinged on the defendants' alleged false certifications to Medicare and Medicaid of their compliance with the Stark law and the Anti-Kickback law, and this information had not been publicly disclosed before he filed his complaint. The defendants countered that the relator's allegations were substantially similar to the publicly disclosed information. The court held that there was ample evidence in the public record of the defendants' financial and referral relationships with one another, and that the relator's claims were based upon that information. The court stated that "[a]ny stranger to the transactions here referenced could examine the evidence of remunerative financial relationships described above, see that the defendants had referral relationships, and conclude that the Stark and Anti-Kickback statutes had been violated." While the court noted that the public disclosures did not reveal the substance of the defendants' certifications to Medicare and Medicaid, it reasoned that such disclosures "were routine filings, necessary for the payment of any claims. They do not represent the sort of information unavailable to strangers to the public transactions that constitute non-disclosed information." Consequently, the court held that the relator's claims were based on publicly disclosed information.

Having determined that the relator's allegations had been previously publicly disclosed and that the relator's FCA claims were based upon those disclosures, the court analyzed whether the relator was qualified for the "original source" exception to the public disclosure rule, noting that in order to qualify, the relator needed to have direct and independent knowledge of the information upon which his allegations were based and

must have voluntarily provided that information to the government before filing his complaint. The court concluded that the relator was not an original source of the information upon which his complaint was based. As an initial matter, the court mentioned that the relator's original *qui tam* complaint did not contain any allegations regarding the defendants' allegedly illegal financial relationships; the court determined that the relator only included those allegations after such information became widely available through public disclosures. In addition, although the relator had been previously employed by two of the defendants, he left was not employed by any of the defendants during the time period in which the alleged improprieties occurred and thus, did not have direct and independent knowledge of the information contained in his complaint. The court was not persuaded by the relator's contention that he remained in close contact with former colleagues who were still working for the defendants, as the court held that this was insufficient to meet the original source standard because it did not give the relator any first-hand information. Moreover, the court held that the relator did not voluntarily provide information regarding the defendants' alleged fraud to the government. The court noted that the relator "filed his initial complaint in this matter in 2004, after he had been arrested on federal financial charges and signed a plea agreement that required him to provide information on illegal activities of others as a condition of that agreement." Given the relator's situation, the court concluded that he was compelled to disclose information regarding the defendants' alleged wrongdoing to the government before filing his complaint. Since he did not voluntarily provide the information to the government, he did not satisfy the requirements for original source exception to the public disclosure rule. As a result, the court held that it lacked subject matter jurisdiction over the relator's claims, and those claims were dismissed pursuant to the public disclosure bar.

***U.S. ex rel. Lewis v. Walker*, 2011 WL 3794690 (11th Cir. Aug. 26, 2011)**

Three relators brought a *qui tam* action against a group of EPA employees, the University of Georgia, and a foundation affiliated with the university. The relators alleged that the defendants violated the False Claims Act by providing false information to the government in order to obtain research funds in order to investigate a variety of sewage sludge incidents on local Georgia farms. The defendants moved for summary judgment on the relators' claims, and the United States District Court for the Middle District of Georgia granted the defendants' motion, finding that it lacked subject matter jurisdiction over the claims because of the FCA's public disclosure bar rule. The district court held that the relators' fraud claims were based on information they obtained through requests under the federal Freedom of Information Act (FOIA) and the Georgia Open Records Act (GORA), and therefore, their claims fell within the public disclosure bar. Since the district court concluded that the relators did not qualify for the "original source" exception to the public disclosure bar, it held that it did not have jurisdiction over the relators' claims, and consequently, those claims were dismissed. The relators appealed this

ruling to the U.S. Court of Appeals for the Eleventh Circuit, which affirmed the district court's decision.

Public Disclosure Bar

The relators argued that the district court erred when it held that documents they obtained through FOIA and GORA requests were publicly disclosed for the purposes of the FCA. The relators relied heavily on the Second Circuit's decision in *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94 (2d Cir.2010), as they apparently assumed that the U.S. Supreme Court would affirm the Second Circuit's holding that agencies' written responses to FOIA request are not automatically deemed "report" for purposes of the FCA's public disclosure bar. However, the Supreme Court reversed the Second Circuit's decision and held that a federal agency's written response to a FOIA request does indeed constitute a "report" within the meaning of the FCA's public disclosure bar—even if the "report" does not reflect an investigation by the agency of any possible FCA violation.

The Eleventh Circuit observed that the relators obtained their information through FOIA and GORA requests, from previous litigation records, from various government reports, and from a journal article—all of which the court held, were "public disclosures" for FCA purposes. The court observed that the public disclosure bar was amended in 2010 to clarify that only disclosures from federal government sources can bar federal *qui tam* cases. However, the court noted that the present case was already pending when that amendment became effective, and that since the amendment does not apply retroactively, it would not apply to the present case. Furthermore, the court observed that there was no indication in the record that the any of the relators had independent knowledge of any of the information upon which their fraud claims were based, and concluded that the relators did not qualify for the original source exception. The court rejected the relators' argument that by compiling the various publicly disclosed information they'd received in order to reconstruct the defendants' allegedly fraudulent grant application, they exhibited some independent knowledge that qualified them for the original source exception. Instead, the court held that the information the relators' compiled "was available to anyone who wished to use it for the same purpose," and thus, did not reflect any "independent" knowledge.

Therefore, the court affirmed the district court's ruling and upheld the grant of summary judgment in favor of the defendants.

***U.S. ex rel. Leveski v. ITT Educ. Servs., Inc.*, 2011 WL 3471071 (S.D. Ind. Aug. 8, 2011)**

A relator brought a *qui tam* action against her former employer, an educational services corporation, alleging that the defendant violated the False Claims Act by causing the submission of false claims for federal education grants and loan sub-

sides arising under Title IV of the Higher Education Act. Specifically, the relator alleged that the defendant violated the HEA by improperly compensating its admissions and recruitment employees based directly on the number of students they enrolled. The United States declined to intervene in the relator's suit. The defendant then moved to dismiss the action for lack of subject matter jurisdiction, arguing that the relator's claims were precluded by the FCA's public disclosure bar, since she based her allegations on previously-filed suits and other publicly disclosed information. The defendant further argued that the relator did not qualify as an original source, and thus, there was no exception to the rule barring her *qui tam* suit. The United States District Court for the Southern District of Indiana granted the defendant's motion.

The defendant argued that nearly identical allegations had already been filed in a prior case, and that the relator even reviewed those similar claims before filing her own suit. The relator countered, arguing that her suit added claims regarding additional misconduct by a financial aid advisor and that the time period for her claims did not overlap with the time period for the prior claims. The court found that the relator's claims did overlap with the prior claims and held that the relator's addition of violations by the financial aid advisor was insufficient to differentiate her action from the prior suit. As a result, the court held that a public disclosure occurred when the prior suit was filed. Additionally, the court held that since the relator's allegations were substantially similar to the claims already asserted, the relator's claims were based upon the public disclosure, and thus, the relator's complaint was barred. The relator then argued she qualified as an original source of the information upon which her allegations were based. The court observed that although the relator possessed facts relating to the defendant's incentive-based compensation practices, this was not enough to overcome the public disclosure bar, because the relator did not allege that she had direct and independent knowledge of the defendant's overall fraud scheme, which included knowledge that the defendant intentionally and knowingly defrauded the Department of Education. Since the relator could not demonstrate that she qualified for the original source exception to the public disclosure bar, her claim was dismissed for lack of subject matter jurisdiction.

***U.S. ex rel. Jamison v. McKesson Corp.*, 2011 WL 3370344 (5th Cir. Aug. 5, 2011)**

A relator brought a *qui tam* action against a nursing facilities management company (Beverly), its durable medical equipment (DME) supplier subsidiary (CSMS), and another Medicare supplier and its parent company (McKesson). The relator alleged that the defendants submitted fraudulent Medicare claims that falsely certified compliance with Medicare program standards. Specifically, the relator alleged that Beverly set up CSMS as a sham DME provider and that CSMS entered into a joint venture with McKesson to provide DME to Beverly. Consequently, the

relator alleged that all claims presented under CSMS' Medicare supplier number were false. The United States intervened in the relator's suit. The defendants then moved for summary judgment, arguing that the district court did not have subject matter jurisdiction over the relator's complaint, since that complaint was based on publicly disclosed information and the relator was not the original source of the information upon which the complaint was based. The United States District Court for the Northern District of Mississippi granted the motion. The relator appealed to the U.S. Court of Appeals for the Fifth Circuit, which affirmed the district court decision.

The circuit court first determined that the relator's original complaint was the operative complaint for purposes of determining subject matter jurisdiction, since that complaint would have been dismissed if the district court did not have subject matter jurisdiction—the court held that amended complaints cannot save an original complaint for subject matter jurisdiction purposes. After examining the relator's original complaint, the court found that it “described various fraudulent schemes only generally,” and that even though it alleged several schemes and listed numerous defendants, it did not allege which defendants engaged in which fraud schemes. The court, relying on a group of documents that the defendants purported publicly disclosed the relator's allegations, then determined that the relator's action was based upon prior public disclosures. Although none of those documents named any of the defendants specific to the relator's suit, the court held that those disclosures were sufficient to bar the relator's suit, because the relator's complaint also only included general allegations. The appeals court gave little weight to the fact that the relator's complaint named specific defendants, while at best, the public disclosures only exposed industry-wide fraud. The court found that the relator's list of nearly 450 defendants was arbitrarily created, finding support for this conclusion because the government chose to intervene against only the seven defendants named in the relator's amended complaint and because the relator refused to discuss his method for choosing defendants. Thus, the Fifth Circuit held that the relator did not show that his identification of defendants provided useful additional information and was not based upon the public disclosures, and his *qui tam* action was barred. The court noted that if it had ruled otherwise, then “a *qui tam* relator could arbitrarily select a large group of defendants in any industry in which public disclosures have revealed significant fraud, in hopes that his allegations will prove true for at least a few defendants.

Finally, the Fifth Circuit considered whether or not the relator qualified for the “original source” exception to the public disclosure bar. It held that he did not, since his “complaint merely listed a large group of possible defendants, without identifying specific allegations about any particular one.” Thus, the court declared, “it is obvious that he was not a ‘direct’ or ‘independent’ source of any of the ‘information on which the allegations are based,’” and the district court's dismissal of his *qui tam* action was affirmed.

***U.S. ex rel. Nowak v. Medtronic, Inc.*, 2011 WL 3208007 (D. Mass. July 27, 2011)**

Two relators (Nowak and Dodd) brought a *qui tam* action against their former employer, a medical technology company, alleging violations of the federal FCA, twenty two state FCA statutes, and the District of Columbia's FCA. Nowak filed her original complaint first, followed by Dodd. Subsequently, the relators reached an agreement and filed a consolidated complaint. First, the relators alleged that the defendant knowingly submitted false certifications to the Food and Drug Administration (FDA), in order to obtain clearance for its medical device, which caused fraudulent reimbursement claims to be submitted to various federal government healthcare programs. The relators also alleged that the defendant knowingly and improperly promoted an off-label use of the medical device, which also caused third parties to submit fraudulent claims. Nowak also alleged retaliatory discharge under the federal FCA and the California FCA. The defendant moved to dismiss the relators' claims for lack of subject matter jurisdiction, failure to state a claim and failure to satisfy Rule 9(b)'s pleading requirements. The defendant further argued that Dodd's FCA claims were barred by the FCA's first-to-file rule, and that Dodd's claims were further barred by the release he signed as part of his termination agreement. The United States District Court for the District of Massachusetts granted the motion in part. The court dismissed the relators' fraud claims, but denied the defendant's motion to dismiss Nowak's retaliation claims.

Public Disclosure Bar

First, the court analyzed whether the public disclosure bar applied to the relators' allegations. The court found that the defendant produced sufficient evidence of public disclosure in the news media and by the government to establish that there was prior public disclosure. Specifically, the court focused on several news articles that pre-dated all of the relators' complaints and which discussed the government's concerns about the type of off-label marketing and abuses of the medical device clearance process that the relators alleged the defendant was engaged in. Moreover, the court noted that the FDA had published articles regarding the off label use of the device at issue and had also called a meeting of all the manufacturers of such devices to warn them against off-label use and promotion of the devices. The court concluded that these disclosures contained enough information to enable the government to pursue an investigation, and thus, the relators' fraud allegations had been previously publicly disclosed. The relators contended that the disclosures only revealed industry-wide suspicion, and not specific allegations against the specific defendant. This alone, they argued, was not sufficient to constitute a public disclosure that would bar their *qui tam* action. The court disagreed, and found that several of the disclosures identified the defendant and recognized it as a significant manufacturer. The court held that these public disclosures explicitly linked the defendant to both the allegedly fraudulent off-label promotion

and false-certification schemes. Since the publicly disclosed information was “substantially similar” to the relators’ allegations, the court held that the relators’ complaint was “based upon” the public disclosures; although the court acknowledged that the relators’ complaint added details about the fraud, it still concluded that the relators alleged the same fraudulent scheme as was revealed in the prior public disclosures. Accordingly, the court held that the public disclosure bar applied to the relators’ allegations.

The court then analyzed whether the relators qualified as original sources of their allegations. The relators conceded that Dodd failed to voluntarily disclose his allegations to the government prior to filing his *qui tam* action. Instead, he provided the government with such information concurrent with filing his complaint. As a result, relator Dodd did not satisfy one of the criteria for original source status, and all claims attributable to Dodd were dismissed. With regard to Nowak, the court found that she disclosed her claims of off-label marketing to the government prior to filing her *qui tam* complaint and that her off-label marketing allegations were based on personal knowledge and did not simply parrot the public disclosures. However, the court determined that Nowak had no first-hand knowledge of the information on which her false-certification claims were based. Accordingly, the court held that Nowak qualified as an original source with respect to her off-label promotion allegations, but her false-certification allegations were dismissed.

First-to-file

Next, the court analyzed whether the relators were barred by the FCA’s first-to-file rule. The court found that even if Dodd qualified as an original source, his allegations would be barred under the first-to-file rule, because Nowak’s action, which was filed before Dodd’s, was a related, pending action that was based on the same facts. The relators had argued that while their allegations were similar, Dodd disclosed additional essential facts, and therefore was not precluded by the first-to-file bar. The court disagreed, and held that Dodd added no new essential facts and that Nowak offered sufficient allegations and evidence to put the government on notice of the essential facts of the defendant’s allegedly fraudulent scheme. Accordingly, the court dismissed Dodd’s claims for lack of jurisdiction, pursuant to the first-to-file bar. The relators argued that because they had a relator-share agreement and submitted a consolidated complaint, Dodd could not be dismissed from the *qui tam* action. The court, however, held that since it lacked jurisdiction over Dodd’s claims, those claims must be dismissed; the court held that whether the relator-share agreement survives the dismissal of one relator was a matter of contract between the two relators.

Relator’s Release of FCA Claims

The court then considered the defendant’s argument that Dodd released his FCA claims as part of his termination agreement with the defendant. The relators argued that the release was unenforceable with respect to the FCA claims—they contended

that only the government could release those claims, and that public policy considerations should also prohibit the release of the FCA claims. The court found that the language of Dodd's release was sufficiently expansive to include his *qui tam* claims, and that the information Dodd relied upon and the fraud he alleged were known to him before he executed the settlement agreement and, consequently, any claims arising from that information fell within the group of released claims. The court also rejected the relators' public policy argument, concluding that the government knew of Dodd's allegations prior to the execution of the release and before his action was filed. Thus, the court held that Dodd's release stripped him of standing and his action was dismissed.

Failure to State a Claim

Following Dodd's dismissal from the case, the court analyzed whether Nowak stated a valid claim under the FCA. The court found that she failed to identify any specific claim for off-label use that was submitted to the government. However, she alleged that ninety percent of all devices were being used off-label and that eighty percent of payments for such devices were through Medicare and Medicaid. Accordingly, the court held that a very high probability existed that improper claims were submitted to the government. Further, the court found that Nowak adequately supported her claim that the defendant falsely represented its medical device as effective and safe for use, by alleging sufficient facts to infer that the use of the defendant's device was not medically necessary, safe, or effective, and that the defendant was aware of these deficiencies. Further, the court found that Nowak alleged sufficient facts to show the defendant intended physicians to consider its device as safe and effective and to use it for procedures that would, in turn, form the basis of reimbursement claims to the government. Accordingly, the court held that Nowak stated a valid claim under the FCA.

Failure to Plead Fraud with Particularity

With respect to the defendant's assertion that Nowak's off-label marketing claims did not meet Rule 9(b)'s pleading requirements, the court concluded that Nowak's claims alleging fraudulent direct sales to the government were largely conclusory and did not meet the particularity requirement. And with regard to her allegations that the defendant caused third party submissions of false claims, the court found that she failed to provide the time, place, and content of any alleged false representation. Further, the court found that she failed to provide any evidence that the third parties sought reimbursement from the government or that the defendant intended the government to pay for the medical devices. The court found that the defendant clearly intended to profit from off-label sales, but concluded that it was unclear whether or not the defendant intended to do so specifically at the expense of the government. Accordingly, the court held that Nowak failed to allege the fraud with requisite particularity. As a result, her off-label marketing claims were dismissed.

FCA Retaliation

Finally, the court analyzed Nowak's retaliation claim. The court observed that Nowak described various instances in which she allegedly had challenged the defendant's off-label promotion activities, refused to engage in those activities, spoke with in-house counsel about her concerns, and expressed concerns about her own legal liability should she participate in the defendant's alleged off-label promotion scheme. However, the court found that she failed to allege her concerns with regard to any knowing submission of fraudulent claims to the government. Accordingly, the court held that her complaints and objections alone were not sufficient to constitute protected conduct. However, Nowak filed a *qui tam* action against the defendant, which certainly constituted protected conduct, and she was terminated from her job about a year and a half later.

The court then examined whether the defendant knew of Nowak's protected conduct before she was terminated from her job, and held that the relator adequately pled that the defendant was on notice of her protected conduct. The court noted that, very soon after the relator filed her *qui tam* complaint, the defendant made public an FDA investigation of its off-label marketing practices. The court reasoned that the defendant knew that this investigation could very well be related to the FCA, and, while the defendant was not aware of Nowak's sealed *qui tam* complaint when she was terminated, the court held that, at the motion to dismiss stage, Nowak's allegations and circumstantial evidence made it plausible that the defendant knew that her actions were related to the government's investigation. The court further found that, several months after the government initiated its investigation, Nowak was placed on probation, after having been consistently praised for her performance in the previous months. The court then held that the inferences raised by Nowak's retaliation claim were sufficient to establish that the defendant fired her at least in part as retaliation due to her protected activity. Thus, the court held that Nowak stated a valid claim under the FCA for retaliation and she was allowed to maintain that claim.

***U.S. ex rel. Ketroser v. Mayo Found.*, 2011 WL 2967475 (D. Minn. July 22, 2011)**

A group of four relators brought a *qui tam* action against a foundation, alleging that the defendant submitted false claims for payment to Medicare and Medicaid, by misrepresenting its compliance with certain procedures and by billing for services that were not provided. The government intervened on part of these latter allegations. The defendant moved to dismiss. The United States District Court for the District of Minnesota partly granted the defendant's motion. The court dismissed the relators' first claim for lack of subject matter jurisdiction. Further the court dismissed the non-intervened portion of the relators' second claim for failure to state a claim and denied as moot the remainder of the claim. The court also granted the government leave to file a statement of interest.

The defendant argued that the relators' false certification claims should be dismissed for lack of subject matter jurisdiction pursuant to the FCA's public disclosure bar. After stating that "[i]t is undisputed that Relators' first claim is based on allegations that were publicly disclosed before Relators brought this action," the court turned its attention to determining whether or not the relators qualified for the FCA's "original source" exception to the public disclosure bar. The relators argued that they did qualify, as they had direct and independent knowledge of the information on which that first claim was based. The court disagreed, though, and found that the record revealed that the relators acquired the information upon which their first claim was based through public disclosures from prior litigation. As a result, the court dismissed the relators' first claim for lack of subject matter jurisdiction.

With regard to second, non-intervened claim—that the defendant had accessed and examined a surgical pathology slide without producing reports—the court observed that the applicable billing codes did not explicitly require a written report for surgical pathology services. Thus, the court dismissed the relators' second claim for failure to state a claim. The defendant further argued that the remainder of the relators' second claim should be dismissed, since it essentially repeated the allegations of the government's complaint in partial intervention, but the court denied as moot the Defendant's motion to dismiss the remainder of relator's second claim.

***U.S. ex rel. Kirk v. Schindler Elevator Corp.*, 2011 WL 2632130
(2nd Cir. July 6, 2011)**

A relator brought a *qui tam* action in the U.S. District Court for the Southern District of New York, alleging that his former employer, an elevator company, violated the False Claims Act by providing false reports and false certifications to the U.S. Department of Labor regarding the number of veterans it employed, in order to fraudulently receive federal contract funds. As part of his pre-filing investigatory efforts to confirm his suspicions, the relator—who was a Vietnam veteran himself—and his wife requested copies of the defendant's reports to the Department of Labor through requests under the Freedom of Information Act (FOIA). The Department of Labor supplied the relator with the requested materials, but undertook no substantive investigation of the elevator company's certifications contained in those materials. Once the relator received the materials and confirmed that the company's reports to the Department of Labor were false, he commenced his *qui tam* action against the company.

The defendant moved to dismiss the action, arguing that the relator's complaint was barred by the False Claims Act's public disclosure provision. Notably, the company did not allege that the underlying documents the relator received—the actual reports the company had filed with the Department of Labor—were public disclosures. Rather, the company asserted that the Department of Labor's search

for the documents constituted an “administrative investigation” and that the agency’s written response to the relator constituted an “administrative report”, which deprived the district court of subject matter jurisdiction over the relator’s claims. The district court agreed, and dismissed the relator’s action. The relator appealed that decision to the U.S. Court of Appeals for the Second Circuit, which vacated the district court’s decision and remanded the case, holding that government agencies’ responses to FOIA requests do not automatically result in administrative investigations and/or reports, under the False Claims Act’s public disclosure bar, but are merely ministerial acts. The defendant then petitioned the U.S. Supreme Court for certiorari, which the Court granted. TAF Education Fund then filed an *amicus curiae* brief in support of the relator.

The United States Supreme Court, in a 5-3 decision (Justice Kagan, who served as U.S. Solicitor General when the Court addresses similar issues in 2009, recused herself from the case) disagreed with the relator, the Second Circuit, and TAFEF and held that “[a] federal agency’s written response to a FOIA request for records constitutes a ‘report’ within the meaning of the FCA’s public disclosure bar.” The Court reasoned that the FCA does not define “report”, and that since the public disclosure bar include other broad categories of disclosures, such as “news media”, the term “report” should also be broadly construed. Relying on the broadest plain meaning of the term, the Court concluded that “report” means “something that gives information,” and held that all agency written responses to FOIA requests provide information, and are thus, reports, for FCA purposes. The Court determined that its expansive reading of “report” was consistent with congressional intent to preclude parasitic relators, stating that “[a]nyone could identify a few regulatory filing and certification requirements, submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall in a *qui tam* action under the FCA.” The Supreme Court then remanded the matter to the Second Circuit, for further proceedings regarding whether the relator’s *qui tam* action was “based upon” the public disclosures.

Justice Ginsburg, joined by Justices Breyer and Sotomayor, dissented, and agreed with the Second Circuit that the types of disclosures discussed in the FCA’s public disclosure bar provision all arise in an investigatory context, and that the term “report” should also be read in that context. These Justices reasoned that since routine responses to FOIA requests do not involve synthesizing documents for the purpose of gleaning insight or information, but merely consist of assembling and duplicating records and/or noting the absence of records, such routine responses do not generate “reports,” for purposes of the FCA’s public disclosure bar. The dissenting Justices declared that the majority’s opinion weakens the FCA as a fraud-fighting tool, as it bars non-parasitic, non-frivolous relators with partial information from substantiating that information through FOIA requests, in order to satisfy Rule 9(b)’s pleading standards.

On remand, the Second Circuit first observed that the relator's claims amounted to two separate allegations: (1) that, for some years, the defendant filed reports with the DOL that contained false information; and (2) that, for other years, the defendant failed to file reports with the DOL at all. The circuit court then considered each of the relator's claims. With respect to the defendant's failure to file, the Second Circuit held that since the relator lacked independent knowledge of the defendant's practices, the fact that the defendant did not file DOL reports for certain years was indisputably derived from the DOL's FIOA responses that indicated that reports were not found, and were therefore publicly disclosed through the FOIA responses. Moreover, since the relator did not have direct and independent knowledge of that information, the circuit court held that he did not qualify for the public disclosure bar's original source exception. Consequently, his failure-to-file reports claim was dismissed.

With respect to the relator's claim that the defendant filed false reports, the Second Circuit noted that, unlike the failure-to-file claim, this claim was premised on alleged facts that were not publicly disclosed, but which were based on the relator's personal knowledge. Accordingly, the appeals court held that the relator's claim regarding the defendant's allegedly false reports was not based on publicly disclosed information. As a result, that claim was allowed to proceed. The matter was then remanded to the district court for further proceedings consistent with the Second Circuit's order.

FALSE CLAIMS ACT RETRALIATION CLAIMS

***U.S. ex rel. Moore v. City of Dallas*, 2011 WL 4912590 (N.D. Tex. Sept. 27, 2011)**

A relator originally brought a *qui tam* suit against his former employer, the City of Dallas, as well as a private company, alleging FCA and state law claims. The plaintiff alleged he was hired in the city auditor's office and assigned to work in the fraud, waste, and abuse section. In that position, the plaintiff alleged that he discovered that the defendants had improperly billed ambulance calls and submitted false Medicare and Medicaid claims to the government, resulting in overpayments to the defendants. He later filed a *qui tam* case and three business days after the city learned of the litigation—and only weeks after the plaintiff had received a “fully successful” performance review—he was terminated from his job. He then amended his complaint to add a retaliation claim under the False Claims Act, the Texas Medicaid Fraud Prevention Act (TMFPA) (which is Texas' counterpart to the federal False Claims Act), and the Texas Whistleblower Act (TWA) (which prohibits governmental entities from retaliating against employees who report violations of the law by that government entity or its employees). Both the plaintiff and the city moved for summary judgment on the plaintiff's retaliation claims, and the United States District Court for the Northern District of Texas denied both motions.

Retaliation

The city argued that it had a legitimate non-retaliatory reason for the plaintiff's firing and that the plaintiff could not show that those reasons were a pretext for retaliation. The court noted that, according to the city, the relator was not fired for any whistleblowing activity, but rather because he had breached a fiduciary duty to the city and had violated both government auditing standards and his office's policies and procedures, by creating a significant personal interest in the subject matter of an audits for which he had been hired to perform. The court, though, found that the plaintiff had proffered sufficient evidence for a reasonable jury to conclude that he was fired in retaliation for engaging in protected activity under the False Claims Act, since he alleged that he discovered a pattern of fraudulent Medicare/Medicaid billing by the city, that he expressed his concerns about the city's potential FCA liability (and even discussed with his supervisor the possibility of someone filing a *qui tam* suit), that he ultimately filed a *qui tam* suit himself, and that he was fired from his job within days of the city learning about his FCA suit, notwithstanding the fact that he had recently received a good performance review. The court also noted that the city's former mayor had testified that, in the initial meeting with the city auditor following the revelation of the *qui tam* suit, the city auditor stated that he wanted to fire the relator and that he

viewed the FCA suit as an incredible breach of ethics. The court concluded that there were disputed issues of material fact regarding the reason for the plaintiff's firing, which precluded a grant of summary judgment for either side. Thus, the court denied both parties' motions for summary judgment on the relator's retaliation claim under the FCA.

The court also denied the parties' motions for summary judgment on the retaliation claim under the TMFPA. The plaintiff sought summary judgment, arguing that he had produced conclusive evidence of retaliation and therefore summary judgment was warranted as a matter of law. The defendant disputed that allegation and further countered that the relator's claim was time-barred. The court again held that the evidence proffered by both parties created a dispute of material fact regarding the reason behind the relator's firing, and therefore, summary judgment in favor of either party was inappropriate. The court did, however, determine that the relator's retaliation claim under the TMFPA was not time-barred, since the parties apparently agreed that the TMFPA includes a 180-day statute of limitations period for retaliation claims, and the court held that the relator first brought his retaliation claims within 180 days after he was terminated from his job—based on the date the court granted the relator's motion to amend his original *qui tam* complaint in order to add a retaliation claim under the TMFPA.

Finally, the court considered the parties' summary judgment motions on the retaliation claim under the Texas Whistleblower Act. Again, the relator argued that he was entitled to summary judgment, since he had produced conclusive evidence of retaliation. And again, the defendant city argued that it was entitled to summary judgment because the relator had not shown that he was retaliated against, and since his claim was time-barred. Once again, the court denied both parties' motions, finding that the existence of material disputed facts regarding the circumstances surrounding the relator's firing precluded summary judgment. The court, though, did determine that the relator's retaliation claim under the TWA was not time-barred. Although the TWA only includes a 90-day limitations period, the court found that before adding retaliation allegations to his original *qui tam* complaint, the relator filed a grievance with the city, which was ultimately denied by the city on the basis that the law only covers current employees, and he was no longer employed by the city. The court held that during the period when the city was considering the relator's grievance—about one month—the statute of limitations was tolled. As a result, the court held that the relator's TWA claim, was not time-barred.

***Mayer v. Boys & Girls Clubs of Philadelphia Inc.*, 2011 WL 4467669 (E.D. Pa. Sept. 23, 2011)**

A plaintiff brought an action against her former employer, the Boys and Girls Club of Philadelphia (BGCP) and the School District of Philadelphia, alleging retaliatory discharge under the False Claims Act (FCA) and the Pennsylvania Whistle-

blower Law (PWL). The plaintiff alleged that the school district received federal government funding from the U.S. Department of Labor to remedy academic underachievement in one of its schools, and that the school district used those funds to contract with BGCP, which operated a mentor program that the school district wanted to implement in the school. The plaintiff further alleged that the federal funding provided students participating in the program with catered meals, but that she—in her capacity as BGCP’s program assistant for the mentoring program at the school—observed a shortage of those meals because staff and teachers at the school were stealing them. She stated that she reported what she saw to the school district’s superintendent, noting that the school was not only cheating the students, but was also defrauding the Department of Labor (DOL) by falsely representing that the meals were going to the students. She alleged that no remedial action was taken in response to her complaints to the superintendent and that when she complained to the school’s principal, she was told that the meals were not her concern and that she had no right to question the school district’s actions. The principal also allegedly told that plaintiff that she knew that the plaintiff had spoken to the superintendent and that she (the principal) intended to teach the plaintiff a lesson. Some time later, the plaintiff alleged, she also complained about the purloined meals to BGCP’s site coordinator for the school, and within a couple of days, she was terminated from her job, with the school district terminating her assignment as program assistant to the school and the BGCP terminating her employment as well. Months later, the plaintiff filed her suit. BGCP moved to dismiss her complaint for failure to state a claim, but the U.S. District Court for the Eastern District of Pennsylvania denied that motion.

