
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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Devon Energy Corporation

Odyssey HealthCare Inc.

Beth Israel Medical Center

Mylan Inc.

Total Fina S.A., Total Minatome Corporation, Total Exploration Production USA Inc., Fina Oil and Chemical Company, Elf Exploration Inc., and Total E&P USA Inc.

CitiMortgage, Inc.

Gunnison Energy Corporation, SG Interests I Ltd. and SG Interests VII Ltd.

Rhode Island Hospital

Capmark Finance LLC

Bank of America Corporation, JPMorgan Chase & Co., Wells Fargo & Company, Citigroup Inc., and Ally Financial Inc.

Dava Pharmaceuticals Inc.

Fourteen Hospitals: Plainview Hospital, Plainview, N.Y.; North Shore Syosset Hospital, Syosset, N.Y.; North Mississippi Medical Center, Tupelo, Miss.; Mission Hospital, Asheville, N.C.; Wenatchee Valley Medical Center, Wenatchee, Wash.; Community Hospital Anderson, Anderson, Ind.; St. John's Mercy Hospital, Creve Coeur, Mo.; Gulf Coast Hospital, Fort Myers, Fla.; Lee Memorial Hospital, Fort Myers, Fla.; and Cape Coral Hospital, Cape Coral, Fla.

Mylan Laboratories, Inc. and Mylan Pharmaceuticals, Inc.

Cayuga Medical Center

The Boeing Company

Cancer Genetics, Inc.

Johnson & Johnson and Janssen Pharmaceuticals Inc.

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Denver Health and Hospital Authority

Actavis Mid-Atlantic, LLC and Actavis Elizabeth, LLC

Maersk Line Ltd.

FROM THE PRESIDENT

“Continuity gives us roots; change gives us branches, letting us stretch and grow and reach new heights.” –Pauline R. Kezer¹

I begin my tenure as Executive Director of Taxpayers Against Fraud Education Fund in a time of both continuity and change for the False Claims Act. As we head toward the 150th anniversary of the FCA, we know the law has been serving the purpose that motivated its enactment by President Lincoln and his congressional colleagues. At the same time, the FCA has proved an adept tool for addressing fraud schemes that could not have been envisioned by the law’s authors.

In enacting the False Claims Act in 1863, the primary purpose articulated by the law’s supporters was rooting out fraud that had infected defense contracting during the Civil War. Concern over accountability in the defense industry also infused debate over the amendments to strengthen the law in 1986.

However, over the past 25 years, with growing public awareness of the FCA as a mechanism for fighting fraud, whistleblowers have come forward in a wide range of industries beyond defense contracting, and health care fraud cases today account for at least two-thirds of all FCA recoveries. As whistleblowers, their private counsel, and government attorneys continue to learn from their experiences with the FCA, we see new trends emerging such as this year’s multi-billion dollar claims involving fraud in state pension fund management.

And the success of the FCA has also led to enactment of state FCAs in the majority of states and the recent establishment of whistleblower programs at the Internal Revenue Service, Securities Exchange Commission, and Commodity Futures Trading Commission—all of which has tremendous potential to increase public accountability in our tax programs and financial systems. As SEC Chair Mary Shapiro noted this year, the new SEC program is “already providing the agency with hundreds of higher-quality tips” and is “prodding companies to enhance their internal compliance programs.”

The cases described in this edition of the *False Claims Act Quarterly* underscore both the continuity and change in FCA practice. The case descriptions in the settlements section show that the law continues to be a check on fraud in the defense arena. They also demonstrate that recent fraud claims have involved a host of other issues including:

- substandard psychiatric counseling and treatment to adolescents in the Medicaid system
- bid rigging in a USAID contract to build a sewer in Egypt

1. Pauline R. Kezer is a former member of the Connecticut House of Representatives and former Secretary of State of Connecticut.

- underpaying royalties owed on natural gas produced from federal and Indian lands, and
- mortgage loan servicing and foreclosure abuse

The range of these subjects reflects that the FCA has a positive impact both on fiscal accountability across government agencies and on issues that affect individual's lives around the country and the world.

I am honored to join Taxpayers Against Fraud Education Fund in its efforts to promote public understanding and effective use of the False Claims Act. I look forward to working with TAFEF and the many public and private parties who are devoted to building on past FCA successes to reach new heights in taxpayer accountability.

Best regards,
Kristin Amerling

Recent False Claims Act
& *Qui Tam* Decisions

JANUARY 1, 2012–MARCH 31, 2012

FALSE CLAIMS ACT LIABILITY

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

***U.S. ex rel. Tessitore v. Infomedics, Inc.*, 2012 WL 826889 (D. Mass. Mar. 12, 2012)**

A relator brought a *qui tam* action against the pharmaceutical marketing company she had formerly worked for (Infomedics), as well as a consumer healthcare company and its subsidiary (collectively, GSK) alleging violations of the FCA and the Anti-Kickback Statute (AKS). The relator alleged that GSK knowingly caused healthcare providers to submit false claims to the government and paid illegal kickbacks to physicians who participated in its “Initiative for Social Anxiety Assessment and Care Program” (ISAAC)—a program that was purportedly a study into social phobias, but, the relator alleged, was actually a marketing mechanism to encourage physicians, through monetary incentives, to prescribe one of GSK’s drugs. GSK hired Infomedics to administer the ISAAC program and to serve as its intermediary with consumers. The relator alleged that GSK used continuing education classes it hosted, as well as other means, to promote its drug and to recruit physicians to use GSK-devised diagnostic tools to screen their patients. The relator claimed that the physicians were instructed to refer any positively-screened patients to an ISAAC survey, in exchange for compensation for each patient who completed the survey. The relator alleged that those physicians then prescribed the defendant’s drug to their patients and subsequently submitted claims to the federal government healthcare programs seeking reimbursements, while failing to disclose the fact that the claims were based on improper kickbacks. In addition, the relator alleged that after GSK’s drug received FDA approval, GSK created television and print ads touting the drug for off-label uses and hired Infomedics to host “800” telephone numbers for consumers to call to get more information about the drug. Infomedics allegedly created mailing lists of those who called the 800 numbers and sent out brochures and drug inserts to those individuals. However, according to the relator, GSK and Infomedics failed to comply with the industry practice of providing consumers with an alternate phone number for consumers to report adverse experiences associated with using GSK’s drug. The relator had been employed as a supervisor of the defendants’ call center, and she alleged that over 7% of the calls made to the call center were to report adverse experiences with the drug but that Infomedics never informed GSK of those calls and the nature of those calls was never reported to the FDA.

The defendants moved separately to dismiss the relator’s claims, arguing that the relator failed to plead the fraud scheme with particularity, that she failed to state

a claim under the False Claims Act, and that her *qui tam* complaint was barred by the FCA's first-to-file and public disclosure provisions.

Holding: The United States District Court for the District of Massachusetts granted the defendants' motions, holding that the relator failed to plead the fraud with particularity.

Pleading Fraud with Particularity

The court began by examining whether or not the relator's allegations of illegal kickbacks to physicians—and false claims submitted to the federal government as a result—were pled with particularity. The court found that the relator offered no factual support for her allegation that the defendants caused physicians to submit false claims to the federal government, even if her allegations of illegal kickbacks were true. The court noted that the relator failed to plead: (1) the identity of any physician who was alleged to have participated in the ISAAC program or who was improperly induced to prescribe GSK's drug; (2) the identity of any patient who completed the defendants' telephone survey or who was prescribed GSK's drug as a result of doing so; (3) any pharmacy or hospital that filled an improperly-induced prescription for GSK's drug; or (4) the date, location, content, or amount of any false claim submitted to any federal government healthcare program. Consequently, the court held that the relator failed to plead with particularity that the defendants provided illegal kickbacks and caused false claims to be submitted to the government.

The court then examined the relator's allegation that the defendants concealed reports of adverse experiences from the FDA. The relator had alleged the defendants were required by the FDA to investigate and report any adverse events associated with their drugs and to periodically submit new information that could affect the FDA's previous conclusions about the safety of the drugs, but failed to do so. She further argued that certifying compliance with the requirement to report adverse events was a mandatory condition precedent to obtaining FDA approval, and claimed that if GSK had informed the FDA that it did not intend to report adverse events, then the FDA would have never approved its applications for drug approval. As a result, the relator argued, GSK's alleged fraud in its drug applications caused all subsequent claims to the federal government for reimbursements related to that drug to be false. The court, though, held that the relator's theory of FCA liability lacked the requisite particularity, as the relator failed to plead the dates of any of GSK's drug applications to the FDA, failed to identify any individual who made the alleged false statements to the FDA or who were involved in the concealment scheme, and failed to provide sufficient information regarding internal GSK procedures on FDA submissions or the content of any such submissions to the FDA. Accordingly, the court held that the relator's complaint was devoid of allegations sufficient to establish that GSK knowingly made or caused false statements to the federal government. Alternatively, the relator argued that if GSK had timely reported to the FDA the instances of consumers experiencing adverse events, then the FDA would have ordered GSK to issue warnings that would

have resulted in fewer drug sales and fewer claims to the federal government for reimbursement for GSK's drug. The court, however, held that this alternative argument also failed, since it was based on a presumption, without any factual support, that physicians would have prescribed GSK's drug less often. Accordingly, the court held that the relator neither connected the defendant's alleged concealment scheme to any false reimbursement claim, nor did she show that the defendants intended to defraud the government. Therefore, the court granted the defendants motions to dismiss the concealment allegations for failure to plead with particularity.

The relator's *qui tam* complaint was dismissed with prejudice to the relator, but without prejudice to the government.

***U.S. ex rel. McDonough v. Symphony Diagnostic Servs., Inc.*, 2012 WL 628515 (S.D. Ohio. Feb. 27, 2012)**

A relator brought a *qui tam* action on behalf of the United States government and seven U.S. states alleging that his former employer—a mobile diagnostic services provider—and its various affiliated centers knowingly submitted false claims to Medicare and Medicaid in which they falsely certified their compliance with a Corporate Integrity Agreement (CIA) and with the Stark Law and the Anti-Kickback Statute (AKS). Specifically, the relator alleged that the defendants engaged in an illegal kickback scheme by offering substantial discounts to skilled nursing home facilities (SNFs) that used the defendants' Medicaid-covered x-ray services, in exchange for patient referrals for which the defendants could bill public insurance programs directly—a practice called “swapping agreements.” None of the government entities intervened in the relator's suit. The relator, who was an expert on mobile x-ray services and who had been employed as an assistant to one of the defendants' executives, also alleged retaliatory discharge. With respect to the retaliation claim, the relator alleged that he alerted the defendants' CEO and other executives of the kickback scheme, and that they admitted that the fraud was occurring but took no actions to stop it. He claimed that he was instructed not to take any action to stop the fraud either, and that he was eventually terminated from his job in retaliation for confronting the defendants. The defendants moved to dismiss the relator's claims for failure to state a claim and for failure to plead fraud with particularity.

Holding: The United States District Court for the Southern District of Ohio granted the defendants' motion in part; the relator's retaliation claim was dismissed but his fraud claim was not.

Failure to State a Claim

The court began by examining the sufficiency of the relator's fraud claim. The defendant argued that the relator failed to state a claim under the False Claims Act because his allegations could not prove the alleged AKS and Stark Law violations upon which

his FCA claims were based. Specifically, the defendants argued that the relator failed to allege a fair market value for the x-ray services or the amount actually charged by the defendants and thus, could not allege any remuneration. The court, though, determined that the relator had pled sufficient facts to state a claim, as his complaint included allegations regarding the below-market rates the defendants charged to nursing homes involved in the alleged scheme—or alleged that the defendants did not bill for the services at all. The court held that such indirect remuneration schemes might violate the AKS and accordingly denied the defendants’ motion to dismiss the fraud claims for failure to state a claim.

Failure to Plead Fraud with Particularity

The court then considered the defendants’ argument that the relator failed to identify any specific fraudulent claims submitted to the government and therefore, failed to plead the alleged fraud scheme with particularity. The court rejected that argument, finding that the relator’s allegations were drawn from his personal experiences and collectively supported a strong inference that the defendants submitted fraudulent claims. The court found that the relator provided specific examples of the SNFs involved, the nature of the alleged referral scheme, the degree of the alleged discounts provided, and the range of years of the alleged fraud. Moreover, the court found that the relator named multiple officers, including the defendants’ CEO, who were allegedly involved in the scheme. Accordingly, the court held that the relator successfully pleaded the alleged fraud scheme with particularity. The defendants’ motion to dismiss for failure to satisfy Rule 9(b) was denied.

Retaliation

Finally, the court analyzed the relator’s retaliation claim, in which the relator alleged that the defendants terminated him because of actions he took in furtherance of his *qui tam* action. The defendants argued that the relator failed to put them on notice that he was pursuing an FCA claim and thus, they were unaware of any protected activity he might have been engaged in. The court agreed, stating that while the relator insisted that the defendants change their practices, he never put them on notice that he was contemplating a *qui tam* action. Consequently, the retaliation claim was dismissed.

***U.S. ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 2012 WL 523623 (M.D. Fla. Feb. 16, 2012)**

A relator brought a *qui tam* action against his former employer—a hospital—and the hospital’s subsidiary, alleging that the defendants violated the False Claims Act by submitting claims based on violations of the Stark Act and the Anti-Kickback Statute (AKS). The relator alleged the defendants’ FCA violations occurred during three schemes that occurred both during and after his employment. Specifically,

he alleged that the defendants paid surgeons for patient referrals, gave improper remunerations to physicians, and contracted with a urology group to recruit only their physicians. The relator further alleged that the defendants falsely certified their compliance with Medicare guidelines. The defendants moved to dismiss the relator's complaint for failure to plead the alleged fraud with particularity. The government declined to intervene but filed a statement of interest.

Holding: The United States District Court for the Middle District of Florida granted the defendants' motion to dismiss, but also granted the relator leave to amend his complaint.

Pleading Fraud with Particularity

First, the court analyzed the relator's allegation that the defendants presented false claims to the government. The court found that the relator failed to identify a single claim for reimbursement based on patients referred, failed to identify any doctors who allegedly received illegal remunerations from the defendants, and failed to provide the names of any urologists who were allegedly illegally hired by the defendants. Further, the court found that the relator summarily concluded that the three fraud schemes he alleged actually led to the submission of any fraudulent claims. As a result, the court determined that the relator failed to plead his claims regarding the defendants' alleged presentment of false claims with particularity. The relator argued that his complaint satisfied Rule 9(b)'s pleading requirements because it included "indicia of reliability," based on his own specialized and personal experience, which indicated that the defendants presented false claims to the government. The court disagreed, and concluded that the relator did not plead any facts indicating any specific knowledge that false claims were submitted. Therefore, the court held the relator failed to satisfy Rule 9(b)'s particularity requirements and those claims were dismissed.

Next, the court analyzed the relator's claim that the defendants used false statements claims in support of their claims. The court determined that the relator failed to demonstrate that the defendants acted with the purpose of getting a false claim paid and held the relator only made conclusory allegations regarding this claim, without any factual support. Further, the court found that the relator did not provide the dates, amounts, or any other identifying details for any alleged payments based on these claims and that his complaint lacked indicia of reliability because the relator was not employed by the defendants when these claims for reimbursements were allegedly received by the government. Therefore, the court dismissed these claims as well.

Third, the court analyzed the relator's allegations that the defendants violated the FCA's "reverse false claims" provision. Again, the court found that the relator provided no specific allegations, and instead only plead conclusory claims. Specifically, the court found that the relator failed to allege any obligations the defendants owed to the government or any other information that would put the defendants on notice to the substance of his claims. Therefore, the court dismissed the reverse false claims allegations.

Finally, the court analyzed the relator's conspiracy claims and found that the relator's bare legal conclusions of conspiracy were wholly unsupported by specific factual allegations of any agreement or overt act in furtherance of a conspiracy. More specifically, the court found that the relator failed to identify any patients, claims, or physicians involved in the alleged conspiracy. Consequently, the court dismissed the relator's conspiracy claim.

The court dismissed the relator's claims without prejudice and gave the relator 21 days to file an amended complaint.

***U.S. ex rel. Jamison v. McKesson Corp.*, 2012 WL 487998 (N.D. Miss. Feb. 14, 2012)**

A relator brought a *qui tam* action against a nursing home chain (Beverly) and various medical supply and billing companies, alleging that the defendants engaged in a fraud scheme in which they provided various kickbacks to each other. The relator alleged that Beverly created a subsidiary, CSMS, to supply enteral nutrition, urological, and ostomy products. CSMS was also named as a defendant in the relator's suit. The relator alleged that CSMS received its own Medicare DME (durable medical equipment) supplier number, which enabled it to bill Medicare and receive reimbursements. Further, the relator alleged that when CSMS applied for its own Medicare DME number, it was required to certify that Medicare reimbursements were conditioned on its compliance with various laws and regulations, including the federal anti-kickback statute (AKS) and the Stark law. The relator alleged that CSMS and Beverly met with DME contract billing companies—also named as defendants—to discuss possible contracts. The relator alleged that defendant McKesson met with Beverly and CSMS to discuss billing services with its company, defendant MediNet, as well as its medical supply entity, MMS—a non-defendant. The relator alleged that Beverly and McKesson reached an agreement in which Beverly agreed that CSMS would use MediNet's contract billing services. The two companies also agreed that McKesson would reduce the price for its contract billing services if CSMS also agreed to use MMS to supply its general medical equipment. The relator alleged this agreement violated the AKS. The government intervened in the relator's suit, alleging that Beverly "dangled" the prospect of McKesson obtaining its DME supply business in order to induce MediNet to provide it with the lowest possible fees—even below fair market value—and also forced MediNet to reduce its prices on the billing contract. The defendants moved for summary judgment.

Holding: The United States District Court for the Northern District of Mississippi denied the defendants' motion.

False Certifications of Compliance with the AKS

The court began by considering the plaintiffs' assertion that the defendants—by engaging in a kickbacks scheme—caused false healthcare claims to be submitted to the government. Beverly and CSMS argued that they did not violate the AKS and Stark Law because there was no remuneration, as MediNet's participated in a competitive bidding process and that its bid was in line with fair market value. The government countered that MediNet's bid was below fair market value because, at best, MediNet broke even on the contract in an effort to fill the Beverly-affiliated string of nursing facilities' medical supply needs. The government noted that the company that had performed CSMS's billing services had been charging CSMS three times more than MediNet did. The court held that the government and Beverly/CSMS presented genuine issues of material fact regarding whether or not there was any illegal remuneration under the contract. Similarly, the court held that material issues of disputed fact existed regarding the knowledge and materiality elements of the defendants' FCA liability. As a result of these findings, the court held that a trial was necessary to determine whether Beverly/CSMS violated the AKS and presented false claims. The court rejected the defendants' argument that even if MediNet's prices were below fair market value, they were protected by an AKS' safe harbor provision. Instead, the court found that the safe harbor provision did not apply, since neither Beverly/CSMS nor MediNet had a duty to disclose or report any discounts provided by MediNet—a prerequisite for the safe harbor provision. The court also rejected the defendants' argument that the government was barred by *res judicata* because CSMS's compliance with "Supplier Standards" had already been established in prior adjudications before the National Supplier Clearinghouse, in which the government's allegations of false claims based on violations of the supplier standards were dismissed because the claims were submitted in good faith. Instead, the court found that these prior adjudications were not "rendered by a court of competent jurisdiction," did not constitute a "final judgment on the merits," did not include any "findings of fact" regarding the AKS, and did not involve MediNet or McKesson. The court denied Beverly/CSMS's motion for summary judgment.