Retaliation

With respect to her retaliation claim under the False Claims Act, BGCP argued that the plaintiff failed to adequately plead that she engaged in any protected conduct that led to her being terminated from her job. With respect to her state law retaliation claim, BGCP argued that the claim failed because BGCP was not a public body and the Pennsylvania Whistleblower Law only protects employees of public bodies from retaliation. Moreover, BGCP argued that purloining school meals does not qualify as “wrongdoing” as that term is used in the PWL.

The court first determined that the plaintiff sufficiently pled her protected conduct under the FCA, as she alleged that she witnessed misconduct regarding student meals that were paid for with federal funds and that she expressed her concerns to appropriate individuals about fraudulent representations being made to the DOL. The court also determined that the plaintiff adequately pled that she was terminated from her job because of her protected conduct, as she alleged that she informed appropriate BGCP officials of the alleged misconduct she observed, thereby making them aware of her protected activity, and the close proximity of her final complaint to the BGCP site coordinator and firing strongly suggested a causal connection between the two.

Thus, the court held, the plaintiff stated a retaliation claim under the FCA and the defendant's motion to dismiss her federal claim was denied.

The court also denied the defendant's motion to dismiss the plaintiff's retaliation claim under the PWL. The defendant had argued that it is a private entity, and that the PWL only applies to a "public body." The defendant argued that its receipt of public funds pursuant to its contract with the school district does not make it a public body within the meaning of the PWL. The district court disagreed, though, and, relying on prior caselaw interpreting the relevant language, an entity is a public body under the PWL if it is funded in any amount by the Commonwealth of Pennsylvania. The court held that the plaintiff's allegations—namely, that the BGCP received state funds—when construed in the light most favorable to her, were sufficient to overcome the defendant's motion to dismiss. In addition, the court rejected the defendant's argument that the alleged misconduct of school employees stealing students' meals was, at best, a *de minimis* violation of the law and could not serve as the basis for a claim under the PWL. Instead, the court held that the plaintiff adequately pled that the defendant engaged in "wrongdoing" under the PWL, as she alleged that the misconduct led to a shortage of student lunches, that it occurred on multiple occasions, and that it resulted in fraudulent misrepresentations to the DOL. Consequently, the court denied the defendant's motion to dismiss the PWL claim.

***Jewell v. Lincare, Inc.*, 2011 WL 4336710 (D. Me. Sept. 15, 2011)**

A plaintiff brought an action against his former employer, alleging retaliatory discharge under the False Claims Act and state law. Specifically, the plaintiff alleged that he suspected his supervisor of forging client signatures and backdating Medicare and Mainecare documents. He further alleged that he raised concerns about the supervisor's actions to one of his managers, but the managers only gave the supervisor a warning, while telling the supervisor that the plaintiff had reported his alleged wrongdoing. The relator alleged that, upon receiving this information, the supervisor began harassing him, by yelling at him, making fun of him, and even throwing a heavy object at him. Additionally, the plaintiff alleged that a manager told him that he did not want to know anything about forging or backdating documents, and that the office would be shut down and employees would lose their jobs if the supervisor's actions ever became public. Finally, the plaintiff alleged that a month after his last complaint to the manager, he was called into a meeting with the manager and the supervisor and was told that he being terminated for failing to complete paperwork the day before—paperwork that he had actually completed. Instead, the plaintiff alleged that he was terminated in retaliation for his whistleblowing. The defendant moved to dismiss the plaintiff's retaliation claim under the FCA, arguing that the plaintiff failed to state a claim. The United States District Court for the District of Maine denied the motion.

Retaliation Under the FCA

The defendant argued that the plaintiff failed to state a claim under the FCA, since he did not sufficiently allege that he engaged in any protected conduct. The defendant argued that the plaintiff only alleged that his supervisor forged and backdated unspecified documents—allegations that the defendant claimed amounted to nothing more than an internal complaint about regulatory violations and incorrectly completed paperwork. The defendant argued that the plaintiff had not stated a retaliation claim under the FCA, since he did not complaint about any alleged fraudulent bills to the government. The plaintiff argued that his investigation and inquiry into the alleged forgeries could reasonably lead to a *qui tam* suit under the FCA and, therefore, he had engaged in protected conduct. The court agreed with that plaintiff and held that, at the motion to dismiss stage, the plaintiff's allegations that his supervisor backdated and forged client signatures on documents that were later submitted to Medicare and Mainecare for reimbursement were sufficient to state a claim for retaliation under the FCA.

Next, the court rejected the defendant's argument that it was not aware of the plaintiff's protected conduct, finding that the defendant was on notice because the plaintiff informed his supervisor and manager of the suspected forgeries, and they knew that the documents in question were eventually submitted to the government for reimbursement. The defendant then argued that the plaintiff had inadequately pled the causation element of FCA retaliation claims, stating that the plaintiff relied solely on conclusory allegations that were unsupported by any facts. The defendant argued that the plaintiff was fired because he failed to complete necessary paperwork, while the plaintiff argued that he did complete the paperwork and was fired in retaliation for his whistleblowing. The court found that the plaintiff sufficiently alleged that he was terminated for a pretextual reason, relying on the fact that he was fired soon after making his protected conduct known to the defendant. Accordingly, the court held that the plaintiff's allegations were sufficient to state a claim under the FCA, and denied the defendant's motion to dismiss.

***Quint v. Thar Process, Inc.*, 2011 WL 4345925 (W.D. Pa. Sept. 15, 2011)**

A plaintiff brought a *qui tam* action against his former employer, alleging, among other things, a claim under the False Claims Act for retaliation. The plaintiff alleged that the defendant made false statements to the Advanced Technology Program of the National Institute of Standards and Technology in order to receive federal grants to develop production of diesel-grade biofuel from plants. Specifically, he alleged that the defendant misrepresented the capabilities of its extraction system, which failed to meet federal standards. He alleged that he raised concerns about this issue to the defendant, through its management and that he continued reviewing the defendant's reports to the government, in an effort to stop the de-

defendant from misappropriating federal funds. He stated that he received a hostile reaction from management and was discouraged from contacting the government, but was subsequently terminated from his job because he prepared a report for the government about the alleged false claims. The defendant moved to dismiss the plaintiff's FCA retaliation claim, arguing that he failed to state a claim. The United States District Court for the Western District of Pennsylvania granted the defendant's motion.

Retaliation

The defendant argued that the plaintiff failed to plead facts which demonstrated that his alleged reports to management should be considered "protected conduct" under the FCA. In addition, the defendant argued that it did not have any knowledge of acts which arguably constituted protected conduct. Furthermore, the defendant argued that even if it failed to achieve success in the program funded by the government, such failure did not constitute fraud under the FCA. The plaintiff, on the other hand, argued that he engaged in protected conduct by bringing specific concerns about possible fraudulent conduct to the attention of the management. The court found that the only action by the plaintiff that might be deemed protected conduct was his alleged review of the defendant's allegedly fraudulent reports that were filed with government. The court, though, found that the plaintiff failed to allege that the defendant knew about his investigation of possible fraud, or that he advised anyone in management of his intention to complain to the government about the company's purportedly fraudulent claims. As a result, the court dismissed the retaliation claim for failure to state a claim.

***Halasa v. ITT Educ. Servs., Inc.*, 2011 WL 4036516 (S.D. Ind. Sept. 12, 2011)**

The plaintiff brought a *qui tam* action against his former employer, an educational institution, alleging retaliatory discharge under the False Claims Act and state law. The plaintiff alleged that the defendant was not fairly distributing leads about potential students among its recruitment employees, that the defendant admitted ineligible students by either improperly assisting them to pass the placement test or by altering their scores, that the defendant forced its employees to alter students' data regarding whether graduates' employment positions were related to their degrees, and that the defendant falsified students' grades and attendance records to alter its statistics. The plaintiff alleged that he was terminated because he listened to employees' complaints about these alleged practices, investigated them, and put his superiors on notice. The defendant moved for summary judgment on the plaintiff's claims. The United States District Court for the Southern District of Indiana granted the defendant's motion.

Retaliation

The court found that the plaintiff failed to show how the defendant's alleged practices violated the FCA. Specifically, the court found he failed to show that the defendant was required to distribute leads fairly pursuant to any federal regulation, contractual provision, or particular policy. Similarly, the court held that the plaintiff failed to show that any federal regulation, contractual provision, or particular policy required the defendant to utilize a placement exam or to certify that it only admitted students who passed a particular exam. With regard to the plaintiff's remaining claims, the court observed that he conceded that he had no specific information about any inaccurate reporting by the defendant of students' grades, attendance, or graduate employment, and the court found that the plaintiff failed to show that the defendant had an improper compensation policy and conceded that he only suspected that the policy was fraudulent. Accordingly, the court held that the plaintiff's alleged investigation conducted of these practices could not form the basis of an FCA retaliation claim. Further, the court found the plaintiff failed to put the defendant on notice about any possible protected activity. The plaintiff conceded that he did not report his concerns directly to any of the individuals who terminated him and that he did not have any direct evidence that they were aware of his concerns. Moreover, the court found that the plaintiff—who had been hired as one of the defendant's "College Directors," responsible for ethics and compliance issues—failed to show that he was not expected to address the defendant's alleged improprieties as part of his job, and therefore, could not establish that any complaints he allegedly made to the defendant were conspicuous enough to constitute protected activity under the FCA. Accordingly, the court held that the plaintiff failed to put the defendant on notice about any protected activity under the FCA and granted summary judgment in the defendant's favor.

***Glynn v. Impact Sci. & Tech., Inc.*, 2011 WL 3792358 (D. Md. Aug. 25, 2011)**

A plaintiff brought an action against his former employer, a technology corporation, alleging, among other things, that the defendant retaliated against him in violation of the False Claims Act. The plaintiff had worked as a principal engineer for the defendant, with the primary responsibility of designing various modules and components for the defendants' Mobile Multi-Band Jammer systems (MMBJs), which were used to counteract improvised explosive devices (IEDs) by interfering with their trigger signals. The defendant was contracted to deliver these devices to the U.S. Special Operations Command (SOCOM). The plaintiff alleged that he became concerned about a new technology the defendants were developing and that he believed the MMBJ devices would fail under extreme temperatures. He alleged that he raised these concerns to his supervisors and management, that he contacted a United States Attorney's Office to raise his concerns, and that he met

with a government investigator from the Department of Defense. He claimed that as a result of these actions, he was terminated from his job a few months later. The defendant countered that the plaintiff was terminated because of his bad behavior and insubordination. Both parties moved for summary judgment, and the defendant also countersued for breach of contract, among other claims, citing an employment agreement the plaintiff signed at the commencement of his employment.

Retaliation

The plaintiff alleged that he engaged in protected activity by investigating the defendants' submission of defective MMBJ devices to SOCOM, by opposing the defendants' submission of false claims to SOCOM, and by initiating government investigations of the defendants' allegedly fraudulent conduct. The defendant, though, asserted that the plaintiff was not protected by the FCA's anti-retaliation provision, arguing that he did not engage in protected activity, since he never subjectively believed that he was investigating false claims and since his disclosures to the Government were not objectively reasonable. The court noted that the FCA only protects employee-plaintiffs from retaliation when they can show that their conduct raised a "distinct possibility" of a *qui tam* action. The court concluded that the plaintiff's acts of investigating and opposing the defendant's provision of allegedly defective MMBJ devices to SOCOM were not sufficient to constitute protected conduct under the FCA, since the plaintiff did not show that these acts raised a distinct possibility of an FCA action. The court found that even though the plaintiff raised his concerns to the defendant, he appeared to have been merely performing his job duties, and significantly, he did not raise concerns about fraud against the government. Thus, the court denied the plaintiff's motion for summary judgment with respect to his assertion that he engaged in protected conduct by investigating and opposing the defendant's delivery of allegedly defective products to SOCOM.

Next, the court examined the plaintiff's claim that he engaged in protected activity by investigating the defendant's allegedly false certifications of compliance with the terms of its government contracts. He claimed that the contract required the defendant to prepare monthly status reports, detailing its progress and describing any issues affecting the quality of its devices. Moreover, the plaintiff claimed that the defendant was required to prepare a separate report, certifying that it had completed various performance tests. He claimed that he engaged in protected conduct when he investigated the defendant's failure to satisfy these contractual requirements. The court agreed that the plaintiff conducted an investigation, but found that his conduct did not raise a distinct possibility of an FCA action, since he had not personally seen the contractual terms at issue. The court held that without knowledge of the contract requirements, it was very difficult to characterize the plaintiff's belief that the defendant was falsely certifying compliance with the contract requirements as objectively reasonable; this fact "cast doubt on whether [the relator]'s investigation of false certification raised a distinct possibility of an FCA suit from his perspective." Thus, the court held that the plaintiff could not show that he was engaged in protected activity by investigating the defen-

dants' alleged false certification of compliance with the MMBJ contracts, and denied the plaintiff's motion for summary judgment on that aspect of the retaliation claim.

Finally, the court examined the plaintiff's claim that he engaged in protected activity by initiating government investigations into the defendant's allegedly fraudulent conduct and false billing. Once again, the court determined that while the plaintiff's actions constituted an investigation, those actions did not raise a distinct possibility of an FCA action, since the plaintiff had not seen the contracts at issue and thus could not form a reasonable, objective belief that the defendant was engaged in false billing. In addition to these findings, the court held that the plaintiff could not demonstrate two other elements of retaliation claims under the FCA—that the defendant had knowledge of the plaintiff's reports of concern to the government and that, as a result it took adverse action against him. The court then denied the plaintiff's summary judgment motion with respect to that aspect of his retaliation claim.

Furthermore, the court noted that the plaintiff failed to set forth facts demonstrating that his discharge was motivated, even in part, by his alleged protected acts. The court also found that the plaintiff's poor attitude and behavior at work was a legitimate reason for his termination and that he did not begin his external reporting until after he was informed of his poor reviews. The court held that his termination was not caused by his alleged protected activity. Therefore, the court granted the defendant's summary judgment motion on the retaliation claim.

Defendant's Counterclaims

The plaintiff contended that the defendant's counterclaims against him constituted additional post-termination retaliation. The court, though, concluded that the defendant only became aware of facts giving rise to its counterclaims during the course of discovery with the plaintiff, which "provides legitimate, non-retaliatory bases for [the defendant]'s counterclaims. Thus, the court granted the defendant's motion for summary judgment as to the relator's post-termination retaliation claim.

The relator also argued for a declaratory judgment that his employment agreement with the defendant was unenforceable to the extent that it prohibited him from reporting unlawful conduct to the government. The court rejected this argument, finding that the plaintiff failed to meet his burden of proof, since he only stated that he did not agree with the defendant's position that the agreement was enforceable and then made "an irrelevant assertion with respect to the confidentiality provision." Consequently, the court granted summary judgment in favor of the defendant on the plaintiff's request for a declaratory judgment that the terms of the employment agreement were unenforceable. The court then granted the defendant's summary judgment on its breach of contract counterclaim, finding that the plaintiff violated the agreement's nondisclosure provision by "using, disclosing, and failing to return confidential information in breach of a nondisclosure provision." The court held that this was a standard, enforceable employment contract provision and observed that the plaintiff admitted that he violated the provision when he failed to return over one thousand confidential and proprietary files to the defendant after his termination.

***U.S. ex rel. Hobbs v. MedQuest Assocs., Inc.*, 2011 WL 3703762
(M.D. Tenn. Aug. 23, 2011)**

A relator brought a *qui tam* action alleging that her former employer, a diagnostic testing corporation (MedQuest), and three of its affiliated companies violated the False Claims Act and committed Medicare fraud by unlawfully conducting diagnostic tests of Medicare beneficiaries without the required and appropriate physician supervision, and by improperly using another physician's Medicare billing number. The relator also alleged that the defendants violated the FCA by terminating her employment in retaliation for her whistleblowing. The government intervened in the relator's *qui tam* action and added several common law claims. Both the government and the defendants moved for summary judgment on the fraud claims. The defendants also moved to dismiss the relator's retaliation claim. The United States District Court for the Middle District of Tennessee granted the government's motion for summary judgment. The court further granted in part the defendants' motion to dismiss the relator's retaliation claim.

Retaliation Claim

The defendants argued that the relator's retaliation claim should be dismissed, as it lacked factual bases. They claimed that the relator was aware that her employment was "at will" and that she could be terminated from her job at any time, with or without cause. They contended that there were complaints about the relator's job performance, and that was the reason she was fired. Given the defendants' factual representations regarding the circumstances of the relator's firing, the court converted the defendants' motion to dismiss into a motion for summary judgment.

The defendants also argued that the relator's retaliation claim should be dismissed as time-barred. The court first noted that when the relator's retaliation claim was filed, the FCA did not specify a statute of limitations for bringing such claims. Instead, the Supreme Court directed courts to apply the most analogous state law statute of limitations. As the relator's employment was governed by Tennessee law, the court looked to the law of that State to determine the statute of limitations to apply to the relator's retaliation claim. The court observed that under Tennessee law, claims for injuries to personal property carry a three-year statute of limitations, while personal injury claims only carry a one-year limitations period. The court determined that claims by "at will" employees are deemed personal injury claims under Tennessee law—only individuals with employment contracts are entitled to personal property claims for retaliation. Since the relator's retaliation claim was filed more than a year after she was terminated from her job, the court agreed with the defendants that the claim was time-barred.

The court rejected the relator's argument that the standard three-year statute of limitations that was as part of the 2010 amendment to the FCA should apply, noting that, by its own terms, that provision has an effective date of July 22, 2010—more than three years after the relator filed her retaliation claim.

Fraud Claims

Next, the court considered the parties' summary judgment motions on the plaintiffs' fraud claims. The court summarized the plaintiffs' fraud claims as follows: (1) the defendants caused legally false claims to be presented to Medicare, by knowingly violating and/or disregarding Medicare regulations for payment that require the presence of qualified supervising physicians for the tests conducted by the defendants; and (2) the defendants intentionally used an improper Medicare provider number when billing for certain testing services, in order to hide the fact that one of their facilities was not eligible to receive payments under Medicare's regulations.

With regard to the plaintiffs' first theory of liability, the defendants argued that the claim failed as a matter of law, for lack of proof of a violation of a controlling federal statute or regulation, as they claimed that the applicable Medicare regulations did not require a board certified radiologist to serve as a supervising physician for the testing at issue—the defendants claimed that any physician could supervise those diagnostic tests, and that there was a conflict among Medicare carriers regarding this practice, which precluded any liability under the FCA. The court then considered the defendants' contention that a violation of a federal statute or regulation was a prerequisite for finding an FCA violation, and disagreed with the defendants' characterization. The court held that materially false statements and omissions in MedQuest's Medicare enrollment applications resulted in a contract of sorts with Medicare in which the defendants agreed to conform to various requirements that an approved supervising physician be present during the defendants' tests. In addition, the court held that the defendants' claims for payments and their omissions in reports to Medicare necessary to secure Medicare payments were sufficient to prove a violation of the FCA.

Ultimately, though, the court determined that the defendants were indeed subject to express Medicare regulations and that there was no conflict among Medicare carriers regarding the requirement that a qualified physician be present during the testing at issue. The court held that the defendants were aware of these express regulations, engaged in a pattern of violating them, and improperly billed for procedures in violation of the FCA. The court granted the government's motion for summary judgment on these claims, and denied the defendants' motion.

The court then analyzed the plaintiffs' claims that the defendants submitted false Medicare claims that included an incorrect provider billing number. The plaintiffs alleged that the defendants failed to give the Medicare proper notice of its acquisition of a doctor's facility by completing a new Medicare enrollment form, and instead, they improperly continued using the doctor's Medicare billing number for their testing. The court agreed, as it found that such changes in ownership of existing health care institutions required proper notice. Thus, since MedQuest waited 18 months before notifying the government of the change in ownership by completing a new enrollment application, the court held that the plaintiffs established proof of the defendants' reckless disregard for Medicare regulations. Consequently, the court held that granting the government's summary judgment motion with respect to this claim was also warranted.

Damages and Civil Penalties

With respect to the government's first claim—that the defendants failed to comply with Medicare regulations regarding supervising physicians—the court concluded that the defendants caused 474 false claims to be presented, for a total of \$343,758.22 in damages to the government. The court held that the maximum civil penalty of \$11,000 should be imposed for each of these false claims, since the defendant was an experienced healthcare provider that chose to disregard the applicable Medicare regulations. Moreover, the court determined that the defendants submitted an additional 995 false claims that included an improper billing number, for a total of \$493,185.46 in damages. The court imposed the minimum \$5,500 civil penalty for each of these claims; the court also noted that since the defendants were given a one-month grace period under the applicable regulations to notify Medicare of the change in ownership, the defendants would only pay penalties for 17—not 18—months of false claims that included the incorrect provider number.

***Thomas v. ITT Educ. Servs., Inc.*, 2011 WL 3490081 (E.D. La. Aug. 10, 2011)**

The plaintiff brought an action against her former employer, an educational institution, alleging retaliatory discharge under the FCA. The plaintiff alleged that the defendant received state and federal subsidies to assist students with expenses, but that the defendant would only qualify for these subsidies if it met certain accreditation requirements, which included having its student body maintain a cumulative 2.5 grade point average. The plaintiff alleged that when she reported to the deans of the school that she was going to assign many of her students low and failing grades, the deans instructed her to falsify student grade records, so that the defendant would meet the subsidy requirements. She further alleged that she refused to falsify her students' grades, and instead contacted the Accrediting Counsel of Independent Colleges and Schools (ACICS) to report the alleged fraud and that she also inquired about whether the defendant's conduct was compliant with its accreditation guidelines. She alleged that, as a result of these actions, the defendant terminated her from her job. The defendant moved to dismiss the claim, arguing that the plaintiff failed to state a claim and failed to meet the heightened pleading standard. The United States District Court for the Eastern District of Louisiana denied the motion.

The court first turned its attention to whether or not Rule 9(b)'s heightened pleading standard applied, or whether Rule 8(a)'s notice pleading standard applied. The court, relying on decisions from various circuit courts, noted that FCA retaliation claims do not allege fraud, and therefore are not subject to Rule 9(b)'s pleading requirements. Consequently, the court ruled that Rule 8(a) applied to FCA retaliation claims and denied the defendant's motion to dismiss for failure to satisfy

pleading requirements. The court then evaluated whether or not the plaintiff stated a claim for relief under the FCA. It determined that she did, as she “provided enough factual matter to ‘allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” As a result, the defendant’s motion to dismiss the plaintiff’s FCA retaliation claim was denied.

***Collins v. Ctr. For Siouxland*, 2011 WL 2893038 (N.D. Iowa July 15, 2011)**

Two plaintiffs filed an action under the anti-retaliation provision of the False Claims Act, alleging that their former employer, a nonprofit corporation that provided comprehensive human services, as well as two individual defendants, improperly terminated their employment after they sought to expose the defendants’ misuse of federal funds. The defendants moved for summary judgment, arguing that they did not engage in any wrongdoing and did not misuse federal funds. They also argued that they did not have any knowledge of protected activities by the relators and asserted that the relators were terminated for legitimate reasons. The United States District Court for the Northern District of Iowa denied the defendants’ motion for summary judgment on the relators’ retaliation claims.

The defendants argued that when the plaintiffs were discharged, they were not engaged in conduct protected by the FCA. The court, though, noted that the plaintiffs believed that the individual defendants fraudulently changed billing records in order to defraud the government and concluded that the defendants were aware of this, as the plaintiffs reported their beliefs to their supervisors and took their concerns to members of the board of directors. Further, the court found that the plaintiffs warned the defendants about possible legal action by the government as a result of what they perceived to be wrongful conduct. The court also found that one of the plaintiffs made copies of files she believed to be evidence of the fraud and delivered those documents to government investigators before she was discharged. The court held that both plaintiffs made out a *prima facie* case that they were engaged in protected activity at the time of their discharge. The court also observed that any reasonable person would consider the plaintiffs’ discharge from their employment to be a materially adverse employment action. The court found that there were fact questions for the jury on whether plaintiffs were terminated *solely* on the basis of protected activity, but found sufficient evidence on record to support the plaintiffs’ claims that they were terminated because of their whistleblower activities. Accordingly, the court denied the defendant’s motion for summary judgment on plaintiff’s retaliation claim.

***U.S. ex rel. Jajdelski v. Kaplan, Inc.*, 2011 WL 2669485 (D. Nev. July 7, 2011)**

A relator brought a *qui tam* action against his former employer, an owner and operator of educational and vocational institutions, alleging violations of the FCA and state law. Specifically, the relator alleged that one of the defendant's institutions filed fraudulent student financial aid requests. The defendant moved to dismiss for failure to plead with particularity and failure to state a claim. The United States District Court for the District of Nevada granted the motion, finding that the relator failed to plead fraud with particularity, as he did not sufficiently plead the time, place, or parties involved, or show that the defendant had knowledge of the alleged fraud. Further, the court found the alleged activities occurred prior to the defendant's acquisition of the institution in question and that the relator did not allege that the defendant continued the alleged fraudulent activities after the acquisition. Under the standards governing successor liability, the court held that the defendant could not be held liable for the institution's alleged conduct. Accordingly, the court held that the relator failed to state a claim and his complaint was dismissed with prejudice.

***See U.S. ex rel. Yannity v. J & B Med. Supply Co., Inc.*, 2011 WL 4484804 (E.D. Mich. Sept. 27, 2011) at page 43.**

***See U.S. ex rel. Diaz v. Kaplan Univ.*, 2011 WL 3627285 (S.D. Fla. Aug. 17, 2011) at page 49.**

***See U.S. ex rel. Dyer v. Raytheon Co.*, 2011 WL 3294489 (D. Mass. July 29, 2011) at page 80.**

***See U.S. ex rel. Nowak v. Medtronic, Inc.*, 2011 WL 3208007 (D. Mass. July 27, 2011) at page 17.**

***See U.S. ex rel. Stone v. OmniCare, Inc.*, 2011 WL 2669659 (N.D. Ill. July 7, 2011) at page 88.**

COMMON DEFENSES TO FCA ALLEGATIONS

A. Not Knowingly False

***U.S. v. Kaman Precision Prods., Inc.*, 2011 WL 3841569 (M.D. Fla. Aug. 30, 2011)**

The United States brought an action against a defense contractor corporation, alleging that the defendant violated the False Claims Act and common law by knowingly presenting false claims for payment under a contract with the U.S. Army. Specifically, the government alleged that the Army entered into a contract in which the defendant agreed to supply fuzes used in bunker buster bombs. The fuzes contained a component part, called a bellows motor. The United States government alleged that the bellows motor the defendant originally used was too powerful and caused the fuzes to fire unpredictably, and consequently, the defendant developed a new bellows motor to solve that problem. The original bellows motor was then used in another, different fuze, for a different Army project. The two sets of bellows motors looked identical, but were given different stock numbers, were ordered using different purchases orders, and were stored in different areas of the defendant's facility. The government alleged that, at some point, the defendant became concerned that it would not be able to fill an Army order for fuzes containing the new bellows motor, and decided to substitute fuzes containing the old, nonconforming bellows motor instead, without disclosing the substitution to the Army. The government alleged that the defendant substituted over one thousand fuzes without the Army's knowledge or consent, and that the claims it submitted for payment for the shipment of fuzes were all false, as they included a certification that the fuzes conformed to all the requirements of the contract.

The defendant moved for summary judgment on the government's claims, arguing that the government failed to present any evidence that the defendant knowingly submitted false information. The defendant argued that its substitution of the bellows motors was unintentional and that the government failed to prove that the substitution was material to its decision to make payments under the contract. The defendant also alleged that there was no evidence of falsity, because the certification of compliance with the contract only related to the contract's performance requirements and not to its design requirements. The United States District Court for the Middle District of Florida denied the defendant's motion.

Scienter

The defendant argued that the government failed to present any evidence that it knowingly submitted false information, arguing that the substitution of bellows motors was not intentional because the two sets of bellows motors were identical and the defendant thought that it was using the same part. The court found that this contention raised a genuine issue of material fact, since it was not clear whether the defendant's manager made an inquiry at all before substituting the parts, or whether the defendant's management was even told about the shortage of the new bellows motors. As a result, the court held that the government's evidence regarding scienter was sufficient to withstand the defendant's motion for summary judgment, and that motion was denied.

Materiality

The defendant then argued that the government's FCA claims fail because it failed to show that the defendant's certifications of compliance were material to the government's payment decision. The court, though, held that the government put forth sufficient evidence showing that it would not have paid the defendant, had it known about the substitution of the fuze parts. The court further found that after the government was made aware of the fact that the defendant had used the wrong bellows motors, all fuzes containing those bellows motors were quarantined. As a result, the court held that the government presented sufficient evidence on the materiality element to withstand the defendant's summary judgment motion.

Falsity

Finally, the defendant argued that the government did not present sufficient evidence of falsity, because the defendant only certified its compliance with the contract's performance requirements and not its design requirements. The court found that the defendant's arguments were misplaced, because the contract required the defendant to use parts that met unique requirements. The court made clear that this was not a performance contract in which the defendant could be absolved of liability by providing parts that were "just as good" as those specified in the contract—the court further noted that the defendant's own documents supported the conclusion that the two sets of motors were not interchangeable. Accordingly, the court held that the government offered sufficient evidence of the falsity of the defendant's claims to withstand summary judgment. Thus, the defendant's motion was denied.

B. Relator Released Defendant from FCA Claims

***See U.S. ex rel. Nowak v. Medtronic, Inc.*, 2011 WL 3208007 (D. Mass. July 27, 2011) at page 17.**

C. Statute of Limitations

***See U.S. ex rel. Estrada v. Quad City Prosthetic, Inc.*, 2011 WL 3273142 (C.D. Ill. Aug. 1, 2011) at page 79.**

FEDERAL RULES OF CIVIL PROCEDURE

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

***U.S. ex rel. Yannity v. J & B Med. Supply Co., Inc.*, 2011 WL 4484804 (E.D. Mich. Sept. 27, 2011)**

Three relators brought a *qui tam* action against their former employer, a medical supply company, alleging, among other things, violations of the federal FCA and the Michigan Medicaid False Claims Act. Specifically, the relators alleged that the defendant defrauded the United States and the State of Michigan by fraudulently billing for medical supplies. Furthermore, the relators alleged that when they identified, researched, and opposed these billing practices, they were terminated from their respective jobs in the defendant's billing department as part of the defendant's attempt to cover up its wrongdoing. After a two year investigation, the federal government filed a notice which stated it was not able to make a decision as to whether it would or would not intervene, allowing the relators to pursue their fraud claims on behalf of the government. The defendant separately moved to dismiss the relator's fraud and retaliation claims and also moved to unseal the entire court file, while the relators moved for leave to file an amended complaint.

The United States District Court for the Eastern District of Michigan considered each motion in turn.

Leave to File an Amended Complaint

With respect to the relators' request to amend their complaint, the court observed the relators' assertion that their proposed amended complaint would enhance their existing allegations with a more detailed identification of names, dates and other matters that were pertinent to this lawsuit. Further, they argued that the proposed amendments were timely and designed to respond to certain arguments raised by the defendant. As the defendant did not oppose the relators' motion and acknowledged the propriety of allowing the proposed amendment in an effort to cure the deficiencies, the court granted the relators' motion for leave to amend their complaint.

Failure to Plead Fraud with Particularity

Next, the court analyzed the defendant's motion to dismiss the relators' fraud claims for failure to satisfy the heightened particularity standard of Federal Rule of Civil Procedure 9(b). The defendant argued that the relators failed to identify any specific false claims, the names of the patients allegedly involved, the types of services alleg-

edly rendered, and the dates of service relating to certain allegedly fraudulent Medicaid claims—the defendant argued that although the relators were not required to list every single patient, claim or pertinent document, they were required to provide representative examples. The defendant, however, also acknowledged that in lieu of dismissing the relators’ complaint, the court should give the relators an opportunity to amend in order to provide greater specificity. The relators argued the heightened pleading standard could not be read in isolation from the notice-pleading standard, which simply required a short and plain statement of the claim. Further, they urged the court not to impose a standard that was too harsh and to view their allegations in their entirety. They argued that Rule 9(b)’s pleading standard should be relaxed, since they were unable to allege the specifics of the defendant’s false claims, since that information was within the defendant’s exclusive possession. The court held that since it already granted the relators’ motion for leave to amend their complaint, the defendant’s motion to dismiss their fraud allegations for failure to plead the alleged fraud scheme with particularity must be rejected as moot.

Retaliation

The court then analyzed the defendant’s motion to dismiss the relators’ retaliation claims. The defendant argued that the FCA, as it existed when the relators’ retaliation claim was brought, only prohibited retaliation against an employee who engaged in conduct “in furtherance of an action” under the FCA. The defendant contended that the relators could not show that they engaged in any conduct that would have led the defendant to believe that they were contemplating filing a *qui tam* action, and therefore, the retaliation claim failed. The relators countered that they all identified, researched, and opposed an array of fraudulent schemes within the defendant’s billing practices and that these activities were a direct cause of their termination. They also argued that the FCA only requires a showing that they were engaged in some “protected activity” about which their employer was aware. They claimed that, under the FCA, both an “investigation” in furtherance of a *qui tam* action is a protected activity, as well as bringing alleged fraud to the attention of one’s supervisors. As they alleged that they did both of these things, they argued that their retaliation claim should not be dismissed. Finally, they argued that even if there was a question as to whether the defendant lacked notice of its potential FCA liability, such an issue created a factual question that could not be resolved at the pleading stage. The court, having already granted the relators’ motion to amend their complaint, held that the defendant’s motion to dismiss the retaliation claims would also be denied as moot.

FCA Seal

Finally, the court analyzed the defendant’s motion to unseal the entire court file, asserting that due process principles required the unsealing of the entire case, so that the defendant could properly defend itself. The government opposed the defendant’s request, arguing that unsealing the court file would undermine the confidentiality of

the government's ongoing investigation of the defendant's alleged wrongdoing. The defendant, though, argued that to the extent the government resisted the unsealing for fear of jeopardizing its ongoing investigation, the court should conduct an *in-camera* review of any purportedly confidential or protected documents to assess the propriety of keeping them sealed. The court found the government failed to sufficiently establish the risk it might incur from the unsealing of the court file, finding that, based on the government's requests for extensions of the seal and the documents that had already been furnished by the relators, unsealing the court file would not jeopardize the government's investigation, cause harm to any prospective witness, or otherwise disclose the government's confidentiality investigatory methods. Further, the court found the defendant was entitled to explore any relevant defenses and to understand the basis of the allegations being lodged against it. Accordingly, the court granted the defendant's request to unseal the entire record subject to an *in-camera* review of the file contents by the court.

***U.S. ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 2011 WL 3911095 (E.D. Va. Sept. 6, 2011)**

A relator brought a *qui tam* action against two related pharmaceutical companies, alleging violations of the FCA and state laws. Specifically, the relator alleged that the defendants improperly promoted a drug for an unapproved usage, misrepresented the nature and efficacy of the drug, and provided unapproved sample doses—all of which allegedly caused health care providers to submit false claims to various federal health care programs. In an earlier opinion, the United States District Court for the Eastern District of Virginia dismissed the relator's second amended complaint for failure to state a claim and failure to plead with particularity. Thereafter, the relator filed a third amended complaint and the defendants again moved to dismiss. The court again granted the defendants' motion and dismissed the relator's complaint with prejudice, holding that the relator's third amended complaint asserted similar facts as the earlier complaint. Further, the court declined to exercise supplemental jurisdiction over the relator's state law claims and dismissed those claims without prejudice.

Failure to Plead Fraud with Particularity

The court began by analyzing the relator's claim that the defendant's caused providers to present false claims to the government. The court found that the relator relied on statistics and general allegations concerning the patients to whom the defendant's drug was marketed and distributed. The relator argued that the drug was being promoted for non-approved uses because the types of medical specialists who were prescribing the drug to patients do not treat any condition for which the drug had been approved, and because, based on two prescriptions he was aware of, he inferred that a significant percentage of non-reimbursable prescriptions from the sales territory he worked in

were submitted for reimbursement. The court found the relator's allegations failed to establish that specific false claims were presented for payment or approval or that the defendants' activities caused such false claims to be presented.

Next, the relator alleged that primary care physicians generally received 60 milligram sample doses of the drugs from the defendants, and that these physicians wrote 98 prescriptions for the drug that were submitted to Medicare for reimbursement. The relator alleged that the Medicare claims for these prescriptions were false, because primary care physicians do not treat conditions for which a 60 milligram dose of the drug has been approved. The court, though, found that these allegations were insufficient to establish FCA liability, since the relator failed to allege that any of the 98 were for actually for 60 milligram doses of the drug. Similarly, the court rejected the relator's allegation that approximately 9,000 prescriptions for the drug were submitted for reimbursement in two particular sales districts, noting that the relator failed to identify the doctors who issued those prescriptions or the illnesses for which they issued the prescriptions. The relator then pointed to several physicians who attested that they were unaware of the drug's availability in a 30 milligram dosage—the relator alleged that these physicians prescribed the drug for an off-label use and that the defendants caused those physicians to submit false healthcare reimbursement claims to the federal government. The court found the relator failed to allege when the prescriptions were allegedly issued, or that any claims for payment were actually submitted for these prescriptions. Accordingly, the court held the relator failed to identify any false claims or to plead the necessary facts to establish the defendants' FCA liability for causing the presentment of false claims.

Finally, the court rejected the relator's contention that the defendants directed its sales representatives to make false representations about the drug to physicians. The court found that the relator failed to allege what, when, where and to whom the alleged representations were made. Further, the court found that the relator failed to allege any fraudulent acts that were the result of the defendants' alleged misrepresentations or that any such fraud was material to a claim to the federal government for payment. Accordingly, the court dismissed the relator's claim for failure to plead with particularity.

***U.S. ex rel. Pilecki-Simko v. Chubb Inst.*, 2011 WL 3890975 (3rd Cir. Sept. 6, 2011)**

Two relators brought a *qui tam* action against an educational institute (TCI) and two other corporations (TCC and HTI), alleging that the defendants violated the False Claims Act by knowingly causing false claims to be presented to the government and by using false statements to get the false claims paid. The relators alleged that TCI made misrepresentations to the Department of Education that allowed it to improperly secure federal student financial aid funds in the form of loans and grants from the government, pursuant to Title IV of the Higher Education Act (HEA). According to the relators, the defendants entered into a Program Partici-

pation Agreement that required compliance with the HEA, but failed to abide by the terms of that agreement because they violated the HEA's incentive compensation ban. Consequently, the relators' alleged, the defendants' certifications of compliance with the HEA—and the defendants' claims for financial aid funding—were false. The relators further alleged that TCI's corporate parents, HTI and TCC had control over TCI's actions and were therefore liable for its conduct.

The defendants moved to dismiss the relators' complaint for failure to state a claim and for failure to plead with particularity. The United States District Court for the District of New Jersey granted the defendants' motions and dismissed the relators' complaint with prejudice. The court held that the relators failed to plead the alleged fraud scheme with particularity and that the alleged improper conduct fell within an HEA safe harbor provision that shielded the defendants from FCA liability. The relators moved for reconsideration, arguing that the safe harbor provision was not appropriately raised as an affirmative defense in the defendants' motion to dismiss, that the safe harbor provision did not apply to allegations about TCI's conduct prior to its enactment, and that the safe harbor regulation did not cover some of the defendants' alleged improper conduct, such as gifts and offers of trips to its top admissions officers. The district court denied the relators' motion for reconsideration, finding that it was procedurally improper and that the relators had not demonstrated a clear error of law resulting in manifest injustice. The relators appealed this ruling to the U.S. Court of Appeals for the Third Circuit, challenging the district court's dismissal of their *qui tam* complaint and its denial of their request for leave to amend their complaint. The Third Circuit affirmed the district court's decision. It also granted defendant TCC's motion for damages and costs, finding that the relators' allegations against that defendant were frivolous, pursuant to Federal Rule of Civil Procedure 38.

Failure to Plead Fraud with Particularity

The relators argued that the district court erred in applying Rule 9(b)'s pleading standard, since the court required them to plead knowledge beyond what they had access to. They argued that they sufficiently pled the necessary elements to establish the defendants' FCA liability, as they alleged that TCI violated the incentive compensation ban, but signed the Program Participation Agreement (PPA) in which they stated that they were in compliance with that provision. However, the Third Circuit found that the relators' complaint did not state facts supporting a reasonable inference that TCI knew, acted in reckless disregard, or deliberately ignored the fact that any of its submissions and/or statements to the government were false because of an alleged violation of the incentive compensation ban. As a result, the circuit court held that relators' complaint could not survive the defendants' motion to dismiss. Additionally, the court found that the relators did not allege sufficient facts, such as how the defendants documented, or were made aware of the alleged violations to the extent needed

to support a plausible claim that they knowingly submitted false claims. The circuit court held that since it was able to resolve the dismissal of relators' complaint on this basis, it did not need to make a determination with respect to the district court's allegedly heightened knowledge standard.

***Chesbrough v. VPA, P.C.*, 2011 WL 3667648 (6th Cir. Aug. 23, 2011)**

Two relators brought a *qui tam* action against a medical services provider, alleging that the defendant violated the False Claims Act and state law by submitting false Medicare and Medicaid billings. They contended that the defendant's billings were fraudulent because the defendant was an invalid corporation. In addition, they alleged that the defendant's billing for radiology studies was fraudulent because the tests were either not properly documented, were performed with equipment that did not conform to industry standards, or were administered by inadequately trained radiology technologists. The defendants moved to dismiss the relators' complaint, arguing that the relators failed to state a claim and failed to plead fraud with particularity. The United States District Court for the Eastern District of Michigan granted the defendant's motion. The district court held that the relators were "unable to provide dates or particularities for even a single claim that was submitted to the government, much less any false statement made in connection therewith." The relators appealed the district court's ruling to the U.S. Court of Appeals for the Sixth Circuit, arguing that their FCA claim was pled with sufficient particularity.

Pleading Fraud with Particularity

First, the circuit court analyzed whether the relators had alleged a scheme that constituted fraud. The court noted that the relators attached to their complaint x-ray studies that were allegedly defective or nondiagnostic, and which did not meet industry standards. But the court observed that, although the relators alleged that the defendant failed to meet objective standards for testing, they failed to allege that the defendant was expressly required to comply with those standards as a prerequisite to payments for its claims. The court found that the relators failed to identify any specific regulations that mentioned compliance with industry standards or that conditioned payment of claims on compliance with those standards. Similarly, the Sixth Circuit concluded that the relators failed to cite any regulation in support of their allegations that the defendant violated HIPAA or that it violated Medicare regulations because it was an "illegal corporation" under Michigan law. As a result, the Sixth Circuit held that the relators' allegations regarding these issues did not amount to pleading a "fraudulent scheme" actionable under the FCA.

But the circuit court determined that the relators did adequately allege that the defendant knowingly submitted claims to the government for purely nondiagnostic tests that had no medical value, noting that the examples of five such nondiagnostic

studies the relators attached to their complaint. The court then examined whether or not the relators sufficiently alleged that the defendant actually submitted claims for the worthless nondiagnostic tests to the government. It held that they did not, since they could not identify with particularity any billings or costs reports that were actually submitted to the government, or any dates on which bills were submitted. The relators argued that a relaxed pleading standard should be applied to their action because they had no access to the defendant's billing records, but that the facts they alleged support "a reasonable inference—not a mere assumption—that [the defendant] did, in fact, submit claims to Medicare." However, the court refused to apply a relaxed standard, since the relators lacked any personal knowledge of the defendant's billing practices or contracts with the government. It held the relators only assumed that the tests in question were performed on Medicare or Medicaid patients and that the defendant billed those programs for the services. The court declared that the mere existence of a few nondiagnostic tests did not support a strong inference that the claims for those tests were submitted to the government, and thus, affirmed the dismissal of the relators' complaint.

***U.S. ex rel. Diaz v. Kaplan Univ.*, 2011 WL 3627285 (S.D. Fla. Aug. 17, 2011)**

Three relators (Gillespie, Diaz, and Wilcox) brought a *qui tam* action against their former employers, a higher education service provider and one of its subsidiaries, alleging that the defendants violated the False Claims Act. Specifically, the relators alleged that the defendants submitted false claims to the federal government for education funds under the Higher Education Act (HEA)—the relators alleged that the defendants' claims were false because the defendants failed to comply with various provisions of the HEA, and were therefore not eligible to file claims for funds. In addition, one of the relators alleged that the defendants violated the FCA by retaliating against him after he engaged in protected whistleblower activity.

Relator Gillespie alleged two theories of FCA liability: (1) that the defendants failed to comply with the Rehabilitation Act (RA)—a statute that prohibits recipients of federal financial assistance from discriminating against individuals with disabilities—even after the Department of Education conducted an investigation and directed the defendants to make specific remedial changes; and (2) that, in order to continue receiving federal funding, the defendants inflated students' grades—by tying professors' jobs to their student evaluations and by implementing a grade distribution system in which half of each class received "A" or "B" grades—and falsely certified to the government that those students were maintaining satisfactory academic progress.

Relators Diaz and Wilcox alleged that the defendants: (1) violated the HEA's incentive compensation ban, which prohibited the defendants from basing student

recruiters' bonuses and other forms of incentive compensation on the number of students they enrolled; (2) violated the HEA's 90/10 Rule, which required the defendants to ensure that at least 10% of student tuition came from cash, rather than student loans; (3) falsified documents in order to receive the accreditation they needed in order to be eligible to receive federal student loan funds; and (4) violated the "Program Participation Agreement" they signed—in which they certified that, in exchange for receiving federal student financial aid, they would comply with various HEA and Department of Education requirements—by enrolling unqualified students, placing extreme pressure on admissions representatives, misusing accreditation claims, and encouraging students to use student loan funds to buy cars and other non-educational items. Relator Diaz also filed a retaliation claim under the FCA, alleging that he was fired from his job with the defendants after he informed them that he was going to notify federal and state authorities of the defendants' HEA noncompliance.

The defendants moved to dismiss the relators' fraud allegations, pursuant to the FCA's first-to-file rule, and for failing to plead the alleged fraud with particularity. The United States District Court for the Southern District of Florida granted the defendants' motion in part.

Failure to Plead Fraud with Particularity

The court examined each of the relators' fraud claims, beginning with the allegation that the defendants violated the FCA by inflating students' grades and falsely certifying their compliance with the academic progress requirements. The defendants argued that the relators failed to establish that the alleged grade inflation formed the basis of an FCA action. The court found that because the relators failed to show how grade inflation violated any regulation, they failed to allege any fraud. Further, the court found that Gillespie failed to allege the "who, what, when, where and how" of the defendants' alleged false certifications to the government that their students maintained satisfactory academic progress. Moreover, the court found that the relators failed to allege the specifics of any non-performing students about whom the defendants made false certifications in order to receive student loans funds. Accordingly, the court dismissed the fraud claims based on the defendants' alleged grade inflation and false certification of satisfactory student academic progress.

Next, the court analyzed the fraud claims based on the defendants' alleged failure to comply with the HEA's incentive compensation ban. The relators had alleged that the defendants paid retention bonuses, cash bonuses, trips and other incentive compensation to their recruiters, based on the number of students they recruited. The court, though, held that the relators' allegations were insufficient to state a violation of the incentive compensation ban, noting the relators' concession that other factors were also part of the defendants' incentive compensation plan. The court found that the relators' complaint acknowledged that these "other factors" were formally part of the

defendants' compensation plan, and simply made conclusory assertions, unsupported by fact, that those factors were not actually considered by the defendants. The court held that the defendants did not plead the alleged fraud with particularity, and that claim was dismissed as well.

The court then considered the relators' allegation that the defendants violated the 90/10 Rule. The relators had argued that the 90/10 Rule prohibited the defendants from deriving more than 90% of its revenue generated by student tuition, and certain other fees and institutional charges from student loan funds. The relators alleged that a scholarship the defendants created for their employees violated the 90/10 Rule, because the scholarship program simply diverted a portion of student loan funds into an account, awarded funds from that account back to students in the form of scholarships, and then allowed the students to use those funds to pay for tuition expenses, in cash. The defendants argued that the relators misconstrued the 90/10 Rule and stated that even if the relators' factual allegations were true, the relators failed to allege how the scholarship program would violate the 90/10 Rule. The court agreed, and as a result, the relators' fraud claims based on violations of the 90/10 Rule.

Next, the court analyzed the relators' allegation that the defendants failed to comply with the Rehabilitation Act. Relator Gillespie had alleged that the defendants violated the RA because they did not provide accommodations for his bipolar disorder. He alleged that he filed a complaint with the Department of Education's Office of Civil Rights (OCR), which investigated his claim, denied his claim, determined that the defendants had violated the RA in other ways, and entered into a Resolution Agreement with the defendants. Gillespie argued that the defendants' claims for HEA funds were false, because those claims contained the defendants' false certifications of compliance with the RA. Furthermore, Gillespie alleged that after executing the Resolution Agreement with OCR, the defendants continued their pattern of noncompliance with the RA, resulting in additional false claims to the government. The defendants argued that they did not violate the RA and thus, did not make false certifications to the government. The court, though, relying on OCR's finding of seven specific violations of the RA by the defendants, held that the relators adequately pled a violation of the RA, and thus, an FCA violation.

But the court dismissed the relators' fraud claims based on the defendants' alleged continuing failure to comply with the RA, after executing the Resolution Agreement. The court noted that "the very same documentation submitted by [the relator] to substantiate Defendants' non-compliance indicates that after Defendants and OCR entered into a Resolution Agreement, OCR found that the Defendants had complied with the terms of the Resolution." Therefore, it found that the relators failed to show continuous non-compliance, and limited the relator's RA claims to the time OCR determined that the defendants were in compliance with the RA.

The court next focused on the relators' claims involving the defendants' allegedly false accreditation documents. The defendants argued that the relators' claims failed because the relators did not allege that the defendants submitted any false claims to the

government—the allegedly false documents were submitted to a non-governmental accreditation authority. The relators, countered that, for FCA purposes, a false claim exists if a party makes false statements to an accrediting agency in order to obtain accreditation necessary to receive federal funds. The court, however, held that the relators failed to plead the alleged fraud scheme with particularity, since their complaint did not allege which false statements were made, which accrediting bodies the statements were made to, when they were made, or who made them. Therefore, the court granted the defendants’ motion to dismiss fraud claims based on defendants’ alleged false statements to accrediting bodies.

Finally, the court considered the relators’ allegation of several other activities by the defendants that led to violations of the FCA, including enrolling unqualified students, placing extreme pressure on admissions representatives, misusing accreditation claims, and misadvising students. The defendants argued that these allegations should be dismissed, for failure to plead the alleged fraud with particularity and because the relators failed to state an actual violation of any statute or regulation. The court agreed and found that the relators’ complaint was devoid of facts showing that any of their allegations, if true, would constitute a violation of a statute or regulation. Accordingly, the court dismissed the relators’ claims based solely on those allegations.

Retaliation

Next, the court considered Relator Diaz’s retaliation claim. The defendants moved to dismiss that claim on *res judicata* grounds and because they claimed that Diaz failed to adequately plead that he was engaged in protected conduct under the FCA. The defendants’ *res judicata* argument was based on an earlier action Diaz filed against the defendants, in which he alleged job discrimination and retaliation under Florida law. The court held that this prior suit did not bar Diaz’s FCA retaliation claim; since the retaliation claims in the prior case were not FCA claims, the court held that the issues in the two cases were different, and thus, *res judicata* principles did not apply. In addition, the court observed that Diaz eventually dropped his earlier retaliation claims, and since no the “final judgment on the merits” requirement was not met, *res judicata* did not apply.

The defendants also argued that Diaz’s retaliation claim should be dismissed because he did not adequately plead any protected conduct under the FCA. The court disagreed, finding that Diaz told the defendants that he was notifying governmental authorities of their alleged wrongdoing. Based on this, the court held, the defendants reasonably could have feared being reported for fraud or being sued in a *qui tam* action.

The defendants then argued that Diaz’s retaliation claim should be dismissed because there was no possibility that he could have filed a viable FCA action based on the information he reported. The court again disagreed with the defendants, noting that the relators *had* plead some viable FCA claims and stating that there was a distinct possibility that Diaz could have filed other viable FCA claims. Therefore, the court denied the defendants’ motion to dismiss Diaz’s retaliation claim.

First-to-File Rule

Lastly, the court analyzed the defendant's contention that the FCA's first-to-file rule precluded the relators' claims. The defendants argued that approximately five months before the relators' suit was filed, another *qui tam* complaint, with the incentive compensation allegations as the relators', was filed against one of the defendants. The court noted that, in the present case, the relators' incentive compensation fraud claims were dismissed, and only a subset of their claims based on alleged violations of the RA remained. Therefore, the court held, the allegations in the two *qui tam* actions were different, and the FCA's first-to-file rule did not apply.

***U.S. ex rel. Gatsiopoulos v. Kaplan Career Inst., ICM Campus*, 2011 WL 3489443 (S.D. Fla. Aug. 9, 2011)**

Two relators brought a *qui tam* action against their former employers, a higher education service provider and its wholly-owned subsidiary, alleging violations of the Higher Education Act (HEA). The relators alleged that the defendants submitted false claims to the government by falsely certifying their compliance with requirements of the HEA—certifications that were prerequisites for receiving student financial aid funds. Specifically, the relators alleged that the defendants violated the HEA's advertising rules by providing compensation to admission representatives based solely on their enrollment success. Further, the relators alleged that, in order to receive loans through the Direct Loan program and Federal Family Education Loan (FFEL) program, the defendants improperly advertised job placement rates while not making available the state licensing requirements for the jobs, and that they manipulated graduation and job placement rates in order to comply with the rules requiring 70% achievement rates for each. One of the relators also brought a claim for retaliation under the FCA. The defendants moved to dismiss the fraud allegations for failure to state a claim and failure to plead with particularity. The United States District Court for the Southern District of Florida granted the motion in part.

Pleading Fraud with Particularity

The court began by analyzing the relator's claims based on the violations of the HEA's advertising rules. The defendants argued that the relators failed to allege that they advertised job by using job placement rates. Specifically, the defendants argued that the two documents relied upon by the relators—a "Student Consumer Information" booklet and a document entitled "Student Disclosure Placement Rates"—were not advertisements. The court further concluded that the booklet was not relevant to the time period at issue. The court found that the second document, however, was distributed to prospective students and was therefore, an advertisement. The defendants then argued that the relators failed to adequately allege that the defendants did not

provide state licensing requirements to prospective students. The court agreed, as it found that the relators failed to allege with particularity why the data in the document was false or that the defendants actually failed to make data available. Next, the defendants argued that the relators failed to adequately allege that the defendants did not provide state licensing requirements for any particular program. The court found the relators' general allegations established the defendants did not make the licensing information available through certain particular means, but those allegations did not establish that the defendants failed to make licensing information available through other means. Thus, the court dismissed the relators' claims based on job placement rates and licensing requirements with prejudice.

The court then analyzed the relators' claims based on the violations of the 70% rules. The defendants argued that the relators failed to allege that these rules applied to any of the defendants' specific programs. The court disagreed and found that the relators alleged that all of the defendants' programs were subject to these rules, as they all received financial assistance from the Direct Loan and FFEL programs. The defendants then argued that the relators' allegations were insufficient, since they could have been eligible for loans under these programs through other means that did not require compliance with the 70% rules. The court, though, noted that the defendants failed to identify any specific program for which eligibility was not based on compliance with the 70% rules. Taking the relators' allegations as true for the purpose of deciding the defendants' motion to dismiss, the court held the relators adequately alleged that all of the defendants' programs must comply with the 70% rules, and denied the defendants' motion to dismiss.

***Cade v. Progressive Cmty. Healthcare, Inc.*, 2011 WL 2837648 (N.D. Ga. July 14, 2011)**

A relator brought a *qui tam* action against her former employer, a healthcare company, and several individuals, alleging that the defendants violated the False Claims Act by knowingly billing for medically unnecessary tests and other services, by fraudulently using the names of physicians who did not provide those services. Further, she alleged that the owner of the healthcare company falsified or changed billing codes in order to claim higher reimbursements, and fraudulently used different codes to resubmit claims that had been rejected. The defendants moved to dismiss the relator's complaint for failure to state a claim and failure to plead fraud with particularity. The United States District Court for the Northern District of Georgia granted the motion, finding that the relator failed to plead fraud with particularity.

The relator argued that a relaxed pleading standard should apply to her claims, since the information necessary to allege the actual submission of false claims was within the defendants' possession. The court analyzed whether the relator's allegations about the defendants' billing process and her involvement in that billing process

in her role as office manager provided sufficient indicia of reliability for her belief that the defendants actually submitted false claims. The court determined that the relator's role in the billing process was too limited to substantiate her claims of fraud with adequate reliability. The court then concluded that the relator's allegations that the defendants actually submitted false claims were general and conclusory, noting that she did not provide specific details regarding the submission of any claims, did not specify who had submitted false claims, failed to differentiate between Medicare, Medicaid and private insurance, and failed to explain the basis for her belief that false claims were submitted to any one of these entities. The court found that the relator had, at most, a limited role in the billing process, consisting only of filling out patient demographic information. Further, the court noted that the relator made no effort to describe the defendants' billing process and failed to describe the role of a third party billing company which reviewed and submitted claims on behalf of the defendants. The relator countered, alleging that she audited the defendants' claims based upon a report from the third party billing company. The court, though, found that the relator failed to specify what information was in the audit reports, whether the information was available to her or what led her to believe that false claims were actually submitted. Further, the court found that the relator failed to detail the critical process of actually submitting the defendants' claims and merely stated generic allegations of wrongdoing. Accordingly, the court held that the relator failed to plead fraud with particularity and dismissed relator's claims.

***U.S. ex rel. Watine, et al. v. Cypress Health Sys. Florida, Inc.*, 2011 WL 2710062 (N.D. Fla. July 12, 2011)**

A relator brought a *qui tam* action against two hospitals (Cypress Florida and Cypress Wyoming), alleging FCA violations due to the submission of fraudulent claims. Specifically, the relator alleged that the defendants engaged in acts, schemes and billing practices to defraud various federal and state healthcare programs to maximize Medicare reimbursements through fraudulent "upcoding." The relator worked as a physician at Cypress Florida and alleged that the physicians were instructed to falsely bill the highest paying codes and that he was even reprimanded for not doing so. Further, he alleged that he was asked to review twenty-five Medicare Summary Notices (EOBs) and to appeal Medicare's denial of those claims. He stated that he was unable to submit any letters, however, as he determined that each of the claims included incorrect billing codes. He alleged that he then, on his own initiative, pulled sixteen random patient history charts and found that improper, higher-paying billing codes were used before claims were apparently submitted to the government healthcare programs. The relator also alleged that Cypress Florida billed nursing home patient visits as if the patient was seen at the hospital, because reimbursement for seeing patients at the hospital was higher. The government declined to intervene in the relator's action. The

relator made similar allegations against Cypress Wyoming, based on his claims against Cypress Florida. The defendants separately moved to dismiss the relator's complaint for failure to plead with particularity and for lack of subject matter jurisdiction. They also moved for an award of attorneys' fees. In response, the relator moved to amend his complaint, if necessary. The United States District Court for the Northern District of Florida granted the defendants' motions, dismissing the relator's complaint against Cypress Wyoming with prejudice, but granting the relator's motion for leave to amend his claims against Cypress Florida.

The court began by examining the allegations against Cypress Florida. It found that the relator's allegations of fraudulent upcoding failed to allege how the claims were actually submitted. With respect to the twenty-five EOBs the relator examined, the court held that the relator failed to allege the amount of the false claims, who submitted those claims, and when the claims were submitted. Similarly, the court found, with respect to the allegations concerning the sixteen random patient charts the relator pulled, that he failed to allege the details surrounding the submission of any false claims to a government healthcare program. The court found that the relator's allegations of fraud regarding billing for nursing home visits as if they were hospital visits was based on an internally generated record and that the relator failed to provide the details as to how, when, and to whom the allegedly false claims were submitted. Finally, the court found, with respect to the relator's allegation of fraudulently churning patients, that the relator again failed to include details of any falsely submitted claims for payment. Therefore, it held the relator failed to meet Rule 9(b)'s heightened pleading requirements and dismissed the claims against Cypress Florida.

The court then examined the allegations against Cypress Wyoming. Since those claims were based on the allegations against Cypress Florida, the court held that the claims against Cypress Wyoming were also deficient. Further, the court held that the relator failed to link the actions of the two defendants, finding that the relator made no independent or specific allegations linking Cypress Wyoming to the actions of Cypress Florida. As a result, the court dismissed the allegations against Cypress Wyoming with prejudice for failure to plead with requisite particularity. Although the court ultimately dismissed the claims against Cypress Wyoming, it did reject that defendant's argument that the court did not have subject matter jurisdiction over the relator's claims against it because the relator was not an original source of the information upon which those claims were based. The court clarified that the original source inquiry is only made after a determination has been made that the relator's allegations are based on a prior public disclosure under the FCA.

Finally, despite finding the pleadings inadequate, the court did not award attorneys' fees to either defendant, as it held that the relator's claims were not filed frivolously or for the purpose of harassment.

***U.S. ex rel. Grayson v. Genoa Healthcare*, 2011 WL 2670079 (W.D. Wash. July 6, 2011)**

A relator brought a *qui tam* action against his former employer, a nationwide pharmaceutical company located at Community Mental Health Centers (CMHC). The relator alleged violations of FCA, retaliatory discharge, and other common law claims. Specifically, he alleged that the defendant routinely waived copayments from some CMHC's Medicare and Medicaid patients, that he informed his supervisor of the copayment waivers on a conference call, and that one of the defendant's manager stated that the defendant had an agreement with CMHC to waive copayments under \$3.10. The relator then alleged that he reported the defendant's Medicare copayment waivers to the Office of the Inspector General of the Department of Health and Human Services. A few months later, he was terminated from his job.

The relator concluded that the defendant's copayment waivers were kickbacks to CMHC (which was responsible for the payment of Medicare copayments), that the defendant billed Medicare for some prescriptions that were never dispensed, that the defendant changed dates of medication as a means of ensuring that the Medicare claims would be accepted, and retaliatory discharge. The defendant moved to dismiss for failure to state a claim and for failure to plead with required particularity. The United States District Court for the Western District of Washington denied the motion with respect to the retaliation claim, but granted the motion with respect to the fraud claims.