Piercing the Corporate Veil

Next, the court considered McKesson's argument that it was entitled to summary judgment because it was not a party to any of the transactions, was not a Medicare provider or supplier, did not submit any claims to Medicare, and did not directly own any MediNet shares. The government, though, argued that McKesson executives had knowledge of, provided input into, and approved MediNet's strategy for securing Beverly's business. Moreover, the government contended that Beverly and CSMS knew that they were dealing with McKesson and did not differentiate between McKesson, MediNet and MMS. The court decided not to pierce the corporate veil, as it found that there was a genuine issue of material fact as to the level of control and input

McKesson had with respect to MediNet's contract with CSMS. Thus, the court denied McKesson's summary judgment motion.

See *U.S. ex rel. Bartz v. Ortho-McNeil Pharm., Inc.*, 2012 WL 695886 (D. Mass. Mar. 2, 2012), at page 22.

JURISDICTIONAL ISSUES

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

***U.S. v. AseraCare, Inc.*, 2012 WL 187519 (E.D. Wis. Jan. 23, 2012)**

Three relators brought a *qui tam* action in the U.S. District Court for the Eastern District of Wisconsin, alleging that two healthcare providers defrauded Medicare. The relators' action was similar to two other *qui tam* suits—one in the U.S. District Court for the Northern District of Georgia and one in the U.S. District Court for the Northern District of Alabama. The government intervened in the Alabama action and filed a complaint against the defendants. The relators, supported by a Statement of Interest from the government, moved for transfer of venue to the Alabama district court. The defendants opposed the motion, and argued that the other *qui tam* actions would be dismissed pursuant to the False Claims Act's first-to-file rule, and consequently, a transfer of venue would be futile.

Holding: The United States District Court for the Eastern District of Wisconsin granted the relators' motion.

First-To-File Rule

The defendants argued that a transfer of venue would be futile, since the FCA's first-to-file bar would lead to the dismissal of both the Georgia and Alabama *qui tam* cases. The court disagreed and accepted the relators' argument that the first-to-file bar only precludes actions by private parties, and does not bar suits by the government. The court noted that the plain language of the statute prohibits a "person *other than the Government* [from intervening or bringing] a related action based on facts underlying [a] pending action." The court then applied the first-to-file rule to the related Alabama action—which had been filed as a *qui tam* action by private parties—and asked: "did the government's intervention suddenly change the classification of that case, or would it still be subject to dismissal under the first-to-file bar?" The court relied on the U.S. Supreme Court's decision in *Rockwell Int'l Corp. v. United States*, in which the Court held that, because the government intervened in a *qui tam* action, its complaint-in-intervention survived the dismissal of the relator's complaint pursuant to the FCA's public disclosure bar. Similarly, the district court held that the government's complaint-in-intervention in the instant action would survive in the event that the relator in the related Alabama case was dismissed on first-to-file grounds. As a result, the court concluded that a transfer of venue would not be futile.

The defendants also argued that a transfer of venue would not satisfy the standard of 28 U.S.C. § 1404(a), which reserves changes of venue "[f]or the convenience of parties and witnesses, in the interest of justice." The court held that each of these factors weighed in favor of a change of venue. Thus, the relators' motion was granted.

***U.S. ex rel. Sonnier v. Allstate Ins. Co.*, 2012 WL 75041 (M.D. La. Jan. 10, 2012)**

A relator brought a *qui tam* action against an insurance company, alleging that the defendant violated the False Claims Act and defrauded the Federal Emergency Management Agency by engaging in “unit price manipulation” in its reimbursement claims to the National Flood Insurance Program, following various hurricanes that had struck the Gulf Coast region. Specifically, the relator alleged that when the defendant adjusted flood insurance claims on properties for which it also provided wind insurance, it improperly inflated the replacement costs for damages attributable to flooding and reduced the replacement costs for damages attributable to wind. Since wind insurance, unlike flood insurance, is generally not underwritten by the federal government, the defendant could decrease its own exposure for insurance claims, while increasing the federal government’s exposure. In addition, the relator alleged that the defendant received a 3.3% allowance fee from the government for each flood insurance claim it serviced, and that since this fee was based on the amount of each flood insurance claim, the defendant was able to receive inflated allowance fees from the government for each of its inflated flood insurance claims. As a result, the defendant doubly benefitted, while the government was doubly defrauded.

The defendant moved to dismiss the relator’s claims for lack of jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1). First, the defendant argued that the False Claims Act’s first-to-file rule and its public disclosure bar deprived the court of subject matter jurisdiction over the relator’s claims, since the relator’s “unit price manipulation” allegation was substantially similar to claims alleged against the defendant in four previously filed *qui tam* suits; for purposes of its public disclosure argument, the defendant alleged that the relator was not an original source of the information on which his allegations were based. The defendant also moved to dismiss the relator’s claims on the grounds that the relator failed to plead the alleged fraud with particularity, as required by Federal Rule of Civil Procedure 9(b).

Holding: The United States District Court for the Middle District of Louisiana granted the defendant’s motion.

First-to-File Bar

The court first considered the defendant’s “first-to-file” argument. The court noted that the False Claims Act only bars *qui tam* actions when a separate, related *qui tam* case, based on the same facts, is still pending. After examining the four previously filed actions, the court noted that all four suits alleged that the defendant defrauded the federal government by mischaracterizing wind damage as flood damage, and then submitting flood insurance claims to the government for reimbursement under the National

Flood Insurance Program. The court rejected the present relator's argument that the allegations in his complaint differed from the prior complaints, finding that the allegations contained in the five complaints "differ[ed] only in degree." In addition, although the court acknowledged that, at the time the present relator's complaint was filed, two of the prior actions had already been dismissed, and thus, were no longer pending, the other two previously filed complaints were still pending at the time the relator's suit was filed. With respect to one of those two pending suits, the court found that the allegations were "identical" to the relator's. Consequently, the court held that the present action was barred, and the purposes of the FCA's first-to-file rule's were served, since the relator's action did not "help reduce fraud or return funds to the federal fisc because long ago the government had enough information to discover related frauds."

Since the court granted the defendant's motion to dismiss on first-to-file grounds, it declined to consider the defendant's public disclosure bar and Rule 9(b) arguments.

See *U.S. ex rel. Bartz v. Ortho-McNeil Pharm., Inc.*, 2012 WL 695886 (D. Mass. Mar. 2, 2012), at page 22.

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

***U.S. ex rel. Schumann v. AstraZeneca PLC*, 2012 WL 1071133 (E.D. Pa. Mar. 30, 2012)**

A relator brought a *qui tam* action alleging that a group of pharmaceutical companies—one of which he'd formerly worked for—entered into fraudulent agreements so that their respective brand-name drugs would be dispensed, rather than equivalent generic drugs. The relator alleged that the defendants entered into these agreements in order to evade their best price reporting obligations to the government. The relator also alleged that his former employer received illegal kickbacks from the other group of defendants in exchange for promoting the sale of their drugs. The defendants moved to dismiss the relator's claims, on the basis of the False Claims Act's public disclosure bar, and the United States District Court for the Eastern District of Pennsylvania granted the defendants' motion, finding that the relator failed to plead that he was an original source of the information underlying his claims. The relator then moved for reconsideration of the court's ruling.

Holding: The U.S. District Court for the Eastern District of Pennsylvania denied the relator's motion, finding that the relator failed to specify any error of law or fact that would justify reversing the court's previous order.

The court first analyzed the declaration the relator attached to his motion and found that the declaration did not present any new information, but instead contained information that was available to the relator at the time when he filed the amended complaint at issue. Therefore, the court refused to consider the relator's declaration when deciding the motion for reconsideration. The court also rejected the relator's argument that the court had committed error by requiring him to have knowledge of all the elements of the defendants' alleged fraud scheme at the pleading stage. The court noted that the relator failed to cite where the court determined that the relator was required to have such knowledge. Thus, the court held that the relator failed to show any direct and independent knowledge of the alleged fraud and held that it had applied the proper standard when dismissing his *qui tam* suit.

The court then examined the relator's allegations of error regarding his pleadings, in which he argued that since the defendants did not challenge his original source status, the court erred by considering the jurisdictional attack related to his status as an original source as factual instead of facial and by not accepting his allegations as true. The court, though, stated that it did consider the defendants' challenge as a factual attack, that is did not consider any information outside the complaint when determining the relator's original source status (although the court did consider information outside the complaint when determining that

the relator's claims had been previously publicly disclosed), and that it did accept the relator's allegations as true. The court reiterated that it dismissed the relator's complaint based on its determination that the relator simply failed to plead sufficient facts regarding his direct and independent knowledge of the alleged fraud scheme, and instead only made conclusory allegations that the defendants entered into improper agreements to evade the best price requirements.

Furthermore, the court held that the relator's claims regarding the defendants' alleged kickback scheme were nearly identical to his best price allegations, and were thus, equally conclusory and insufficient to establish his direct and independent knowledge. Consequently, the court denied the relator's motion for reconsideration.

The court also denied the relator's request for leave to amend his complaint again, noting that such an amended would be the relator's fifth attempt to modify his allegations.

***U.S. ex rel. Colquitt v. Abbott Labs.*, 2012 WL 1081453 (N.D. Tex. Mar. 30, 2012)**

A relator brought a *qui tam* action against three medical device manufacturers: Abbott (his former employer), BSC, and Cordis. He alleged that these defendants violated the False Claims Act and various state laws by engaging in a fraudulent scheme to obtain FDA clearance and by promoting the off-label use of their devices, which led to the submission of false claims to the government for Medicare/Medicaid reimbursement. More specifically, the relator alleged that the defendants defrauded the Food and Drug Administration by making false statements and omitting material information regarding their stents, including the classification, type, predicate devices, substantial equivalence, intended use, appropriate labels and risk to patients posed by their stents, because they knew that it was easier to get FDA-approval for the devices as biliary stents rather than as vascular stents. He further alleged that once the defendants received FDA approval for their respective biliary stents, they committed fraud by improperly marketing the devices for off-label uses in vascular applications. He claimed that during his employment with Abbott, he was trained to promote Abbott's stent for off-label vascular uses; he asserted that he other defendants used similar training methods. He further claimed that the dimensions of the defendants' devices were more appropriate for use in the vasculature than in the biliary tree. Furthermore, the relator alleged that the defendants violated the FCA by providing illegal kickbacks to physicians and hospitals that used their devices for off-label uses.

The defendants separately moved to dismiss the relator's claims, arguing that the relator failed to state a claim, that he failed to plead his fraud allegations with particularity, and that his allegations were barred by the FCA's public disclosure rule.

Holding: The United States District Court for the Northern District of Texas granted defendants BSC's and Cordis' motions and dismissed all claims against those defendants. The court granted defendant Abbott's motion in part, and only allowed the relator to maintain his off-label marketing claim against that defendant.

Public Disclosure Bar

The court first examined whether the relator's claim was barred by the public disclosure rule. The defendants argued that, prior to the filing of the relator's complaint, the information underlying the relator's claims had been publicly disclosed in the defendants' submissions to the FDA, in various news articles, in the defendants' advertisements in medical journals and trade publications, and in two publicly-available "warning letters" the FDA sent to the defendants in response to advertisements promoting stents for off-label uses. The relator argued that the defendants' FDA submissions and advertisements did not qualify as public disclosures under the False Claims Act. The court disagreed and found that although the FDA submissions in question had been prepared by the defendants, that information was subsequently published by the FDA and therefore, qualified as a public disclosure. The court also held that the articles and advertisements had been disclosed in scholarly periodicals and thus, qualified as public disclosures through the news media. The court further found that one of the FDA warning letters—a letter sent to defendant Cordis in response to Cordis' off-label promotion of its stent—qualified as a public disclosure because it included information regarding the relator's off-label marketing allegations. The court held that the other warning letter—a general letter sent to multiple device manufacturers to remind them about improper off-label promotion of biliary stents—did not qualify as a public disclosure because it was not sufficient to disclose which specific device manufacturers had engaged in improper conduct. As a result of its findings, the court held that the relator's allegations had been publicly disclosed before he filed his *qui tam* complaint.

Then the court then considered the relator's argument that he qualified as an original source, and therefore, his complaint was not barred. The relator argued that he was an original source of the information on which his allegations were based, because he witnessed the defendants promoting off-label uses of their stent devices during his employment. The court, though, held that the relator was not an original source of his claim that the defendants fraudulently induced the FDA to approve their devices, because his knowledge regarding that claim was not independent of the public disclosures, since the information regarding the defendants' submissions to the FDA—including the dimensions of their medical devices—was available to anyone who wanted to find it. However, the court concluded that the relator did qualify as an original source for his off-label promotion claims, as the relator alleged that he was trained to promote the off-label use of Abbott's medical devices and was trained to teach physicians how to use the devices for off-label uses. The court found that the relator's knowledge was "independent" because his particularized information had not been publicly disclosed, and that his knowledge was "direct" because he gained it firsthand as an Abbott employee.

Therefore, the court held that the relator only qualified as an original source for his off-label claims, but not for his fraudulent inducement claims.

Failure to State a Claim/Failure to Plead Fraud with Particularity

Finally, the court examined whether the relator failed to state a claim under the FCA with respect to his remaining off-label marketing claims and/or whether he pled those claims with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure. The defendants argued that the relator's allegations did not allow for a reasonable inference of FCA liability, claiming that the Medicare/Medicaid reimbursement claims submitted by healthcare providers for off-label uses of the defendants' medical devices did not constitute false or fraudulent claims. The defendants further argued that the relator failed properly to plead his off-label promotion theory of FCA liability, because he did not allege sufficient facts regarding any false claims alleged submitted to the government. The court determined that the relator alleged that providers' claims for reimbursement associated with off-label uses of the defendants' devices were improper and false because the government should not have paid claims for non-FDA approved uses of the defendants' devices. Moreover, the court found that the relator alleged specific instances in which he witnessed the defendants promoting their devices for off-label uses, and that he also alleged that the defendants distributed reimbursement guidelines to instruct healthcare providers on how they could seek reimbursements from the federal government for stents used for off-label purposes. However, the court held that the relator only provided sufficient factual detail to satisfy the particularity requirements with respect to his claims against defendant Abbot. The court found that the relator provided only vague claims about BSC and Cordis' alleged frauds. Therefore, the court dismissed the relator's off-label marketing claims against BSC and Cordis, but allowed the relator to maintain those claims against Abbott.

Finally, the court held that the relator failed to provide any specific details about the defendants' alleged kickbacks schemes and as a result, the court dismissed all of the relator's kickback claims.

***U.S. ex rel. Zizic v. Q²Administrators, LLC*, 2012 WL 1019047 (E.D. Pa. Mar. 27, 2012)**

A relator brought a *qui tam* action against two companies that had been hired by the Centers for Medicare & Medicaid Services to serve as qualified independent contractors and to provide appellate review of Medicare claim denials related to a medical device used to treat osteoarthritis of the knee. The relator alleged that the defendants violated the False Claims Act because they did not provide—and could not have provided—the statutorily-required level of review by physicians or other healthcare professionals, due to the large number of appeals and the small number of healthcare professionals employed by the defendants. The relator claimed that these failures led to the submission of false healthcare claims to the government,

as well as the submission to the government of false statements/records material to healthcare claims. He claimed that he was president of another company that had been formed to commercialize the medical device at issue, and that, based on his own review of the appeals related to the device in question, he had first-hand knowledge that the defendants' fraudulent conduct. The government declined to intervene in the relator's case. The defendants separately moved to dismiss the relator's claims, arguing that the relator failed to state a claim, that his complaint failed to plead the alleged fraud with particularity, and that his claims were barred by the FCA's public disclosure rule.

Holding: The United States District Court for the Eastern District of Pennsylvania granted the defendants' motions to dismiss, finding that the relator's claims were barred by the public disclosure rule.

Public Disclosure Bar

The court first examined whether the relator's claims were precluded by the public disclosure bar. The court found that prior administrative hearings revealed that the defendants had conducted claim denial reviews inconsistently and that these findings suggested to the relator that the defendants had not provided reviews of claim denials as per the contract; instead the findings suggested an inference of fraud. The court also noted that prior litigation warranted an inference of fraud, as a prior bankruptcy proceeding alleged that most of the defendants' claims denial reviews were not conducted by a physician and that only a small number of reviews were even handled by a nurse. The court found that the relator's claims were similar to the information contained in the prior public disclosures, and thus, the court had no subject matter jurisdiction over the relator's fraud claims.

The court held that the relator did not qualify for the "original source" exception to the public disclosure rule, since he lacked direct knowledge of the alleged fraud—notably, the relator based his allegations on the affidavit of another individual. The relator alleged that he only relied on the affidavit to substantiate his own first-hand information, but the court determined that the affidavit alleged additional facts that were not revealed to the relator through his own review of the defendants' reconsiderations of claim denials. Therefore, the court held that the relator lacked direct knowledge. The court also found that the relator lacked independent knowledge of the information his claims were based on, since any allegations that did not depend on the affidavit were based on the public disclosures. Therefore, the court concluded that it lacked subject matter jurisdiction over the relator's action and dismissed his complaint.

***U.S. ex rel. Allen v. Guidant Corp.*, 2012 WL 878023 (D. Minn. Mar. 14, 2012)**

A relator brought a *qui tam* action against a medical device manufacturer and its subsidiaries, alleging violations of the False Claims Act, as well as common law claims. Specifically, the relator alleged that the defendants caused hospitals, physicians, and other healthcare providers to submit and receive payment for false Medicare and Department of Veterans Affairs claims, by intentionally misrepresenting the allegedly defective and dangerous nature of their implantable cardiac devices to the FDA—the relator alleged that the defendants’ devices were designed to deliver a shock when it detected an irregular heartbeat, but that the devices were prone to electrical short circuit problems, which could lead to patient deaths. The United States intervened in the relator’s suit and added allegations that the defendants did not inform the FDA about any corrective actions and continued to sell defective devices. The defendants moved to dismiss the relator’s FCA claims, arguing that: (1) the government’s complaint-in-intervention superseded the relator’s complaint; (2) the relator’s claims were precluded by the FCA’s public disclosure bar provision; and (3) the relator failed to plead the alleged fraud with particularity.

Holding: The United States District Court for the District of Minnesota denied the defendants’ motion.

Superseding Complaint

The court first analyzed whether the government’s complaint-in-intervention superseded the relator’s complaint. The court found the relator’s complaint pled a fraud scheme regarding allegedly defective medical devices manufactured after April 2002, while the government brought additional allegations related to devices manufactured before April 2002. Therefore, the court held the government’s claims were not duplicative of the relator’s. The court also noted that the government did not seek to dismiss or settle the relator’s claims or to limit the relator’s participation in the *qui tam* action. Accordingly, the court held the government’s complaint did not supersede the relator’s complaint and denied the defendants’ motion to dismiss the relator’s complaint on the basis that it was superseded by the government’s complaint.

Public Disclosure Bar

Next, the court considered whether or not the relator’s claims were based on publicly disclosed information that would trigger the FCA’s public disclosure bar provision. The defendants argued that the allegations in the relator’s complaint were based on media reports and other public materials. The court, though, did not address the defendants’ argument, as it determined that the relator qualified as an original source of the information on which his complaint was based, since he had used one of the

defendants' cardiac devices and his own device had malfunctioned on at least three occasions, rendering the relator unconscious, causing damage to his heart, and causing him to fall down a flight of stairs. The court held that the relator's direct and independent personal knowledge of the alleged device malfunctions, coupled with the fact that he reported the relevant information about the alleged fraud to the government before filing his complaint, qualified him as an original source. As a result, the court held that the relator's claims were not barred by the public disclosure bar, and denied the defendants' motion to dismiss the relator's complaint for lack of subject matter jurisdiction.

Pleading Fraud with Particularity

Finally, the court addressed the defendants' argument that the relator failed to plead his fraud allegations with particularity, as required by Rule 9(b) of the Federal Rules of Civil Procedure. The court rejected that argument, finding that the relator alleged the time, place, and content of the defendants' allegedly fraudulent acts and misrepresentations. The court also found the relator detailed his own experiences with the defendants' device and described specific representations made by the defendants' personnel about the supposed safety of the device. Further, the court found that the relator alleged the dates on which the defendants were alleged to have submitted false reports to the FDA, which in turn, allegedly led to false representations to Medicare and the Department of Veterans Affairs that the defendants' devices were free from any known defects. Accordingly, the court held the relator pled his fraud allegations with sufficient particularity, and denied the defendants' motion to dismiss the complaint on that basis.

***U.S. ex rel. Jones v. Collegiate Funding Servs., Inc.*, 2012 WL 835747 (4th Cir. Mar. 14, 2012)**

Two relators brought a *qui tam* action against their former employer—a private commercial lender (CFS)—and its subsidiaries, alleging that the defendants submitted Federal Family Education Loan Program (FFELP) claim forms in which they falsely certified that all of the information they provided was accurate and in compliance with all federal regulations. The relators alleged 21 counts of resulting FCA violations. The first 15 counts alleged that, in order to get the government to provide insurance guaranty payments and to pay for loans, CFS and its loan serving company caused the use of false statements through: (1) unlawful inducements (Counts 1-3); (2) deceptive exit counseling (Counts 4-6); (3) deceptive direct mail solicitation (Counts 7-9); (4) bonus compensation for recruiters (Counts 10-12); and (5) violations of the single holder rule (Counts 13-15). The relators also alleged that the defendants directly presented false claims to the government and conspired to submit false claims for insurance guaranty payments, loan interest, and special allowance payments (Counts 16-19). Finally, the relators alleged that

the defendants falsely certified their compliance with regulations so as to avoid obligatory repayments of government insurance, interest, and special allowance payments (Counts 20-21). The defendants moved to dismiss the relators' claims, arguing that the relators failed to plead the alleged fraud with particularity and thus failed to state under the False Claims Act. In addition, the defendants asserted that, due to the FCA's public disclosure bar, the court lacked subject matter jurisdiction over all Counts except Counts 10-12. The relators voluntarily dismissed Counts 13-15. The disputes over the remaining counts were referred to a magistrate judge, who prepared a Report & Recommendation (R&R).

The United States District Court for the Eastern District for Virginia adopted the magistrate's R&R and granted the defendants' motion to dismiss the relator's claims. The court held that it lacked subject matter jurisdiction over Counts 1-6 of the relator's complaint, pursuant to the public disclosure bar and that the relators failed to plead the remaining counts with particularity. The relators appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit, arguing that they had no knowledge of any prior public disclosures and that certain SEC filings did not qualify as administrative reports for purposes of the public disclosure bar.

Holding: The United States Court of Appeals for the Fourth Circuit affirmed the district court's judgment.

Public Disclosure Bar

The court began by analyzing the public disclosure bar and subject matter jurisdiction issue. The relators argued that the district court erred in determining that the essential elements of the relators' allegations in Counts 1-6 of their complaint had already been disclosed in the defendants' SEC filings and in media reports, prior to the filing of the *qui tam* complaint. The district court further held that the relators failed to provide evidence of their direct and independent knowledge of the information on which their complaint was based, and thus did not qualify as original sources of the information supporting their claims.

The relators argued to the circuit court that the documents at issue failed to set out the relators' fraud allegations against the named defendants. The defendants responded, arguing that their parent organization had been named in the media coverage and that various other news reports and their own SEC filings provided enough information for the relators to build their claims. The relators then argued that the defendants' reliance on public accounts of general industry behavior, which did not include any specific allegations against the defendants named in the *qui tam* action, were insufficient to trigger the public disclosure bar. The appellate court determined that the district court relied on a published report of investigations in which the defendants were named, and also relied on the defendants' own claims that their business model included special inducement arrangements with schools for access to student

borrowers. The appeals court also determined that the defendants' SEC filings at issue were "administrative reports" for the purposes of the public disclosure bar, since those documents were requested, received, and made public, as they were presumably included in any corporate profiles compiled by the federal agency. Further, the court found that the documents provided access to information regarding the transactions between the defendants and their customers. Thus, the court held that the SEC filings were administrative reports for the purposes of the public disclosure bar, and affirmed the district court's decision to consider those documents as part of its analysis of the public disclosure bar.

In response to the relators' claims that they did not read the publicly-available documents that gave rise to the defendants' subject matter jurisdiction defense, and thus should not be precluded by the public disclosure bar, the circuit court agreed with the district court's reasoning that while the relators were not required to prove the source of their information, their mere denial of knowledge of the public disclosures was not enough to overcome the public disclosure bar. As a result of these findings, the circuit court affirmed the district court's dismissal of Counts 1-6 of the relators' *qui tam* complaint for lack of subject matter jurisdiction.

Pleading Fraud with Particularity

The court then turned to the remaining counts of the relators' complaint and the defendants' argument that those counts should be dismissed because the relators failed to plead the fraud scheme with particularity. The relators theorized that CFS's alleged habitual violations of the FFELP rendered false all loans CFS made or serviced, as those loans were based on CFS's alleged false certifications of compliance with applicable federal regulations. The relators also provided the district court with blank copies of the certification forms they alleged were falsified. The district court had held that blank certification forms, coupled with the relators' allegations of fraud, did not meet Rule 9(b)'s heightened pleading standard. The circuit court agreed, finding that the relators alleged only broad inferential claims and failed to provide sufficient supporting facts, such as details regarding particular transactions between the defendants and the government or the name and identity of any person who made a false certification of compliance to the government. Consequently, the circuit court upheld the district court's ruling that the relators failed to plead their fraud claims with particularity and the circuit court affirmed the district court's dismissal of the relators' remaining claims.

***U.S. ex rel. Bartz v. Ortho-McNeil Pharm., Inc.*, 2012 WL 695886 (D. Mass. Mar. 2, 2012)**

A relator brought a *qui tam* action against the pharmaceutical company he previously worked for (Johnson & Johnson (J&J)), the company's subsidiaries, and a medical distributor (McKesson). The relator alleged that the defendants violated the False Claims Act, the Anti-Kickback Statute (AKS) and various state laws. The

relator also alleged a claim for retaliation under the False Claims Act. Specifically, the relator alleged that the J&J defendants manipulated rebate amounts owed to the government, falsely reported to the government the Average Manufacturer Price and the Best Price of drugs, and paid illegal kickbacks to nursing home drug purchasers who purchased their drugs, including defendant McKesson. The relator's retaliation claim was based on his assertion that he was demoted and eventually fired from his sales job with a J&J subsidiary when he complained about the defendants' allegedly fraudulent conduct. The defendants moved to dismiss the relator's fraud claims under the FCA's public disclosure and first-to-file provisions.

Holding: The United States District Court for the District of Massachusetts granted the defendants' motion to dismiss the fraud claims, but allowed the relator to maintain his retaliation claim.

Public Disclosure Bar

First, the court analyzed whether the relator's *qui tam* allegations were precluded by the FCA's public disclosure bar provision. The defendants had argued that the relator's allegations were barred by previously filed lawsuits, by media reports, and by industrial journal publications. The relator countered that his fraud allegations provided new details of financial accounting records and explanations of the defendants' internal accounting policies and that any previously disclosed information regarding the relator's Best Price allegations was too vague to qualify as a true "public disclosure" for FCA purposes. The relator also noted that many of the prior lawsuits the defendant relied on as public disclosures were not *qui tam* actions. The court agreed with the defendants' assessment, finding that all essential elements of the relator's fraud claims had been publicly disclosed before he filed his *qui tam* complaint and that the information contained in the prior disclosures was sufficient to put the government on notice of the alleged fraud. The court then turned to the question of whether or not the relator qualified as an original source. The relator argued that, as a former employee of one of the defendants, he possessed first-hand knowledge of the sales data used to calculate sales bonuses. The court, though, determined that the relator failed to provide any supporting facts regarding his first-hand knowledge, as he merely copied numerous documents from computer systems he had access to during his employment. Thus, it held that the relator failed to show that he was an original source. Since the allegations giving rise to the relator's fraud claims had been previously publicly disclosed, the court held that it lacked subject matter jurisdiction over the relator's *qui tam* allegations, and the relator's fraud claims were dismissed.

First-to-File Rule

Next, the court considered the defendants' argument that the relator's fraud claims were also barred by the FCA's first-to-file rule. The relator acknowledged the existence

of other *qui tam* actions against the defendant, but argued that these suits did not bar his complaint, since he alleged different types of frauds, based on different material facts, and none of the cases relied on by the defendants was pending when he filed his complaint. The court disagreed, finding that the relator's allegations were substantially similar to the previously-filed *qui tam* complaints and that those actions were indeed pending when the relator's *qui tam* action was filed. Accordingly, the court held that the relator's fraud claims were also barred by the FCA's first-to-file rule.

Stating a Claim for Relief

The court analyzed the relator's fraud claims against McKesson, wherein the relator alleged that McKesson, as a direct purchaser—and not as a purchasing agent—took kickbacks from J&J in exchange for purchasing certain J&J drugs. The relator further asserted that since McKesson served as a direct purchaser, it was not eligible for the “administrative fees” it received from J&J, which were originally termed as discounts, apparently in an attempt to fall within the Safe Harbor Provisions of the AKS. The court held that the relator's reliance on the defendants' alleged non-compliance with the AKS as a basis for FCA liability was misplaced. The court observed that the AKS was amended to expressly provide that claims to the government that result from violations of the AKS constitute violations of the FCA as well, but noted that this amendment only applied to drugs dispensed after July 1, 2010. Since the relator's employment had been terminated in 2007, and since the relator failed to identify any illegal “kickback” paid to McKesson after 2006, the court held that the relator's claims against McKesson failed.

Retaliation

With respect to the relator's retaliation claim, the defendants argued that the relator failed to put them on notice of his *qui tam* action, and thus failed to satisfy one of the criteria for properly pleading a cause of action under the FCA's anti-retaliation provision. The relator responded that the defendants had knowledge of his whistleblowing activities, particularly since he alleged that he made several complaints to his former employer about the defendants' allegedly illegal practices. The court held that the relator was not required to “inform[] the employer of the exact nature of his investigative activities,” and noted that he would be protected from retaliations if “the employer knew (or believed) of [sic] the employee's ‘disloyal’ acts, and punished him accordingly. Ultimately, the court held that the relator's allegations were sufficient to state a claim for retaliation under the False Claims Act.

***U.S. ex rel. Assocs. Against Outlier Fraud v. Huron Consulting Group, Inc.*, 2012 WL 506824 (S.D.N.Y. Feb. 16, 2012)**

A corporate relator brought a *qui tam* action against two medical service corporations (Huron and Vincent) and a financial intermediary (Empire), alleging that the defendants violated the federal False Claims Act and the New York State FCA by submitting Medicare/Medicaid reimbursement forms seeking outlier reimbursement. The relator alleged that Huron controlled Vincent and exercised its control to have Vincent submit inflated claims to the government. The relator further alleged that Empire ignored the inflated claims and processed them at a higher reimbursement level. The defendants moved separately to dismiss the relator's claims, arguing that the relator's complaint was barred by the FCA statutes' respective public disclosure bar provisions.

Holding: The United States District Court for the Southern District of New York denied the defendants' motions and held that even though the relator's allegations had been previously publicly disclosed, the relator qualified as an original source of the information on which its allegations were based.

Public Disclosure Bar

The court first determined that the relator's fraud allegations had been previously publicly disclosed, as those allegations were based on information obtained through requests made under the Freedom of Information Act (FOIA). The defendants argued that the relator's action should be dismissed because the Supreme Court held that information gleaned from FOIA requests constitutes publicly disclosed government reports under the FCA. As the court confirmed that the requested documents contained information on which the relator's fraud allegations were based, it held that the relator's claims were based on the public disclosure.

The court then analyzed whether the relator qualified as an original source of the information on which his complaint was based, and would be exempted from the public disclosure bar. The relator argued that he based his allegations on information he obtained as a former independent contractor working for Huron's reimbursement department. Huron countered that the relator was not an original source, citing the Second Circuit's opinion in *U.S. ex rel. Dick v. Long Island Lighting Co.* for the proposition that in order to qualify as an original source, a relator must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which the *qui tam* allegations were based. The court, however, found that the Supreme Court had already rejected this interpretation of the public disclosure bar and the original source exception, and held that Congress did not intend to link original source status to the information underlying the public disclosure. Defendant Empire then argued that because the relator did not work for them and did not know how they processed outlier charges, he had no direct and independent knowledge of the allegations. The court disagreed, and found that although the relator might not have known who made

which specific decisions at Empire, the relator demonstrated direct and independent knowledge of his core allegations against that defendant. Therefore, the court held that the relator was an original source of his claims against all the defendants and each of their respective motions to dismiss was denied.

***U.S. ex rel. Green v. Serv. Contract Educ. & Training Trust Fund,* 2012 WL 432569 (D.D.C. Feb. 13, 2012)**

A relator brought a *qui tam* action against his former employers, an international labor union (LIUNA) and its training institute (SCETTF), as well as 29 government contractors, alleging that the defendants submitted false claims in connection with various federal service contracts. Specifically, the relator alleged that the defendants misrepresented to the government that the training they provided qualified as a bona fide fringe benefit under the Department of Labor regulations because: (1) the 29 government contractor defendants were reimbursed for a substantial portion of their training costs; and (2) those government contractor defendants improperly used government funds for on-the-job training to compensate employees for work required under the government contracts. The relator eventually voluntarily dismissed his claims against 24 of the contractor defendants. All but one of the remaining defendants moved to dismiss the relator's claims, arguing that the claims were based information that had already been publicly disclosed on one of the defendants' websites and for which the relator did not qualify as an original source, and that the relator failed to plead facts with particularity.

Holding: The United States District Court for the District of Columbia granted the defendants' motion, finding that the relator's action was based on publicly disclosed information and he did not qualify as an original source. Further, the court held the relator failed to plead his fraud claims with particularity. Accordingly, the court dismissed the relator's claims.

Public Disclosure Bar

The court began by addressing the defendants' public disclosure argument, in which they claimed that the relator's fraud allegations were based on information about one of the defendants' training programs that had been publicly disclosed on that defendant's website. The relator countered that the website—which was specifically referenced in his complaint—was merely a self-promoting advertisement for a select audience and was not a traditional public news source. The court, though, found that the promotional webpage was readily accessible to the public and that there was no evidence that access to the information on the site was limited or restricted in any way. Therefore, the court held that the website qualified as news media, for purposes of the FCA's public disclosure bar. The court then determined that the relator's complaint included fraud allegations that were “based upon” the publicly disclosed information,

as the relator's allegation that the defendants engaged in a scheme to receive improper reimbursements from the government mirrored information from the website. The court, however, held that the relator's fraud claims regarding on-the-job training had not been previously publicly disclosed. Finally, the court held that the relator did not qualify as an original source of that information, noting that the relator's "general assertion that he has direct and independent knowledge 'derived through his employment' does not suffice to explain the basis of his knowledge of any elements of the alleged fraud committed by these defendants," particularly since the relator alleged a fraud scheme that spanned from around 1978 through 2009, yet he was only employed by defendant companies between 2001 and 2004. Moreover, the court found that the relator failed to adequately show that he provided the government with information regarding the fraud before the public disclosure occurred, as required by the D.C. Circuit Court. Consequently, the court held that the relator did not qualify as an original source of the information upon which his complaint was based. Since the public disclosure bar precluded the relator's claims regarding improper reimbursements, those claims were dismissed for lack of subject matter jurisdiction.

Pleading Fraud with Particularity

Next, the court considered the defendants' argument that the relator's remaining on-the-job training claims were not pled with the requisite particularity. The court agreed with the defendants, noting that the relator "set forth neither an adequate factual basis nor any detailed description of the specific falsehoods underlying those claims," and that "nowhere in the complaint does [the relator] identify with particularity a single lie, or false representation, regarding on-the-job training made by any of the defendants to a government official in order to secure a contract, or in order to get a claim paid." As a result, the court held that the relator failed to plead a single on-the-job-training fraud claim with particularity, and thus, the court granted the defendants' motion to dismiss those claims.

***U.S. ex rel. Johnson v. Golden Gate Nat. Senior Care, LLC*, 2012 WL 465676 (D. Minn. Feb. 13, 2012)**

An individual and her new employer—a healthcare rehabilitation company—brought a *qui tam* action against her former employer, an occupational therapy company—and other nursing care centers, alleging that the defendants conspired to defraud the government and ultimately did fraudulently bill Medicaid and Medicare for services that were not properly supervised by certified physical and occupational therapists and for individual therapy services that were actually provided as part of group sessions. The defendants moved to dismiss the relator's claim based on the False Claims Act's public disclosure bar. They also asserted that the relator failed to plead the alleged fraud scheme with particularity, as required by Federal Rule of Civil Procedure 9(b).

Holding: The United States District Court for the District of Minnesota denied the defendants' motion.