Pleading Fraud with Particularity

The court analyzed the various allegations regarding the submission of false claims. First, the court found that the relator failed to allege that the defendant submitted any false claims to the government for which copayments were waived. Additionally, the court found that the relator cited an outdated statute for the proposition that routine waivers of copayments results in false claims. Moreover, the court found that the relator failed to plead the alleged fraud scheme with sufficient particularity to create an inference that false claims were actually submitted. Second, the court found the relator failed to allege that the defendant knowingly submitted false claims to Medicare and requested payment for prescriptions that were not dispensed to patients. The court also found the relator failed to plead the specifics of the alleged fraud, as the relator failed to allege the specifics of the individuals who committed the fraud, when the fraud was committed, and where the alleged fraud took place. Third, the court similarly found that the relator failed to properly allege that the defendant changed the dates of service on medications billed to Medicare after they were dispensed to patients to prevent the rejection, since the relator failed to allege the specifics of claims for which the dates of service were changed. As a result, the court held that the relator's fraud

allegations failed to state a claim under the FCA, and failed to meet the heightened requirements of Federal Civil Procedure Rule 9(b).

Retaliation Claim

The court then examined the relator's FCA retaliation claim and found that the relator set forth sufficient facts to constitute a plausible claim, as the relator sent an email to the defendant's management, expressing concerns that the routine waiver of copayments constituted fraud. Further, the court found the relator reported his concerns to the Office of the Inspector General of the Department of Health and Human Services. The court held that the relator alleged sufficient facts to establish that he was engaged in protected activity, and that he put his employer on notice of his protected activity. Therefore, the court held the relator adequately stated that his employment was terminated in retaliation because he opposed the illegal practices of his employer.

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

***U.S. ex rel. Porter v. HCA Health Servs. of Okla., Inc.*, 2011 WL 4590791 (N.D. Tex. Sept. 30, 2011)**

A relator brought a *qui tam* action against a hospital (Medical City), two corporations that operated medical labs (HCA and TMSI), and an individual (Nikaein), alleging violations of the federal False Claims Act and the similar Texas Medicaid Fraud Prevention Act. Specifically, the relator alleged that the defendants performed tissue compatibility testing on transplant organs before transplantation, that such testing was regulated by federal law—namely, the Clinical Laboratory Improvement Act (CLIA), and that the corporate defendants violated CLIA by sharing and comparing their test results with each other before those results were reported to the public. The relator alleged that individual defendant Nikaein facilitated these improper communications. According to the relator, due to the defendants' violations of the CLIA, their Medicaid/Medicare claims for reimbursement to the federal and Texas governments were false, as those claims contained false certifications of the defendants' compliance with applicable laws, including the CLIA. Defendants HCA and Medical City moved to dismiss the relator's complaint for failure to plead fraud with particularity and failure to state a claim. HCA also moved to transfer venue, or in the alternative, to dismiss the complaint for lack of personal jurisdiction. The relator also moved for leave to amend his complaint. The United States District Court for the Northern District of Texas denied HCA's motions to transfer venue or to dismiss the complaint for lack of personal jurisdiction. However, the court granted in part the defendants' motions to dismiss for failure to state a claim and to plead fraud with particularity. The court also denied relator's leave to amend as moot.

Personal Jurisdiction/Venue

First, the court analyzed the personal jurisdiction issue raised by defendant HCA. The court determined that the False Claims Act provides for nationwide service of process on defendants, which gives the court personal jurisdiction over any defendant that has minimum contacts with the United States. As the court observed that HCA was an Oklahoma corporation, and thus, a United States citizen, it concluded that HCA had the requisite minimum contacts required for the court to exercise personal jurisdiction over HCA. Thus, HCA's motion to dismiss the relator's complaint for lack of subject matter jurisdiction was denied.

With respect to HCA's motion to transfer venue to the U.S. District Court for the Western District of Oklahoma, the court held that even though the relator *could* have filed his case in Oklahoma, a transfer of venue was not warranted because the Oklahoma district court was not a more convenient venue. The court noted that any pertinent

documents located in Oklahoma could be easily transferred to Texas through “modern technology,” and that HCA had failed to identify any non-party witnesses who were outside the court’s jurisdiction—the court noted that HCA’s own employees who were outside the reach of the court could be compelled to testify due to their employment status, and therefore the location of any such witnesses would not be considered for venue purposes. Moreover, the court held that since HCA was the only defendant located outside the Northern District of Texas, a change of venue would shift any burdens from HCA and onto the relator and the other three defendants. Finally, the court determined that neither the Texas district court nor the Oklahoma district court was more convenient in terms of court congestion and that Texas (which the relator alleged was defrauded by the defendants) had a stronger local interest in the case than did Oklahoma. Thus, the court denied HCA’s motion to transfer venue.

Failure to State a Claim

The court then analyzed whether the relator’s complaint should be dismissed for failure to state a claim. The court first noted that the Texas Medicaid Fraud Prevention Act had been amended in May of 2011, but concluded that the amended statute was not retroactive, and thus, the prior version of the law applied. Under the prior Texas law, when the State declined to intervene in a *qui tam* action, the action must be dismissed. Since the State of Texas declined to intervene in the relator’s case, the court held that the *qui tam* allegations under the Texas law must be dismissed.

The court then considered the relator’s allegations under the federal False Claims Act, noting the parties’ disagreement over whether or not Medicaid/Medicare reimbursements were conditioned on compliance with the CLIA—if so, then such compliance was material to the government’s payment decision and a false certification of compliance would lead to FCA liability. The court held that the issue of whether the government conditioned Medicaid/Medicare payments on CLIA compliance was complex and required an analysis of information outside the four corners of the relator’s complaint, which in turn would convert the defendants’ motion to dismiss into a motion for summary judgment. Rather than make a summary judgment ruling, the court chose only to decide the defendants’ motion to dismiss and read all factual allegations in the light most favorable to the relator. As a result, the court held that there was plausible ground on which the relator’s claims could rest and thus denied the defendants’ motion to dismiss for failure to state a claim.

The court then considered the relator’s argument that even if CLIA compliance was not a condition for payment under Medicaid/Medicare, his FCA claims could still be maintained under a fraudulent inducement theory. Specifically, the relator alleged that the defendants falsely represented to the government that their labs were in compliance with CLIA and that the government relied on these representations when it decided to award benefits that the defendants were not entitled to receive. The court, though, rejected the relator’s argument, since the relator failed to allege that the defendants made any false statements that induced the government to allow them to

participate in the Medicaid and Medicare programs—instead, the relator alleged that after the defendants were allowed to participate in the program, they made false claims for reimbursement that were based on false certifications. As a result, the relator’s claims based on a fraudulent inducement theory were dismissed.

Finally, the court analyzed the relator’s reverse false claim theory of FCA liability, in which the relator alleged that the defendants failed to refund the amounts they allegedly improperly received in Medicare/Medicaid reimbursements from the federal government. According to the court, these allegations were not true “reverse false claims” allegations, but rather merely re-casted the relator’s original claim that the defendants presented false statements to the government. The court found that the FCA’s reverse false claim provision did not apply, since the relator did not allege that the defendants had an existing obligation to reimburse money they received from the federal government. Consequently, any reverse false claims allegations were dismissed for failure to state a claim.

***U.S. v. Edelstein*, 2011 WL 4565860 (E.D. Ky. Sept. 29, 2011)**

The United States brought an action in the United States District Court for the Eastern District of Kentucky alleging, among other things, that a pharmacy (Holland), the pharmacy’s owner/operator and the owner/operator’s wife (Mr. and Mrs. Edelstein), and one of the pharmacy’s employees (Bond) violated the False Claims Act by improperly selling drug samples and then submitting claims for those samples to healthcare providers who in turned submitted those claims to Medicaid, in violation of applicable Medicaid regulations. Both the United States and defendant Bond moved for summary judgment on the government’s FCA claims.

Application of FERA Amendments to the FCA

The court noted that the FCA liability provisions under which the government filed suit were amended by the Fraud Enforcement and Recovery Act of 2009. The court further recognized that the FERA amendments were enacted, at least in part, in response to the U.S. Supreme Court’s decision in *Allison Engine Co. v. U.S. ex rel. Sanders*, in which the Court interpreted various liability provisions of the False Claims Act in contravention of congressional intent. However, the court held that those amendments did not apply to this case, since FERA’s retroactivity provision specified that the FCA amendments only applied to “claims” that were pending on or after June 7, 2008 (two days before *Allison Engine* was decided). The court, agreeing with the analysis of other district courts, concluded that the FERA retroactivity provision’s use of the word “claims” as opposed to “cases” could only mean that the FCA amendments would apply to any case in which a defendant’s claims to the government for payment or approval were still pending. Since no such claims were still pending in the government’s case against the defendants, the court held that the prior version of the FCA’s liability provisions applied.

Presenting False Claims

Defendant Bond argued that the government could not maintain its allegation that the defendants violated the FCA's presentment provision—which prohibits knowingly presenting or causing to be presented “to an officer or employee of the United States Government” a false claim for payment or approval. Bond asserted that the government failed to demonstrate a necessary element of presentment, as the government only alleged that the defendants presented false claims to a private health care provider, not any government entity. The district court, applying the Supreme Court's holding in *Allison Engine Co.*, determined that the FCA's presentment provision imposes liability on those who present false claims to the government, as well as those who cause others to present false claims to the government. Thus, as an initial matter, the court held that the defendants were not automatically absolved of liability merely because they did not present any false claims to the government, as they could still be liable for causing health care providers to do so. In any event, the court held that there could be no FCA liability for presenting false claims, unless the government could show that the defendants submitted false claims that were ultimately presented “to an officer or employee of the United States Government.”

The court determined that the government's presentment allegations were insufficient to establish the defendants' FCA liability, because the government did not allege that the defendants presented any claims to the government, nor did they demonstrate that the defendants' allegedly false claims were ultimately presented to the government by someone else. The court noted that had the government alleged that the defendants submitted false claims to a state agency that administers Medicaid, then that would constitute evidence of presentment to the federal government, since Medicaid is a joint federal-state program and states routinely submit Medicaid claims they receive to the federal government during the reconciliation process. However, the court found, the government merely alleged that the defendants submitted false claims to a private managed care program, without further alleging that the claims were ultimately presented to the federal government. Thus, the court held, the government's claims were deficient.

The court rejected the government's argument that the individual defendants were estopped from contesting liability because they pled guilty in a prior criminal proceeding to violating the Prescription Drug Marketing Act. The court, though, noted that the defendants' guilty plea did not include an admission of fraud or making false statements, and thus, they were not estopped from denying those elements of FCA liability. As a result, the court denied both the government's and defendant Bond's motions for summary judgment with respect to the government's allegations that the defendants were liable for violating the FCA's presentment provision.

Making False Statements/Records

The court next considered the government's claim that the defendants violated the FCA by making false statements or records to get false claims paid or approved by the government. The court first observed that, although the government maintained this claim against the other defendant, it abandoned this claim with respect to defendant Bond—although the government alleged that Bond created records that were material to false claims, the court determined that the allegation was made only in support of the government's conspiracy claim against the defendants. Thus, this claim was dismissed against Bond. The court, again relying on the *Allison Engine* decision, held that the defendants could only be liable for making false statements or records if the government could show that they intended for any such statements/records to be material to the government's decision to pay or approve false Medicaid claims. The court held that it was not clear from the record whether the Edelstein defendants intended that the federal government would pay false claims based on their allegedly false statements/records, and therefore denied the government's summary judgment motion with respect to that claim.

Conspiracy

Finally, the court analyzed the government's conspiracy claim. The court held that the government's claim was dependent on a showing that the defendants knew and intended that the federal government would pay the allegedly false claims at issue. Since that issue was not yet resolved, the court denied the government's motion for summary judgment on the conspiracy claim.

U.S. ex rel. Onnen v. Sioux Falls Indep. Sch. Dist. No. 49-5, 2011 WL 4433163 (D.S.D. Sept. 21, 2011)

A relator brought a *qui tam* action against a school district, its superintendent, and several of its board members. The relator had previously been employed by a post-secondary technical school that was governed by (but not funded by) the school district. The school received funding from a combination of state funds, federal grants, student tuition and fees, and payments for sales and services provided to the public and to students. The relator alleged that the technical school violated that False Claims Act because, in order to receive federal funds, the school signed a "program participation agreement" in which it certified to the federal government that it was in compliance with specified federal statutes and regulations, while, in fact, the school was violating those very statutes and regulations by falsifying graduation surveys, by falsely claiming in its catalogue that one of its programs had received a specific accreditation, by violating the Family Education Rights and Privacy Act, by making false claims about its faculty's qualifications, and by awarding degrees to students who had not earned them. Notably, the school was not

named as a defendant in the *qui tam* action. Instead, the relator argued that under the FCA, the school district and its governing body—which oversaw the school—were liable for the school’s acts. The defendants filed a motion for judgment on the pleadings, or in the alternative, for summary judgment. The United States District Court for the District of South Dakota denied the defendants’ motion for judgment on the pleadings, but granted their motion for summary judgment.

Failure to State a Claim

As an initial matter, the court did not consider whether or not the school—which received state funding—would be treated as an arm of the state for FCA purposes, and thus not amenable to suit by a relator. Instead, the court found that the relator’s allegations were so insufficient that granted the defendants’ summary judgment motion was warranted regardless. The court examined the relator’s fraud claims and held that they amounted to nothing more than the relator’s own speculations and were based on an affidavit he submitted that, according to the court, only included conclusory allegations. Simply stated, the court held that the relator did not meet his burden “to provide factual support for the who, what, where, when, and how of the fraudulent conduct he allege[d].” Consequently, the court granted the defendants’ motion for summary judgment.

Additionally, the court, relying on Eighth Circuit precedent, held that both the U.S. Department of Education as well as the regulatory scheme at issue in the relator’s complaint already provide for detailed remedies for noncompliance, including revocation of eligibility status, terminating, suspending or otherwise limiting continued participation, and recovery of benefits conferred. The district court concluded that allowing relators to use the FCA to remedy noncompliance in these areas would undermine the government’s own regulatory procedures, and therefore, summary judgment in the defendants’ favor was appropriate.

***U.S. v. Toyobo Co., Ltd.*, 2011 WL 3874858 (D.D.C. Sept. 2, 2011)**

The government brought an action against two related companies (collectively, “Toyobo”) that manufactured and sold a synthetic fiber called Zylon. The government alleged that the defendants contracted with trading companies to distribute the Zylon fiber to weaving companies, which provided woven Zylon fabric to bullet-proof vest manufacturers. The government further alleged that the vests were sold to various local law enforcement authorities under federal government programs that reimbursed these authorities for a percentage of the costs for purchasing vests with a five-year warranty. The government alleged that the defendants learned that Zylon fiber was defective and that, as a result, vests containing the fiber degraded more quickly than they had originally represented and would not satisfy the five-year warranty. The government claimed that the defendants failed to properly disclose this information and instead chose to conspire with vest man-

ufacturers to continue selling vests containing Zylon. The defendants moved to dismiss the government's complaint for failure to state a claim and failure to plead with particularity. The defendants argued that the government failed to plead factual allegations indicating that the defendants presented false claims for payment, made false statements, or conspired to get the government to pay these claims. The United States District Court for the District of Columbia granted in defendants' motion in part. The court granted the defendants' motion with respect to a subset of the government's conspiracy claims and denied it in all other respects.

Failure to State a Claim

The court first analyzed the government's allegation that the defendants caused vest companies to present false claims, based on the allegedly false 5-year warranty. However, the court noted that since the government did not allege that any of the vest manufacturers made any express false statements regarding the services they rendered or the goods they provided to the government, it could not maintain a claim that Toyobo caused false claims to be presented to the government. The court also held that the government did not properly allege a claim that Toyobo caused vest manufacturers to make implied false statements to the government, since the government could not show that any of the relevant players—including the government itself—understood that the vest manufacturer's contracts with the government included, as a prerequisite for payment, a requirement that the vests be fit for use for five-years.

The court's analysis did not end there, however. The court held that even in the absence of these allegations, the defendants' alleged misrepresentations about Zylon's rate of deterioration induced the vest manufacturers to sell Zylon vests to the government. The court determined that these alleged misrepresentations tainted all of the vest manufacturers' claims to the government for payment, resulting in payments being made for allegedly defective vests containing Zylon. Further, the court found that the government satisfied Rule 9(b)'s heightened pleading requirements by alleging in detail the time, place, and content of the allegedly false representations, and by identifying the individuals allegedly involved in the fraud. The court rejected the defendants' argument that the government misconstrued the warranty as guaranteeing service for five years. The defendants claimed that the warranty only guaranteed that the vest manufacturers would replace or repair any defective vests within five years of its retail purchase, but the court held that the defendants' arguments had no bearing on the government's fraudulent inducement theory of liability, which hinged on the defendants' alleged attempts to prevent vest manufacturers from learning about defects in Zylon. The court further held that the government satisfied the causation requirement through its allegations that the defendants marketed Zylon to vest manufacturers and used the prospect of refunds, rebates, and reimbursements, to induce those manufacturers to continue producing Zylon products and selling them to the government, even in the face of questions about Zylon's suitability for use in bullet-proof vests. Thus, the defendant's motion to dismiss those claims was denied.

Next, the court analyzed the government claim that the defendants caused false statements to be made to the government. The defendants argued that their statements were immaterial to the government's decision to purchase vests, since the government continued to purchase vests after it was presented with information regarding Zylon degradation. However, the court found that the government sufficiently alleged that the natural consequences of the defendants' alleged acts of misrepresenting and concealing unfavorable data about Zylon's degradation caused the vest manufacturers to submit false claims for payment. Likewise, the defendants' motion to dismiss those claims was denied.

Finally, the court analyzed the government's conspiracy claims, in which the government alleged that Toyobo conspired with the weavers and vest manufacturers to sell defective Zylon-containing vests to the government. The defendants argued that the government's allegations failed to indicate any agreement between the defendants and any other party to conspire to defraud the government. The government responded that it had adequately pled that the defendants entered into agreements with numerous companies that participated in the chain of production of vests containing Zylon. The court agreed with the defendants and held that the government's complaint was devoid of any factual allegations that could support an inference that the defendants and the vest manufacturers entered into any agreements for the purpose of getting the government to pay for claims. The court held that the government's allegations that vest manufacturers were aware that Zylon was defective yet continued to sell Zylon vests were insufficient to aver that the defendants and the vest manufacturers entered into an agreement to commit fraud. In fact, the court noted, the government's conspiracy allegations were inconsistent with its claims that Toyobo induced the vest manufacturers to continue using Zylon by misrepresenting to them the extent of the degradation problem. Consequently, the government's claims that Toyobo conspired with vest manufacturers to violate the FCA were dismissed.

The court, though, found that the government's allegations were sufficient to state a claim under the FCA that Toyobo conspired with its Zylon weavers to commit fraud against the government. The court found that the government sufficiently pled that Toyobo entered into agreements with its weavers to provide the weavers with certain refunds and replacements, as an inducement to convince the weavers to continue weaving Zylon despite questions about its ballistic suitability. The court held that since the vest manufacturers could not produce vests without woven Zylon, these allegations were sufficient to satisfy the requirement that the agreements had the purpose of getting claims paid by the government. The court also held that the allegations fulfilled the particularity requirements for a conspiracy claim. Thus, the court denied the defendants' motion to dismiss this subset of the government's conspiracy claims.

***U.S. ex rel. Feldman v. City of N.Y.*, 2011 WL 3862844 (S.D.N.Y. Sept. 1, 2011)**

A relator brought a *qui tam* action against the City of New York, alleging that that the city caused the State of New York to submit false Medicaid claims to the federal government and that the city caused the state to make false statements to the government that were material to those claims. The United States intervened in the relator's suit and filed its own complaint. Specifically, the plaintiffs alleged that the city routinely authorized and reauthorized certain personal care service (PCS) benefits for Medicare patients, including split-shift 24-hour care, without first obtaining a Local Medical Director's (LMDs) determination as to the need for such care; the relator has twice served as an LMD, over a total period of about nine years. Split-shift 24-hour care generally requires two or more aides who work together to provide uninterrupted 24-care. Split-shift 24-hour care is about twice as expensive as "sleep-in" 24-hour care, in which continuous, daytime and nighttime care is provided by a single aide. In addition, the plaintiffs alleged that the city improperly overruled LMD determinations concerning the appropriate level of care for individuals requesting 24-hour care, and reauthorized 24-hour care without first obtaining and reviewing patient assessments prepared by nurses and social workers, as required under state law. The city moved to dismiss both complaints for failure to state a claim. The defendant also moved to dismiss the relator's complaint for lack of standing. The United States District Court for Southern District of New York granted the city's motion to dismiss the relator's complaint, but denied the motion to dismiss the government's FCA claims.

Relators' Standing

The court began by examining the relator's standing to maintain his *qui tam* complaint following the government's decision to intervene in all of the relator's claims. The defendant argued that the relator lacked standing to maintain a separate complaint, since the relator's claims were identical to the government's. The court examined both complaints and agreed with the defendant, finding that all the material aspects of the relator's complaint were covered by the government's complaint. As a result, the court dismissed the relator's complaint for lack of standing, while noting that the dismissal did not affect the relator's ability to receive a share of any recovery by the government.

Failure to State a Claim—Submission of False Claims

The court then examined the government's complaint. The defendant argued that the government failed to establish that the city caused the submission of false claims to the government because the State of New York administers its Medicaid program through its State Department of Health ("DOH"), which had ultimate control over the form and content of the city's Medicaid reports to the government. But the government argued that the city submitted weekly authorization lists that included individu-

als for whom the city had unlawfully and fraudulently authorized and reauthorized PCS benefits, such as split-shift 24-hour care. The government claimed that the city caused the state to submit false claims because DOH exclusively relied on the city's lists when it submitted Medicaid reports to the federal government to obtain federal funds. But the city countered that its decisions with respect to reductions or terminations of PCS benefits are subject to review and reversal by a state administrative law judge, which breaks the causal link between the city's actions and DOH's submissions to Medicaid. The court, though, determined that state administrative law judges do not have jurisdiction over the city's initial *authorization* of PCS benefits, and also noted that the government was not seeking liability against the city in instances in which a state administrative law judge ultimately decided whether an individual should receive such benefits. Thus, the court rejected the city's argument. The city also argued that the government's fraud allegations related solely to alleged noncompliance with state, rather than federal, Medicaid regulations, and accordingly the city's claims and statements to the federal government were not "false" under the FCA. The court found that while the immediate thrust of the government's allegations related to the defendant's alleged failure to comply with regulatory requirements imposed by state law, those requirements were expressly incorporated into the applicable federal Medicaid regulations. As a result, the court held that the government adequately pled that the defendant falsely represented its compliance with federal law.

Next, the defendant argued that the New York Department of Health (DOH) did not explicitly precondition payment on compliance with DOH regulations, and therefore, the allegedly false certifications were not material to the government. However, the court found that DOH regulations did state that the authorization of personal care service benefits "must be based on" certain considerations, and that federal Medicaid regulations state that the federal government will only reimburse costs for services that are "authorized or not prohibited under" state law. Taking these two regulatory schemes together, the court held that Medicaid reimbursements to the State of New York are conditioned on the State's compliance with its own DOH regulations. The defendant further argued that the government's claims failed because the government could point to no particular statute to which the State's Medicaid reports certified compliance. The court agreed that the Medicaid reports only included a general certification of compliance with "applicable implementing federal, state, and local statutes, regulations [and] policies." However, the court found that such a broad, non-specific certification might still, in context, include a certification of compliance with certain core, specific legal requirements, which could lead to FCA liability. The court held that, in this instance, the city did cause the DOH to submit claims that certified their compliance with applicable federal and state law. In announcing its holding on this issue, the court stated that "[b]ecause State regulations require that certain procedures be followed before PCS benefits may be authorized, and federal regulations require that States must follow their own regulatory procedures in order to be eligible for Medicaid reimbursement payments, the Court concludes that the very act of submitting a claim for reimbursement for PCS benefits . . . constitutes, at a bare minimum, an

implied certification that those benefits were authorized in accordance with governing State and federal law.” Thus, the court held, the government adequately pled that the DOH Medicaid reports were false.

Lastly, the court turned to the defendant’s final argument—that the government failed to allege that the defendant *knowingly* caused the submission of false claims. The government had alleged that, as a matter of course, the city systematically authorized personal care service benefits in violation of DOH regulations. The government contended that its complaint adequately pled the FCA’s “knowing” element, by alleging that city showed “deliberate indifference” or reckless disregard” of the fact that its routine DOH violations would lead to the submission of false Medicaid claims. The city countered that it did not exhibit reckless disregard or deliberate indifference, since it is required to pay a portion of the state’s share of Medicaid costs, and that by causing the submission of false Medicaid claims, the city would not only be defrauding the federal government, but it would be defrauding itself as well. The court, though, observed that, pursuant to New York State law, the annual amount the city would have to pay to cover Medicaid costs was capped. In addition, the court determined that the city could incur substantial administrative costs by conducting proper due diligence before authorizing PCS benefits, and that by disregarding such due diligence requirements, the city could have saved itself considerable funds. The court determined that these two factors undermined any fiscal incentive the city may have had to avoid improper Medicaid billing. The court found that since the city’s contribution to cover Medicaid expenses was far smaller than that of the State of New York and the federal government, “a finder of fact could reasonably infer from the Government’s allegations that the City ‘knowingly’ caused the submission of false claims.” Thus, the court held that the government adequately stated its claim that the city knowingly caused the submission of false claims.

The court denied the city’s motion to dismiss the government’s claims in which the city was alleged to have caused the submission of false Medicaid claims.

Failure to State a Claim—Making False Statements/Records

Next, the court considered the government’s second theory of FCA liability—that the defendant caused false statements to be made that were material to false claims. The court noted that this allegation requires the government to establish a “double falsity,” namely, a false statement or record, as well as a false claim. The court concluded that the government adequately pled both elements. As noted above, the court held that the government’s complaint properly pled that false claims were submitted for Medicaid reimbursement. Thus, the court only needed to determine whether or not the government properly pled the existence of false statements or records, material to those false claims. The government alleged that the city’s weekly authorization lists that were sent to DOH constituted false records under the FCA, since those lists impliedly represented that the city had complied with applicable DOH regulations when authorizing PCS benefits for the individuals included on those lists. The city countered that the lists could not be false records because they did not contain any affirmative

representations. However, the court held that, by alleging that DOH exclusively relied on the city's lists when submitting Medicaid reimbursement claims for PCS benefits, the government's allegation of the city's implicit false representations to DOH was sufficient to establish both the existence of false records and that such allegedly false records were material to the government decision to provide Medicaid reimbursements for PCS benefits. Accordingly, the court denied the city's motion to dismiss the government's claims alleging that the city made false statements and records that were material to false Medicaid claims. The court found that the defendant's weekly authorization lists were clearly material because they formed the primary basis by which the state compiled the defendant's benefit information for inclusion in the reports. As a result, the court held that the government sufficiently stated a claim.

***U.S. v. First Choice Armor & Equip., Inc.*, 2011 WL 3799544 (D.D.C. Aug. 29, 2011)**

The United States brought FCA claims against an armor equipment manufacturer, its founder, and its President, alleging that the defendants violated the False Claims Act and other laws, by selling body armor containing Zylon fiber to government enforcement agencies under the Bullet Proof Vest Grant Partnership Act (BPVGPA) program. Under the BRVGPA program, the federal government reimbursed local law enforcement authorities for a percentage of the cost of purchasing bullet proof vests and other body armor. The United States alleged that in the year 2000, the defendants began selling bullet proof vests containing Zylon fiber—the fiber had been woven into layers of fabric, which were inserted into the vests. According to the government, in 2001, the defendants learned that the Zylon fiber they were using degraded as it aged and when it was exposed to various light, heat, and humidity conditions. Further, the government alleged that the defendants received expert analysis recommending that they add more layers of Zylon fiber to compensate for the degradation, as other manufacturers of Zylon-containing vests had done. In spite of this, the defendants allegedly ignored the warnings, failed to add more layers, and continued to market the vests as the thinnest and lightest vests available on the market that included a five-year warranty. In fact, the government alleged that as late as 2003, the defendants were marketing their vests as “different” and “thicker” than the competition's. Finally, beginning in 2004 and continuing into 2005, the defendants began discontinuing the sale of these vests. The government alleged that the individual defendants then stripped \$5 million from the vest manufacturing company, forcing it into insolvency, and used that money on expensive personal purchases, including a Ferrari, a Maserati and a private jet.

The defendants moved to dismiss the government's complaint for failure to state a claim and for failure to plead fraud with particularity. The United States District Court for the District of Columbia denied the defendants' motion with respect to the government's FCA claims.

Failure to State a Claim/Plead Fraud with Particularity

The defendants argued that the government did not state a claim under the False Claims Act because it did not sufficiently allege the falsity of any claim. The government responded that it believed that it was purchasing vests that met the industry-standard five-year warranty against defects, when in fact, it was not. Additionally, the government alleged that falsity was established because the defendants failed to disclose to it information that revealed the true integrity of the Zylon fabric, even though the defendants knew that its vests were defective.

In addition, the United States alleged that the materiality element of FCA liability was proven, since it would not have paid for vests or reimbursed law enforcement agencies for claims for vests they purchased, had it known that the vests degraded much more rapidly than was disclosed. Further, the government alleged that both it and the defendants understood that satisfaction of the five-year industry standard warranty was a condition of payment to the defendants. The court held the materiality requirement was satisfied as the government alleged that it would not have paid for the vests had it known about their degradation. Additionally, it held that since the defendants did not change the quality standards or the warranty period even after they were presented with the degradation data, it could be construed that the defendants understood the five year industry standard warranty as requirements for condition of payments. The court further held that the government pled its fraud claims with particularity as it set out in detail the time, place, individuals involved, and content of the defendants' allegedly false representations.

The defendants then argued that the government misconstrued the five-year warranty, asserting that the warranty only constituted a promise to replace or repair defective vests within five years of the date of purchase. The court, though, observed that such factual disputes were not to be resolved at the motion to dismiss stage, during which the plaintiff's factual allegations are to be accepted as true.

As a result, the court denied the defendants' motion to dismiss the government's FCA claims.

***U.S. ex rel. Carpenter v. S & K Techs., Inc.*, 2011 WL 3664415 (M.D. Ga. Aug. 19, 2011)**

A relator brought a *qui tam* action against her former employer, a federally-chartered corporation organized by two Native American tribes, alleging that the defendant violated the False Claims Act by submitting false claims to the United States Air Force and by later terminating her from her job in retaliation for her whistleblowing. The relator alleged that the defendant contracted with the government to update and maintain various inspection and repair manuals and records for U.S. military aircraft that were sold to foreign countries. The relator alleged that the contract required the defendant to maintain a quality control program that ensured that no less than 95 percent of these documents were er-

ror free, which required periodic updates. The relator alleged that, pursuant to her employment position with the defendant, she was responsible for reviewing the documents for errors in grammar and formatting and that her supervisor was responsible for ensuring that the content of the documents was properly and accurately updated. She alleged that one of her subordinates discovered four instances in which significant content updates, called “change bars,” were needed and that this information was eventually brought to the attention of the relator’s supervisor. She further alleged that the supervisor agreed with two of the four suggested changes, but disagreed with the other two recommended changes, and then directed both the relator and the other employee to refrain from checking for substantive errors, and to only focus on grammatical and formatting issues. The relator alleged that she investigated the matter and voiced her concern that the supervisor regarded change bars as unimportant, which could lead to flight safety issues. She alleged that she was directed to forward all of her emails and documents regarding the issue to another of her superiors, which she did. She stated that less than a week later, she was fired for insubordination.