Public Disclosure Bar

The court began by analyzing the FCA's public disclosure bar. The defendants identified a series of public documents and cases, which they alleged disclosed the relators' fraud allegations before the *qui tam* action was filed. However, the court found that none of the public documents identified the alleged fraud or any of the specific acts or practices raised by the relators in their complaint. The court also found that, even if the relators' allegations had been previously publicly disclosed, the relators qualified as original sources of the information on which their allegations were based, because one of the relators worked at one of the defendants' therapy centers and had personal knowledge of the alleged improper services and billing. Therefore, the court held the public disclosure bar did not prohibit the relators' suit.

Pleading Fraud with Particularity

The court then considered the defendants' argument that the relators' complaint did not plead the alleged fraud scheme with particularity. The court, though, found that the relators alleged the time, place and manner of the alleged fraud and identified 41 specific instances of allegedly false bills to the government. The court also found that the relators listed the initials of the patients who received the defendants' services, as well as the dates and amounts of time billed. Accordingly, the court held that the relators' allegations were pled with sufficient particularity.

The defendants' motion to dismiss was denied.

***U.S. ex rel. Rille v. Sun Microsystems, Inc.*, 2012 WL 260755 (E.D. Ark. Jan. 30, 2012)**

Two relators brought a *qui tam* action alleging that a technology company violated the False Claims Act by engaging in illegal kickbacks schemes and by charging the government inflated prices. Days before the relators filed their suit, and unknown to the relators, the General Service Administration (GSA) initiated an audit of the defendants' pricing practices. The Department of Justice intervened in the relators' case, a settlement agreement was eventually reached, and the claims against the defendant were dismissed. The government later moved to dismiss the relators' pricing claims, arguing that those claims were prohibited by the False Claims Act's public disclosure bar. The defendant separately moved to dismiss all of the relators' fraud claims on public disclosure grounds.

Holding: The United States District Court for the Eastern District of Arkansas denied both motions.

Public Disclosure Bar

The government argued that the relators' defective pricing allegations had been publicly disclosed in GSA audit-related discussions with the defendant and in two magazine articles, and as a result, those allegations should be dismissed for lack of subject matter jurisdiction, pursuant to the False Claims Act's public disclosure bar provision. The government argued that the audit reports revealed that the defendant: (1) had not provided the government with current, accurate, or complete customer sales practice information; (2) had not complied with contractual price reduction clauses; and (3) had not administered its contracts in accordance with their terms. Although the relators' initial complaint was filed before the disclosures occurred, the government argued that the relators did not allege any pricing claims until they amended their original complaint—after the public disclosures. However, the court found that the relators' original complaint, taken as a whole, included defective pricing claims. In addition, the court found that the purported public disclosures did not clearly indicate that a fraud had occurred, and therefore could not preclude the relators' claim. Moreover, the court held that even if the relators' allegations had been previously publicly disclosed, the relators were an original source of that information, and therefore their *qui tam* action and defective pricing claims would not be barred. The court noted that one of the relators became aware of the alleged fraud during his employment with another technology company, and that the relators also possessed documentary evidence of the alleged fraud. Accordingly, the court denied the government and the defendant's motions to dismiss the defective pricing claim.

The defendant echoed the government's arguments with respect to the relators' pricing claims and the court also denied the defendant's motion to dismiss those claims. The defendant also argued that the relators' kickback claims had been previously publicly disclosed and should be dismissed for lack of subject matter jurisdiction. The defendant argued that the alleged kickback scheme had been widely publicized in the press and that the government was aware of its practices before the relators filed their complaint. However, the court found that the alleged prior disclosures failed to disclose the critical elements of fraud or to clearly indicate that fraud was involved. Additionally, the court again emphasized that the relators would have qualified for the original source exception to the public disclosure bar nonetheless. Accordingly, the court denied the defendant's motion to dismiss the relator's claims.

***U.S. ex rel. Estate of Cunningham v. Millennium Labs. of Cal.*, 2012 WL 259572 (D. Mass. Jan. 30, 2012)**

A relator brought a *qui tam* action against a medication monitoring services company (Millennium) and several other defendants, alleging violations of the federal False Claims Act and several state FCA statutes. Specifically, he alleged that Millennium encouraged healthcare providers who used its urine drug testing services

to fraudulently double-bill Medicare and Medicaid—the scheme involved having providers use a Millennium drug testing kit that could test for multiple drugs from a single specimen, and then advising those providers to improperly bill the government for every drug for which the specimen was tested, rather than for only one comprehensive test. The relator claimed that he became aware of Millennium’s billing practices while he worked for a competing company. Less than a year after filing his *qui tam* complaint, the relator passed away. His estate was substituted as the relator and the case proceeded. Millennium moved to dismiss the suit, arguing that the fraud allegations were based on information that had been previously publicly disclosed, that the fraud allegations were not pled with particularity, and that the complaint failed to state a claim.

Holding: The United States District Court for the District of Massachusetts held that the relator’s claims were based on a prior public disclosure, and were barred by the False Claims Act’s public disclosure provision. Consequently, the court determined that it did not have subject matter jurisdiction over the relator’s claims against Millennium, and those claims were dismissed with prejudice. The court declined to address Millennium’s other arguments or to entertain the relator’s state-law claims.

Public Disclosure Bar

Millennium argued that, before the relator’s *qui tam* action was filed, the alleged fraud scheme had already been publicly disclosed in a civil action brought in state court. In fact, Millennium asserted that five days before the relator’s suit was filed, Millennium filed a complaint against the relator and his employer in state court alleging, among other things, defamation and intentional interference with contractual relations. Millennium alleged that one of the relator’s co-workers had emailed some of the Millennium’s customers and informed them about the defendant’s alleged wrongdoing, which, according to Millennium, constituted a public disclosure. The court first noted that after the original *qui tam* action was filed, but before it was amended to include the relator’s estate, the False Claims Act’s public disclosure bar provision was amended to make clear that only public disclosures made in federal court proceedings will bar *qui tam* actions. The defendant argued that the public disclosure rule that existed when the original *qui tam* complaint was filed—which allowed for public disclosures in both federal and state court proceedings—should apply. The relator’s estate countered that the amendment to the public disclosure bar is retroactive and thus, the new public disclosure bar should apply. The court concluded that, since the public disclosure bar deprives courts of jurisdiction over *qui tam* claims, it first needed to determine whether or not it had jurisdiction over the original *qui tam* complaint. The court also mentioned that “[i]f jurisdiction did not exist over this claim at the time the suit was filed, then the suit must be dismissed because a party cannot amend to fix a jurisdictional defect.” Thus, the amended complaint, filed after the public disclosure bar was

amended, could not save the *qui tam* action, in the event that the public disclosure rule barred the original complaint.

And the court did hold that the public disclosure rule barred the original *qui tam* action, since, at the time that action was filed, the allegations of fraud had already been disclosed in a forum that triggered the public disclosure bar, the relator's allegations were substantially similar to, and therefore, "based upon" the public disclosure, and the relator did not assert that he was an original source of that information and could qualify for an exception to the public disclosure bar. The *qui tam* action was dismissed with prejudice.

***U.S. ex rel., Leveski v. ITT Educ. Servs. Inc.*, 2012 WL 266943 (S.D. Ind. Jan. 30, 2012)**

A relator brought a *qui tam* action alleging that her former employer, an educational institution, caused false claims for federal educational funds to be submitted to the government, by falsely certifying its compliance with a requirement not to base incentive compensation on student recruitment success. The defendant moved to dismiss the relator's complaint, arguing that the relator's allegations were based on publicly disclosed information from previously filed suits, and that she was not an original source of that information. The United States District Court for the Southern District of Indiana granted the defendant's motion, agreeing that the relator's allegations were based on public disclosures from a previously-filed *qui tam* action against the defendant.

The relator then moved to alter or amend the judgment, arguing that the court had committed two fundamental errors: (1) the court ignored the differences between her action and the previously filed action; and (2) the court did not apply binding Seventh Circuit precedent that purportedly set out a "notice of fraud standard" that applied to public disclosure.

Holding: The United States District Court for the Southern District of Indiana denied the relator's motion.

Public Disclosure Bar

The relator argued that the previously-filed suit was materially different from her action, because it involved a simple, direct, and obvious violation of the incentive compensation provision, as opposed to her allegations of a more elaborate and disguised violation. Due to these differences, she argued, her allegations were not based upon those in the previously-filed action. The court disagreed, as it found that the relator's allegations mirrors those in the previously-filed action, since both complaints alleged violation of the incentive compensation provision which, in turn, caused the submission of false claims to the government. The court held that the allegations raised in the

previously-filed action were sufficient to put the government on notice of the alleged fraud scheme. The relator then argued that her allegations could not have been based upon information from the previously-filed action, because her claims arose before the enactment of a safe harbor provision which allowed salary adjustments for recruiters not based “solely” on recruitment success. The court disagreed and held that the safe harbor provision was only designed to “clarify” the type of activity that violated the incentive compensation provision, and “was not a tectonic shift in the law.” Further, the court held that the safe harbor did not change the fundamental point that both cases alleged the same scheme of falsely certifying compliance with the incentive compensation ban.

The court distinguished this situation from situations in which a prior public disclosure did not include enough information to give rise to an inference that a particular defendant committed a particular fraud. The court found that here, the prior public disclosure alleged that the same defendant committed the same fraud—even though the allegations in the two cases were not identical, the court held that substantial similarity was all that was required. Accordingly, the court denied the relator’s motion to alter or amend its judgment.

FALSE CLAIMS ACT RETALIATION CLAIMS

***Goodwin v. Novartis Pharms. Corp.*, 2012 WL 1079086 (W.D. Ky. Mar. 30, 2012)**

The plaintiff brought an action against her former employer, a pharmaceutical corporation, alleging unlawful retaliation and other employment law claims under the False Claims Act and common law claims. The plaintiff alleged that the defendant retaliated against her after she internally reported her concerns that off-label marketing tactics discussed at a training session were illegal and violated the False Claims Act. Specifically, the plaintiff alleged that she informed her immediate supervisor of her concerns, she reported her concerns through the defendant's internal compliance hotline, she spoke directly with the company's ethics and compliance director, and she spoke to a member of the defendant's corporate security team. She claimed that none of those efforts led to any changes to the defendant's marketing plans, but instead, the plaintiff suffered retaliation, as she was harassed, was avoided by other employees, was placed under a new supervisor, was denied managerial support, was not given credit for work she had done, and received two unsigned letters at her home—ostensibly from other employees of the defendant corporation—demanding that she quit her job. The defendant moved to dismiss her retaliation claim under the False Claims Act for failure to state a claim.

Holding: The United States District Court for the Western District of Kentucky denied the defendant's motion to dismiss the FCA retaliation claim.

Retaliation

The defendant first argued that the plaintiff's retaliation claim failed because she could not show that she had engaged in any protected activity under the FCA, as she did not allege that the defendant submitted any false claim for payment to the government. Further, the defendant argued that the plaintiff's internal reporting only raised concerns regarding violations of government regulations, not FCA violations. The court, though, found that the plaintiff repeatedly expressed concerns about possible FCA violations, not just regulatory matters. The court further determined that drug manufacturers can be liable under the FCA for encouraging submitting reimbursement claims to the government that are based on off-label prescriptions, and thus, the plaintiff was not required to demonstrate that the defendant submitted false claims to the government. Accordingly, the court held the plaintiff sufficiently pleaded that she had engaged in protected activity under the False Claims Act.

The court then turned to the defendant's argument that it did not have notice of the plaintiff's protected activity. First, the court found that reporting possible illegal conduct was not part of the plaintiff's job duties, and thus, her complaints were not

routine. The court also found that the plaintiff's internal complaints specifically referenced possible FCA violations, thus putting the defendant on notice that her complaints could lead to a *qui tam* action. As a result, the court held that the plaintiff's complaints to the defendant satisfied the notice element of an FCA retaliation claim. Lastly, the court found that the defendant never challenged the plaintiff's assertion that her protected activity was the cause of the defendant's retaliatory conduct. Accordingly, the court held that the plaintiff sufficiently pled each element of a retaliation claim under the FCA. The defendant's motion to dismiss the FCA retaliation claim was denied.

***Rohler v. Rolls-Royce Corp.*, 2012 WL 1098636 (S.D. Ind. Mar. 30, 2012)**

A plaintiff brought an employment law action against her former employers—an aero-engine manufacturing company and its affiliate—alleging, among other things, violations of the False Claims Act's anti-retaliation provision that arose following the plaintiff internal reporting of the defendants' falsification of information and submissions of fraudulent claims to the government. The defendants moved for summary judgment.

Holding: The United States District Court for the Southern District of Indiana granted the defendants' motion.

Retaliation

The court began by dismissing the claim against the affiliated defendant, noting that at the time the alleged retaliation occurred, the plaintiff was not employed by that the defendants. The court then examined the retaliation claim against the remaining defendant and found that the plaintiff failed to satisfy all of the necessary elements for pleading her FCA claim. First, the court determined that the plaintiff could not demonstrate that she engaged in a protected activity. The court noted that the plaintiff's retaliation claim was based on internal reporting of a conversation she overheard in which her supervisor advised another employee to "make up" something—the plaintiff conceded that she could not remember the substance of the conversation and did not know whether the supervisor had instructed the other employee to submit any false information to the U.S. government. The court held that the plaintiff's claim was based on tenuous facts and that a reasonable employee overhearing the same conversation or receiving the plaintiff's internal reports would not conclude that the defendant was defrauding the United States. Thus, the court held that the plaintiff failed to show that she engaged in protected activity, pursuant to the FCA's anti-retaliation provision. Since the plaintiff was unable to show that she had engaged in protected activity, she could not demonstrate that the defendant was on notice of any protected activity or retaliated against her in response. Consequently, the defendant's summary judgment motion was granted and the plaintiff's FCA retaliation claim was dismissed.

***Manfield v. Alutiiq Intern. Solutions, Inc.*, 2012 WL 1048597 (D. Me. Mar. 28, 2012)**

Two plaintiffs brought an action against their former employer and its subsidiaries, alleging a variety of claims. Included among the allegations was a claim by plaintiff Manfield for retaliatory discharge under the False Claims Act. Manfield alleged that he had been employed as one of the defendants' site supervisors, with responsibility for security at a naval shipyard. Manfield alleged that the defendants shipped a package of ammunition to him at the shipyard, without having the proper memorandum of understanding (MOU) in place with the Navy. As a result, he claimed, he was not allowed to legally accept the delivery. Although he eventually found a place where he could legally store the ammunition, he informed the defendants' project manager of the problem with the delivery. He claimed that his supervisor became upset that he was "not willing or able to help us out." Manfield alleged that the defendants later sent a shipment of guns to him, prior to executing an MOU with the Navy. Again, he refused the delivery and informed another of his superiors of the problem. He was then directed to accept the delivery of a "computer," but he noticed that the "computer" had the same tracking number as the guns. He informed both of his superiors that the "computer" delivery actually contained guns, but did not receive a response from them.

Subsequently, the defendants executed an MOU with the Navy. A day after the MOU was approved, the defendants brought rounds of frangible ammunition to the security officers at the shipyard. This delivery violated the defendants' contract with the Navy, which required the defendants to provide the more lethal ball ammunition. Manfield claimed that he informed his manager of the contract violation, and the manager agreed with his assessment and stated that ball ammunition would be delivered to replace the frangible ammunition. Manfield also reported problems with the gun belts and holsters the defendants provided to their security officers, as the equipment did not meet contract specifications and created safety hazards. Furthermore, Manfield alleged that several of his co-workers were not properly paid for the time they worked for the defendants and that he alerted the defendants' human resources department of the discrepancies and directed his co-workers to do the same. He alleged that some of the other security officers may have filed complaints with the Department of Labor. Days later, Manfield met with his manager and was informed that he was being fired from his job. He alleged that the manager told him that the defendants did not trust his decision to refuse pre-MOU shipments or to instruct other employees to contact human resources regarding their payroll issues. The defendants moved to dismiss Manfield's retaliation claim, arguing that Manfield failed to state a claim under the FCA for which relief might be granted.

Holding: The United States District Court for the District of Maine denied the defendants' motion.

Retaliation

Manfield argued that he was protected from retaliation under the False Claims Act's anti-retaliation provision because his complaints to his supervisors about the defendants' alleged attempts to make improper ammunition deliveries and their distribution of improper gun belts and holsters constituted protected activity under the FCA. Manfield further argued that the defendants knew that he was engaged in protected activity and that he was discharged, at least in part, because of his complaints. The court found that neither Manfield's reporting of his co-workers' payroll complaints, nor his complaints of unlawful shipments of guns and ammunition were related to potential FCA violations, and therefore could not be considered protected conduct. However, the court also found that Manfield's reports regarding the inadequacy of equipment distributed to security officers under the contract with the Navy could concern possible FCA violations.

The defendants argued that alleged equipment deficiencies at best amounted to a breach of contract, which could not form the basis of an FCA claim—they argued that Manfield's retaliation allegations were fatally defective because they did not specify how the allegedly inadequate gear provided by the defendants was linked to the presentment of any false or fraudulent claims to the government. The court rejected the defendants' argument, noting that the FCA includes liability provisions that are not tied to the presentment of false claims to the government. The court also found that although Manfield did not allege how the defendants were paid by the government, he did allege that the defendants and Navy had a contract for security services and that the contract itself constituted a claim for payment, for FCA purposes. The court stated that the defendants' representations to the government regarding their future compliance with the Navy contract will amount to false statements for FCA purposes, if either the defendants made those representations with the intention of shortchanging the government or if they recklessly disregarded the contract's requirements. The court also mentioned that Manfield's manager admitted that the defendants' actions had violated the contract, and held that although these contractual violations may have stemmed from honest mistakes, they also may have resulted from fraud. Since all reasonable inferences were construed in favor of the plaintiff at the motion to dismiss stage, the court held that Manfield has alleged a sufficient factual predicate for his claim that he was engaged in protected conduct when he reported potential violation of the Navy contract to his employer.

The court further found that the defendants were aware of Manfield's protected activity, since his internal reporting to his former employer constituted both an effort to stop a potential FCA violation and put the employer on notice that Manfield had engaged in activity that could reasonably lead to the filing of an FCA suit. Finally, the court held that Manfield alleged sufficient facts to support his claim that he was fired for a retaliatory reason, and not, as the defendants claimed, for being defiant and uncooperative. The court concluded that a reasonable inference could be drawn that the defendants fired Manfield because they could not trust him to ignore improper

conduct. Therefore, the court held that there was at least some factual support for Manfield's allegation. Accordingly, the court denied the defendants' motion to dismiss the retaliation claim.

***U.S. ex rel. George v. Boston Scientific Corp.*, 2012 WL 1038633
(S.D. Tex. Mar. 27, 2012)**

A relator brought a *qui tam* action against two companies—Guidant Corp. (GS) and Boston Scientific (BS)—both of which designed, developed and marketed cardiovascular products. She alleged that BS acquired GS's Cardiac Rhythm Management and Cardiac Surgery Units and that GS hired her as a manager during the transition. She claimed that the defendants violated the False Claims Act by improperly promoting a medical device for an off-label use, which caused physicians to submit fraudulent reimbursement claims to Medicare and Medicaid. She also included a claim under the FCA for retaliatory discharge, alleging that she openly complained about the defendants' off-labeling marketing and healthcare fraud, and was harassed and within months, was terminated from her job. The relator's complaint was dismissed, but she was granted leave to amend. She filed an amended complaint that only asserted her retaliation claim. The defendants moved to dismiss that complaint, arguing that the plaintiff failed to state a claim for relief under the FCA and that her claim was time-barred.

Holding: The United States District Court for the Southern District of Texas denied the defendants' motion.

Retaliation

The defendants first contended that the plaintiff's retaliation claim was time-barred. They argued that the most closely analogous state law limitations period applied to the claim and that the Texas Whistleblower Act, with its 90-day statute of limitations, was the most closely analogous state law. The Texas district court rejected this argument, noting that the Fifth Circuit had already decided that the two-year statute of limitations for personal injury claims applied to FCA retaliation claims filed in Texas. The plaintiff's claim was filed within this time frame, and thus, the court held, her retaliation claim was not time-barred.

Next, the court next examined whether or not the plaintiff had engaged in protected activity. The plaintiff alleged that the defendants were well aware of the dangers of off-label marketing and that she'd asked, during two separate employee presentations, whether the government would view BS's marketing of a medical device for off-label uses as fraud. The defendants argued that the plaintiff failed to allege that she engaged in protected activity because she did not expressly complain to the defendants about fraud against the government or about making false claims for federal funds, nor did she inform management of her intention to file a *qui tam* action. The court found

that the plaintiff's allegations of asking questions about the legality of off-label promotions of medical devices during employee presentations was sufficient to support a reasonable conclusion that BS could have feared being reported to the government for fraud or sued in a *qui tam* action by the plaintiff or another employee attending the presentations. The court noted that the plaintiff further alleged that after she complained to the defendants, she was reprimanded and warned that she could lose her job. The court concluded that the plaintiff properly alleged that she had engaged in protected activity under the FCA.

The court also held that the plaintiff adequately pled that the defendants were on notice of her protected activity. The court rejected the defendants' argument that the plaintiff's claim was deficient because she did not allege who made the decision to fire her or whether that person knew about the questions and concerns she raised during employee presentations. Rather, the court relied on the plaintiff's allegations that her manager was present at both presentations and certainly knew about her complaints, and that the same manager was one of the people who reprimanded her and told her to resign. Therefore, the court held that the defendants were on notice of the plaintiff's protected activity.

Finally, the court examined causation. The defendants argued that they fired the plaintiff because she did not complete work on time. The plaintiff, of course, contended that, because of her whistleblowing activity, the defendants held her to a higher standard than other employees, and that she was reprimanded, told to stop inquiring into the legality of off-label marketing, instructed not to discuss her allegations with anyone else and told that she should resign, improperly placed on a performance improvement plan, required to return internal telephone calls within 30 minutes or face termination, harassed with telephone calls at all hours and held out as an example to the other employees. The court found that these detailed allegations, coupled with the approximate two-month time period between the plaintiff's complaints and her termination, were sufficient to state a retaliation claim under the FCA. The defendants' motion to dismiss was denied.

***Tolman v. Am. Red Cross*, 2012 WL 892312 (D. Idaho Mar. 14, 2012)**

A plaintiff brought an action against his former employer—the Idaho Chapter of the American Red Cross—as well as its national parent organization—the American Red Cross—alleging, among other things, that the defendants violated the False Claims Act by firing him from his job in retaliation for his complaints about their alleged misuse of public funds. This claim had been previously dismissed for failing to state a claim, as the U.S. District Court for the District of Idaho held that the plaintiff failed to show that he had engaged in “protected conduct” under the FCA, since his complaint failed to adequately describe the defendants' alleged fraud against the government about which he had complained. The plaintiff was granted an opportunity to amend his complaint. His amended complaint included more specific allegations, including allegations that the CEO of the Idaho Chapter

failed to do fundraising or to hold required fundraising meetings, cut employee pay instead and immediately fired the finance director who challenged her decision, fired the plaintiff when he complained about her misuse of funds as well, and later raised about \$90,000 from a raffle fundraiser that went “missing.” The defendants again moved to dismiss his retaliation claim, arguing that he failed to state a claim under the FCA and that he failed to allege the fraud scheme with particularity.

Holding: The United States District Court for the District of Idaho granted the defendants’ motion in part.

Retaliation

In response to the defendants’ argument that his complaint did not describe a fraud on the government, the plaintiff asserted that his allegations about the CEO’s misuse of the raffle funds was sufficient to state a fraud against the government. The court, though, noted that the raffle fundraiser occurred after the plaintiff had been fired, so any complaints about the raffle funds could not have led to his termination. Thus, the court was left to consider whether or not the plaintiff’s complaints about the defendants’ financial mismanagement amounted to “protected activity” under the FCA. The court first determined that actionable conduct under the FCA involves a false assertion of entitlement to obtain or retain government money or property. The court then held that the plaintiff’s complaint did not include any such allegation, stating that “at most, he is complaining about mismanagement and intimidation tactics.” As a result, the court dismissed the relator’s retaliation claim once again.

***Gerhard v. D Constr., Inc.*, 2012 WL 893673 (N.D. Ill. Mar. 14, 2012)**

A plaintiff brought an action against his former employer, a construction company and its owners, alleging, among other things, a claim for retaliatory discharge under the False Claims Act. The plaintiff alleged that the defendants received federal funds under the American Reinvestment and Recovery Act to complete various construction projects and that the defendants’ government contracts included the defendants’ agreement to comply with all applicable laws and regulations in performing their work. He further alleged that he was hired by the defendants as a safety inspector and that observed and reported OSHA violations at two of the defendants’ federally-funded work sites. The plaintiff alleged the defendants’ safety manager instructed him to attend a training program at a nuclear power plant, which the plaintiff ultimately did not attend due to concerns about his health. He was fired the next day. The plaintiff alleged that the training program was not mandatory, and that he was fired in retaliation for reporting the defendants’ non-compliance with their contractual obligations. The defendants’ moved for summary judgment on the plaintiff’s claim.

Holding: The United States District Court for the Northern District of Illinois granted the defendants' motion to dismiss the retaliation claim. The court rejected the plaintiff's argument that the defendant's mere non-compliance with OSHA could result in a fraud on the government, noting that the plaintiff had not offered any authority for such a broad reading of the False Claims Act—a reading that the court said would mean that “any violation of any law or regulation on the job site of a construction company receiving ARRA stimulus funds would potentially violate the FCA.” The court also mentioned that the plaintiff failed to show that the defendants had any knowledge of his alleged protected conduct, finding no evidence that the plaintiff ever informed the defendants that he was engaged in actions that could result in the filing of an FCA complaint. Instead, the plaintiff only reported safety violations to the defendant, consistent with his normal job responsibilities.

***Guerrero v. Total Renal Care, Inc.*, 2012 WL 899228 (W.D. Tex. Mar. 12, 2012)**

A plaintiff brought an action against his former employer, a renal care provider, alleging retaliatory discharge in violation of the False Claims Act. He alleged that one of his co-workers committed Medicare and Medicaid fraud by charging for procedures that were not performed or that were not ordered by doctors. He further alleged that he notified the defendant's director of the fraudulent activity and the director became incensed and threatened to report false allegations about the plaintiff to the human resources department. The relator claimed that he also discussed the matter with another supervisor, whom he also told that he was going to report the alleged fraud to the director's superiors, as he did not believe that the director would remedy the problem. The plaintiff was later terminated from his job, without explanation, and before he had been able to discuss the alleged fraud with the director's superiors. The defendant moved to dismiss the plaintiff's claims for failure to plead the alleged fraud with particularity. The defendant also argued that the plaintiff's actions did not amount to “protected activity” under the False Claims Act and that it had no knowledge of the plaintiff's investigation of alleged fraud against the government.

Holding: The United States District Court for the Western District of Texas denied the defendant's motion.

Retaliation

The court first analyzed whether Rule 9(b)'s heightened pleading standard applied to the plaintiff's claims. The defendant had argued that since retaliation claims under the False Claims Act must be “supported by an allegation of fraud against the government,” such claims are subject to Rule 9(b)'s particularity standard. The court rejected the defendants' argument and noted that all circuit courts that have considered the is-

sue have held that retaliation claims under the FCA are not dependent on allegations of fraud, and thus, retaliation claims need not be pled with particularity.

The court then turned to the issue of whether the plaintiff's actions constituted protected conduct under the FCA. The plaintiff argued that both his reports to the director about "Medicare/Medicaid fraud" and his revelation to a co-worker that he planned to report the fraud to the director's superiors constituted protected activity. On the other hand, the defendant argued that the plaintiff's investigation of his employer's activities can only be deemed protected activity if the plaintiff could show that a viable FCA claim existed. The defendant argued that the plaintiff failed to allege that a viable FCA claim existed, since he failed to provide any examples of the fraud and failed to offer facts describing the fraud. The court held that the plaintiff's allegations were sufficient to state a claim, as he specifically alleged that he reported to a supervisor that the defendant was submitting fraudulent claims for federal funds.

The defendant then argued that the plaintiff failed to allege sufficient facts to show that he had a reasonable, good faith belief that the defendant was engaged in a fraud against the government. The court refused to apply such a standard—although it noted that courts in other jurisdictions had adopted a "good faith/reasonableness" test. Instead, the court declared that the FCA provides protection from retaliation even before the plaintiff has completely discovered the fraud or "put all of the pieces of the puzzle together," and "even if it is later discovered that no fraud occurred." Thus, the court held that the plaintiff was not required to plead details regarding the underlying fraud or his good faith belief that a fraud was occurring.

Finally, the court considered the defendant's argument that it had no knowledge of any protected conduct by the plaintiff, since the plaintiff did not give the defendant any details or substantive information about the alleged fraud. The plaintiff argued that the defendant was on notice of his protected activity, since he specifically informed his supervisor that the defendant's employee was committing fraud. The court agreed with the plaintiff and found that his assertion that he internally reported a co-worker's submission of fraudulent claims to two supervisors was sufficient to put the defendant on notice of his protected activity. Therefore, the court denied the defendant's motion to dismiss.

***James v. Conceptus, Inc.*, 2012 WL 845122 (S.D. Tex. Mar. 12, 2012)**

A plaintiff brought a claim against his former employer, a medical device firm, alleging retaliation under the False Claims Act. According to the relator, who had been employed as one of the defendant's sales representatives, the defendant fired him from his job after he questioned the legality of the defendant's sales practices with respect to the marketing of certain medical devices to doctors and subsequent claims to Medicaid for reimbursement. The defendant moved to dismiss the plaintiff's complaint and to compel arbitration of the plaintiff's claims, citing the employment agreement between the two parties. The plaintiff countered that the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (the Act) made the arbitration clause unenforceable.

Holding: The United States District Court for the Southern District of Texas granted the defendant's motion and held the arbitration clause was enforceable, since the Act did not invalidate such clauses in the context of FCA retaliation actions, although it did so for retaliation actions brought under the whistleblower provisions of the Commodities Exchange Act and the Sarbanes-Oxley Act. The court did not that the arbitration clause was unconscionable under California law, to the extent that it required the plaintiff to pay half of the defendant's arbitration costs; it was not unconscionable, however, to the extent that it required the plaintiff to arbitrate his claim in California.

As a result, the plaintiff's retaliation claim was dismissed without prejudice, in favor of arbitration in California, pursuant to the parties' agreement.

***Khami v. Ortho-McNeil-Janssen Pharm., Inc.*, 2012 WL 414812 (E.D. Mich. Feb. 8, 2012)**

A plaintiff brought an action against her former employer (a pharmaceutical company) and two supervisors. The plaintiff, who had been employed as a pharmaceutical sales representative, alleged among other things, that the defendants violated the anti-retaliation provision of the False Claims Act, as well as other federal and state laws, by laying her off and refusing to re-hire her after the defendant corporation disbanded its sales force and transferred about half of those employees to another of its divisions. With respect to her False Claims Act assertions, the plaintiff alleged that the corporate defendant had encouraged its sales representatives to illegally promote one of its drugs for off-label uses. She alleged that the company pled guilty to criminal charges stemming from this conduct, and was fined by the U.S. Food and Drug Administration. She alleged that she testified before the grand jury that investigated the company's illegal activity and that she subsequently refused to engage in off-label promotion of the drug. She claimed that her testimony and refusal amounted to protected activity under the FCA, that the defendants were aware of these activities, and that the activities were factors in the company's decision not to re-hire her. As a result, she alleged, the defendants violated the FCA's anti-retaliation provision. The defendants argued that they had legitimate, non-pretextual reasons for terminating the plaintiff's job, and that there was no causal connection between her grand jury testimony and her termination. The defendants moved for summary judgment.

The United States District Court for the Eastern District of Michigan denied the defendants' motion with respect to the plaintiff's FCA retaliation claim. The court held the plaintiff's grand jury testimony constituted protected activity, and that the defendants were aware of this activity. The court noted that this protected activity could have been the reason for her termination, and thus held that summary judgment was not proper, due to disputed issues of material fact regarding the cause of her termination.

***U.S. ex rel. Hendren v. Mayo*, 2012 WL 405665 (N.D. Miss. Feb. 8, 2012)**

Two relators (Hendren and Day) brought a *qui tam* action against five healthcare service providers (Mayo, UHS, Parkwood, MPM and Evergreen) and several individuals, alleging that the defendants violated the False Claims Act and other federal and state laws, by engaging in Medicare fraud. Specifically, the relators alleged that the defendants engaged in patient “poaching,” by allowing patients to be diverted from one of the relators’ practices to another provider. The relators alleged that this other provider was confronted about the alleged poaching and informed that any Medicare claims he submitted for services provided to patients in the absences of a written order from a treating physician were fraudulent. The relators also alleged that after they discovered and reported the poaching to the defendants, the defendants retaliated against them by revoking one of the relators’ privileges to maintain office space at one of the defendants’ facilities and by issuing a warning to the other relator, after he conducted an audit that allegedly uncovered the poaching activity. As a result, the relators added an FCA claim for retaliation to their complaint. Defendants Mayo, UHS, and Parkwood moved to dismiss the relators’ complaint, arguing that the relators failed to state a claim and failed to plead the alleged fraud with particularity. Further, these defendants argued that the relators’ claims were frivolous and that the defendants were entitled to recover their attorneys’ fees from the relators.

Holding: The United States District Court for the Northern District of Mississippi granted the defendants’ motion to dismiss the relators FCA allegations, but denied their request for attorneys’ fees.

Pleading Fraud with Particularity

The court began by analyzing Rule 9(b)’s particularity requirement. It found that the relators failed to allege the “who, what, when, where, and how” of the alleged fraud. The court noted that the relators’ complaint did not include an “allegation that the defendants submitted bills for unperformed services or acted with the intent of getting a false claim paid by the Government.” Accordingly, the court held the relators’ complaint failed to meet the particularity requirements and should be dismissed on that basis.

Retaliation

The court then analyzed the relators’ retaliation claims under the FCA. The court observed that at the time the plaintiffs filed their retaliation claims, the FCA only protected “employees” from retaliation. One of the relators was never an “employee” of any of the defendants, and was only allowed to rent space at one of the defendants’ facilities. Thus, the court held, that relator was not protected by the FCA’s anti-retaliation

provision, as that provision existed at the time of the alleged retaliation. The court held that the second relator had been an employee of one of the defendants, until he conducted an audit of that defendant's practices, allegedly discovered the poaching activity, received a warning from that defendant, and ultimately chose to find another job. The court, though, found that this second relator failed to allege that he engaged in protected activity, as the audit he conducted was encompassed by his routine job functions, and therefore did not put the defendant on notice of any protected activity under the FCA. Accordingly, the court dismissed the relators' retaliation claims.

Attorneys' Fees

Finally, the court considered the defendants' requests for their attorneys' fees. The court found the relators' claims did not meet the standard set forth under the FCA as the claims were not clearly frivolous nor were they brought primarily for the purposes of harassment. Therefore, the court denied the defendants' request.

***Harrington v. Aggregate Indus. Northeast Region, Inc.*, 2012 WL 372708 (1st Cir. Feb. 7, 2012)**

A plaintiff brought a claim under the False Claims Act, alleging that the construction company he had previously worked for retaliated against him and fired him, in response to his protected whistleblowing activity. The plaintiff had previously served as a relator in a *qui tam* lawsuit against the defendant, in which he alleged that the defendant had substituted substandard material for the concrete specified in the defendant's contract to build the "Big Dig"—a highway project in which significant federal funds were used. The United States intervened in the *qui tam* action, the parties reached a settlement, and the relator received a percentage of the government's proceeds from that settlement. The plaintiff alleged that a few days after the settlement agreement was executed, the defendant retaliated against him by firing him from his job. The defendant moved for summary judgment on the plaintiff's retaliation claim, contending that the plaintiff was fired for refusing to take a drug test. The United States District Court for the District of Massachusetts granted the defendant's motion, finding that the plaintiff failed to establish a causal connection between his protected whistleblowing activity and his termination. The plaintiff appealed the district court's ruling to the United States Court of Appeals for the First Circuit.

Holding: The U.S. Court of Appeals for the First Circuit vacated the district court's order and remanded the matter for further proceedings.

Retaliation

The appellate court first concluded that the plaintiff presented a *prima facie* case of retaliation, noting that he alleged that some of the defendant's high-ranking executives

were aware of his status as a relator months before he was fired and that the termination occurred within days of the settlement agreement being signed. The court rejected the defendant's argument that the plaintiff's act of signing the settlement agreement was not protected activity, since that act was not conduct "in furtherance of" a *qui tam* action, but instead, ended the action. The court instead found that the plaintiff's "execution of the settlement agreement was surely conduct in furtherance of that action" commenced by the relator—the action that was resolved when the relator signed the settlement agreement.

The circuit court then turned its attention to the defendant's assertion that the plaintiff was fired for a legitimate, non-retaliatory reason, namely, his refusal to take a drug test. The court found that the record casted substantial doubt as to whether the defendant followed its own drug testing protocols when requiring the plaintiff to submit to a drug test and then firing him for refusing to do so. The court observed that when the defendant initially insisted that the plaintiff take a drug test, he objected, citing his union contract, and the defendant did not press the issue further. The court noted that the defendant tried to force the plaintiff to take a drug test a second time, telling him that the test was required as a follow up to a prior positive test result from years before. The plaintiff again refused and brought the matter to his union representative. The defendant relented once again. Finally, the defendant made a third attempt to force the plaintiff to submit to a drug test, telling him that his name was randomly selected by a third-party testing company. The court, though, found that the defendant failed to provide any evidence showing the plaintiff was randomly selected. Ultimately, the circuit court concluded that the defendant's behavior created a reasonable inference that the plaintiff was terminated for retaliatory reasons.