Both the relator and defendant moved for summary judgment on the relator’s claims. The United States District Court for the Middle District of Georgia granted the defendant’s motion, holding that the relator did not present sufficient evidence to support her claim that the defendant defrauded the government. In addition, the court held that the relator produced no evidence showing that she was engaged in protected activity under the FCA, and thus, she could not maintain her retaliation claim either.

Fraud Claim

The relator alleged that the defendant attempted to conceal its failures to update the documents at issue by instructing her not to check for change bar errors because they were not important. While the defendant acknowledged directing the relator not to check for change bar issues, it argued that this was not because such issues were unimportant, but rather because the relator did not fully understand the technical aspects and military standards governing the use of change bars. The court agreed with the defendant’s characterization, relying in part on one of the relator’s own emails that documented a conversation in which her supervisor stated that he wanted her to focus on grammar changes—notably the email did not contain any statement by the supervisor that change bar issues were unimportant. Additionally, the court found no evidence that the defendant’s instruction to the relator to disregard change bar issues resulted in any errors or that it would result in a breach of contract, much less a false claim. As a result, the court held that the defendant was entitled to summary judgment on the relator’s change bar claims.

The court also took note of another false claim alleged by the relator, namely that the defendant failed to satisfy a contractual obligation to provide the government with a hard copy of any revision that it sent out to its customers—a process that was re-

ferred to as “reissue.” However, the court found that the relator failed to provide any evidence suggesting that such a contractual obligation existed. Furthermore, the court observed that the relator failed to show that she had sufficient personal knowledge of the defendant’s contractual obligations to qualify her to testify on such matters. The court rejected the relator’s argument that the defendant’s reissue process was fraudulent because it allowed the defendant to deceive the government about its error rate, thus affecting the government’s decision to pay and renew the contract. Instead, the court found that the relator failed to provide any evidence that the government used the reissued hard copies to evaluate whether or not to pay or renew the contract. The court also rejected the relator’s argument that the reissue process was fraudulent because it was not authorized in either the military standards or in the contract. Instead, the court found that these were merely conclusory allegations, made without any evidence that the contract or military standards forbade reissues, or that reissues violated the contract or military standards. Therefore, the court held the defendant was entitled to summary judgment on the relator’s reissue claim.

Finally, the court analyzed the third fraud claim raised by the relator—that the defendant defrauded the government by failing to clear reissues with the Foreign Disclosure Office (FDO), as the applicable procedures allegedly required. The court found that the relator failed to produce any evidence of reissues that should have gone through the FDO but did not. The defendant argued that the reissues in question did not meet the requirements for FDO disclosure, and the court determined that the defendant appropriately decided whether to send information through the FDO on a case-by-case basis, in accordance with the applicable standards. The court then granted the defendant’s summary judgment motion on the relator’s FDO claim.

Retaliation

Finally, the court analyzed the relator’s retaliation claim. The relator alleged that she was terminated in retaliation for raising concerns about the defendant’s performance. The court, however, found that the relator had not engaged in protected conduct under the FCA, because the defendant’s conduct, as alleged by the relator, could not have lead to a viable FCA. The court determined that the relator failed to show that the supervisor who was responsible for checking the accuracy and use of change bars ever abandoned that duty. Additionally, the court found that the relator’s failed to follow the chain of command, as instructed, when she took her complaints to other superiors, which led to her termination for insubordination. As a result, the court granted the defendant’s motion for summary judgment on the retaliation claim.

***U.S. v. Corinthian Colls.*, 2011 WL 3524208 (9th Cir. Aug. 12, 2011)**

Two relators brought a *qui tam* action against a public company that operates for-profit vocational schools (Corinthian), members of the company’s board of directors (individual defendants) and an auditing firm (EY). The relators, who had both

previously worked for Corinthian, alleged that the defendants falsely certified to the Department of Education (DOE) Corinthian's compliance with the Higher Education Act's (HEA) ban on recruiter-incentive compensation, so that Corinthian would receive education funds from the federal government. The relators alleged that Corinthian paid incentives to recruiters based on the number of students they enrolled and that those who failed to enroll a minimum number of students were terminated from their jobs. Corinthian and the individual defendants moved to dismiss the relators' complaint, arguing that the relators failed to state a claim and failed to plead the alleged fraud with particularity, and that the court lacked subject matter jurisdiction over their claims. EY filed a separate motion to dismiss on the same grounds. The United States District Court for the Central District of California granted the defendants' motions, holding that the relators failed to state a claim for relief under the FCA. The district court held that the relators' complaint failed to allege that Corinthian made any false certifications to the government. Further, the court held that Corinthian had reasonably relied on DOE's Safe Harbor Provision, which allowed for increases in recruiter salaries that were not based solely on the number of new enrollees and that Corinthian reasonably relied upon the provision. After the district court determined that the claims against Corinthian should be dismissed, it also dismissed the claims against the remaining defendants, finding that those claims were contingent upon Corinthian's liability. The relators appealed the district court's ruling to the U.S. Court of Appeals for the Ninth Circuit, which reversed and remanded the district court's decision.

Failure to State a Claim

First, the appellate court considered whether the facts presented in the relators' complaint alleged an FCA violation by Corinthian. The court began by considering whether or not Corinthian's certifications to the Department of Education of its compliance with the HEA were actually false. The defendant argued that the relators' assertion that Corinthian employees were "disciplined, demoted, or terminated" based on recruiting numbers did not state a claim under the FCA, because the HEA does not prohibit adverse employment actions on the basis of recruitment numbers. Therefore, Corinthian's certification of compliance with the HEA was not false. After reviewing the HEA, the circuit court agreed.

In addition, the defendants argued that DOE's Safe Harbor Provision allowed Corinthian to award salary increases to employees on the basis of recruitment numbers, since that was not the only basis for the salary increase—the defendants argued that salary increases were based on overall performance, including whether or not the employee had achieved a rating of either "Good" or "Excellent," although those terms were undefined. The circuit court found that the mere inclusion of a performance rating was not enough to conclude that Corinthian's compensation program automatical-

ly fell within the Safe Harbor Provision, but since the relators failed to allege any facts regarding the meaning of “Good” or “Excellent,” their complaint did not adequately state a claim for relief. Consequently, the Ninth Circuit granted the relators leave to amend their complaint to cure this deficiency, and held that the district court erred by denying the relators leave to amend.

Second, the court reviewed the FCA scienter requirements. The defendants argued that, even if the relators could allege false statements, Corinthian’s reliance on the Safe Harbor Provision negates scienter. The district court agreed. However, the circuit court disagreed, as it found that the relators repeatedly argued that Corinthian certified compliance with the HEA, while knowing that it was compensating recruiters based on their recruitment numbers. The relators further described how the HEA funds were dispensed to educational institutions in accordance with the number of students they enrolled. The appeals court held that the relators’ complaint did allege that Corinthian acted with the requisite knowledge to be liable under the FCA. However, once again, the court found the relators failed to clearly allege sufficient facts to support their assertion that Corinthian acted while knowing that its compensation program fell outside the Safe Harbor Provision. The Ninth Circuit found that these facts, if formally alleged, would certainly support an inference that Corinthian acted with fraudulent intent and not in good faith. As a result, it held the relators should be permitted to amend their complaint in order to plead additional facts that could cure these deficiencies.

Third, the court analyzed the liability of individual defendants. It held that the complaint failed to set forth each individual’s alleged participation in the fraudulent scheme and failed to allege their involvement in making false statements. However, the court held that the relators should have at least one opportunity to add any facts that could render plausible an inference that one or more of the individual defendants oversaw or actively participated in the alleged fraudulent scheme. Therefore, the court granted the relators leave to amend.

Finally, the court analyzed the allegations against EY. The relators argued that EY falsely certified that Corinthian was in compliance with the recruiter compensation prohibitions and failed to perform the legally required evaluation to determine if the recruiter practices were legal. The court found that the relators sufficiently alleged that EY falsely certified Corinthian’s compliance with the recruiter compensation prohibitions. It found that the relators alleged details as to Corinthian’s practices, and what practices should have been used in their place. Furthermore, the relators expressly alleged that EY issued reports for Corinthian, knowing them to be false. The court held that these facts, taken together, supported a plausible inference that EY acted with fraudulent intent. Therefore, the court held that the relators sufficiently alleged an FCA violation as to EY.

***U.S. ex rel. King v. DSE, Inc.*, 2011 WL 3421417 (M.D. Fla. Aug. 4, 2011)**

A relator brought a *qui tam* action against his former employer, a grenade manufacturer (DSE), and three of its subcontractors, alleging fraud against the United States. The relator alleged that from 2005 through 2007, KDI sold grenade fuses to the United States, before eventually selling its business to DSE. The relator was a consultant for KDI in 2005 and later worked for DSE in 2008. He alleged that while working for KDI, he discovered that the company's quality-testing process could not determine whether or not the grenade fuses met the United States' specifications, and that after he installed a new quality-testing program that exposed an unacceptable defect rate in the grenade fuses, KDI continued to deliver shipments to the U.S., certifying to the government that its fuses complied with quality requirements. The defendants filed separate motions to dismiss. The United States District Court for the Middle District of Florida denied the defendants' motions. KDI then moved for reconsideration, arguing that the court failed to address its unique situation. The court denied KDI's motion for reconsideration.

First, KDI argued that the relator had no opportunity to inspect its grenade fuses and had no knowledge of any FCA violations by KDI, because the company exited the grenade fuse business and sold it to DSE before the relator joined DSE. The court, though, found that when KDI sold its business, DSE acquired all of KDI's inventory of "work in progress" fuses, and that the relator was able to determine that those parts were grossly defective. In addition, the court noted that the relator had been a consultant for KDI years before it sold the business to DSE, and that he acquired information about KDI's product during that time, after he installed new quality inspection software for KDI. Moreover, the court observed the relator's allegation that, as part of each shipment to the United States, KDI provided a certificate that claimed that the company had conformed to applicable quality requirements. Thus, the court held, the relator had an adequate basis for asserting fraud claims against KDI. Thus, KDI's motion for reconsideration was denied.

***U.S. v. Kellogg Brown & Root Servs., Inc.*, 2011 WL 3303486 (D.D.C. Aug. 03, 2011)**

The government brought an action against a contractor, alleging violations of the FCA, among other claims. The defendant had a contract with the government to provide logistical support services for various army operations and the government alleged that the defendant knowingly billed it for the cost of private security contractors—an expense that was not permitted under the contract. The defendant disagreed with the government's interpretation of the contract, and also moved to dismiss the government's fraud allegations for failure to state a claim and failure to

plead fraud with particularity. The United States District Court for the District of Columbia denied the defendant's motion to dismiss the fraud claims.

Failure to Plead Fraud with Particularity

The court began by analyzing whether the government's complaint met Rule 9(b)'s heightened pleading requirements and concluded that the complaint adequately alleged the required specifics of the fraud. Specifically, the court found that the government alleged the "who" of the alleged fraud, by naming the defendant; the "what" of the alleged fraud, by describing the defendant's alleged false claims for private security expenses; the "when," by listing the time period in which the fraud allegedly occurred; and the "where," by stating that the fraud was committed in Iraq. The court also concluded that the government pled the "how" of the alleged fraud, by specifying that the defendant hired more than 30 private security companies and personnel without obtaining the government's approval and with knowledge that these hires were not allowed by the contract. The court noted that the government could have included additional details regarding the "how" of the fraud, including individual claim numbers from the defendant to the government or specific false claims themselves, but the court determined that even without this information, the government's complaint still adequately pled how the alleged fraud scheme operated, since the complaint provided the defendant with sufficient notice of the claims it needed to defend. As a result, the court held that the government's complaint satisfied Rule 9(b)'s pleading standard, and denied the defendant's motion to dismiss on that basis.

Failure to State a Claim

The court then analyzed whether the government failed to state a claim under the FCA. The government argued that the defendant's claims were both "factually false" and "legally false" and the court considered both arguments. With respect to the government's argument that the defendant's claims were factually false, the court noted that the claims did not seek reimbursement for services that weren't provided and didn't inflate the costs for those services. The government argued that the defendant's claims were factually false because the defendant knew that the private security expenses contained in those claims were not allowed by the defendant's contract with the government. The court was surprised by the government's "factually false" theory, which contended that the defendant's claims were false precisely because they were disallowed by the contract. The court observed that such a definition of "factually false" could blur the distinction between claims of fraud under the FCA and claims for breach of contract, which, in the court's opinion would "contradict the purpose of the [FCA]." The court rejected the government's "factually false" theory and held that "determining the scope of a contract is a quintessentially legal, not factual, question."

The court then turned its attention to the government's alternative "legally false" theory of liability, in which the government asserted that the defendant's claims were

false because they included an implied certification that the defendant had complied with the terms of the contract—which prohibited billing for private security expenses—and that this certification was a prerequisite to receiving payment under the contract. The defendant argued that even if it had violated the contract by overbilling the government, the government’s legally false theory of FCA liability should still fail, because the defendant’s certifications of compliance were not express prerequisites for payment. The court rejected the defendant’s argument and held that prerequisites for payment do not necessarily need to appear as express conditions. Instead, the court endorsed the “implied false certification” theory, which only requires that the government “show that ‘the contractor withheld information about its noncompliance with material contractual requirements.’” The court observed the D.C. Circuit Court’s caution that the implied false certification theory is more prone to abuse by FCA plaintiffs who wish to overstate breach of contract claims as FCA actions. So next, the court examined whether the defendant’s certification was material to the government.

With respect to materiality, the court focused on the government’s assertion that the defendant’s false certifications were material to the government’s payment decision because the contract simply did not allow for payment of private security expenses. The government supported its materiality claim with internal emails in which the defendant’s employees acknowledged that the private security costs “could be considered unallowable and could “effect a material change in [the] contract.” The court concluded that this evidence was sufficient to establish materiality, at least at the pleading stage.

Finally, the court examined the scienter factor. In support of the scienter element, the government alleged that the defendant tried to modify the contract to allow for billing for private security expenses, and when those negotiations failed, it billed for those expenses anyway. The defendant argued that the government’s argument was insufficient, because the parties had a reasonable disagreement about the interpretation of the contract—since the defendant claimed that the contract allowed for private security expenses. The court noted that this was a persuasive argument, but held that further factual information was required before a determination could be made regarding contract interpretation. Thus, the court could not dismiss the government’s complaint on that basis. The defendant also argued that scienter was negated because the government paid claims even after it knew that the claims contained private security expenses. The government, though, argued that it rejected the the defendant’s claims as soon as it recognized that they were unallowable expenses. The court held that this dispute of fact must be resolved in favor of the non-moving party, the government. Accordingly, the court concluded that the government had alleged sufficient facts to establish scienter, and denied the defendant’s motion to dismiss for failure to state a claim.

***U.S. ex rel. Estrada v. Quad City Prosthetic, Inc.*, 2011 WL 3273142
(C.D. Ill. Aug. 1, 2011)**

A relator brought a *qui tam* action against two corporations and two individuals, on behalf of the United States and the State of Illinois. The defendant corporations were manufacturers of prosthetics and orthotics, and the individual defendants were employees. The relator alleged that the defendants knowingly submitted false claims to Medicare and Medicaid by upcoding charges that reflected a device more expensive than the one that was actually fitted to patients. The relators also alleged that the defendants billed for services never rendered to Medicare patients. The federal and state governments intervened in part and added a claim for unjust enrichment to the FCA and Illinois FCA claims. The defendants moved to strike and dismiss, arguing that the plaintiffs failed to state a claim and failed to plead fraud with particularity. They claimed that the plaintiffs failed to sufficiently plead facts showing that the defendants had specific intent to defraud the government. Further, the defendants argued that some plaintiffs' claims were barred by the statute of limitations and should be dismissed. The United States District Court for the Central District of Illinois granted the defendants' motion in part, granting the defendants' motion with respect to a subset of claims that were time-barred, and denying the motion with respect to all remaining claims.

Failure to State a Claim

The defendants argued that the plaintiffs' allegation that they presented false claims or caused false claims to be presented did not meet the heightened pleading requirements because it did not allege any specific false or fraudulent claims or sufficient facts showing the defendants' specific intent to defraud the government. They argued that, at best, the government only asserted negligent billing violations, not knowing fraud. The court, though, found that the plaintiffs' allegations were specific enough to provide an adequate basis to infer that false claims were submitted and that the defendants committed fraud by upcoding, billing for services not performed, and unbundled billing. The court further found that plaintiffs had sufficiently pled facts showing defendants possessed specific intent to defraud the government, noting that their allegations: (1) contained detailed facts regarding how codings were affirmatively manipulated and listed; (2) plausibly suggested that the defendants' policies were specifically created so that the claims would be submitted in a way to maximize payment from the government; and (3) suggested that the defendants intended that their claims would be material to the government's decision to pay or approve their allegedly false claims. Thus, the court denied the defendants' motion to dismiss the plaintiffs' allegation that they presented false claims to the government or caused another to do so.

The defendants next argued for the dismissal of the plaintiffs' conspiracy claims and their allegations that the defendants made or used false records or false statements to get false claims paid or approved and to conceal, avoid or decrease obligations

to pay money to the government. The defendants, relying on the Supreme Court's ruling in *Allison Engine Co. v. U.S. ex rel. Sanders*, argued that the plaintiffs could not show that they acted with the specific purpose and intent to defraud the government. The court, though, noted its prior holding (above) that the plaintiffs pled sufficient facts that the defendants had a specific intent to defraud the government. Thus, the defendants' motion to dismiss those claims was denied. The court also denied the defendants' motion to dismiss the plaintiffs' conspiracy claim, stating that the defendants had not adequately developed their argument and that a more fully developed factual record was necessary.

Statute of Limitations

Finally, the court considered the defendants' argument that some of the plaintiffs' claims were time-barred. The plaintiffs agreed that some of the claims fell outside the applicable statutes of limitations under the federal and state FCAs. The parties even seemed to agree that the governments' claims related back to the date on which the relators' *qui tam* suit was filed. However, the parties disagreed over the applicable limitations periods. Because the government intervened in the relator's suit, the plaintiffs argued for a 10-year limitations period for federal FCA claims—not the six-year period advocated by the defendants. The court resolved the dispute and held, since the defendants did not address whether or not the 10-year limitations period should apply, it would be improper to grant the defendants' motion, and thus, the court only dismissed the plaintiffs' FCA claims that were more than 10 years old. Such claims were dismissed with prejudice.

In addition, while the parties agreed that the Illinois FCA claims were limited by a 5-year statute of limitations, the plaintiffs argued that those claims accrued when the relator first learned of the violation, back in December 2003, and thus, only claims under the Illinois FCA that predated December 1998 were time-barred. The defendants countered that the Illinois FCA's 5-year began to run when the relator filed his *qui tam* complaint in March 2006 and thus, any claims under the Illinois FCA that predated March 2001 were time-barred. The court again resolved the dispute, agreeing with the defendants and dismissing all Illinois FCA claims that predated March 2001.

***U.S. ex rel. Dyer v. Raytheon Co.*, 2011 WL 3294489 (D. Mass. July 29, 2011)**

A relator brought a *qui tam* action against his former employer, a defense contractor, alleging that the defendant violated the False Claims Act by submitting false claims to the government and by terminating his employment in retaliation for engaged in protected conduct. The relator, who had been employed as a senior manager in the defendant's corporate finance group, alleged that he developed a special enterprise level working program, called the Raytheon Working Capital Incentive Program (RWCIP). This program was designed to provide bonuses to incentivize

the company's business executives and managers to make improvements in daily operations that would increase cash flow and save money. Notably, cost-saving accounting reclassifications would not count towards the bonuses. As the company also believed that the incentive program would benefit the government, by maximizing efficiencies on the company's various government contracts, it sought approval from the government to bill the government for RWCIP compensation bonuses as "Overhead Charges," and the government agreed to do so.

The relator alleged that the defendant included a \$23 million accounting reclassification for RWCIP purposes, which caused false claims to be submitted to the government. Further, the relator alleged the defendant retaliated against him and ultimately terminated his employment, after he raised concerns about the alleged fraud. The defendant moved to dismiss the relator's claims, arguing that the relator's fraud claim should be dismissed for failure to state a claim and for failure to plead fraud with particularity. Further, the defendant argued that the relator's retaliation claim was time barred. The United States District Court for the District of Massachusetts denied the defendant's motion in part. The court denied the motion with regard to the fraud claim, but granted it with regard to the retaliation claim.

Failure to State a Claim

First, the court analyzed whether the relator stated a claim under the FCA. The defendant argued that the relator failed to establish a nexus between any alleged falsehood and the defendant's contract with the government—in fact, the defendant stated that the relator failed to even identify the specific contracts for which false claims were allegedly submitted. The court observed that while FCA violations can originate from contracts, they can also arise from violations of applicable statutes and regulations. The court noted that the relator relied upon several provisions of the Federal Acquisitions Regulations (FAR) to establish that the defendant owed a duty to exclude the reclassification and corresponding bonus from its charges to the government, and that, at the pleading stage, he was not required to identify the specific contracts at issue, as there was enough evidence to suggest that a government contract did exist. The court held that it was appropriate to allow discovery to provide greater details about the contract.

Next, the defendant argued that the relator failed to establish an actionable false claim, stating that its compliance with the FAR provisions was not a precondition for getting paid. The court, though, analyzed the relevant FAR provisions and determined that "compliance is arguably a precondition to the bonus payments." The court then noted that both the defendant and the government agreed that accounting reclassifications would not be included in the RWCIP, and therefore, this requirement was part of an "established plan" and that the defendant's submission of claims to the government represented the defendant's certification of compliance with that plan. Consequently, the court held that the relator's fraud allegations were sufficient to state a claim, and denied the defendant's motion to dismiss for failure to state a claim.

Failure to Plead Fraud with Particularity

The court then turned its attention whether or not the relator's complaint met Rule 9(b)'s heightened pleading requirements. The court found that the relator's allegations provided specific details about the nature of the allegedly fraudulent scheme, including the employees involved, the "ground rules" requiring the defendant to exclude accounting reclassifications from its overhead charges to the government, and the relator's successive attempts to persuade the defendant to discontinue the alleged fraud. Accordingly, the court held that the relator provided sufficient factual allegations to demonstrate the viability of his FCA claims, and thus denied the defendant's motion to dismiss for failure to plead fraud with particularity.

Retaliation

Finally, the court analyzed the relator's retaliation claim. The defendant argued that the retaliation claim was time barred, and the court determined that the alleged retaliation occurred six years before the relator's *qui tam* complaint was filed. As the court concluded that the applicable limitations period for bringing the retaliation claim was only three years, it held that the relator's retaliation claim was time-barred. The relator, though, argued that his retaliation claim was timely under the continuing violation doctrine, because he was subjected to a continuous pattern of retaliation throughout that six year period, and even beyond his termination. The court explained that the purpose of the continuing violation doctrine "is to allow suit to be delayed until a series of wrongful acts blossoms into an inquiry on which suit can be brought;" the court clarified that the doctrine does not allow plaintiffs to avoid filing suit, as long as their rights continue to be violated. While the court was unclear as to the applicability of the continuing violation doctrine to FCA retaliation claims, it held that the doctrine could not be applied to the relator's claims, since the relator failed to show that the alleged retaliatory acts that occurred within the limitations period could be deemed an "anchoring act" that would relate to retaliation that occurred outside the limitations period. The court rejected each of the "anchoring acts" the relator presented.

First, the court determined that the relator's contention that the defendant retaliated against him when a former colleague refused to speak to him when he expressed interest in an open position with the defendant company was too speculative, particularly since the relator never alleged that he applied for the position. Second, the court determined that the relator's termination, which occurred five years after he raised concerns about the accounting reclassification, was too remote in time to support his claim of continued retaliation. Finally, the court held that the relator failed to provide sufficient factual support for his claim that the defendant retaliated against him by disparaging him professionally after his termination. Consequently, the court refused to apply the continuing violation doctrine to the relator's retaliation claim, and that claim was dismissed as time-barred.

***Davis ex rel. U.S. v. Point Park Univ., et al.*, 2011 WL 3163251
(W.D. Pa. July 26, 2011)**

A relator brought a *qui tam* action against her former employer, an educational institution, and two of its executives, alleging violations of the FCA and state laws. Specifically, the relator alleged that the defendants knowingly submitted false claims and certifications to the Department of Education in order to wrongfully obtain grant funds, which were then misused. The defendants moved to dismiss the relator's complaint for failure to state a claim. The United States District Court for the Western District of Pennsylvania denied the motion. The court held that the relator adequately alleged that the defendants knowingly submitted false claims to the government. Specifically, the court found that the fact alleged by the relator were "sufficient to show that Plaintiff has a 'plausible claim' for relief," as she pled all of the required elements for her fraud claim. Accordingly, the court denied the defendants' motion to dismiss.

***U.S. v. Honeywell Int'l. Inc.*, 2011 WL 2672624 (D.D.C. July 8, 2011)**

The government brought an action under the False Claims Act against a manufacturer of body armor materials to be used in bulletproof vests. The government alleged that the defendant manufactured a shield for use in bulletproof vests, that was made from a fiber called Zylon, which was manufactured by a third-party. Vests containing the defendant's shield were sold to various law enforcement agencies under a federal government-funded program, and included a five-year warranty against defects. The government contended that the defendant knew that the vest manufacturer relied on the defendant's technical expertise regarding Zylon, that the defendant tested the tensile strength of Zylon shield and found that it deteriorated or failed testing, and that the defendant provided manipulated data to the vest manufacturer that showed that the Zylon shield was safe and effective. Additionally, the government alleged that the defendant received additional data from other producers of Zylon products, which suggested that the material was not suitable for use in bulletproof armor, yet the defendant refused to share this information with its vest manufacturer. Finally, the government alleged that the vest manufacturer performed its own tests which revealed a substantial decline in Zylon's strength and reduced its warranty to thirty months—a decision the defendant disagreed with. The government's basic claim was that the defendant caused the vest manufacturer to submit false claims when it sold vests to the government that contained a five-year warranty that the vests could not satisfy. The defendant moved to dismiss the government's complaint for failure to state a claim and for failure to plead the alleged fraud with particularity. The United States District Court for the District of Columbia denied the motion.

The defendant argued that the government failed to plead the falsity of any claim submitted to the government for payment. The government, however, alleged that it believed that it was purchasing vests that met the industry standard five-year warranty, and that the defendant either failed to disclose or only selectively disclosed information to its vest manufacturer and to the public that revealed defects in the vests, which cast doubt on the vests' ability to satisfy the warranty. Further, the government alleged that had it known the defective nature of the vests, it would not have purchased them, and state the defendant took affirmative steps to conceal those risks. The court found that the allegations about the defendant's concealment of test data and the available data on the vests' performance were sufficient to plead that the defendant understood that payment for the vests was conditioned on compliance with those requirements. Additionally, the court held that the government set out in detail the time, place, and content of the defendant's allegedly false representations and identified individuals allegedly involved in the fraud. These allegations, the court held, were sufficient to plead falsity.

The defendant then argued that the vest manufacturer disclosed the defects of its bulletproof vests to the government when it issued a storage advisory that warned against storing the vests in heat and humidity conditions. The defendant argued that this storage advisory disclosed the facts that the government claimed were withheld. However, the court found that the storage advisory failed to address the many defects the defendant uncovered during their testing, and that the storage advisory could not be used to circumvent the government's argument that the defendant impliedly certified that the vests would satisfy the full warranty period. The court also found that the defendant knew that the vest manufacturer lacked the technical expertise and was dependant on the defendant for the assessment of test results. Therefore, the court found that the defendant's misrepresentations tainted all claims from the vest manufacturer to the government. Accordingly, the court held that the government properly stated a claim under the FCA.

The defendant then argued that the government did not plead that the defendant knew that it had caused false claims to be submitted to the government. The court, though, found that the defendant intentionally obscured its Zylon shield test data because it understood that negative data could be detrimental to its market share. Thus, the court held that it was reasonable to infer that the defendant had actual knowledge of the falsity of its representations. Finally, the defendant argued that the government failed to allege a false record or statement that the defendant made to get the payment from the government, arguing that the government merely alleged a scientific disagreement as to the efficacy of the vests. The court disagreed and found that the defendant acted in bad faith by cherry-picking the data it disclosed to the vest manufacturer and to the public. Consequently, the court held that the government sufficiently pled the falsity requirement.

Finally, the defendant argued that the government failed to allege that the defendant's express purpose in making any alleged false statement or record was to obtain payment from the government. The court found that this argument misconstrued the government's theory of FCA liability, which rested on the defendant's alleged manipulation of the test data it communicated to the vest manufacturer. Thus, the court held that the government adequately alleged that the consequences of the defendant's misrepresenting and concealing unfavorable test data about Zylon's degradation caused the vest manufacturer to submit false claims to the government. The defendant's motion to dismiss was denied.

***Kellogg Brown & Root Servs., Inc. v. U.S.*, 2011 WL 2739776 (Fed. Cl. July 6, 2011)**

The plaintiff, Kellogg Brown & Root Services (KBR), a contractor, brought an action against the United States for unpaid costs incurred under a contract to provide logistical support services for various army operations. The government filed counterclaims against the plaintiff, including a counterclaim alleging a violation of the False Claims Act, which the government alleged arose from the defendant's illegal kickback scheme—a scheme that resulted in inflated invoices to the United States under the contract. The government argued that the plaintiff knew that its reimbursement vouchers were fraudulent, based on the allegations contained in an email written by its subcontractor's administrator. The plaintiff moved to dismiss the government's counterclaim. The United States Court of Federal Claims granted the motion and held that the government failed to state a valid FCA claim.

The government had argued that the plaintiff's claims for payment on the government contract were fraudulent under the FCA because its reimbursement vouchers were inflated by the price of alleged kickbacks to subcontractors. The contractor plaintiff countered, arguing that the government failed to allege any causal nexus between the award of contracts and the kickbacks. Further, the plaintiff argued that the government's FCA claim failed to adequately plead the scienter element and to allege anything fraudulent about the plaintiff's reimbursement claims other than their being "tainted" by kickbacks. The government, however, took the position that contractor was vicariously liable for the "knowledge" of its managers, or that its knowledge of fraudulent claims could be inferred via allegations contained in the subcontract administrator's email. The court acknowledged that several other courts had held that the costs of a kickback are presumed to be passed on to the government under the anti-kickback statute, but declined to extend this presumption to claims under the FCA. Further, the court found that the government failed to allege that the subcontractor's charges to the plaintiff were actually inflated, even by the amount of the kickback. The court held the government's FCA counterclaim failed to indicate anything particularly fraudulent about the plaintiff's reimbursement vouchers. Thus, the court held the government failed to

show that a false claim was submitted or that the plaintiff falsely certified compliance with the anti-kickback law. Further, on the issue of knowledge, the court held that the government failed to allege facts showing that the plaintiff or its managers knew of any inflation on the defendant's claims to the government—the government could not rely on the subcontractor administrator's e-mail to establish knowledge of fraud, since the message only provided generalized concerns about pricing irregularities. Accordingly, the court held that the government failed to state a valid FCA claim and the United States' FCA counterclaim was dismissed.