The defendant then argued that the plaintiff was barred from bringing a retaliation claim because the settlement agreement in the *qui tam* action, since that settlement released all of the plaintiff's claims against the defendant. The defendant argued that although the plaintiff was fired after the release was signed, the alleged conduct underlying the firing occurred before the execution of the settlement agreement and therefore, his "claim" arose at that time. The court disagreed and held that the plaintiff retaliation claim was limited to the defendant's post-settlement conduct, and that the defendant only informed the plaintiff that he would be terminated after the settlement agreement had been signed. Thus, the circuit court held, the termination itself was the incident out of which the plaintiff's retaliation action arose, and the prior settlement agreement did not bar the plaintiff from bringing that claim.

***Clinkscales v. Walgreen Co.*, 2012 WL 80543 (D.S.C. Jan. 11, 2012)**

A plaintiff brought an action against his former employer, a pharmacy company, alleging a retaliation claim under the FCA, as well as claims under common law. The plaintiff, who had been employed as a pharmacist at one of the defendant's stores, alleged that the defendant's computer system experienced problems, resulting in numerous prescription sales not being properly recorded as sold, but rather

as “ready.” The plaintiff alleged that he was instructed to perform a reconciliation, in order to compare the prescriptions that the computer indicated were “ready” with the prescriptions that were actually physically available in the stores bins for pickup—this reconciliation would assist the store in determining how many of the prescriptions actually had been sold. The plaintiff began performing the reconciliation, and discovered that nearly 200 prescriptions were listed as “ready”, but were not physically available in the bins, and had not been otherwise noted as sold. As a result, the defendant could not immediately verify whether those prescriptions had been sold without first being properly scanned (which would have removed the “ready” status), had been put back into the defendant’s stock, or had been stolen. The plaintiff alleged that he twice asked the store’s manager for guidance with respect to performing the reconciliation, and eventually refused to finish the reconciliation, and asserted that he believed that doing so would result in unlawful billing to the government—it is unclear whether the prescriptions at issue were for Medicare/Medicaid patients. The store manager, however, believed that the plaintiff simply did not understand how to perform the reconciliation, and left his own work for another employee to complete.

Within two weeks of that incident, the store manager reviewed store surveillance video that showed the plaintiff behaving erratically on the job and violating various company policies. The plaintiff received written warnings for his misconduct and soon after was placed on short-term, and eventually, long-term disability, due to his bi-polar condition. A year later, his employment with the defendant ended, and subsequently, he filed the present action against the defendant, alleging that he was, in essence, “constructively discharged” from his job. The defendant moved for summary judgment on the plaintiff’s FCA retaliation claim.

Holding: The United States District Court for the District of South Carolina granted the defendant’s motion for summary judgment on the plaintiff’s retaliation claim under the False Claims Act.

FCA Retaliation Claims

The defendant first argued that the plaintiff’s retaliation claim failed because he did not plead that he had engaged in protected activity under the False Claims Act. In response, the plaintiff argued that he had engaged in protected conduct, since he expressed his concerns about possible improper billing practices and refused to perform the bin reconciliation. The court noted that the FCA’s anti-retaliation provision protects plaintiffs who hold a reasonable, good faith belief that a defendant has submitted a false claim to the government—even if that belief is ultimately unsubstantiated. The court, however, also noted that mere allegations of “mischarging” or investigations of a defendant’s non-compliance with federal or state regulations does not rise to the

level of protected conduct. The court concluded that the plaintiff did not engage in protected activity under the FCA, because he never alleged that he informed the store manager of his suspicions that the defendant might submit false claims to the government or that he believed that the reconciliation process might be illegal. Thus, the court held, not only did the plaintiff's conduct not rise to the level of "protected activity" under the FCA, even if it did, there was no evidence that the employer-defendant had knowledge of any protected activity, and thus, the defendant could not have retaliated against the plaintiff in response to the plaintiff's actions—in fact, the court noted that the written warnings issued to the plaintiff did not result in a termination, suspension, pay decrease or demotion, and that the defendant had a legitimate, non-retaliatory reason for its warning, given the plaintiff's misconduct that was captured on video. Accordingly, the court held the defendant was entitled to summary judgment on the retaliation claim.

***Riddle v. Dyncorp Intern. Inc.*, 2012 WL 19794 (5th Cir. Jan. 5, 2012)**

A plaintiff brought an action against his former employer and three of its employees, alleging a claim for retaliation under the False Claims Act. Specifically, he alleged that the corporate defendant contracted with the federal government to create a database, but never took any meaningful step to fulfill its obligations. He further alleged that when he protested the company's inaction, he was marginalized at work and was eventually terminated. The defendants moved to dismiss his claim, arguing that the claim was time-barred. At the time the plaintiff's complaint was filed, the FCA did not include a statute of limitations for retaliation claims and courts looked to the most analogous state law and applied that law's statute of limitations. The United States District Court for the Northern District of Texas agreed with the defendants that the 90-day limitations period of the Texas Whistleblower Act (TWA) applied to the plaintiff's claim. Since the plaintiff's claim was filed 178 days after he was terminated from his job, the district court held that his claim was time-barred and the claim was dismissed. The plaintiff appealed the district court's ruling to the U.S. Court of Appeals for the Fifth Circuit, arguing that a the TWA is not the most closely analogous Texas state law to the federal FCA, and that the district court should have applied a longer limitations period; the plaintiff noted that a few months after he filed his complaint, the FCA was amended to include a standard three-year limitations period for retaliation claims, and he argued that this new three-year period should have been applied to his claim.

Holding: The United States Court of Appeals for the Fifth Circuit reversed the district court's ruling and remanded the case for further proceedings, finding that the district court erred by referencing the limitations period contained in the TWA.

Statute of Limitations for FCA Retaliation Claims

The plaintiff argued that the district court erred by looking to the TWA for the appropriate limitations period to apply to his FCA retaliation claim. The Fifth Circuit agreed and noted that the Texas legislature enacted several whistleblower statutes for various types of whistleblowers, and that some of those statutes were specific to whistleblowers in certain employment fields. The appellate court further observed that the TWA was intended to only apply to a specified group of employees—namely, public employees—and thus, should not have been referenced with respect to the plaintiff's claim. The circuit court stated that “[i]n light of Texas’s status-based whistleblower regime, it makes no more sense to borrow from the statute for public employees than it would to borrow from the statute for hospital employees, physicians, nursing home employees, agricultural laborers, or handlers of hazardous materials. Each of these employment fields benefits from a different Texas whistleblower statute.” The court also noted that the TWA generally requires public employees first to pursue retaliation claims through administrative proceedings, during which time the 90-day statute of limitations period is suspended. Since the plaintiff was not a public employee and could not avail himself of those administrative remedies, the Fifth Circuit concluded that he was deprived of an extended limitations period by the district court.

Rather than apply the TWA, the Fifth Circuit held that the two-year limitations period for personal injury claims under Texas law should be applied. The court held that the personal injury provision was more analogous to the FCA than the TWA, because it applied to private employees and applied broadly to actions for wrongful discharge, including wrongful discharge claims that arise when a person is terminated for refusing to commit an illegal act—the appellate court held that, like the FCA, these types of claims “protect law-abiding employees from retaliation from their law-breaking employers and superiors.”

The circuit court considered the plaintiff's argument that, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the FCA's anti-retaliation provision was amended to include a standard three-year statute of limitations, and that this three-year limitations period applied to his retaliation claim. However, the court observed that the amendment was enacted months after the relator's claim was filed, and thus, was not in effect at the time his claim was made. The appeals court did acknowledge that newly-enacted statutes of limitations are sometimes applied to pending cases, but only when doing so would not revive claims that had already expired before the new limitations period took effect. Thus, had the plaintiff's limitations period expired before the amendment was enacted—which would have been the case if the 90-day limitations period applied—then the newly-enacted FCA limitations period would not have revived his claim. But since the court determined that a two-year limitations period applied to the plaintiff's claim, and since the plaintiff's complaint was filed well within that time period, the court concluded that the plaintiff's claim was timely, essentially leaving open the question of whether the amended FCA's statute of limitations should be applied retroactively. In any event, the Fifth

Circuit ruled that the district court erred in applying the TWA's limitations period and dismissing the plaintiff's complaint as time-barred. The district court's judgment was reverse and the case was remanded for further proceedings.

See *U.S. ex rel. Moore v. Cmty. Health Servs., Inc.*, 2012 WL 1069474 (D. Conn. Mar. 29, 2012), at page 65.

See *U.S. ex rel. Bartz v. Ortho-McNeil Pharm., Inc.*, 2012 WL 695886 (D. Mass. Mar. 2, 2012), at page 22.

See *U.S. ex rel. Kappenman v. Compassionate Care Hospice of the Midwest, L.L.C.*, 2012 WL 602315 (D.S.D. Feb. 23, 2012), at page 87.

See *U.S. ex rel. Sasaki v. N.Y. Univ. Med. Ctr.*, 2012 WL 220219 (S.D.N.Y. Jan. 25, 2012), at page 74.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Pro Se Relator

***U.S. ex rel. Pedersen v. Hosp. Corp. of Am., Inc.*, 2012 WL 718896
(D. Utah Feb. 14, 2012)**

A *pro se* relator brought a *qui tam* action against several hospitals and various individual defendants. The defendants moved to dismiss the relator's claims under the False Claims Act, arguing that the statute does not allow *pro se* relators to proceed on behalf of the government. The relator moved for an extension of time to obtain legal counsel and to respond to the motions. The United States District Court for the District of Utah referred the matter to a magistrate judge whose Report and Recommendation suggested that the court grant the defendants' motions. The magistrate, relying on case law from various circuit courts, concluded that the FCA does not *pro se* relators to prosecute *qui tam* actions on behalf of the government—the real party in interest. The district court agreed. The magistrate also recommended that the district court deny the relator's motion, noting that the relator purportedly requested additional time to retain new counsel because his prior attorney withdrew from the case "without cause and without warning." The magistrate, however, determined that the relator had never been represented by counsel, and that there was no evidentiary support for the relator's request for an extension based on a showing of "good cause." Again, the district court agreed and the relator's request was denied.

B. Releases/Waiver/Estoppel

***U.S. ex rel. Linnette Sun and Greg Hamilton v. Baxter Healthcare Corp.*, 2012 WL 366599 (D. Mass. Jan. 26, 2012)**

Two relators brought a *qui tam* action against a pharmaceutical company, alleging violations of the FCA, Stark Act, the Medicaid Best Prices Statute and various state laws. Specifically, the relators alleged that the defendant inflated the prices of various drugs (Recombinate and Advate) and biologics, causing false claims to be submitted to Medicaid and Medicare. In a prior *qui tam* action, another relator alleged that various pharmaceutical companies, including the defendant, had inflated prices of various drugs, including Recombinate, causing false claims to be submitted to Medicaid and Medicare. The defendant and the prior relator reached a settlement agreement, in which the defendant agreed to pay the United States 425 million to resolve the prior relator's claims. In exchange, the defendant was released from any further liability arising from the alleged misconduct. The government consented to the agreement and the prior relator's suit was dismissed with prejudice. In the present action, the defendant moved for partial summary judgment, arguing that the present relators' claims were barred by the settlement agreement. Even though the prior relator had not alleged a fraud scheme with respect to the drug Advate, the defendant argued that the settlement agreement was so broad that it covered any alleged wrongdoing with respect to that drug as well.

Holding: The United States District Court for the District of Massachusetts granted the defendant's motion.

Settlement Agreements and Release of FCA Claims

The defendant argued that the present relators were barred by the prior settlement agreement and release, because the government had an opportunity to object to the broad terms of the agreement, but failed to do so. The relators countered that the government expressly consented only to the dismissal of claims brought by the prior relator, and therefore, their own claims alleging fraud with respect to Advate should be allowed to proceed. The court, though, agreed with the defendant and determined that the plain language of the settlement agreement indicated it included a release from liability with respect to all drugs manufactured by the defendant, without limitation. The relators then argued that limiting the release to only the claims alleged in the prior *qui tam* complaint was consistent with the requirements of the False Claims Act and with public policy. The court, however, concluded that the FCA does not require such an interpretation and that other courts have routinely sanctioned broad releases contained within settlement agreements resolving other *qui tam* cases. The court noted that the FCA allows the government to withhold its consent, if it believes that a settlement's release language is too expansive. Finally, the relators suggested that

the defendant and the prior relator colluded to “sneak language” into the settlement in order to impair the present case. The court rejected that assertion, observing that the government did not contend that it had been “hoodwinked” or that any misrepresentation as to the scope of the release had been made. Accordingly, the court held that the defendant was entitled to judgment as a matter of law and granted the summary judgment motion.

***U.S. v. Honeywell Int’l., Inc.*, 2012 WL 210955 (D.D.C. Jan. 25, 2012)**

The United States brought an action against a manufacturer of bulletproof vests, alleging that the company violated the False Claims Act and common law by knowingly allowed the government to purchase vests that contained a fiber that degraded quickly under certain circumstances and which should not have been used in the vests. The defendant moved to dismiss. The United States District Court for the District of Columbia denied the motion. The defendant then filed an answer to the government’s complaint, asserting various affirmative defenses. The government moved to strike the defendant’s first affirmative defense of waiver and estoppel. Relying on the Supreme Court’s decision in *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414 (1990), the government argued that waiver and estoppel are legally invalid defenses when the government brings claims to recover funds improperly paid from the treasury. Although it recognized other district courts have used *Richmond* to strike estoppel and waiver defenses, the D.C. district court declined to adopt that interpretation of the Supreme Court’s opinion. Furthermore, the court held that even if waiver and estoppel were available defenses, the defendant did not set forth the elements of those defenses. The defendant alleged that the government knew that the vests could degrade quickly in certain conditions and that the government had tested the vests itself. The defendant further alleged that it informed the government of its own testing and offered to share test data, but that the government failed to respond to the defendant’s offer. The court held that the defendant’s allegations failed to identify the necessary estoppel elements of a definite representation by the government, detrimental reliance by the defendant on the government’s representation, or any government misconduct. The court also held that the defendant’s waiver defense failed, as the defendant failed to identify any clear and intentional relinquishment of the government’s rights to sue the defendant under the False Claims Act. Accordingly, the court granted the government’s motion to strike the defendant’s affirmative defenses of estoppel and waiver.

C. Statute of Limitations

See *U.S. ex rel. Mustafa v. Najjar*, 2012 WL 177412 (M.D. Fla. Jan. 23, 2012), at page 63.

See *Riddle v. Dyncorp Intern. Inc.*, 2012 WL 19794 (5th Cir. Jan. 5, 2012), at page 47.

FEDERAL RULES OF CIVIL PROCEDURE

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

***U.S. ex rel. Ciaschini v. Ahold USA Inc.*, 2012 WL 959352 (D. Mass. Mar. 22, 2012)**

A relator brought a *qui tam* action on behalf of the United States, multiple states, and the District of Columbia, alleging that his former employer—a pharmacist—and its subsidiaries conspired to commit fraud and engaged in three specific practices that led to the submission of false claims: (1) the defendants engaged in “shorting” or “front-loading,” whereby they would bill customers’ insurers for the full amount of prescriptions that were only partially filled, asked the customers to return and pick up the remainder of their prescriptions, and then re-stocked any amounts that were not picked up within fourteen days; (2) the defendants engaged in re-adjudication, whereby they re-stocked unclaimed prescriptions, billed the federal healthcare programs in full, and failed to refund the overpayments from the government; and (3) the defendants engaged in “lot control,” whereby they failed to ensure that prescription drugs were returned to the proper lot when they were re-stocked, which led to the commingling of multiple inventories of the same drugs with different expiration dates. The defendants moved to dismiss the relator’s complaint for failure to plead the fraud scheme with particularity, as required by Rule 9(b) of the Federal Rules of Civil Procedure.

Holding: The United States District Court for the District of Massachusetts granted the defendants’ motion.

Failure to Plead Fraud with Particularity

The court began by analyzing the relator’s front-loading claims. The court found that the relator provided detailed information regarding twenty specific instances of alleged front-loading, including billing dates, prescription numbers, customer initials, the number of tablets prescribed, the number of tablets initially dispensed, and the retail price of the prescriptions. However, the court also found that the relator failed to show that any false claims were actually submitted to the government—the court acknowledged the relator’s assertions that the defendants’ employees would submit statements to corporate headquarters, in which they implied that they dispensed full prescription, but the court determined that the relator failed to provide any evidence that company headquarters, in turn, actually submitted this information to the government for reimbursement. The court found that the relator failed to establish that any of the employee statements was used by the defendants to prepare claims to the

government. Further, the court found that the relator failed to specify the date or content of any particular false claim the defendants allegedly submitted to the government. Therefore, the court held that the relator failed to plead the front-loading claim with particularity. That claim was dismissed.

Next, the court analyzed the relator's re-adjudication claims and found that the relator failed to provide the date, the identification number, the amount charged to the government, the name of any restocked prescription, or the identity of anyone who restocked a prescription. The court held that the relator merely alleged that the defendants could have violated the FCA, and that his re-stocking allegations failed to meet the pleading requirements. Consequently, that claim was also dismissed. The court also determined that the relator's lot control claim was deficient. The court found that the relator failed to show which prescriptions were returned to the defendants' inventory, the dates any prescriptions were returned, the respective expiration dates for any affected prescription, which lot(s) they were returned to, or whether claims for the prescriptions were originally billed to Medicare or Medicaid. As a result, the relator's lot control claim was dismissed.

Finally, the court concluded that the relator presented no details demonstrating how the defendants conspired to defraud the government. Accordingly, it held the relator's conspiracy allegation failed.

U.S. ex rel. Perry v. Hooker Creek Asphalt & Paving, LLC, 2012 WL 913229 (D. Or. Mar. 16, 2012)

A relator brought a *qui tam* action against several construction companies, alleging that the defendants falsified the character and quality of materials used in the construction of federally-funded highways. The relator alleged that he had direct and independent knowledge of the defendants' fraudulent conduct and their false statements to the government. The defendants moved to dismiss, arguing that the relator failed to plead the alleged fraud with particularity. The United States District Court for the District of Oregon granted the defendants' motion and dismissed the relator's complaint with prejudice. The court had twice previously granted the relator leave to amend his complaint, directing him to plead his fraud allegations with more particularity. However, the court found that the relator's second amended complaint still failed to allege who committed the fraud, failed to identify any invoices that were alleged to contain false statements, failed to describe when the deficient work was done or when any false records or statements were created, and failed to state where the alleged fraud took place. The court noted that the relator conceded that "he does not have access to the information the billing, records and practices underlying defendant's billing for work performed and materials provided relating to the road construction at issue." Consequently, the court again dismissed the relator's complaint for failure to satisfy the pleading standard. Moreover, the court held that it would be futile to give the relator another chance

to amend, since he lacked the information necessary to plead his claims with particularity. Therefore, the relator's complaint was dismissed with prejudice.

***Klusmeier v. Bell Constructors, Inc.*, 2012 WL 555736 (11th Cir. Feb. 21, 2012)**

Two relators brought a *qui tam* action on behalf of the United States and the State of Florida, alleging that a construction company falsely certified its compliance with the specifications of two Army Corps of Engineers contracts for the construction of a pump station and levees. The relators alleged that, as a condition of payment, the defendant was required to submit monthly invoices to the government, which included a certification that the requested payment was for work performed in accordance with the contract's specifications. The relators alleged that each of these invoices was false. The defendant moved to dismiss the relators' claims for failure to plead the alleged fraud with particularity. The United States District Court for the Southern District of Florida agreed with the defendant and granted the defendant's motion. The relator's complaint was dismissed with prejudice. The relators appealed the district court's ruling to the United Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit affirmed the district court's decision, as it agreed with the district court that the relators only made conclusory allegations regarding the alleged fraud scheme, and provided no specific details regarding the defendants' alleged presentment of false claims. Although the appellate court determined that the relators alleged details regarding how the defendant allegedly violated its contracts and although the relators provided some details regarding when the defendant's monthly invoices were submitted, it found that the relators failed to establish that the defendant's alleged contractual violations resulted in the submission of false claims to the government. The circuit court also held that the relators lacked the type of personal knowledge required to support their FCA claim, noting that one of the relators alleged that he was present on the construction site and observed contract violations, but did not provide facts to support the allegation that the defendant submitted requests for payment for non-compliant work. Finally, the Eleventh Circuit held that the relators had already been given opportunities to amend their complaint and had failed to properly request leave to amend their complaint a third time. Thus, the circuit court upheld the district court's denial of the relators' request for leave to amend their complaint and the complaint was dismissed with prejudice.

***U.S. ex rel. Watine v. Cypress Health Sys. Fla., Inc.*, 2012 WL 467894 (N.D. Fla. Feb. 14, 2012)**

A relator brought a *qui tam* action against his former employer—a hospital—and its administrator, alleging that the defendants violated the federal and Florida False Claims Act statutes by defrauding various government healthcare programs. The relator claimed that the defendants improperly increased reimbursements from the government by engaging in upcoding, fraudulently reporting the location where patients received services, and “churning,” which involved separating patient appearances for diagnoses, testing, treatment, and medication in order to bill the government for separate office visits. With respect to the relator’s upcoding claim, the relator alleged that the defendants instructed their employees to use the highest-paying codes in order to receive the largest reimbursements from the government. He further alleged that he was asked to appeal the denial of 25 of the defendants’ Medicare claims, but that he was unable to do so, since all of the claims included incorrect codes. He also alleged that, on his own initiative, he pulled 16 random patient history charts covering a seven-year period and found that the codes used on the charts were higher-paying than what should have been used. With respect to the relator’s claim that the defendants fraudulently reported the locations of patient services, the relator stated that the defendants submitted false healthcare claims to the government which billed the government for services provided at the hospital’s more expensive out-patient clinic than at the nursing home where the services were actually provided. With respect to the relator’s allegation that the defendants engaged in churning, the relator asserted that a hospital administrator explained an eight-step plan to him regarding the defendants’ churning practices.

The United States District Court for the Northern District of Florida dismissed the relator’s original complaint without prejudice for failure to plead the alleged fraud with particularity. The relator filed an amended complaint and the defendants once again moved to dismiss the complaint for failure to plead the fraud scheme with particularity. The corporate defendant also argued that it should not be held liable for the alleged fraud, which occurred when 100% of its stock was owned by different owners.

Holding: The United States District Court for the Northern District of Florida granted the defendants’ motion in part. The court held that the relator could maintain claims for upcoding and place-of-service, but that his fraudulent churning claim did not meet Rule 9(b)’s pleading requirements. The court also held that the corporate defendant could be held liable for fraud that occurred before its stock was purchased by new owners.

Pleading Fraud with Particularity

The court began by analyzing the relator's upcoding claims, noting two categories of claims: claims based on the relator's review of twenty-five Medicare submissions; and claims based on the relator's review of sixteen patient charts. With respect to the 25 Medicare submissions, the court held that the relator failed to allege the amount of the claims, identify who submitted the claims, or state when the claims were submitted. Thus, the court held the relator's allegations regarding those 25 claims were insufficient to meet the heightened pleading standard. Those claims were dismissed. The court then examined the relator's allegations regarding the 16 patient charts he randomly pulled and examined. With respect to these claims, the court found that the relator only provided specific dates and amounts of the claims submitted for four of the 16 patients; the claims regarding the remaining charts contained only general allegations and were dismissed. Thus, the court held that the relator's upcoding claim was limited to the four patient charts for which he provided sufficient particularity.

The court then analyzed the relator's place of service claim and found that the relator provided three examples of visits to the nursing home being billed as visits to the out-patient clinic. The relator alleged specific billing dates and payment amounts for each of the examples. The court held that these details were sufficient to meet the particularity requirements with respect to the place of service claim. Finally, the court analyzed the relator's allegation of fraudulent churning, observing that the relator alleged the he was reprimanded by a hospital administrator for not fraudulently churning patients. However, the court found that although the relator alleged he was told the particulars of the alleged churning scheme, he failed to plead the details of any false claim based on churning. Therefore, the court held the relator failed to adequately plead the fraudulent churning claim and that claim was dismissed.

Defendant's Change of Ownership

The defendant hospital argued it could not be held liable for alleged fraud caused by its prior owner. The court, though, found that under governing federal Medicare regulations—which preempted any conflicting state law—transfers of corporate stock do not constitute changes of ownership. Accordingly, the court held that the sale of the hospital's corporate stock did not affect its liability under the federal FCA. The court recognized that Florida law defines changes of ownership to include transfers of at least 51 percent of corporate stock, but did not speculate regarding whether or not this definition affected the defendant's liability under the Florida FCA, as the defendant did not argue that its liability under the Florida statute was different than under the federal statute.

***U.S. ex rel. Santa Ana v. Winter Park Urology Assocs., P.A.*, 2012 WL 386680 (M.D. Fla. Feb. 7, 2012)**

A relator brought a *qui tam* action against a clinic that had previously employed him (WPU), as well as another clinic (ROC) and its personnel, alleging that the defendants submitted false Medicare claims. The defendants moved to dismiss the relator's fraud claim, arguing that the relator failed to meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b); the ROC defendants additionally argued that the relator failed to allege that any of them even submitted a false claim. The United States District Court for the Middle District of Florida denied the defendants' motions and held that the relator described the defendants' alleged fraud scheme in extensive detail, by describing several types of fraudulent activities including billing practices, failures to supervise radiation therapy procedures, improper self-referrals, submissions of false Medicare claims, and the defendants' knowledge of these activities. Further, the court found that the relator alleged his own personal knowledge of these events, which provided the necessary "indicia of reliability" to overcome the defendants' motions to dismiss. The court also held that although the relator did not allege that the ROC defendants submitted false claims to the government, he did allege and describe how the ROC defendants caused such claims to be presented, in violation of the FCA. Thus, the relator was allowed to maintain his fraud claims and the defendants' motions to dismiss were denied.

***U.S. v. Peterson*, 2012 WL 315443 (E.D. Wash. Feb. 1, 2012)**

The United States brought an action against the vice president of a supply company that provided materials to government contractors. The government alleged that the defendant violated the False Claims Act, the Anti-Kickback Statute (AKS) and common law, by conspiring with a U.S. Department of Energy (DOE) prime contractor materials coordinator to purchase products at inflated prices from the coordinator's wife's business, in exchange for the coordinator purchasing the defendant's materials at inflated prices for the DOE. The government contended that through this scheme, the defendant and the coordinator's wife received increased business as well as improper and excessive profits. In addition, the government alleged another scheme in which the defendant conspired with another DOE prime contractor materials coordinator to purchase various personal items through the company. The defendant moved to dismiss the government's fraud claims, arguing that the government failed to plead the alleged fraud scheme with particularity.

Holding: The United States District Court for the Eastern District of Washington granted the defendant's motion.

Pleading Fraud with Particularity

Although the court found that the government's complaint provided sufficient detail of the alleged fraudulent schemes, it concluded that the government failed to detail the factual allegations relating to the president's involvement in the alleged fraud, as the government did not allege when, where, or how the defendant company president participated in or facilitated the alleged fraud. Further, the court found that the government failed to detail with specificity why the defendant's alleged conduct violated the FCA or any benefits the defendant received from the alleged schemes. Accordingly, the court held the government failed to meet the pleading requirements and dismissed the FCA claim. The court granted the government leave to amend its complaint.

***U.S. ex rel. Sanchez v. Abuabara*, 2012 WL 254764 (S.D. Fla. Jan. 27, 2012)**

A relator brought a *qui tam* action against an engineering services company and three individuals, alleging that the defendants fraudulently induced the U.S. Department of Defense (DOD) and the U.S. Army to contract with them. Specifically, he alleged that the defendants submitted false certifications regarding the corporate defendant's financial condition, which caused the DOD to award a contract to the defendants' insolvent company. The defendants moved to dismiss the *qui tam* complaint for failure to state a claim and failure to plead the alleged fraud scheme with particularity.

Holding: The United States District Court for the Southern District of Florida granted the defendants' motion to dismiss the relator's complaint without prejudice for failure to plead the fraud scheme with particularity. The court granted the relator leave to amend his complaint.

Stating a Claim

The relator argued that the contract with the government was obtained by means of false statements and fraudulent inducements, and consequently, each of its claims to the government should be deemed false, even if they contained technically accurate information. Additionally, the relator argued that the company's financial statements were, for FCA purposes, false statements that were material to payments the government made to the defendants. The defendants argued that the relator failed to allege that they actually submitted any claims—a failure that, according to the defendants, made the relator's complaint dead on arrival. The court, however, found that, due to defendants' financial relationship with the government under the contract, the relator sufficiently pled that the defendants presented claims for money to the government. Next, the defendants argued that the relator failed to allege that any of the claims submitted were actually false. The relator argued that he was not required to show that the claims contained false information, because all of the claims arose from a con-

tract procured by fraud. The court agreed with the relator and held that because the relator's theory of liability was based on an allegation that the contract was the result of fraud, the relator did not need to allege that the defendants' claims were false or fraudulent on their face. The court held that the relator's allegations were sufficient to state a claim—if the relator pled the alleged fraud with particularity.

Pleading Fraud with Particularity

The court then analyzed whether or not the relator pled the alleged fraud with particularity. First, the court identified the defendants' allegedly false statements—the relator had described an allegedly false statement made by one of the individual defendants relating to the company's financial viability, and another allegedly false statement made by a second individual defendant regarding the company's awardee status. The court found that the relator did not cite any statement or omission by the third defendant. Next, the court examined the relator's allegations regarding the time and place of each statement and found that the relator identified the time and place with respect to only one of the two alleged false statements. Third, the court examined the content of the statements. The court found that the relator had alleged that the defendant company misled the DOD, but failed to provide any factual basis connecting the individual defendants' alleged false statements. Finally, the court examined what the defendants obtained as a consequence of the alleged fraud and found that the relator had pled this element, as he alleged that the defendant company received payments from the government pursuant to the contract.

The defendants then argued that that the relator's most critical allegations were alleged only upon "information and belief" and argued a second reason for the court to dismiss the *qui tam* complaint for lack of particularity. The relator countered that pleading FCA allegations upon information and belief is permitted when details about the fraud are peculiarly within the defendants' knowledge and control. The court agreed with the relator, but determined that the relator's complaint failed to include sufficient details regarding one of the most crucial allegations—that one of the defendants' allegedly falsely certified financial statements was actually submitted to the DOD—even though details regarding that fact were not solely within the defendants' knowledge and control. Further, the court found that the relator failed to assert whether or not he sought to obtain additional detailed information from the DOD. The court held that the relator's failure to obtain this information was a fatal defect. As a result, the court granted the defendants' motion to dismiss the complaint for failure to satisfy the particularity requirement. The court determined that the one allegedly false statement that the relator appeared to plead with particularity would be dismissed, as it was pled upon information and belief.

Lastly, the court considered the defendants' argument that the relator failed to allege that they knowingly deceived the government, arguing both that the government was not deceived and that the defendants did not deceive the government knowingly. The defendants argued that the government was not deceived and had the same

knowledge as the defendants, because it could have discovered all evidence of the alleged fraud through a “cursory review of the financial statements.” The court, though, found that it was clearly plausible that the DOD could have been misled by false financial statements. The court also held that, under the FCA, the “knowledge” standard requires no proof of a specific intent to defraud. Accordingly, it held that the relator’s allegations of knowledge did not constitute a separate ground for dismissal.

The relator’s complaint was dismissed solely for failing to plead fraud with particularity and the relator was granted leave to amend the complaint.

***U.S. ex rel. Mustafa v. Najjar*, 2012 WL 177412 (M.D. Fla. Jan. 23, 2012)**

In 2001, Samir Najjar pled guilty in a criminal proceeding to making false statements in connection with a scheme to obtain improper medical services reimbursements to government entities. The plea agreement included restitution and forfeiture. Subsequently, Samir made some payments, but eventually informed the government that he lacked the means to make the remaining restitution payments and submitted supporting financial disclosures to show his inability to pay. The government then filed a civil action against Samir and his brother Lee, alleging that the brothers hid Samir’s control of valuable assets and submitted false statements to avoid Samir’s obligation to pay the full restitution amount. The defendants moved separately to dismiss those claims, arguing that the FCA allegations failed to state a claim and failed to plead the alleged fraud with particularity. Defendant Lee also asserted that the statute of limitations applied to the FCA claims against him.

Holding: The United States District Court for the Middle District of Florida denied the defendants’ motions.

What Constitutes a Reverse False Claim

The defendants first argued that the government failed to state a claim under the False Claims Act, because the government was not collecting a debt owed, but was merely acting as a collection agent for a third party—the victims of Samir’s criminal offenses. The court disagreed and held that a reverse false claim can occur whenever someone makes false statements in order to avoid making a payment to the government—“regardless of ultimate destination of those funds.” As a result, the court held that the government’s claims fell within the reverse false claim provisions of the FCA and the defendants’ motion to dismiss was denied.

Pleading Fraud With Particularity

Next, the defendants argued that the government failed to plead its claims with sufficient specificity. The court again disagreed. The court found numerous specific allegations of fraud, including: (1) that the defendants engaged in the transfer of several pieces of real

estate within weeks of Samir's guilty plea; (2) that an LLC registered to Lee, but which had no staff or legitimate business operations, purchased a million-dollar house that Samir used as a personal residence only a few days before Samir's guilty plea; (3) that Samir failed to state in a financial disclosure that he had sold valuable real estate; and (4) that the brothers offered to sell certain properties worth millions of dollars to an undercover agent. Therefore, the court held the government sufficiently described the alleged fraudulent scheme and that the government's pleading could permit a reasonable inference that the defendants were liable for violating the False Claims Act. Thus, the court denied the defendants' motion with respect to their Rule 9(b) argument.

Statute of Limitations

Defendant Lee argued that the False Claims Act allegations against him were barred by the FCA's statute of limitations. He argued that he was first named as a defendant in a 2011 amended complaint, but that the most recent alleged false statement attributed to him was a financial disclosure made in May 2004. Therefore, he claimed that the FCA's six-year statute of limitations had expired on the claims brought against him. The court disagreed, and noted that the False Claims Act provides that suits be brought within the later of "(1) six years from when the violation occurred or (2) three years after the pertinent Government official knew or should have known of the violation," but, in any event, not more than 10 years after the violation occurred. The court reasoned that defendant Lee could not establish that, in May 2004—or even three years later—the government knew or should have known that the financial disclosure at issue was false. Therefore, the government would have had up to ten years in which to amend its complaint and name him as a defendant. The court noted that even if the six year limitations period applied, the government's claims would still be timely, as the government alleged that the defendants submitted false statements until October 2006, and that it was reasonable to infer that defendant Lee was responsible for at least one of the false statements submitted within the six-year limitations period.

See *U.S. ex rel. Colquitt v. Abbott Labs.*, 2012 WL 1081453 (N.D. Tex. Mar. 30, 2012), at page 15.

See *U.S. ex rel. Jones v. Collegiate Funding Servs., Inc.*, 2012 WL 835747 (4th Cir. Mar. 14, 2012), at page 20.

See *U.S. ex rel. Tessitore v. Infomedics, Inc.*, 2012 WL 826889 (D. Mass. Mar. 12, 2012), at page 3.

See *U.S. ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 2012 WL 523623 (M.D. Fla. Feb. 16, 2012), at page 6.

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

***U.S. ex rel. Moore v. Cmty. Health Servs., Inc.*, 2012 WL 1069474 (D. Conn. Mar. 29, 2012)**

A relator brought a *qui tam* action against her former employer, a health care facility (CHS), its chief executive officer, and its chief financial officer, alleging that the defendants engaged in a scheme to submit fraudulent bills to Medicare and Medicaid. Specifically, the relator that the defendants created a billing system that automatically upcoded reimbursement claims to reflect the highest rate for every visit by billing the government using the names of physicians, even when patients were seen by non-physicians. The relator also alleged that the defendants allowed unlicensed providers to see patients and then billed the government using the names of credentialed doctors. In addition, she alleged that the defendants routinely falsified information when applying for government grants by lying about their credentials and by falsely certifying that patients receiving treatment at CHS would be billed on the sliding fee scale mandated by the government, when in fact, virtually all of the patients were billed the same maximum rate. Further, the relator alleged that she reported the fraud to the individual defendants and complained to her employer's management. She claimed that, in response to her complaints, she was insulted, threatened with termination, and subjected to severe verbal abuse. As a result of this abuse, the relator alleged that she suffered major stress, became ill, was placed on medical leave and was thereafter terminated. CHS and the individual defendants separately moved to dismiss the relator's complaint for failure to state a claim.

Holding: The United States District Court for the District of Connecticut granted the defendants' motions to dismiss the fraud claims, but allowed the relator to maintain her retaliation claim.

Failure to State A Fraud Claim

First, the court examined the relator's upcoding claims. The defendants argued that these claims were deficient because the code allegedly used to automatically inflate bills to the government was not limited to describing services provided by physicians only, but could be used for other types of visits as well. Furthermore, the defendants argued that their allegedly false claims could not have resulted in the wrongful disbursement of government funds, because CHS was paid the same rate for each covered Medicare/Medicaid visit, regardless of whether the patient was seen by a physician or another core provider. The relator did not dispute that all of CHS's patient visits were billed at the same rate regardless of whether the patient saw a physician, but she argued that the defendants' false reports played a role in determining the fixed rate per visit that the government would pay CHS in the future. The defendants countered that the

fixed rate was based on their cost reports to the government, not on the frequency with which they used certain billing codes. The defendants argued that the relator's complaint did not allege any falsification of cost reports, and therefore failed to state a claim under the FCA. The court agreed and held that "without any allegation that CHS falsified figures in its cost reports, the . . . Complaint does not allege that CHS took any meaningful steps to manipulate the all-inclusive rate." The court granted the defendants' motion to dismiss the relator's fraud claims based on alleged upcoding.