LITIGATION DEVELOPMENTS

A. Applicability of Fraud Enforcement and Recovery Act of 2009 (FERA)

U.S. v. Hawley, 2011 WL 3295419 (N.D. Iowa Aug. 1, 2011)

The government originally brought a *qui tam* action against an insurance corporation and its owner, alleging that the defendants knowingly presented false claims and made false records in order to get false crop insurance claims approved. The government also alleged conspiracy and common-law claims of fraud and mistake of fact. The defendants moved for summary judgment on the government's claims and the United States District Court for the Northern District of Iowa granted the defendants' motion with regard to presentment of false claims and common-law mistake of fact, but denied the motion with respect to all other claims. Subsequently, the court entered summary judgment, *sua sponte*, and granted the defendant's summary judgment motion with respect to the government's remaining claims, holding that the Supreme Court's decision in *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, foreclosed the government's claims alleging false records and false statements and conspiracy, since the government failed to show that the defendants intended for the government to pay their crop insurance claims and thus, intended to defraud the government. The government appealed the district court decision with respect to those remaining claims. The U.S. Court of Appeals for the Eighth Circuit reversed, holding that the record created genuine issues of material fact regarding the defendants' knowledge and intent, because the defendant-owner had extensive experience which could lead a jury to find that he knew that the fraudulent representations would ultimately be sent to the government for payment. The defendants then moved for partial summary judgment, arguing that the then-recent amendments to the FCA, set forth in FERA, did not apply retroactively and that the prior version of the FCA—upon which the *Allison Engine* decision was based, prompting the FERA amendments—applied. The defendants also argued that any retroactive application of the FERA amendments would punish them for conduct that was not proscribed at the time it was allegedly committed, in violation of the *Ex Post Facto* clause of the Constitution. Finally, the defendants argued that retroactive application would violate their right to due process. The district court granted the defendants' motion.

Application of the FERA Amendments

The defendants argued that the FERA amendments did not apply retroactively to their case, since the amendments state that they only apply to "claims under the False Claims Act" that are pending on or after June 7, 2008. The defendants contended that

“claim” is a defined term in the FCA—meaning request or demand for payment—and that none of the claims at issue was pending on or after June 7, 2008. The government countered that, for purposes of the amendments’ effective date provision, the term “claim” refers to claims for relief brought under the FCA. The government argued that the defendant’s interpretation of the effective date made no sense, since “claims” are not made under the FCA, and also noted that the effective date provision is included in FERA, not the FCA, and therefore, adopting the FCA’s definition of “claim” was erroneous. The court held that under a plain reading of the effective date provision, “claim” means demand for money, and not legal case. Since none of the defendants’ demands for government money was pending on or after June 7, 2008, the court granted summary judgment in the defendants’ favor.

The defendants also argued that retroactive application of the FERA amendments would be unconstitutional, in violation of the Ex Post Facto clause, claiming that while the FCA is a civil statute, it is meant to be punitive in nature. The government responded that the FCA is a civil statute that compensates the United States for false and fraudulent claims, and that the Ex Post Facto clause does not apply to it. The court concluded that “the FCA’s statutory scheme is so punitive either in purpose or effect as to negate Congressional intent to deem it civil.” Thus, the court held that the Ex Post Facto clause applied and that retroactive application of the FERA amendments would be unconstitutional.

Finally, the defendant argued that retroactive application of the FERA amendments would violate his constitutional Due Process rights. The government responded, arguing that due process requirements only warrant a showing that the retroactive application of the FERA amendments is justified by a rational legislative purpose, and that the amendments serve the legitimate purpose of recovering funds for the government. The court declined to rule on this issue, finding that its prior rulings were sufficient to support summary judgment in the defendants’ favor.

***U.S. ex rel. Stone v. OmniCare, Inc.*, 2011 WL 2669659 (N.D. Ill. July 7, 2011)**

A relator brought a *qui tam* action against his former employer, a provider of pharmaceuticals and related ancillary services, alleging violations of the federal FCA and various state false claims act laws, involving fraud against government entities and retaliatory discharge. Specifically, the relator, who served as the defendant’s vice president for internal audit, alleged that the defendant: ignored audit results which revealed the defendant’s retention of overpayments from Medicare and Medicaid; submitted false claims with respect to a pediatric drug, by improperly stockpiling supplies of the drug that should have been discarded and then using the surplus to fill additional prescriptions, while billing the government for additional supplies of the drug; engaged in a fraudulent Medicaid pricing scheme; and retaliated against him for engaging in protected whistleblower activity. 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 Northern District of Illinois granted the motion in part. The court dismissed with prejudice two counts of the relator's complaint regarding the defendant's alleged retention of overpayments, noting that those counts were based on amended liability provisions of the federal FCA—liability provisions that were not in effect at the time of the alleged violations. To the extent that those counts purported to allege the defendant's liability under the former FCA provision, the court dismissed the two counts with prejudice without prejudice. The Court held that the relator's allegations regarding the stockpiled drugs should proceed to summary judgment. The court denied the defendant's motion to dismiss the relator's retaliation claim, and all of the remaining active claims were continued.

First, with respect to the relator's argument that the defendant's alleged retention of overpayments constituted a violation of the FCA, the court noted that the parties agreed that there was no liability for retention of overpayments prior to the amendment of this liability provision through the Fraud Enforcement and Recovery Act of 2009, which did not explicitly address its retroactive effect. The court relied on the text of the Patient Protection and Affordable Care Act and a Senate Report to conclude that the relator's theory of liability would create an impermissible retroactive effect. As the court concluded that the relevant events took place before the prospective amendment enacted, it held that the defendant could not be liable for retention of an overpayment. Accordingly, the court dismissed those claims with prejudice. The court then analyzed those claims under the pre-FERA FCA and found that the relator's claims failed to adequately allege the presentment of a false claim, as the relator only alleged that the defendant knew or should have known that false claims were being made. Further, the court found that even though the relator attached a spreadsheet detailing document deficiencies at the claims level, he failed to effectively articulate how the deficiencies resulted in the submission of false claims. The court held that submitting a claim without all required documentation does not render it fraudulent. Accordingly, the court dismissed those claims without prejudice to the extent that they alleged the defendant's liability under the pre-FERA FCA.

Next, the court analyzed the relator's claims regarding the defendant's improper stockpiling of drugs and double-billing to the government—specifically the Nevada Medicaid program. The defendant argued that this alleged fraud was duly investigated by the Nevada Department of Justice and that a settlement was reached. Further, the defendant argued that the investigation and settlement triggered the FCA's public disclosure bar, and barred the relator from bringing a claim regarding that conduct. The court found that the defendant based its arguments on a series of exhibits documenting the investigation and resulting settlement, and concluded that those documents could not be considered as part of a motion to dismiss. Therefore, the court converted the defendant's motion to dismiss this claim into a narrow motion for summary judgment on the public disclosure bar

issues, which would be decided after both parties were given an opportunity to present any and all relevant evidence.

Finally, the court analyzed the relator's retaliation claim, in which the relator alleged that he presented a document to the defendant's internal audit committee that reflected the deficiencies he found as part of his audit, and that he informed the defendant that his findings amounted to fraud. However, the court found that specific types of employees called "fraud alert" employees are subject to a heightened pleading standard because their job, by definition, is to give notice to employers of fraud. The court found the relator, being the vice president for internal audit, fit within this category. However, the court determined that the relator alleged the "magic word" "fraud" when he turned over his audit reports, so he satisfied the heightened standard and adequately alleged a retaliation claim. Consequently, the retaliation claim was not dismissed.

See *U.S. v. Edelstein*, 2011 WL 4565860 (E.D. Ky. Sept. 29, 2011) at page 61.

B. Calculating Damages and Civil Penalties

See *U.S. v. Mastellone*, 2011 WL 4031199 (S.D.N.Y. Sept. 12, 2011) at page 103.

See *U.S. ex rel. Hobbs v. MedQuest Assocs., Inc.*, 2011 WL 3703762 (M.D. Tenn. Aug. 23, 2011) at page 34.

See *U.S. v. Phung*, 2011 WL 3584812 (W.D. Okla. Aug. 15, 2011) at page 103.

C. False Certification of Compliance

***U.S. ex rel. Westmoreland v. Amgen, Inc.*, 2011 WL 4342721 (D. Mass. Sept. 15, 2011)**

A relator brought a *qui tam* action against a biotechnology company (Amgen) and its affiliates (INN) and (ASD), alleging that the defendants knowingly caused health care providers to submit false Medicare claims and conspired to defraud the Medicare program. Specifically, the relator alleged that the defendants violated the Anti-Kickback Statute (AKS) by encouraging health care providers to submit claims for the value of the excess or “overfill” amount of drugs contained in their vials and failed to include that amount in its average sales price (ASP). Further, the relators alleged that the defendants caused providers to submit false Medicare claims because the providers’ claims included a false certification of compliance with the AKS—and such a certification was required pursuant to the Medicare Provider Agreement (PA) that Medicare participant must sign. The defendants moved for partial judgment on the pleadings, arguing that the PA was contrary to applicable Medicare statutes and regulations, which do not require such a certification of compliance with the AKS as a prerequisite for payment. The relator countered that the AKS itself makes clear that compliance is a prerequisite for payment under Medicare, and the U.S. Government—which declined to intervene in the relator’s case—filed a statement of interest in support of the relator’s position. Both the relator and defendant Amgen filed cross-motions for partial summary judgment as to the alleged overfill allegations, with the relator arguing that claims that include inflated ASPs are patently false, and Amgen arguing that the applicable regulations make clear that overfill amounts are not to be considered for ASP purposes and that there was no evidence that Amgen intended to submit inflated ASPs. INN and ASD also moved for partial summary judgment, arguing that they were shielded from liability by the AKS’s safe harbor provisions for group purchasing organizations (GPOs). The relator filed a cross-motion for partial summary judgment against these two defendants, arguing that the safe harbor was inapplicable to them. The United States District Court for the District of Massachusetts considered all of the parties’ motions.

False Certification of Compliance with the AKS

The court began by analyzing the defendants’ motion for partial judgment on the pleadings, in which they argued that the PA requirement of certifying compliance with the AKS was contrary to the Medicare regulations, which do not condition payment on compliance. Further, they argued that the Centers for Medicare and Medicaid Services’ (CMS) adoption of a version of the PA that included the certification clause at issue was procedurally improper and outside the scope of the agency’s authority. The court found that the defendants failed to identify how or why certification of compliance with the AKS as an implied precondition of payment was contrary to

the Medicare statutes and regulations—instead, the court held that compliance with the AKS was a precondition for payment, even if it is not expressly stated. The court also held that the PA was adopted in accordance with the law, it represented a valid exercise of CMS’s regulatory authority that was entitled to judicial deference, and the certification clause was consistent with the Medicare statutes and regulations as well as the purpose of the AKS. Accordingly, the court denied the defendants’ motion with respect to the AKS allegations.

Average Sales Price

Next, the court analyzed the parties’ cross motions for partial summary judgment on the relator’s overfill allegations. The relator argued that, because CMS termed overfill as a free product, it was therefore a price concession that should have been deducted from the ASP determination. However, the court found that appropriate ASP calculations did not have to include overfill amounts and that because Amgen consistently followed this methodology, it did not fraudulently inflate ASPs; the court held that even if Amgen failed to comply with a reporting obligation, such failure could not have resulted in an artificially inflated ASP. As the court determined that the ASP Amgen submitted to CMS was not erroneous as a matter of law, it held that Amgen’s intent or knowledge in making its ASP calculation was irrelevant. Thus, the court denied the relator’s motion on the overfill allegations and granted Amgen, holding that the relator could not establish Amgen’s liability or any damages to the government with respect to this claim.

AKS Safe Harbor Provision

The court then analyzed the parties’ cross motions for partial summary judgment as to INN & ASD’s assertion that the AKS’s safe harbor provision for GPOs shielded them from liability for alleged false claims. The relator, however, argued that the safe harbor provision was inapplicable to INN, because INN failed to comply with certain safe harbor requirements. The relator alleged that INN had impermissibly close relationships with Amgen and ASD—INN and ASD formerly had an exclusive GPO-distributor relationship and share an accounting department and other key personnel and INN and Amgen had entered into a GPO agreement which made Amgen the primary source of INN’s revenue. The relator argued that these relationships were inconsistent with the congressional intent in creating the GPO safe harbor, and also alleged that INN failed to comply with an AKS safe harbor provision requirement that it mail out annual disclosure letters disclosing these relationships and specifying the administrative fees it received from vendors. The defendant’s disputed the relator’s claims. The court determined that that the question of whether or not INN complied with its obligation to send annual disclosure letters to its members was an issue for the jury to decide. Accordingly, the court denied parties’ motions for partial summary judgment.

The relator then argued that INN could not assert the safe harbor as an affirmative defense because, by allegedly conspiring with Amgen and ASD, it violated the

fiduciary duty that it owed its members as their purchasing agent. The court agreed that statutory and regulatory compliance alone could not absolve INN of FCA liability, if INN's relationship with the other defendants revolved around a marketing scheme to induce providers to bill Medicare for overfill amounts, when the defendants knew, deliberately ignored, or recklessly disregarded whether or not such billing was allowable. The court held that INN's potential FCA liability was independent of any claim of exemption that it may have under the AKS.

Finally, the court considered ASD's argument that the safe harbor provision shielded it from FCA liability, because it complied with all the requirements for providing discounts to its providers, including Amgen. The relator countered, arguing that ASD did not keep sufficient records to show any manner by which its discounts to Amgen were allocated and funded. The court found that ASD's claim of safe harbor protection had no bearing on whether it independently or as part of a conspiracy with the other the defendants encouraged the submission of false Medicare claims. Further, the court observed that genuine disputes of fact remained as to whether ASD conspired with Amgen and INN to defraud the government by causing providers to seek reimbursement for overfill. As the court held that whether ASD actively marketed overfill to providers was a question for the jury to decide, it denied the parties' summary judgment motions with respect to ASD's liability.

***U.S. ex rel. Yannacopoulos v. Gen. Dynamics*, 2011 WL 3084932 (7th Cir. July 26, 2011)**

A relator brought an action against two corporations (General Dynamics and Lockheed), alleging numerous violations of the FCA with respect to the sale of F-16 fighter jets to Greece—which used funds borrowed from the United States to make the purchases. The defendants moved for summary judgment and the United States District Court for the Northern District of Illinois granted the motion. The relator appealed that decision to the Seventh Circuit, alleging judicial error and asserting that the defendants made numerous false statements to the United States in order to obtain the funds for the sale to Greece. The Seventh Circuit affirmed the district court's decision.

First, the court analyzed the relator's claim that General Dynamics lied to the United States about its involvement in establishing and serving as majority shareholder in a venture capital company in Greece—the Hellenic Business Development and Investment Company (HBDIC). In addition, before releasing loan funds to Greece to finance the sale of the fighter jets, the U.S. Defense Security Assistance Agency (DSAA) required General Dynamics to execute a Contractor's Certification Agreement (CCA) regarding the fighter jets contract. The relator alleged that General Dynamics submitted invoices to the government for payment and that each invoice certified its compliance with the contract and the CCA. The relator alleged that these certifications were false because General Dynamics breached both the Contract and

the CCA when it improperly included various costs associated with its investment in HBDIC in the contract price, thereby passing on those costs to the United States, as lender to Greece. The appeals court, though, determined that these charges were not prohibited under the contract, and thus, no false certification occurred. With respect to the CCA, the relator argued numerous false certifications occurred. The court, however, found that these allegations were based on the relator's erroneous interpretation of the contract. Consequently, the appeals court held that General Dynamics did not falsely certify compliance with the CCA either. The court held that the grant of summary judgment in General Dynamics' favor was proper, with respect to the relator's claims related to HBDIC.

Second, the court analyzed the allegations that General Dynamics made misrepresentations regarding the "Economic Price Adjustment" (EPA) clause in the contract with Greece. Under the terms of the Greek sale, General Dynamics was to receive advance payments, which prompted the parties to include a draft EPA clause in the contract which allowed for reductions in the total contract price. But before the contract was finalized, the draft EPA language was removed from the contract, in exchange for General Dynamics' agreement to the fighter jets more quickly than originally contemplated. The relator asserted that General Dynamics was required to inform the United States of any changes to the EPA clause. He alleged that General Dynamics submitted invoices to the U.S. government for funds on Greece's, months before notifying the United States that the EPA clause had been removed from the contract. Those invoices, he alleged, included false certifications of General Dynamics' compliance with the terms of its agreement with the U.S. The appellate court, however, found that the parties had mutually agreed to delete the EPA clause, and that, after receiving and reviewing the contract, the U.S. government made no financial changes to account for the absence of the EPA clause. This led the court to conclude that the removal of the EPA clause was not material to the U.S. government's decision to finance the Greek sale, and that summary judgment in favor of General Dynamics on the EPA clause claim was also appropriate.

Third, the court analyzed the relator's claim that General Dynamics falsely certified its compliance with the CCA by failing to inform the U.S. government of requirements in the contract relating to the value of spare parts to be purchased. The relator alleged that this contract term was violated when Greece purchased spare parts from other suppliers, but that the parties informally agreed to disregard the violation—a violation the United States was never informed about. The relator argued that when General Dynamics subsequently submitted invoices to the United States that did not discuss the spare parts issue, it falsely certified its compliance with the CCA. But the circuit court found that the relator failed to offer evidence showing that General Dynamics knew that its invoices to the U.S. contained false information, since the requests for advance payments were based on estimates and thus, it was not possible for General Dynamics to know that its figures were inaccurate. Since the relator could not adequately show that General Dynamics had knowledge

of false certifications, the Seventh Circuit held that summary judgment in General Dynamics' favor was also appropriate with regard to the relator's spare parts claim.

Next, the court analyzed the relator's claim that General Dynamics falsely certified its compliance with the CCA with respect to a depot program for materials and equipment to be used to repair and maintain the fighter jets. The relator argued GD falsely certified compliance with the CCA when it submitted invoices to the U.S. but failed to report an implicit understanding with Greece to disregard the timetable for the depot program. Again, the Seventh Circuit disagreed with the relator. The court observed that the applicable contract provision only provided the date by which Greece could decide to cancel the depot program and not incur any costs beyond those delineated in the contract. The court concluded that the relator's claim was based on an incorrect interpretation of the contract, and therefore failed as a matter of law. Accordingly, the court held summary judgment in the defendant's favor was appropriate on this issue.

Finally, the court analyzed the claims with respect to defendant Lockheed, which acquired one of General Dynamics' divisions and assumed all of the rights and obligations under the contract with Greece. Lockheed and Greece executed two modifications to that contract, and the relator alleged that both modifications were reverse false claims. The relator argued that the first modification led to an overpayment to General Dynamics (which was passed on to Lockheed), and that Lockheed then concealed its obligation to make a refund to the U.S. The circuit court, though, found that the relator failed to provide sufficient evidence to show any falsity with respect to the modification, that Lockheed had knowledge of any falsity, or that Greece did not actually agree to pay the price set forth, which would have negated any claim of an overpayment. As a result, the circuit court held that the first contract modification did not constitute a reverse false claim.

The relator argued that a second contract modification—which provided for a refund from Lockheed to Greece—was also false, in two aspects. First, he argued that the modification falsely represented that the defendants had refunded the entire amount at issue, when in fact, some of the funds had not yet been repaid. Second, he asserted that the modification did not truthfully reconcile the payments the defendants received with the amount of work that had been performed, thereby allowing Lockheed to secretly retain some advance payments for work that was never performed. With regard to the first issue, the circuit court concluded that the language of this modification did not state that the full amount of the refund had already been paid. Thus, the modification was not false in that respect. With regard to the second issue, the court held that the relator failed to demonstrate that the modification was false, since he did not allege that this modification did not reflect an actual agreement between Lockheed and Greece regarding the amount of the refund. Accordingly, the court held the relator failed to show that this second modifications was a reverse false claim either.

D. FCA Seal

***U.S. ex rel. Littlewood v. King Pharm., Inc.*, 2011 WL 3805607 (D. Md. Aug. 29, 2011)**

A relator brought a *qui tam* action against three pharmaceutical companies, alleging that the defendants engaged in an illegal scheme to promote an off-label use of a drug, which caused false claims to be presented to the federal government healthcare programs. The United States declined to intervene in the relator's case. Subsequently, the relator filed a voluntary dismissal without prejudice, to which the government consented. The government then requested unsealing the relator's complaint, its own notice of declination to intervene, and its proposed order. Additionally, the government requested that all other papers filed in the action, including the government's two motions for extension of time to keep the relator's complaint under seal, remain sealed, arguing that these documents were provided to the court alone for the sole purpose of evaluating whether the seal and time for making an election to intervene should be extended. The relator opposed the government's request to unseal her *qui tam* complaint, stating that the presumption of public access to judicial documents did not apply, since she voluntarily dismissed the action. She further argued that public interest and public policy considerations supported maintaining the seal and that unsealing the case would cause significant harm to her. In addition, she argued that unsealing the case would cause significant harm to the defendants and to others who were named in her complaint and accused of wrongdoing. In response, the government argued that maintaining the seal would violate the strong presumption in favor of the public's right to examine and copy judicial records, and that the relator failed to satisfy the burden to maintain her identity under seal. The United States District Court for the District of Maryland denied both parties' requests, and ordered that the case be unsealed in its entirety.

Keeping the *Qui Tam* Complaint Under Seal After Voluntary Dismissal

The relator argued that since she dismissed her complaint before serving it on the defendants, the case should remain sealed indefinitely. She argued that unsealing her complaint would result in serious harm to her, as she remained an employee of one of the defendants. The court held that the presumption in favor of public disclosure of court records can only be overcome by a significant countervailing interest, and concluded that the relator failed to demonstrate any relevant privacy right to overcome the public's right to access court documents. Additionally, the court found nothing in the FCA evincing a congressional intent to impose a permanent seal over all *qui tam* suits that were voluntarily dismissed by the relator after the government declined to intervene. Further, the court found that the relator's employment concerns were similar to those of the many other employee-relators who brought suits against their

employers or former employers for various reasons, and for which the FCA provides a cause of action for retaliation. The court held that such fears were not sufficient to overcome the presumption of public access. Finally, the court found that the FCA's seal provision was implemented to allow the government time to investigate *qui tam* claims, not to protect the identity of relators. As a result, the court held that there was no basis to maintain the seal following the relator's voluntary dismissal of the *qui tam* complaint.

Keeping the Government's Requests for Extensions Under Seal

The court then examined the government's request to keep its two motions for extensions of time under seal. The court found that the government failed to present sufficient reasons to maintain the seal over those motions, stating that "the Government has not articulated any cognizable rationale to maintain the seal," since the motions for extensions of time did not contain information that would jeopardize an ongoing investigation, nor did they include confidential investigative methodology. As a result, the court denied the government's request to unseal those documents.

***See U.S. ex rel. Yannity v. J & B Med. Supply Co., Inc.*, 2011 WL 4484804 (E.D. Mich. Sept. 27, 2011) at page 43.**

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

U.S. ex rel. Nicholson v. Spigelman, 2011 WL 2683161 (N.D. Ill. July 8, 2011)

A relator brought a *qui tam* action against a psychologist, a non-profit children's shelter, and a pharmacy, alleging that the defendants submitted false Medicaid reimbursement claims for prescriptions intended for "off-label" uses, in violation of the False Claims Act. The defendants moved to dismiss the relator's allegations for failure to state a claim, failure to plead with particularity, and for lack of subject matter jurisdiction. The United States also moved to dismiss the relator's complaint, arguing that allowing her case to proceed would be detrimental to the government's interests, since the actual damages alleged amounted to only a few hundred dollars and since, even if those damages were trebled and statutory penalties were added, the government would still incur more in litigation expenses than it could expect to recover. Moreover, the government argued that its participation in the case would divert its limited resources from more substantial and important investigations. The United States District Court for the Northern District of Illinois granted the government's motion, denied the defendant's motion as moot, and dismissed the relator's case with prejudice.

In opposition to the government's motion, the relator argued that the litigation costs to the government would be relatively small; she also offered not to seek discovery against the government without leave of court. However, the court found that the relator ignored the fact that the defendants would seek discovery that would burden the government and the government would further have to monitor the case and file briefs when necessary. In addition, the court found that the relator ignored the fact that she herself wanted to depose four Medicaid and Medicare officials in connection with her opposition to the government's motion. The court concluded that the government offered substantial reasons to show a legitimate purpose for dismissal. The relator argued that dismissal was arbitrary and capricious and that the government underestimated the financial upside of the litigation. The court, though, held that the government's cost-benefit calculation could not be deemed arbitrary. The court determined that the government would have an interest in pursuing the manufacturer of the drug, but not parties such as the present defendants. Additionally, the court found that the defendants lacked the resources to satisfy any reasonably substantial judgment, and that even if the relator correctly assessed the magnitude and legal merit of the case, the government's actual recovery was likely to be small.

Next, the relator argued that she had a right to an evidentiary hearing and discovery, including depositions of four Medicaid and Medicare officials. The court found that the relator failed to show why an evidentiary hearing was warranted. Further, the court observed that allowing the relator to conduct discovery or to depose Med-

icaid and Medicare officials would lead to what the government was trying to avoid in moving to dismiss the action—namely, costly and time-consuming depositions and discovery with little prospect of significant recovery. The court found that the relator’s opportunity to respond to the government’s motion to dismiss in writing and at a hearing provided all the due process she was due under the FCA. Accordingly, the court granted the government’s motion and dismissed the relator’s *qui tam* action with prejudice. The defendants’ motion was denied as moot.

F. Leave to Amend *Qui Tam* Complaint

***U.S. ex rel. Tamanaha v. Furukawa Am., Inc.*, 2011 WL 3423788
(9th Cir. Aug. 5, 2011)**

A relator brought a *qui tam* action against two corporations, alleging that the defendants violated the False Claims Act by submitting materially false information to the U.S. Customs Service in order to undervalue imported goods, which would reduce customs duties owed on those goods. The defendants moved to dismiss the relator's complaint for failure to state a claim and for failure to plead with particularity, and the United States District Court for the Central District of California granted the defendants' motion. The relator requested leave to amend his complaint, so as to allege more concisely that the defendants violated a preexisting obligation to pay customs duties established by the federal regulations. The court denied the relator's request. The relator then appealed to the Ninth Circuit, which reversed and remanded the district court's ruling, as it held that any amendment to the relator's complaint would be the first and would not be inherently futile, and that the relator could cure any defects by amending his complaint to allege the specific sources of the defendants preexisting obligation to pay customs duties and to plead with greater particularity. As a result, the court held that the district court abused its discretion in denying the relator leave to amend his complaint.

G. Relators' Share

***U.S. ex rel. Rille v. Cisco Sys., Inc.*, 2011 WL 4352309 (E.D. Ark. Sept. 19, 2011)**

Two relators brought a *qui tam* action against a government contractor (Cisco), alleging that the company violated the False Claims Act, the Anti-Kickback Act, and other laws. The government did not intervene in the case immediately, and only joined the case after the relators had pursued it on their own for more than three years. Eventually, the government did intervene and filed a notice of settlement with Cisco and another company, Comstor, both of which the government alleged made inaccurate and incomplete disclosures and false statements, and both of which, according to the government, provided improper kickbacks. Although the settlement agreement disposed of the fraud claims (which were subsequently dismissed with prejudice), the matter of the relators' share of the government's settlement proceeds—which totaled about \$48 million—was left unresolved. When the relators moved for a determination of relators' share, the government opposed their efforts with a cross-motion to dismiss the relators' claims for failure to plead fraud with particularity. The U.S. District Court for the Eastern District of Arkansas (which retained jurisdiction over the relators' share dispute following the settlement of the fraud claims) denied the government's motion and granted the relators'.

Relators' Share

In its cross-motion to dismiss the relator's *qui tam* allegations, the government argued that the relators failed to properly plead the fraudulent scheme that led to the settlement, pursuant to Federal Rule of Civil Procedure 9(b). In response, the court simply held that, given the fact that, at the time the government filed its cross-motion, the case had been settled and dismissed with prejudice, “[t]he time for pointing out deficiencies under Rule 9(b) has passed.”

The government then claimed that the relators were not entitled to a share of the settlement proceeds because the government found no evidence of the kickback scheme as alleged by the relators and did not settle with the defendants in connection with any such alleged conduct; instead, the government asserted, the settlement resolved claims that Cisco and Comstor fraudulently induced the government to enter into a contract for the purchase of Cisco products by misrepresenting the nature of the commercial relationship between Cisco and Comstor. The government also argued that because the relators' complaint never mentioned Comstor, the relators were not entitled to recover any share of settlement proceeds paid by that defendant.

With regard to Cisco, the court found that the relators' *qui tam* allegations coincided with the fraud scheme alleged by the government. Moreover, the court noted that the relators pursued the case for a significant amount of time before the government intervened and that when the government finally chose to intervene, it needed to make a showing of good cause, which it did by stating that it had “received and consid-

ered additional information from the Relators.” The court held that the relators’ action was the catalyst that ultimately led to the government’s settlement with Cisco. The court further determined that there was no evidence that the relators stopped participating in the prosecution of the case after the government intervened. Thus, the court held, the relators were entitled to a share of the government’s proceeds following its settlement with Cisco. While the court acknowledged that the FCA is silent regarding relator’s share calculations, it noted that a minimum 15% share of the government’s proceeds “is generally viewed as a finder’s fee,” and observed that the U.S. Department of Justice has created a list of guidelines that may be relevant to determining the extent to which any relator substantially contributed to the prosecution of a *qui tam* case. Applying those factors, and recognizing that the relators were more focused on an alleged kickback scheme for which the government found no evidence, the court concluded that the relators were entitled to a 17% share of the government’s proceeds from its settlement with Cisco.

With regard to defendant Comstor, the court again rejected the government’s arguments and awarded the relators a share of the settlement proceeds. The government had argued that the relators could not share in the proceeds received from Comstor because their *qui tam* complaint never even mentioned Comstor and the relators never provided any information or assistance with respect to the settlement with that defendant. In fact, the government argued that a government audit—not the relators’ action—was the source of the government’s claims against Comstor and that the government did not settle with Comstor based on any conduct alleged by the relators. The court, however, found that even though the relators’ complaint did not mention Comstor directly, it alleged that Cisco had made alliances with other companies that resulted in fraud against the government. The court further found that the government intervened in the relators’ action and that the action was settled with respect to conduct that the relators alleged. Therefore, the court held that the relators’ failure to mention Comstor would only decrease their award, rather than eliminate it entirely. As a result, the court held that the relators were only entitled to the minimum 15% share of the government’s settlement proceeds from Comstor.

H. *Res Judicata* and Collateral Estoppel

***U.S. v. Mastellone*, 2011 WL 4031199 (S.D.N.Y. Sept. 12, 2011)**

The United States brought an action under the False Claims Act, alleging that an individual made false statements to the government in order to defraud the U.S. Department of Justice Victim Compensation Fund of 2001 (DOJ Fund), which was established to provide financial assistance to victims of the 9/11 terrorist attacks. The government alleged that the defendant applied for these funds and fraudulently stated that he was disabled and unable to perform any work. The government alleged that he received a monetary award based on his false statements. Later, in a criminal action, the defendant pled guilty to a felony charge of fraudulently stealing money, admitting that he was not permanently disabled and was able to work. He was sentenced to 30 months imprisonment and ordered to pay restitution. The government then brought this FCA action against him, based on the same factual allegations raised in the criminal case. The government moved for summary judgment and the defendant failed to file an opposition. The United States District Court for the Southern District of New York granted the government's motion. The court found that the defendant knowingly made false statements, which were material to the government's decision to pay out of the DOJ Fund. Further, the court found that, pursuant to the FCA and principles of issue preclusion, the defendant was estopped from denying the essential elements of the government claim, which involved the same transaction as the prior criminal action. The court awarded the government treble damages, but offset that amount by the amount recovered by the government in restitution in the criminal action.

***U.S. v. Phung*, 2011 WL 3584812 (W.D. Okla. Aug. 15, 2011)**

The United States brought an action under the False Claims Act against a physician, alleging that the defendant improperly sought reimbursement for 74 upcoded Oklahoma Medicaid claims, presented two false claims and made a false record with respect to those claims, and cause 13 false claims for prescriptions to be presented. Before the government filed its civil suit, the defendant had been convicted of 51 counts of intentionally distributing a controlled substance, one count of health care fraud, and one count of altering records. The defendant was sentenced to a total term of imprisonment for 109 months. The government argued that the criminal conviction for health care fraud estopped the defendant from denying the existence of the Medicaid fraud scheme at issue in the civil FCA case, or from re-litigating that issue. Both the government and the defendant moved for summary judgment. The United States District Court for the Western District of Oklahoma granted the government's motion and denied the defendant's motion.

The court determined that the defendant was precluded from re-litigating the issue of the existence of the fraud scheme. First, the court noted that the defendant

was a party to both the criminal and civil cases. Next, the court observed that the defendant had a full and fair opportunity to litigate the Medicaid fraud issues during the criminal trial, and that the criminal case had been finally adjudicated—the defendant’s conviction was even upheld on appeal to the U.S. Court of Appeals for the Tenth Circuit. Finally, the court held that the Medicaid fraud issues in the criminal proceeding were identical to the Medicaid fraud issues presented in the civil case, since the essential elements of the Medicaid fraud count in the criminal case—namely, that the defendant knowingly devised a Medicaid fraud scheme based on upcoding; that he executed or attempted to execute that scheme; and that he did so with the intent to defraud Medicaid—were the same as the government’s claims in the civil case. Moreover, the court held that the time frame in both the criminal and civil cases overlapped, even though the civil case alleged fraud that occurred slightly before and slightly after the time frame at issue in the criminal case. Based on those factors, the court held that the defendant was estopped from contesting the Medicaid fraud and granted summary judgment in favor of the government.

In addition to the government’s estoppel argument, the court held that summary judgment was proper because the evidence the government offered in the criminal case—in the form of affidavits from an expert witness and from a Special Agent—supported its civil claims. Consequently, the court granted summary judgment in favor of the government, and held that the defendant was liable for treble damages, plus statutory penalties for each false claim. When calculating the government’s damages, the court offset the amount of damages to the state of Oklahoma, since Medicaid is a joint federal/state program, and the federal government could only recover its share of damages. After this adjustment was made, the United States’ trebled damages amounted to \$4,800.48. The court then imposed statutory penalties, noting that, for each false claim, the penalty ranged between \$5,500 and \$11,000. Rather than seek penalties for each of the 74 false claims alleged, the government sought a statutory penalty for each of the 22 patients for which the defendant submitted false claims, which totaled \$121,000. Although the amount imposed in statutory penalties far exceeded the United States’ actual damages, the court acknowledged that the government sought less than 1/3 of the penalties it could have sought, which “alleviate[d] concern that imposition of statutory penalties in this case would violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.”

Judgments & Settlements

JULY 1, 2011–SEPTEMBER 30, 2011

LHC Group Inc. (W.D. La. September 30, 2011)

Home health provider LHC Group Inc. (LHC) agreed to pay the United States \$65 million plus interest, to resolve allegations that, between 2006 and 2008, LHC improperly billed Medicare, TRICARE and the Federal Employees Health Benefits program for services that were not medically necessary and for services rendered to patients who were not homebound. In addition to the civil settlement agreement, the company agreed to enter into a Corporate Integrity Agreement with the Department of Health and Human Services, Office of Inspector General. The settlement resolves a *qui tam* case filed by Judy Master, who will receive over \$12 million as her share of the federal government's recovery.

Science Applications International Inc.; Applied Enterprise Solutions LLC; Dale Galloway; Stephen Adamec; and Robert Knesel (S.D. Miss. September 29, 2011)

Science Applications International Inc. (SAIC); Lockheed Martin; Applied Enterprise Solutions LLC (AES); AES CEO Dale Galloway; and former government employees Stephen Adamec and Robert Knesel agreed to pay the United States over \$22 million to resolve bid rigging allegations. SAIC agreed to pay \$20,400,000 and AES and Dale Galloway agreed to pay \$2,166,000. Adamec and Knesel agreed to pay \$110,000. These defendants resolved allegations that they knowingly submitted or caused the submission of false claims and conspired to submit such claims under a contract with the General Services Administration (GSA) in support of the Naval Oceanographic Major Shared Resource Center (NAVO MSRC). In addition, Adamec and Knesel, allegedly shared advance procurement information with SAIC and took other measures to bias the contract selection in favor of SAIC. In January 2011, Lockheed Martin reached a \$2 million settlement with the United States to settle related allegations. The allegations were originally brought by a *qui tam* relator, David Magee, who is a former computer scientist at the U.S. Naval Oceanographic Major Shared Resource Center in Mississippi. Magee was represented by the law firms of Helmer, Martins, Rice & Popham; Galihier, DeRobertis, Ono; and Owen, Galloway & Myers. TAFEF member Paul B. Martins, of Helmer, Martins, Rice & Popham, was lead attorney in this matter.

Dr. Steven H. Stern and Kentuckiana Center for Better Bone and Joint Health PLLC (W.D. Ky. September 27, 2011)

Dr. Steven H. Stern and his practice, Kentuckiana Center for Better Bone and Joint Health PLLC (KCB), agreed to pay the United States \$349,860 to settle allegations that from December 2003 through December 2006, they double-billed Medicare for Infiximab, a drug used to treat rheumatoid arthritis. Specifically, Stern and KCB were accused of splitting vials of Infiximab across multiple patients, and then billing Medi-

care as though whole vials were used for each patient. The claims arose in a *qui tam* complaint filed by former KCB employee Suzette L. Sewell-Scheuremann. She will receive a relator's share of \$70,000, plus attorney's fees, costs and expenses.

Hill-Rom Company, Inc. (E.D. Tenn. September 27, 2011)

Hill-Rom Company, Inc., a durable medical equipment supplier, agreed to pay the United States \$41.8 million to resolve Medicare fraud allegations. Hill-Rom allegedly knowingly submitted numerous false claims to the Medicare program for certain specialized medical equipment for patients who did not qualify for the equipment and for patients who had died or were no longer using the equipment. Hill-Rom also allegedly submitted claims for medically unnecessary equipment. In addition to the settlement, Hill-Rom also entered into a five-year Corporate Integrity Agreement with the U. S. Department of Health and Human Services, Office of Inspector General.

Guidant LLC (M.D. Tenn. September 26, 2011)

Guidant LLC, a subsidiary of Boston Scientific Corp., agreed to pay the United States \$9.25 million to resolve allegations that it caused the Veterans Affairs Department, Defense Department, Medicare and Medicaid to overpay for implantable cardiac devices. From 1981 to 2007, the company allegedly inflated the cost of replacement pacemakers and defibrillators and failed to grant appropriate credits for devices that failed while under warranty. The case was brought by relator Robert Fry, who will receive a \$2.3 million share of the federal recovery. Fry is a former Guidant sales agent.

Abri Health Plan Inc. and Universal American Financial Corp. (September 25, 2011)

Abri Health Plan Inc. and parent company Universal American Financial Corp. agreed to pay the United States \$4.8 million to settle health care fraud allegations that Abri sales agents misled customers about the scope of the Medicare Part C coverage plans and sometimes enrolled them without their consent. Additionally, Abri allegedly paid doctors for referrals and paid customers to sign up for Medicare Part C coverage plan. This settlement resolves a 2008 *qui tam* action filed by relators James Mlaker and J.D. Webb. The relators, former Abri employees, will receive a combined relator's share of more than \$900,000. Mlaker was an Abri sales agent, and Webb was a manager for Abri. The relators were represented by TAFEF member Nola Hitchcock Cross of the Cross Law Firm, S.C.

CH2M Hill Hanford Group Inc. (E.D. Wash. September 22, 2011)

CH2M Hill Hanford Group Inc., a wholly-owned subsidiary of CH2M Hill Companies Ltd., agreed to pay the United States \$1.5 million to resolve False Claims Act and

Anti-Kickback Act allegations that the company knowingly submitted false claims and paid kickbacks in connection with a contract to operate and manage mixed radioactive waste at the Department of Energy's (DOE) Hanford Nuclear Site in Washington State. Between 2003 and 2005, two company employees responsible for purchasing supplies were alleged to have improperly made over 200 purchases from companies owned and run by their spouses and then charged the costs to DOE. CH2M allegedly failed to address these improper purchase schemes even though annual internal audits alerted the company to weaknesses in its purchase card controls.

Lydia Demski; Deerpath International Inc.; Scope Services Inc.; and American Nuclear Resources Inc. (N.D. Ohio September 21, 2011)

Lydia Demski agreed to pay the United States \$800,000 to resolve allegations that she and her companies, Deerpath Corp., Scope Services Inc. and American Nuclear Resources Inc., falsely participated in a veterans' preference contract program. Demski was accused of knowingly causing the submission of false claims relating to a contract to refurbish equipment at the National Aeronautics and Space Administration's (NASA) Plumbrook facility in Sandusky, Ohio. The re-furbishment contract at the facility was set aside by NASA for a Service-Disabled Veteran-Owned Small Business (SDVOSB). Demski was alleged to have organized and controlled a fraudulent SDVOSB under the name Deerpath International, Inc., as a means of directing contract work to her other businesses. The fraud allegations were brought by relator, Greg Fones, who will receive a \$140,000 share of the settlement amount. Fones was represented by TAFEF members David L. Haron and Mercedes Varasteh Dordesi of the Frank Haron Weiner firm.

Marci Taylor; Treehouse Behavioral Services, PLLC; Treehouse Pediatric Center, PLLC; and The Autism Clinic of Texas (W.D. Tx. September 21, 2011)

Marci Taylor, owner of Treehouse Behavioral Services, Treehouse Pediatric Center and The Autism Clinic of Texas, agreed to pay the United States \$1.4 million to settle allegations involving the submission of false claims for payment to the TRICARE program. From January 1, 2005, to December 31, 2009, Taylor and her companies allegedly billed TRICARE for applied behavior analysis (ABA) services that were not rendered by certified therapists; overcharged TRICARE for ABA services; billed TRICARE for services that were not eligible for reimbursement as ABA therapy; and submitted other false records to TRICARE. The relators in this case were Dr. Raymond G. Good and Darlene J. Good.

Jesse Nunn and Future Research Corporation (September 21, 2011)

Future Research Corporation and its president, Jesse Nunn, agreed to pay the United States \$200,000 to settle claims that they improperly obtained contracts from the Department of the Navy that had been set aside for companies that qualified for the Small Business Administration's (SBA) Historically Underutilized Business Zone (HUBZone) program—which requirements companies to meet certain criteria, such as maintaining their principal office in a designated HUBZone and employing 35 percent of their workforce from a HUBZone. Future Research Corp. allegedly bid on and received the Navy HUBZone contracts based on false certifications that the company and Nunn made to the Navy. This settlement was the result of the collaborative efforts of the Civil Division of the Department of Justice, the SBA Office of General Counsel, the SBA Office of Inspector General and the Department of the Navy.

Tamimi Global Company Ltd. (C.D. III. September 16, 2011)

Saudi Arabia-based Tamimi Global Company Ltd. (TAFGA) agreed to pay the United States \$13 million to resolve civil and criminal allegations related to kickbacks the company allegedly paid to a Kellogg Brown & Root Inc. (KBR) employee, and illegal gratuities allegedly given to a former U.S. Army sergeant, both in connection with contracts involving the Army's operations in Iraq and Kuwait. TAFGA employees allegedly paid kickbacks to the KBR employee in order to obtain subcontracts awarded under LOGCAP (Logistics Civil Augmentation Program) III. In addition, TAFGA employees allegedly paid illegal gratuities to Army Sergeant Ray Chase, who was responsible for certain Army food services at camps in Kuwait in 2002 and 2003. In addition to the civil settlement, the company agreed to enter into an 18-month deferred prosecution agreement.

BP Amoco Corporation; Amoco Production Company; BP Exploration & Oil Inc.; BP America Inc.; Atlantic Richfield Company; and Vastar (E.D. Tex. September 16, 2011)

BP Amoco Corp. (formerly Amoco Corp.), Amoco Production Company, BP Exploration & Oil Inc., BP America Inc., Atlantic Richfield Company, and Vastar agreed to pay the United States \$20.5 million to settle claims that the companies violated the False Claims Act by knowingly underpaying royalties owed on natural gas produced from federal and Indian leases. The companies were alleged to have improperly deducted certain costs from the royalty values they reported and to have improperly reported processed gas as unprocessed gas, which resulted in a reduction of their royalty payments on federal and Indian leases. The estate of the deceased relator, Harold Wright, will receive a \$5.3 million share of the federal recovery. This is the latest in a series of settlements arising from Wright's False Claims Act *qui tam* cases against vari-

ous natural gas company defendants, which have returned about \$270 million to the federal government.

Watson Pharmaceuticals Inc. and Sandoz Inc. (D. Mass. September 15, 2011)

Generic drug makers Watson Pharmaceuticals Inc. and Sandoz Inc. agreed to pay the United States \$145 million to resolve two False Claims Act cases alleging that they defrauded U.S. and state governments by causing Medicaid to overpay for drugs. Watson agreed to pay \$79 million and Sandoz—Novartis AG's generic unit—agreed to pay \$66 million. Both suits were filed by Ven-a-Care of the Florida Keys, which was represented by TAFEF member James Breen of The Breen Law Firm, PA.

Accenture LLP (D. Ark. September 12, 2011)

Accenture LLP agreed to pay the United States \$63.675 million to resolve False Claims Act *qui tam* allegations that the company submitted or caused the submission of false claims for payment in connection with numerous U.S. government information technology contracts. Accenture allegedly received kickbacks for recommending certain hardware and software vendors to the government, improperly inflated prices, and fraudulently rigged bids. The relators in this case were former Accenture employees Norman Rille and Neal Roberts, who were represented by the Jeffers Mangels Butler & Mitchell firm.

Maxim Healthcare Services Inc. (D.N.J. September 12, 2011)

Maxim Healthcare Services Inc. agreed to pay the United States and 43 states a combined \$150 million to settle claims that it falsely billed home healthcare claims to Medicaid and to the Veterans Affairs program for services that were not rendered, services that were not properly documented, and services that were performed by 13 unlicensed offices. Maxim agreed to pay a criminal penalty of \$20 million and to pay \$130 million in civil penalties. Maxim also agreed to enter into a deferred prosecution agreement, to enter into a corporate integrity agreement, and to accept a corporate monitor. The relator in this case, Richard West, will receive a \$15.4 million share of the recovery. West was represented by TAFEF member Robin Page West, of Cohan & West, P.C.

TriWest Healthcare Alliance Corp. (N.D. Cal. September 9, 2011)

Arizona-based TriWest Healthcare Alliance Corp. agreed to pay the United States \$10 million to resolve allegations concerning the Department of Defense's TRICARE medical benefits program. Between 2004 and 2010, TriWest allegedly signed letters of agreement with health care providers for service discounts and then failed to give

TRICARE the benefit of the negotiated discounts. This settlement resolves a False Claims Act *qui tam* suit filed by four former TriWest employees: Judi Jerdee, Deborah Thornton, Linda Glassgow and Paige Fiorillo. The relators will receive a combined \$1.7 million share of the federal recovery.

Janzen, Johnston & Rockwell Emergency Medicine Management Services Inc. (M.D. La. September 1, 2011)

Janzen, Johnston & Rockwell Emergency Medicine Management Services Inc. (JJ&R) agreed to pay the United States \$4.6 million to settle allegations that it submitted inflated claims to Medicare and to Louisiana's Medicaid program. JJ&R provides billing services for physicians, hospitals and other health care providers, and, from 2000 through 2007, the company allegedly utilized an improper coding formula that generated claims for a marginally higher level of service than the physicians actually provided. JJ&R also was alleged to have routinely added charges for minor services. In addition, JJ&R allegedly often failed to comply with Medicare's coding rules governing the submission of claims for teaching physicians. This settlement is the result of a *qui tam* suit filed by Le Jeanne Harris, a former JJ&R employee. Harris will receive a \$774,450 share of the federal recovery.

Noble Jewelry Ltd. (S.D.N.Y. September 1, 2011)

Noble Jewelry Ltd., an international jewelry company based in Hong Kong, and certain of its New York affiliates, agreed to pay the United States \$3.85 million to resolve allegations involving false customs declarations and false shipment invoices. The companies allegedly engaged in a scheme involving the submission of false customs declarations and false jewelry shipment invoices and defrauded the government by under-reporting the value of imported goods on falsified documents, thereby reducing customs duties owed. The relator in this case, who was represented by Kirby McInerney LLP, will receive a 19% share of the \$3.85 million settlement.

Minnesota Transit Constructors Inc. (D. Minn. August 24, 2011)

Minnesota Transit Constructors Inc. (MnTC) agreed to pay the United States \$4.6 million to settle allegations involving a federally-funded transit construction project in Minneapolis, Minnesota. MnTC is a joint venture comprised of Granite Construction, C.S. McCrossan Inc., Parsons Transportation Group and a number of subcontractors. MnTC was the prime contractor on a project to design and build the Hiawatha Light Rail Transit System in Minneapolis. Under the contract, MnTC and its subcontractors were required to use Disadvantaged Business Enterprises (DBEs) for part of the work on the project. They were also required to comply with the DBE regulations and to accurately report their DBE contracting. MnTC allegedly claimed that materials and services for the project were provided by DBEs, when in fact they

were provided by non-DBE subcontractors. MnTC also allegedly misrepresented the actual participation of DBEs, which were allegedly hired merely as extra participants in order to appear as if a DBE had performed the work. This matter was investigated by the Department of Justice's Civil Division, the U.S. Attorney's Office for the District of Minnesota, the Department of Transportation's Office of Inspector General and the Federal Transit Administration.

Par Pharmaceuticals, Inc. and Par Pharmaceuticals Companies, Inc. (D. Mass. August 24, 2011)

Par Pharmaceuticals, Inc. and Par Pharmaceuticals Companies, Inc. agreed to pay the United States and the states of Texas, Florida, Alaska, South Carolina, and Kentucky \$154 million to resolve Medicaid fraud claims that the companies reported inflated average wholesale pricing information that caused government entities to pay inflated reimbursements for drugs under Medicare and Medicaid. The United States will receive \$90,950,000 from the settlement. The relator in this matter, Ven-A-Care, will receive \$9,009,000 of the federal recovery. Ven-A-Care was represented by TAFEF member James Breen of The Breen Law Firm, PA.

Red River Computer Co., Inc. (D.N.H. August 18, 2011)

Red River Computer Co., Inc. agreed to pay the United States \$2.3 million to resolve allegations that it defrauded the U.S. Department of Defense, the U.S. Department of Commerce, the U.S. Department of Interior, the Environmental Protection Agency, the Library of Congress, and the General Services Administration, by failing to follow equipment and support provisions contained in contracts it had with those agencies. Among its alleged offenses, Red River failed to obtain and/or provide agreed-upon services from specific vendors like Sun Microsystems and Panasonic—despite being paid for those services, the company allegedly provided substituted services and withheld that information from the government.

Taleo Corporation (D.D.C. August 16, 2011)

Taleo Corporation agreed to pay the United States \$6.49 million to resolve allegations that it knowingly caused false claims to be submitted to the Transportation Security Administration (TSA) of the Department of Homeland Security (DHS). Taleo subcontracted with CPS Human Resource Services—a company that contracted with TSA to perform human resource services—and agreed that it would charge TSA a discounted commercial list rate for its services. However, Taleo allegedly failed to use its normal procedure to calculate the commercial list rate, which resulted in a higher rate and inflated charges to TSA. This settlement resolves a *qui tam* action filed by Gary Hetland, a former Taleo employee.

The Walgreen Co. (D. Conn. July 27, 2011)

The Walgreen Co. agreed to pay \$140,000 to resolve allegations that it violated the False Claims Act by fraudulently billing Medicare/Medicaid and the Connecticut ConnPACE Program for prescription drugs. From June 1, 2006 through August 31, 2006, the company allegedly submitted duplicate claims to the respective federal and state healthcare programs for patients who were dually-eligible for Medicare Part D as the primary payor, and who were eligible for Medicaid or ConnPACE as the secondary payor. After the alleged billing errors were detected by the pharmacy unit at the Department of Social Services, the matter was investigated by the Office of Inspector General for the Department of Health and Human Services.

CHI Institute (E.D. Pa. July 24, 2011)

CHI Institute agreed to pay the United States \$1.6 million to settle allegations that it misled students and the federal government about the availability of promised educational programs. CHI allegedly failed to provide sufficient externships necessary for students to graduate from the surgical technology program, and a majority of those students received some form of federal student financial aid. CHI is part of Kaplan Higher Education Corporation, a subsidiary of Kaplan, Inc. This settlement resolves a False Claims Act *qui tam* suit.

Laboratory Corporation of America (E.D. Cal. July 21, 2011)

Laboratory Corporation of America, also known as LabCorp, agreed to pay the State of California \$49.5 million to settle claims that the company violated California's False Claims Act by overcharging California's Medicaid program and by giving doctors kick-backs for patient referrals. LabCorp was accused of charging laboratory tests at rates that exceeded the maximum amounts permitted by law. Additionally, LabCorp allegedly offered discounted or free testing to doctors, hospitals and clinics that referred Medi-Cal patients and other business to the labs. The allegations were brought by relators Hunter Laboratories, LLC and its CEO, Chris Riedel.

PRIDE Industries (E.D. Cal. July 11, 2011)

PRIDE Industries and its subsidiary, PRIDE Industries One, agreed to pay the United States \$400,000 to resolve allegations that it knowingly submitted false claims relating to a contract to provide maintenance services at the Department of the Army's Ft. Bliss Army Base in El Paso, Texas. The alleged contract violation involved the Ability-One Program, which procures contracts for goods or services in order to provide employment opportunities to people who are blind or have other significant disabilities. Between 2007 and 2010, PRIDE employed a number of temporary, non-disabled employees as part of its maintenance staff, but allegedly reported false ratio numbers to

the government agency designated to help oversee the program. In addition, PRIDE was accused of overcharging the Department of the Army under its maintenance contract by including unallowable costs and by overcharging for labor. This settlement resolves a False Claims Act *qui tam* suit filed by Timothy Hediger and Lois Perez, who will receive \$68,000 as their share of the settlement.

Joseph Ubaghs (D. Conn. July 8, 2011)

Joseph Ubaghs, a New Milford clinical social worker, agreed to pay \$210,000 to resolve allegations that, from January 2006 through December 2007, he fraudulently billed Medicaid by overbilling for individual and group psychotherapy services and by billing for counseling sessions that never occurred. Under the terms of the settlement, he is excluded from Medicare, Medicaid, and all other federal health care programs for a period of five years.

ArmorGroup North America Inc. (D.D.C. July 7, 2011)

ArmorGroup North America Inc. (AGNA) and its affiliates agreed to pay the United States \$7.5 million to resolve allegations that AGNA submitted false claims for payment involving a State Department contract. AGNA was contracted to provide armed guard services at the U.S. Embassy in Kabul, Afghanistan, and at a Naval Support Facility in Bahrain. AGNA guards allegedly violated the Trafficking Victims Protection Act and misrepresented the prior work experience of numerous individuals it had hired to guard the Embassy. The settlement resolves a False Claims Act *qui tam* suit filed by James Gordon, a former director of operations for AGNA. Gordon will receive a \$1.35 million share of the settlement amount. Gordon was represented by TAFEF members Janet Goldstein, Rob Vogel and Debbie Katz of the Vogel, Slade & Goldstein firm.

Legal Analysis

A Practitioner's Update: Recent *Qui Tam* Fee Awards

A PRACTITIONER'S UPDATE: RECENT *QUI TAM* FEE AWARDS¹

By Marc S. Raspanti, Esquire,² Martha S. Helmreich, Esquire,³
and Sonia S. Shariff, Esquire⁴

INTRODUCTION

Qui tam fee cases decided in the last two years do not break any new ground, but continue along already-established lines of decision. Below, we discuss *Perdue v. Kenny A.* and two other Supreme Court fee award cases, *Astrue v. Ratliff* and *Fox v. Vice*, as well as the recent crop of prevailing plaintiff and prevailing defendant cases.

A. Supreme Court Fee Cases

1. *Perdue v. Kenny A.* — The Lodestar Method Revisited.

The most significant fee award case in the past two years is probably *Perdue v. Kenny A.*, 130 S. Ct. 1662, (2010). Although a 42 U.S.C. § 1988 and not a *qui tam* fee award case, *Perdue v. Kenny A.* will undoubtedly influence how courts approach fee awards in *qui tam*, prevailing plaintiff cases.

The most widely used method to calculate a fee award under federal fee-shifting statutes is the “lodestar.” To determine the lodestar, a court multiplies the prevailing hourly rates of an attorney by the hours worked. The Supreme Court has stated that the virtues of the lodestar method are that it is administrable, and “objective” as it limits the discretion of trial judges and permits meaningful judicial review.

In *Perdue*, the Supreme Court was asked to answer what appeared to be a straightforward question: whether the calculation of an attorney’s fee based on the lodestar may be increased because of the attorney’s superior performance and the results obtained? The Court, citing its precedent answered in the affirmative, but then proceed-

1. This article is designed to be a practitioner’s update of the article published in the April 2009 False Claims Act and *Qui Tam* Quarterly Review.

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ed to significantly limit the scope of its holding by stating that such an increase in an attorney's fee is permitted only in extraordinary or rare circumstances because there is a strong presumption that the lodestar is sufficient.

Specifically, the Court held that fee enhancements may be appropriate for superior attorney performance, in the following circumstances: 1) "where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation," e.g. if the hourly rate takes into account only a single factor such as years since the attorney's bar admission; 2) "if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted;" or 3) "where the attorney's performance involves an exceptional delay in the payment of fees." 130 S. Ct. at 1674.

In keeping with both its narrow holding and precedents, the Supreme Court also rejected the possibility of an enhancing a fee award because of the novelty and complexity of a case. The Court stated that these factors are already reflected in the billable hours recorded by the attorney and therefore, do not support an increase in the fee award.

Moreover, the Supreme Court held that a party seeking the fee enhancement must produce "specific evidence" which supports an enhanced fee so that the trial court's decision to increase the fee award is "reasonable, objective, and capable of being reviewed on appeal."

Thus, because of *Perdue's* holding, *qui tam* attorneys can expect that in their typical cases, fee enhancements are not likely because a federal district court judge's ability to exercise his or her discretion to adjust the lodestar upwards is now severely curtailed. Similarly, neither the novelty nor the complexity of a *qui tam* case will result in a prevailing plaintiff's attorney recouping a fee award greater than a lodestar.

2. *Astrue v. Ratliff*—Fee Awards Belong to the Plaintiff.

The second fee case decided by the Supreme Court in 2010 was *Astrue v. Ratliff*, 130 S. Ct. 2521. *Ratliff*, an attorney, filed a motion on behalf of her client for fees and costs under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). The district court granted the unopposed fee request, but the United States then filed an action seeking an administrative offset against the fee award pursuant to 31 U.S.C. § 3716. The government asserted that *Ratliff's* client owed the United States the administrative offset amount because of a pre-existing debt which was completely unrelated to the underlying social security case on which the client had prevailed. *Ratliff*, then attempted to personally intervene in the United States action to challenge the offset. She asserted that the fee belonged to her and not her client, and therefore could not be subject to the government's offset.

The district court held that *Ratliff* lacked standing to challenge the proposed offset, but the Eighth Circuit Court of Appeals reversed, based on its precedent which recognizes that EAJA fee awards belong to a party's attorney. The Eighth Circuit did however, acknowledge that its precedent was at odds with decisions of the other circuits.

The Supreme Court unanimously reversed the Eighth Circuit's holding. All of the Justices agreed that fees awarded to prevailing plaintiffs under the EAJA and similar statutes belong to plaintiffs, not their counsel. Therefore, the Court held it was proper for the government to seek an administrative offset against the EAJA fee award. Interestingly, although Justice Sotomayor, who wrote a concurring opinion in which Justices Ginsberg and Stevens joined, agreed that the Court's precedents and the text of the EAJA compelled the conclusion reached by the Court, she noted that it was not clear that Congress intended that the party rather than the attorney be awarded the fees under the EAJA. Justice Sotomayor, in effect urged Congress to revisit the language of the statute authorizing the government's offsets to avoid impeding the purpose of fee award statutes — to help plaintiffs obtain counsel to challenge government action.

Therefore, following *Ratliff*, an argument that a *qui tam* fee award is the “property” of counsel, as a matter of statutory right, is unlikely to be successful. The FCA clearly provides that an award of fees is part of the relief a court can award to a *qui tam* plaintiff. 31 U.S.C. § 3730(d). Accordingly, any representation of a *qui tam* plaintiff, or defendant, should be structured on the assumption that any fee awarded by a court is payable to the client, not to his or her counsel. Therefore, counsel should be vigilant that they need to protect their entitlement to payment and should negotiate a contingency contract with their clients at the inception of the representation.

3. *Fox v. Vice*—Fee Awards to Prevailing Defendants in Mixed Success Cases.

In *Fox v. Vice*, 131 S.Ct. 2205 (2011), a § 1988 case, the Court was presented with the issue of what fees, if any, should be awarded to a prevailing defendant where the plaintiff's suit involved both frivolous and non-frivolous claims. In an unanimous opinion the Court, led by Justice Kagan, held that in such a case, the defendant was entitled to fees, but only for work that he would not have incurred “but for” the frivolous claims. Although this is a stricter standard than the one the Court has set for fee awards to plaintiffs in “mixed” cases, it is consistent with the rationale for fee shifting- to prevent frivolous litigation.

The Court noted that use of a “but for” standard might, in some instances, allow compensation for work that relates to both frivolous and non-frivolous claims. A lawyer may for example, do more work on the plaintiff's frivolous claim because of the defendant's greater financial exposure on that claim. According to the Court,

the dispositive question is not whether attorney costs at all relate to a non-frivolous claim, but whether the cost would have been incurred in the absence of the frivolous litigation. The answers to those inquiries will usually track each other, but when they diverge, it is the second that matters.

The Court also reiterated its pronouncement in *Hensley v. Eckerhart* that the determination of fees “should not result in a second major litigation,” and that “[t]he essential

goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection.” Interestingly, unlike in *Perdue*, where the Court took pains to limit the discretion of district courts, here the Court acknowledged that district courts have significant discretion to determine the reasonable fees. Specifically, the Court stated that the “trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorneys’ time,” and that appellate courts must defer to the lower court’s “superior understanding of the litigation.”

B. A Survey of Recent Prevailing Plaintiff *Qui Tam* Fee Cases.

1. *United States ex rel. Rille v. Hewlett Packard Co.*, 2011 WL 4625646 (E.D. Ark. October 5, 2011).

This case, which terminated in a Stipulation of Dismissal filed by the Government and HP, was one of eight cases filed against about 30 defendants by the same Relators, all involving the same general allegations of defective pricing, kickbacks and other violations, carried out through strategic alliances. Work on these cases began in 2002. The cases were consolidated for case management purposes pursuant to a joint motion filed by the Relators and the United States, and all settled. In four the settlement included negotiated statutory fees. In the other three cases, including this one, the parties could not agree on fees and costs.

In their § 3730(d) motion filed in this case, plaintiffs sought \$2,430,983 in fees and \$269,424 for costs. The fee request was divided into two categories: general fees and HP-specific fees. Plaintiffs arrived at the general time figure for which they sought fees in this case by subtracting the recoveries from the four negotiated fee cases, specifically the amount remaining after allocating each of those recoveries first to case-specific time. Plaintiffs then proposed that the “unpaid balance” of general time be divided among the remaining three defendants, including HP.

The court rejected this proposal, finding no support for it in case law or principles of fairness, and held that HP would be responsible for 1/8 of the general hours, multiplied by a reasonable rate.

With respect to HP-exclusive time, the court found three categories of problems with the amounts billed: 1) an excessive amount billed to recovery of fees; 2) hours spent on a collateral issue — Relator’s conflict with the United States over Relator’s share of the settlement with HP; and 3) the existence of entries that were vague or otherwise inappropriate. Citing to *United States ex rel. Miller v. Bill Harbert Int’l Constr., Inc.*, 601 F.Supp. 2d 45, 50 (D.D.C. 2009),⁵ for the proposition that a court was not required to provide a line-by-line accounting or reduce an award by specific amounts in response to specific objections, the court made an across-the-board 15% reduction in HP-exclusive hours. It also reduced the requested rates for out of state counsel to a number closer to “the prevailing market rates in the relevant (local) com-

5. Discussed in paragraph 3 below.

munity.” Thus top partner rates went from \$650 to \$375 an hour; other rates were similarly reduced.

Although the court talked about the possibility of a lodestar enhancement or reduction based on plaintiff’s “degree of success,” citing to *Hensley v. Eckhart*, it did make such an adjustment. Curiously, the court’s opinion does not cite to *Perdue v. Kenny A.*, which was decided in 2010, on the subject of a possible enhancement. Ultimately, it awarded plaintiffs \$861,485 in fees, as compared to \$2,430,983 sought, and \$78,542 in costs, some of which it also found excessive and/or not properly the subject of a petition for costs, compared to \$269,424 sought.

2. *Maxwell v. Kerr-McGee Oil & Gas Corp.*, 2011 WL 2174413 (D. Colo., June 2, 2011).

This case, in which the government did not intervene, involved royalty reports filed by the defendant with the Minerals Management Service (MMS) for oil and gas leases on government land. The relator, Maxwell, was an auditor for the MMS. Although MMS disagreed with Maxwell’s conclusions that the defendant had filed false royalty reports, he went forward with a *qui tam* action, which resulted in a jury verdict of \$7,555,886 in damages, trebled to \$22,667,658, plus penalties. Maxwell then sought attorneys’ fee pursuant to 31 U.S.C. § 3730(d)(2) in the amount of \$2,178,632.25. He also sought an enhancement of one-third of this amount “to account for the risk of non-payment given his attorneys’ contingent fee.”

Although the defendant did not dispute the reasonableness of the hours worked by Maxwell’s attorneys or the reasonableness of their hourly rates, the defendant argued that the total amount of fees was excessive given the contingent fee agreement between Maxwell and his attorneys. The court rejected this argument. It held that the existence of a contingent fee agreement between Maxwell and his attorneys does not justify reducing the lodestar under 31 U.S.C. § 3730(d)(2) because this statute mandates the award of attorney fees as a part of a fee-shifting policy regardless of the fact that the prevailing party’s attorneys’ might receive compensation from another source such as a contingent fee agreement.

The defendant also argued that Maxwell’s “degree of success” should result in a reduction of the award of attorneys’ fees. The Court rejected this argument as well. The court noted that unlike other cases, where “degree of success” involves a relator asserting both frivolous and non-frivolous claims, here, Maxwell pursued only one claim for which the jury returned a favorable verdict. The court held that merely because the jury did not award the full extent of the damages Maxwell sought, did not make his case a partial success. Similarly, the court stated that merely because it had calculated the civil penalties differently than what was stated in Maxwell’s petition, did not mean that his case was only moderately successful.

The court granted Maxwell’s request for \$2,178,632.25 in attorneys’ fee. In so doing, it held that this amount was 28.8% of the damages awarded by the jury and 9.5%

of the total award and therefore, was reasonably proportionate to the amount that Maxwell had recovered.

However, the court denied Maxwell's request for a fee enhancement. In accordance with well-established Supreme Court precedent, the court held that there was no need to compensate Maxwell's counsel for the risks associated with undertaking his representation because Maxwell's contingency fee agreement as well as the statutory fee award have already subsumed this risk.

3. *United States ex rel. Miller v. Bill Harbert International Construction, Inc.*, 786 F.Supp.2d 110 (D.D.C., 2011 (on remand from appeal of prior decision styled *Miller v. Holzmann*, 575 F.Supp. 2d 2 (D.D.C. 2008)).

This non-intervened, *qui tam* case has a complicated procedural posture. In 1995, the relator, Miller, brought a claim under the FCA that the defendants were conspiring to rig the bidding process for development projects in Egypt which were funded by the USAID. Miller identified a number of development projects or contracts in his complaint, but his allegations focused on one contract in particular, "Contract 20A," which involved the installation of large-diameter sewer pipes throughout Cairo. Two other contracts that Miller identified in his complaint were Contracts "29A" and "07."

The jury returned a verdict against all the defendants finding that they had "conspired to defraud the government." The jury also specified damages for contracts 20A, 29A, and 07. However, because of personal jurisdiction issues that came to light late in the case, the court was only able to enter a judgment against the defendants with respect to contract 20A. The jury had specified damages of \$29,920,000 with respect to contract 20A, which the Court then trebled under 31 U.S.C. § 3729(a) before entering a final judgment. Following this judgment, Miller requested fees' and costs, expenses, and supplemental awards for additional attorneys' fees and costs. The court awarded Miller more than \$7 million in attorneys' fees and almost \$300,000 in expenses and costs.

Defendants then appealed to the D.C. Circuit both on the merits of the case as well as on the fee award issues. The D.C. Circuit reversed the district court's judgment with respect to certain defendants on claims related to Contract 20A and directed the lower court to "consider the appellants' requests for vacatur of fees and costs in a manner consistent with this court's opinion and judgment." This case then is the district court's attempt on remand to follow the D.C. Circuit's directive to resolve the fee dispute.

Miller agreed that for those defendants for whom the D.C. Circuit reversed the judgment on all claims, vacatur of fees was appropriate. However, he disagreed that a vacatur of fees was appropriate for the remaining defendants. The Court ultimately agreed with Miller. In reaching this conclusion, the Court first found that Miller remained a prevailing party and that the remaining defendants were jointly and severally liable for the entirety of the fee award less any necessary reductions.

The district court next turned to the question of whether any reductions to the fee award were necessary. Defendants argued that the claims which were dismissed with respect to contracts 29A and 07 required a reduction of the fees. The district court applied the two step *Hensley v. Eckerhart* analysis to determine Miller's award for "partial success." Under the first prong, the court held that the dismissed claims relating to contracts 29A and 07 were inter-related to the successful claims relating to contract 20A. Thus, the court held that it could not simply exclude the fees on time spent on the unsuccessful claims. The district court then moved on to the second prong of *Hensley* under which it is required to determine whether "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." The court considered two figures under this prong. First, it noted that Miller's counsel had invested approximately 70% of their efforts to support claims related to contract 20A and the overall conspiracy. Second, the court noted that Miller had achieved tremendous success because nearly 88% of the original damage award remained available to him after the D.C. Circuit's reversals. The Court found that in light of Miller's considerable success, he was entitled to 80% of the original fee award.

4. *United States ex rel. LeFan v. General Electric Company*, 397 Fed. Appx. 144 (6th Cir., September 3, 2010).

This case was before the Sixth Circuit on cross-appeals from the district court's order of January 15, 2008, and was reported in our previous article on fees, "How Best to Get Paid After a Successful *Qui Tam* Case" (April, 2009). As stated in that article, following the settlement of this *qui tam* case, the District Court for the Western District of Kentucky awarded attorneys' fees to relators' counsel.

One of the issues raised in this case was whether relators' lead counsel was properly awarded a higher, non-local, "out-of-town specialist" rate. The Sixth Circuit concluded that the district court did not abuse its discretion by calculating the relators' lead counsel's award at a higher rate. Specifically, the Sixth Circuit held that although the lower court had not per se determined that (i) the hiring of an out of town specialist was reasonable; and ii) the rates sought by this out of town specialist were reasonable, the district court's decision and order did in effect comport with these two requirements.

Another issue raised in this case was whether the remaining attorneys were paid at the correct local rate. Specifically, the defendant, General Electric, argued that the district court abused its discretion by awarding the remaining attorneys fees at their 2007 hourly rates. The Sixth Circuit affirmed the district court's decision by agreeing that the 2007 rates were necessary to "compensate the law firms for their delay in receiving payments" and because these rates adequately compensated the attorneys without giving them a windfall.

The third major issue was raised by relators' law firm, regarding the district court's failure to award it fees for work performed on a related first-to-file challenge involving a third party. The Sixth Circuit held that the district court properly subtracted \$10,967.75 from the fee award on the first-to-file issue because this action "did not directly involve the *qui tam* defendants." The Sixth Circuit noted that General Electric had no participation in, or apparently any knowledge of this related first-to-file dispute.

Relators' attorneys also argued that the district court abused its discretion by failing to appropriately compensate them for fees incurred in litigating the attorneys' fee issue. At the outset the Sixth Circuit held that absent unusual circumstances, in cases that settle without trial, the hours for preparing and litigating the attorney fee case that are compensable should not exceed more than 3% of the hours spent on the main case. Because the Sixth Circuit determined that the district court had not followed this rule, it remanded this issue to the district court and directed it to first determine the hours spent by relators's attorneys on the underlying FCA claim alone and then apply the 3% cap with respect to the fee-related litigation.

The final issue that relators' attorney raised was that the district court improperly calculated the interest owed on the attorneys' fee award in setting a supersedeas bond amount. The Sixth Circuit held that the date on which interest begins to accrue is the date on which the court issues a final order that entitles the relator to a share of the Government's recovery, which will necessarily also entitle the relator to a fee award "[i]n light of the FCA's mandatory fee-shifting provision." It held that the district court had applied the wrong standard by finding that the relators did not become entitled to an award until it was quantified. Accordingly, the Sixth Circuit vacated the district court's order of March 28, 2008 approving a supersedeas bond in the amount of \$2.4 million and directed it to re-calculate the interest owed in this case.

5. *United States ex rel. Ellison v. Visiting Physicians Association, P.C.*, 2010 WL 2854137 (S.D. Ohio, July 19, 2010).

This case, which settled in 2009, included in the Stipulation of Dismissal that the relator, Ellison, was a prevailing party for purposes of his allegations that defendant violated §§ 3729(a)(1) and (2) of the FCA. Plaintiff then filed a petition for attorneys' fees for the time period of February 2004 through March 2005.

The court cited to *Perdue v. Kenny A.* and *Burlington v. Dague* in support of the proposition that the lodestar is presumed to equate to a reasonable fee. In calculating the lodestar, the court, over the defendant's objection, calculated fees using current rather than historical rates to adequately compensate relators' attorneys for their delayed payment. The defendant also challenged the reasonableness of the hours, but the court held the time spent performing preliminary research, preparing and filing the Complaint and Disclosure Statement and preparing a fee agreement were all reasonable amounts of time. Accordingly, the Court refused to cut any of these hours. Following Sixth Circuit precedent however, the court did limit the award for time spent litigating the fee petition to 3% of the total hours spent on the underlying FCA claim.

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

This was a retaliation case brought under 31 U.S.C. § 3730(h), with fees being awardable under § 3730(h)(2) which, like § 3730(d), provides for an award of “reasonable fees” as part of the relief afforded to a successful plaintiff.

The district court followed the lodestar model to calculate the fee award. With respect to the “reasonable billing rate” component of the lodestar calculation, the court refused to award plaintiff’s counsel the rates they were seeking because it found that these rates were not supported by counsel’s evidence, including affidavits, and exceeded the market rate for lawyers of comparable skill and experience in the Western District of Kentucky for similar cases. Interestingly, in determining the market rate for plaintiff’s counsel, the court looked to the rates of employment discrimination/retaliation lawyers rather than the rates involved in typical FCA cases.

With respect to the hours worked by plaintiff’s counsel, the court reduced these hours by 25% because it found that there was inadequate documentation, potential duplication and excessive time billed. Although the court awarded fees plaintiff’s counsel for time spent on the fee application, and defendant’s motion for a new trial, it reduced these post-trial hours by 25%. The court also held that under Sixth Circuit precedent plaintiff’s counsel was not entitled to a fee enhancement for “exceptional success.”

7. *United States ex rel. Kimball v. Cathedral Rock Corp.*, 2010 WL 147810 (E.D. Mo., Jan. 11, 2010).

In this case, the defendant had submitted false claims for reimbursement to federal and state Medicare and Medicaid programs. The court awarded plaintiff the full amount of attorneys’ fees sought, despite defendant’s objections that plaintiff’s counsel had spent excessive time on research. Specifically, defendant argued that because plaintiff’s counsel was familiar with *qui tam* actions, the time billed for research was unreasonable. In response, the court stated that the amount of time spent on research by plaintiff’s counsel was not only reasonable but also “prudent, as the law may have changed since the inception of the case.” The court reminded defendant that the “assumption that the law has remained stagnant is neither wise nor satisfies on attorney’s ethical obligation to his client.” The court did however, make some reductions in plaintiff’s cost requests.

8. *United States ex rel. Herndon v. Appalachian Community Head Start, Inc.*, 674 F.Supp.2d 773 (W.D. Va. 2009).

In this case, the relator, Herndon alleged that the defendant filed false claims with HHS and also fired him in retaliation for his investigation of those claims. A jury trial resulted in a verdict for *Herndon*. In the fee award portion of its decision on the parties’ post-trial motions, the court awarded Herndon the full amount of fees sought using

the lodestar method. Although the defendant did not object to the number of hours or the rates claimed by Herndon's attorneys, it did object to the inclusion of paralegal time. Pursuant to *Richlin Sec. Service Co. v. Chertoff*, 553 U.S. 571, 128 S. Ct. 2007 (2008), the court however, refused to exclude paralegal time.⁶

9. *United States ex rel. MacKay v. Touchstone Research Laboratories*, 2009 WL 3150385 (S.D. Ohio, September 30, 2009) and 2010 WL 58267 (S.D. Ohio, January 5, 2010).

This case involved allegations of inappropriate billing practices on the part of the defendant. After the relator, MacKay, discovered these practices and resigned, defendant sued him in state court for defamation, interference with contractual relations and unfair competition as a result of MacKay's accessing a Department of Defense website which contained confidential information concerning defendant's contract proposals. The defendant continued to pursue these state law claims even after MacKay filed his FCA case, which also included a retaliation claim. The FCA case ultimately settled; part of the settlement included an agreement on MacKay's part to not seek fees "segregable to the retaliation claim."

MacKay then petitioned for attorneys' fees. The court awarded what was essentially the full amount of the fees sought by three law firms who had worked on this case. However, consistent with Sixth Circuit precedent, the court did cut some of the fees for preparing and litigating the fee petition because the total time spent was more than 3% of the total time spent on the underlying FCA case.

10. *United States ex rel. Longhi v. Lithium Power Technologies*, 575 F.3d. 458 (5th Cir. 2009), *cert den.*, 130 S. Ct. 2092 (2010).

The relator, Longhi, had initially alleged, in a case in which the United States intervened, that twenty-one contracts solicited under the federal Small Business Innovation Research Program were used as part of a scheme to defraud the government, but ultimately failed to prove a violation with respect to each of these contracts. Following a partial summary judgment the parties cross-moved for partial summary judgment on damages.

The fee section of this case does not discuss the actual amount of fees awarded but only whether the plaintiff's counsel should be compensated for the total amount of the time spent on the case.

The Fifth Circuit applied *Hensley's* two prong test and affirmed the lower court's determination that all of the claims involved "a common core of facts," and that most of counsel's time was spent on the litigation as a whole, making it both inappropriate and unpractical to make any reductions based on "lack of success." Therefore, the Fifth Circuit held that the lower court did not abuse its discretion when it determined that Longhi's counsel was entitled to a "full attorneys' fee award."

6. In *Richlin*, an EAJA case, the Supreme Court held that paralegal time is not only compensable, but compensable at prevailing market rates.

11. *United States ex rel. Thompson v. Walgreen Co.*, 621 F.Supp.2d 710 (D. Minn., May 18, 2009).

In this case, plaintiffs, a group of pharmacists, alleged that Walgreen submitted erroneous bills for prescription drugs to Medicaid on behalf of individuals who were dually insured by Medicaid and third-party insurance. The United States intervened and the action eventually settled. As part of the settlement, Walgreen agreed to pay \$9.9 million with respect to claims filed against it in four states.

Plaintiffs then petitioned the district court for \$448,234.36 in fees and \$24,041.72 for costs. The district court, applied the lodestar method to determine the fee award. The Court ultimately reduced the fee request by \$83,622.00 and the cost request by \$6,661.68 because in its lodestar analysis it found that there was excessive billing, and incomplete or imprecise billing. The court also found that some of the work performed was redundant or unnecessary, or was performed on unrelated claims.

Summary of Prevailing Plaintiff Cases

These cases highlight that district courts are usually willing to award prevailing plaintiffs the full amount of fees sought based on the lodestar as long as the attorneys properly document and can justify the time they have spent working up their cases. Interestingly, and contrary to popular belief that research time is often found to be excessive, the above cases show that courts are willing to factor in research time when calculating fees because they understand that the law with respect to the FCA is constantly evolving.

C. A Survey of Prevailing Defendant Cases

1. *United States ex rel. Schweizer v. OCE North America, Inc.*, 772 F.Supp. 2d 174 (D.D.C. 2011).

This case started out as a three-count FCA claim; the first two counts were dismissed, following intervention by and an agreement between the United States, the defendants and one of the plaintiffs. Following the court's grant of defendants' motion for summary judgment on the third claim, a retaliation claim, the defendants sought fees under § 3730(d)(4). Citing to *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1006-07 (9th Cir. 2002) for the proposition that "[t]he award of fees under the False Claims Act is reserved for rare and special circumstances," the district court denied the request. It found that plaintiff's FCA claim was not "clearly frivolous" or "brought primarily for purposes of harassment." In addition, the United States did eventually intervene after it reached an agreement with the defendants with respect to plaintiff's allegations of fraud.

2. *Cafasso, United States ex rel. v. General Dynamics Systems*, 637 F.3d 1047 (9th Cir. 2011).

This case, brought by a former employee of General Dynamics, purported to state a claim under FCA § 3729(a) and for retaliation. General Dynamics counterclaimed alleging breach of a confidentiality agreement. The district court granted judgment on the pleadings in favor of defendant on the *qui tam* claim and summary judgment in its favor on plaintiff's retaliation claim as well as on its breach of contract claim. Thereafter, General Dynamics filed a motion for an award of fees under state contract law, and the court's statutory and inherent sanctioning power. It did not seek fees specifically under § 3730(d)(4). The court ultimately made an award of fees in the amount of \$300,000 under state law, after considering, *inter alia*, plaintiff's financial circumstances, which it did take into account, and plaintiff's chilling effect on future *qui tam* plaintiffs argument, which it did not.

On plaintiff's appeal to the Ninth Circuit, which included a fees issue, the panel held that the district court did not abuse its discretion in making the award. It addressed plaintiff's concern about the chilling effect of such an award as follows: "This consideration generally counsels against a fee award, and courts should not reject such arguments out of hand. However, relators and their attorneys are not free to engage in misconduct without consequences merely because these consequences might chill others. Further the awarded fees cover [defendant's] successful contract claim not Cafasso's FCA claim. We are confident that future litigants will appreciate the difference." 673 F.3d at 1062-63.

3. *United States ex rel. Ubl v. IIF Data Solutions*, 650 F.3d 445 (4th Cir. 2011).

Plaintiff, Ubl, alleged that its former employer, IIF Data Solutions ("IFF"), had made false representations both when it applied for government contracts and when it submitted invoices pursuant to those contracts. After settlement negotiations fell through, the case went to trial and Ubl lost. The trial court granted IIF's motion for an award of fees under § 3730(d)(4) in the amount of \$501,546.00. Ubl filed an appeal.

The Fourth Circuit held that the district court had abused its discretion by awarding IFF the fee award. It held that Ubl's claims were not "clearly frivolous," a term which the Fourth Circuit defines as "whether the relator's claim, when viewed objectively, clearly had no chance of success."

Here, the Fourth Circuit found Ubl's claims were not "clearly frivolous" because the district court had denied several pre-trial motions to dismiss the case, and the documentary evidence presented by Ubl at trial could have supported a verdict in Ubl's favor. The Fourth Circuit further stated that it was likely, based on its review of the record, that the jury had returned a favorable verdict for IFF because it had found that IFF lacked the *scienter* necessary to violate the FCA. Thus, for all of the foregoing reasons, the Fourth Circuit concluded that the district court was clearly wrong and had abused its discretion by awarding attorneys' fee to IFF.

4. *United States ex rel. Bahrani v. Conagra, Inc.*, 2011 WL 198189 (D. Colo. January 20, 2011).

This ten-year long, reverse false claims action was based on allegations that defendant materially altered hide and meat export certificates issued by the United States Department of Agriculture to avoid having to pay for replacement certificates. This case was before the Tenth Circuit twice, and on the initial remand, a jury found that plaintiff was not an "original source" with respect to his meat export certificate claims. A separate jury found in plaintiff's favor on only one of five of the hide certificate export claims and awarded him damages of \$107.50. The district court trebled the damages and imposed statutory penalties of \$5,500 per claim and entered a judgment of \$27,822.50. Following the entry of this judgment, plaintiff moved for an award of attorneys' fees and costs in the amount of \$3,449,469 and was awarded \$9,724.16 in fees and expenses.

Plaintiff then appealed to the Tenth Circuit, asserting that the district court made a number of errors in resolving the meat and hide export certificate claims. The defendant cross-appealed, alleging that the district court had erred with respect to the claim involving hide export certificates on which plaintiff had prevailed. Plaintiff also filed a separate appeal challenging his fee award. The Tenth Circuit affirmed the district court's judgment with respect to the meat export certificate claims because plaintiff was not an "original source." However, the Tenth Circuit reversed the district court's judgment on the hide certificate issue on which plaintiff had prevailed and directed the district court to enter a judgment in the defendant's favor. The Tenth Circuit also reversed on the award of fees to plaintiff.

Following this second remand, the defendant applied to the district court for costs under Rule 54(d). The district court reluctantly granted this motion because it found defendant was ultimately the prevailing party. The district court also had some harsh words for the plaintiff; specifically it stated that "the relator should not have brought this case" and to the extent that the plaintiff had to pay the defendant's costs, the court stated it may "disincentivize" future relators from bringing similar FCA reverse false claims actions which are lacking in merit.

5. *United States ex rel. Gonzalez v. Fresenius Medical Care N.A.*, 761 F.Supp.2d 442, (W.D. Tex., August 11, 2010).

Here, the Relator had alleged that her former employers, a medical clinic and a doctor, had violated the FCA. She later amended her complaint to allege a FCA retaliation claim. The case went to trial and ended in defendants' favor. Following the trial, the defendants moved for an award of attorneys' fees under § 3730(d)(4) or under 28 U.S.C. § 1927⁷ as well as for costs under Fed. R. Civ. P. 54(d)(1).

7. Sanctions under § 1927 are punitive in nature and require evidence of "bad faith, improper motive, or reckless disregard of duty owed to the court." *Edwards v. General Motors, Corp.*, 153 F.3d 242, 246 (5th Cir. 1998).

In the attorneys' fees section of its opinion, the district court found that the plaintiff's FCA underlying claim was not so clearly frivolous, vexatious, or brought for the purpose of harassing the defendants. The district court, however, held that the medical clinic defendant, Fresenius Medical Care, was entitled to recover attorneys fees' incurred in defending the retaliation claim from the relator's counsel *personally* pursuant to § 1927. The court stated that "as of a certain point in the progression of the case, counsel for Relator unreasonably and vexatiously multiplied proceedings in the retaliation action."

The court refused to award fees under § 3730(d)(4) for just the retaliation claim because it found that no court had awarded fees for the defense of a retaliation case without a finding that the accompanying FCA claim was clearly frivolous, vexatious, or brought for the purpose of harassing defendants.

With respect to the other defendant, Dr. Chavez, the court found that he was not entitled to fees either under § 3730(d)(4) or § 1927 because the FCA claims brought against him were not clearly frivolous, vexatious, or brought for the purpose of harassing him and relator's counsel had not unreasonably and vexatiously multiplied the retaliation proceedings against him.

6. *United States ex rel. Cullins v. Astra, Inc.*, 2010 WL 3008833 (S.D. Fla., July 28, 2010).

After this case, in which the government did not intervene, was dismissed on a Rule 12(b)(6) motion, the defendant filed a motion for attorneys fees under § 3730(d)(4) and for costs pursuant to 28 U.S.C. § 1920, Fed. R. Civ. P. 54, and a local rule.

The district court held that the defendant was not entitled to a fee award. Although plaintiff's claims were not ultimately successful, the court found that "they were not so lacking in arguable merit to be clearly frivolous." To reach this conclusion, the court looked to *Sullivan v. Sch. Bd. of Pinellas Cnty.*, 773 F.2d 1182, 1189 (11th Cir. 1985), a 42 U.S.C. § 1988 case, for a definition of "frivolous." The court also found that plaintiff's action was neither vexatious nor brought primarily for the purpose of harassing defendant. The court did however, award costs to defendant under Rule 54.

7. *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161 (10th Cir. 2009).

In this case the relator, a terminated employee, brought a FCA suit against his former employer, Lockheed Martin ("Lockheed"), alleging that it had submitted false claims to the Air Force and had also retaliated against her. The district court granted Lockheed's motion for summary judgment because it found that the prior releases signed by the relator following a mediated settlement of her retaliation claims barred her FCA claims. The district court also awarded costs to Lockheed pursuant to Rule 54(d). Relator then filed an appeal challenging both the district court rulings on Lockheed's summary judgment motion and award of costs.

With respect to the costs issue, the relator argued on appeal that because § 3730(d)(4) precludes an award of costs in an FCA case unless the claim was clearly frivolous, vexatious or brought for the purposes of harassment, an award of costs pursuant to Rule 54(d) is contrary to the FCA. The relator also argued that the district court should have refused to award costs because this discourages potential relators from bringing *qui tam* suits. The Tenth Circuit held that the district court had not abused its discretion by awarding Lockheed costs under Rule 54(d). The Tenth Circuit stated that § 3730(d)(4) of the FCA does not govern the recovery of costs by a prevailing defendant, rather it speaks only to awarding a prevailing party reasonable attorney's fees and expenses. Therefore, the Tenth Circuit concluded that the district court applied the proper standard, Rule 54(d), in awarding Lockheed costs. The Tenth Circuit also rejected relator's argument that forcing relators to cover the costs of prevailing defendants would be a disincentive to potential relators. The court held that if it were to hold otherwise, "it would effectively legislate a per se rule preventing prevailing FCA defendants from recovering costs" which would become applicable in every FCA case.

8. *United States ex rel. Rosner v. WB/Stellar IP Owner, L.L.C.*, 739 F.Supp.2d 396 (S.D. N.Y. 2010).

Plaintiff, a tenant, brought a FCA claim against a housing complex and the City of New York, alleging that the complex made fraudulent reports to the Department of Housing and Urban Development to obtain tax benefits as well as § 8 federal housing assistance payments. He also alleged that the city was a knowing participant in the scheme. The district court granted defendants' motion to dismiss on jurisdictional grounds because the information on which the suit was based had already been publicly "disclosed" and plaintiff was not an original source. One of the defendants sought to recover fees under § 3720(d)(4) on the basis that plaintiff's claim was frivolous. The court, in refusing the fee request, held that its lack of subject matter jurisdiction was "not so staggeringly obvious that it renders plaintiff's action 'objectively frivolous.'" In addition, the court found that there was no evidence that the tenant's suit was primarily for the purpose of vexing or harassing any of the defendants.

9. *Wood v. Applied Research Associates, Inc.*, 328 Fed. Appx. 744 (2d Cir., July 16, 2009), cert. den., 130 S.Ct. 1285 (Jan. 25, 2010).

The plaintiffs sued various entities which had provided services to the government in connection with an investigation of the World Trade Center collapse.⁸ The district court dismissed the case after finding that the complaint had failed to meet the pleading requirements of Fed. R. Civ. P. 9(b) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). The district court also denied the plaintiff's request to file a second amended complaint. Following the dismissal of plaintiffs' case, the district court also denied the

8. According to the plaintiffs, the collapse of the WTC was actually caused by the use, on 9/11/2001, of exotic weaponry known as directed energy weapons.

defendants' § 3730(d)(4) fee request and instead warned plaintiffs and their counsel about the consequences of filing a frivolous action. The plaintiffs then appealed.

On appeal, the Second Circuit affirmed both the district court's dismissal of the case and its ruling disallowing plaintiffs' to file a second amended complaint. Although the defendants had not formally appealed, they attempted to argue that the district court should have awarded them fees. In response, the Second Circuit held that the district court had not abused its discretion by warning rather than sanctioning the plaintiffs.

10. *United States ex rel. Dodge v. ACS State & Local Solutions, Inc.*, 2009 WL 1748540 (M.D. Fla., June 18, 2009).

This case, which was dismissed on jurisdictional (not original source) grounds, involved false claims related to services provided by the defendant under contract with the Department of Labor and Department of Health and Human Services. Defendant then petitioned for fees under 31 U.S.C. § 3730(d)(4). The court, however, refused to award defendant fees because it found that plaintiff's claims "were not clearly frivolous, clearly vexatious or brought primarily for purposes of harassment," and because the original source issue was "a close call for the court."

Summary of Prevailing Defendants' Cases

These cases highlight that district courts continue to closely examine whether a plaintiff's claims were clearly frivolous, or brought for the purpose of harassment and, more often than not, find that the defendant has failed to meet this standard. The district courts, however, are more willing to award costs to a prevailing defendant under Rule 54(d).