Next, the court examined the relator's allegation that the defendants billed the government for services provided by uncredentialed providers. The relator argued that applicable Medicare regulations required CHS to provide services through credentialed providers. However, the relator's counsel agreed at oral argument that CHS was not subject to the regulation relied upon by the relator. Neither the relator nor the court could find any applicable regulation that required CHS to provide care using only credentialed physicians. Accordingly, the court held that the relator failed to state a claim under the FCA and granted the defendants' motion to dismiss this claim as well.

Third, the court considered the relator's allegation that the defendants falsely certified their compliance with federal sliding fee scale requirements. The defendants argued that this claim failed because the applicable regulations relied on by the relator only required full or near-full discounts for patients below the poverty line, required CHS to waive fees for any patients who were unable to pay them, and prohibited discounts for patients whose incomes exceed the poverty line by two times. The defendants argued that the relator failed to allege a violation of any of these requirements. The court found that though the relator alleged that CHS did not follow its established fee scale and billed patients at a maximum fixed rate, she did not allege that CHS failed to prepare the required fee schedule, or that CHS ever turned away patients based on their inability to pay the alleged fixed rate. Accordingly, the court held that the relator failed to allege that CHS violated any of the sliding fee scale requirements and granted the defendants' motion to dismiss that claim.

Failure to State a Retaliation Claim

Finally, the court examined the relator's retaliation claim. The defendants argued that the relator failed to allege that she was engaged in protected conduct, failed to allege that CHS knew that she was investigating fraud, and failed to allege that her protected activity and termination were connected. However, the court noted that the relator alleged that she was investigating fraud and complained to CHS management and to the individual defendants about what she perceived as fraudulent billing practices. She further alleged that her complaints were met with severe verbal abuse and that she was later terminated. The court held that the relator alleged facts that plausibly supported her claims that she had engaged in protected conduct by investigating practices that reasonably could have led to a viable FCA action and that the defendants were aware of her actions. The court also held that the alleged facts gave rise to an inference that of retaliation in response to protected activity. Accordingly, the court held that the

relator sufficiently alleged her claim for retaliation. The defendants' motion to dismiss the retaliation claim was denied.

***U.S. ex rel. Friddle v. Taylor, Bean & Whitaker Mortg. Corp.*, 2012 WL 1066510 (N.D. Ga. Mar. 27, 2012)**

Two relators brought a *qui tam* action against their former employers: two mortgage lending firms and three individuals (Wright, Hick, and Moseley), alleging that the defendants violated the False Claims Act by engaging in a mortgage fraud scheme in which they falsified high-risk loans in order to induce the federal government to guarantee them and pay the claims when the loans defaulted. The relators also brought claims under the FCA for retaliatory discharge, alleging that after they complained internally about the defendants' alleged schemes, the defendants forced them out of their jobs and tried to thwart their efforts to find new employment; the relators agreed that their retaliation claims were not brought against defendant Wright. The government intervened as to the relators' fraud allegations. The individual defendants separately moved to dismiss the relators' allegations for failure to state a claim, with defendant Wright moving to dismiss the relators' fraud allegations, while defendants Hicks and Moseley only moved to dismiss the retaliation claims. The relators moved for summary judgment.

Holding: The United States District Court for the Northern District of Georgia denied defendant Wright's motion, granted defendant Hicks' motion in part and fully granted defendant Moseley's motion. The court also denied the relators' summary judgment motion.

Failure to State a Claim

The court first examined defendant Wright's motion to dismiss the relators' fraud claims. The court found that the relators described the alleged scheme to defraud the government in detail with respect to the other defendants, but only included a vague reference to defendant Wright—a single allegation of falsifying an employment verification for a loan. The court found that the relators failed to identify when or where this alleged falsification occurred or the manner in which the document was allegedly falsified. The court also found that the relators failed to allege that the loan application in question was presented to the government. Consequently, the court held that the relators' vague reference to defendant Wright was insufficient to state a claim alleging that Wright presented a false claim or worked with the other defendants to defraud the government. However, the court denied Wright's motion to dismiss, in light of the relators' request for an opportunity to amend their complaint, in the event that their claims were deemed deficient.

The court then examined the relators' retaliation claims against defendants Hicks and Moseley. Those defendants argued that the retaliation claims should be dismissed

because the FCA's anti-retaliation provision, as it was written at the time the relators' alleged retaliation occurred, applied only to "employers" and neither defendant employed either of the relators. The court agreed and held that the relators offered no persuasive reason for why "employer" should not be interpreted as it had been by other courts in previous cases. The court rejected the relators' assertion that Hicks and Moseley should be considered employers under an "alter ego" or "corporate veil piercing" theory, noting that the relators failed to point to any binding or persuasive authority that such a common law doctrine could give rise to FCA liability even though the statute did not do so. As a result, the court granted Hicks' and Moseley's respective motions to dismiss the retaliation claims with prejudice.

The court denied the relators' summary judgment motion, as it decided to grant the relators an opportunity to amend their complaint and since discovery had not yet concluded.

***U.S. ex rel. Conrad v. Healthpoint, Ltd.*, 2012 WL 1004775 (D. Mass. Mar. 26, 2012)**

A relator brought a *qui tam* action against several pharmaceutical manufacturers and distributors, alleging that the defendants received Medicaid and Medicare payments for various drugs that had not been approved by the Food and Drug Administration or that were otherwise ineligible for reimbursement. The government intervened in the relator's suit and brought the present own action against one of the defendants—Healthpoint, Ltd.—alleging violations of the False Claims Act and unjust enrichment. The government's FCA claims alleged that one of Healthpoint's drugs contained an active ingredient that the FDA determined to be ineffective and ineligible for Medicaid/Medicare reimbursement. The government also alleged that Healthpoint fraudulently coded the drug as eligible for reimbursement on quarterly reimbursement statements to the Centers for Medicare and Medicaid Services. Healthpoint moved to dismiss the plaintiffs' fraud allegations for failure to state a claim under the FCA.

Holding: The United States District Court for the District of Massachusetts denied the defendant's motion.

Failure to State a Claim

The court first considered the defendant's argument that the government failed to allege that the defendant had the requisite scienter to be subject to FCA liability, based on the defendant's assertions that it was reasonable to model its drug after another, similar drug that had not been categorically precluded from Medicare/Medicaid reimbursement and that it was unaware that FDA notices withdrawing approvals for two other drugs for lack of effectiveness also applied to its drug. The court found that the FDA's categorizations of other drugs could have had an impact on whether the defen-

dant acted reasonably, and therefore, the court decided that a determination regarding whether or not Healthpoint relied on FDA categorizations, and to what extent it may have done so, were issues of fact not properly resolved on a motion to dismiss.

Next, the court analyzed whether the FDA notices, in which the agency withdrew its approvals for drugs that contained some of the same active ingredients as Healthpoint's drug, automatically applied to Healthpoint's drug as well. Healthpoint argued that the notices did not automatically apply to its drug or render its drug ineligible for Medicare/Medicaid reimbursement, claiming that its drug was a combination product that contained many other active ingredients. Healthpoint also argued that before the FDA could revoke its authority to market its drug, it was entitled to an expert's opinion that the drug was subject to the prior FDA notices. The court held that neither the defendant's asserted reasonableness in interpreting FDA regulations, nor any expert opinion provided when the defendant's drug was launched was a matter properly decided on a motion to dismiss.

Ultimately, the court denied Healthpoint's motion to dismiss the relator's complaint for failure to state a claim.

Failure to Plead Fraud with Particularity

Finally, the court examined whether the fraud allegations had been pled with particularity. The court found that the government's allegations included the time period during which the defendant was alleged to have recklessly coded its drug as being eligible for Medicare/Medicaid reimbursement in its quarterly statements. The court also observed that the plaintiffs alleged that Healthpoint's statements were material to the claims for reimbursement for its device. Therefore, the court held that the plaintiffs adequately pled the "who, what, where, and when" of the alleged claim. Accordingly, it denied the defendant's motion to dismiss for failure to plead the alleged fraud scheme with particularity.

***U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 2012 WL 921147 (M.D. Fla. Mar. 19, 2012)**

A relator brought a *qui tam* action against a medical facility and its affiliates, alleging that the defendants violated the False Claims Act by admitting patients when it was not medically necessary to do so, by submitting inflated bills to Medicare, and by participating in improper financial arrangements and self-referrals in violation of the Stark Law. The government intervened in the relator's lawsuit and brought additional claims. The defendants moved to dismiss the fraud claims included in the government's complaint in intervention, arguing that the government failed to plead the fraud claims with particularity and failed to state a claim under the FCA.

Holding: The United States District Court for the Middle District of Florida denied the defendants' motion to dismiss the fraud claims.

Failure to State a Claim

First, the court examined the plaintiffs' allegation that the defendants' self-referrals and other violations of the Stark law led to fraudulent Medicaid claims. The crux of the plaintiffs' argument was that the Medicaid claims included certifications of compliance with the Stark law, and those certifications were false. The defendants argued that this allegation failed as a matter of law, since they were reimbursed by the various state governments, not the federal government, and neither the Stark Amendment nor the Medicaid statute prohibited violators from receiving reimbursement payments from the states. However, the court found that the Medicaid statute does prohibit payments from the federal government to the states to cover medical services resulting from improper referrals and held that submitting such claims—or causing another to submit such claims—can give rise to FCA liability. The court noted that several of the defendants' counterarguments regarding whether or not their financial relationships constituted violations of the Stark law, appeared to be affirmative defenses. The court declared that "it is the Defendants' obligation to plead that [these affirmative defenses] apply rather than the Government's obligation to plead that they do not apply." As a result, the court held that the plaintiffs' allegation that the defendants' improper self-referrals and other Stark law violations caused false claims to be submitted to the federal government stated a valid FCA claim.

The court also rejected the defendants' argument that the plaintiffs' fraud allegations failed to state a claim because the plaintiffs failed to identify any false records or false statements, failed to show that the defendant presented any false claims to the government, and failed to establish that the defendants acted "knowingly." The court held that the plaintiffs were not required to plead such facts in order to state a claim under the FCA and that they were allowed to allege the defendants' knowledge generally—which they did—since the FCA does not require proof of specific intent to defraud.

Failure to Plead Fraud with Particularity

Next, the court considered the defendants' argument that the government failed to plead the alleged fraud scheme with particularity. The defendants contended that the government failed to identify necessary details regarding the allegedly improper financial agreements, including when any such agreements were signed, the components of any alleged compensation paid to physicians that were improperly based on the volume or value of referrals, or any specific instances where services were not rendered by a qualified physician, as required. Again, the court concluded that the defendants' arguments "are relevant to affirmative defenses that the Defendants might raise rather than elements of the Government's causes of action." The court held that there was "no justification for requiring a heightened degree of specificity in regard to these allegations, and denied the defendants' motion to dismiss for lack of particularity. The court similarly disposed of the defendants' argument that the plaintiffs' fraud claims were time-barred.

***U.S. ex rel. Matheny v. Medco Health Solutions, Inc.*, 2012 WL 555200 (11th Cir. Feb. 22, 2012)**

Two relators brought a *qui tam* action against a health care group, its subsidiaries, and two corporate executives, alleging violations of the False Claims Act. In Count I of their complaint, the relators alleged that the defendants falsely certified their compliance with a Corporate Integrity Agreement (CIA) that required them to remit all overpayments they received from the government within thirty days of identification. The relators alleged that the defendants identified overpayments but never refunded the funds to the government, and instead, transferred the funds to unrelated and fictitious patient accounts or eliminated the overpayment from their records through a computer program called a “datafix.” In Count II of their complaint, the relators alleged that the CIA also required the defendants to supply a random sample of patient accounts for compliance review, but that the defendants submitted edited non-random samples that removed evidence of overpayments, resulting in the defendants passing their annual review with a zero percent error rate and avoiding a full audit that likely would have revealed unresolved overpayments. The defendants moved to dismiss the relators’ claims for failure to state a claim under the FCA. The United States District Court for the Southern District of Florida granted the defendants’ motion and dismissed the relators’ complaint with prejudice. The court held that the relators failed to state a claim under the FCA’s “reverse false claims” provision, as they failed to allege with particularity that the defendants knowingly made false statements for the purpose of concealing or avoiding an obligation to pay money to the government. The relators appealed the district court’s ruling to the United States Court of Appeals for the Eleventh Circuit.

Holding: The Eleventh Circuit reversed the district court’s ruling and held that the relators’ allegations were sufficient to survive the defendants’ motion to dismiss.

Failure to State a Claim

The court began by analyzing the issues common to both Counts of the relators’ complaint—namely, whether the defendants violated an obligation under the CIA to remit excess payments back to the government, and whether the defendants knowingly submitted false certifications of compliance with the CIA. The district court dismissed these reverse false claim allegations, finding that the relators failed to show that the defendants were under an obligation to repay money to the government. The Eleventh Circuit disagreed with this ruling, and found that the relators properly alleged that the CIA contained an express contractual obligation that required the defendants to remit overpayments within thirty days of identification. Additionally, the circuit court disagreed with the district court’s holding that the relators failed to adequately allege that the defendants knowingly submitted false certifications of compliance with the CIA, noting that the relators specifically alleged that the defendants willfully and knowingly

devised the schemes to create false records to conceal their failure to comply with the CIA. Accordingly, the court held that the relators adequately alleged their reverse false claim allegations.

With respect to the specific allegations contained in Count I of the *qui tam* complaint, the appellate court reversed the district court's ruling and determined that the relators properly alleged that the defendants knowingly submitted a false certification of compliance in order to avoid and/or conceal their obligation to remit overpayments to the government and that their alleged misrepresentations were material to the government. The circuit court rejected the defendants' argument that the relators' allegations were conclusory because they were not based on personal knowledge of actual false certifications of compliance or submissions of false claims. Rather, the circuit court found that the relators specifically pled the content of the alleged false statements, the date the statements were made, and the persons responsible for the alleged submission of false claims, as well as the specifics of identified overpayments, including the amounts and account numbers of specific overpayments, the dates on which the defendants identified them, the names and titles of defendants' employees who were aware of the identified overpayments, the federal sources of the overpayments—be it Medicare, Medicaid or another federal healthcare program—and the fictitious accounts created by the defendants to conceal the overpayments. Moreover, the court noted that one of the relators was personally involved in meetings in which the defendants discussed identified overpayments and the use of “datafix” to conceal them. The circuit court reasoned that such [p]ersonal involvement with the funds, direct conversations with Defendants regarding the Overpayments, and personal knowledge of the account procedures and CIA requirements further support Relators' allegations.” The circuit court also concluded that the defendants' alleged false certifications of compliance were material to the government, noting that the government relied on the defendants to identify and report excess payments and that any misrepresentation by the defendants would have left the government unable to recover any such overpayments. Consequently, the Eleventh Circuit held that the relators sufficiently pled their reverse false claim allegations, and reversed the district court's dismissal of Count I.

The circuit court then analyzed the allegations raised in Count II of the relators' complaint, regarding the defendants' alleged attempts to manipulate “random” samples of patient accounts to be reviewed for compliance. The defendants argued that the relators failed to plead with particularity that the defendants actually submitted sample patient accounts. The circuit court, though, found that the relators alleged in detail who made the samples, who approved and directed the process for submitting them to the government, when the samples were submitted for annual review, and how the samples were altered. Furthermore, the court acknowledged that it is “more tolerant toward complaints that leave out some particularities of the submissions of a false claim if the complaint also alleges personal knowledge or participation in the fraudulent conduct.” Since one of the relators alleged personal knowledge and involvement in the defendants' alleged manipulation of samples, the court concluded that the relators' allegations were pled sufficiently. The circuit court also noted that the alleged

manipulation of samples was material to the government, since the government would routinely conduct a full audit of the defendants' accounts, if its examination of the defendants' sample patient accounts resulted in an error rate of more than 5%. Thus, the defendants' alleged manipulation of the samples delivered to the government pursuant to the CIA was material to the government, as the samples provided the basis for determining whether or not to conduct a full audit; notably, the relators alleged that the samples provided by the defendants resulted in a 0% error rate. Since the circuit court found that the relators alleged in detail the defendants' manipulation of samples submitted to the government auditors, it reversed the district court's dismissal of Count II of the relators' complaint.

***U.S. ex rel. Boggs v. Bright Smile Family Dentistry, P.L.C.*, 2012 WL 530092 (W.D. Okla. Feb. 17, 2012)**

The relators brought a *qui tam* action against two groups of dentists and their respective dental practices (the "Bright Smile defendants" and the "Abou-Nassar defendants"). The relators alleged that the defendants violated the federal False Claims Act and the Oklahoma Medicaid False Claims Act by falsely certifying their compliance with various laws and regulations when seeking reimbursement from federal and state healthcare programs. In particular, the relators alleged that the defendants violated applicable rules by improperly offering patients courtesy transportation to appointments and by distributing impermissible inducement coupons throughout their communities, whereby patients who redeemed the coupons would receive a \$15 gas card. The Bright Smile defendants and Abou-Nassar defendants separately moved to dismiss the relators' complaint for failure to state a claim.

The United States District Court for the Western District of Oklahoma denied the defendants' motions and held that the relators alleged sufficient facts to state claim. The defendants had argued that their promotional offers were permissible, pursuant to advisory opinions issued by the Department of Health & Human Services Office of Inspector General (OIG). The relators, though, argued that these same OIG advisory opinions supported their fraud claims. The court found that the advisory opinions were not determinative of the plausibility of the relators' claims and held that their ultimate persuasiveness was limited, as they were based on different factual situations. Hence, the court held that the relators' allegations put the defendants on notice of the facts upon which their claims were based. The court noted that, at the motion to dismiss stage, an evaluation of the likely success of those claims was not appropriate. Thus, the court held that the relators claims were sufficient to overcome the defendants' motion to dismiss, and those motions were denied.

***U.S. ex rel. Sasaki v. N.Y. Univ. Med. Ctr.*, 2012 WL 220219
(S.D.N.Y. Jan. 25, 2012)**

A relator brought a *qui tam* action alleging that New York University's (NYU) medical center and school of medicine defrauded the United States Department of Veterans Affairs (VA), in violation of the False Claims Act. He also brought a claim under the FCA for retaliatory discharge. Specifically, the relator alleged that the defendants had an educational and professional partnership with the VA, which provided that NYU residents and other physicians could train at the VA Medical Center in Manhattan, and the Manhattan VA would reimburse NYU for sharing the costs of providing a joint educational program. The reimbursement procedure required NYU to submit invoices to the Manhattan VA for the number of approved resident or physician reimbursements, and the relator alleged that the defendants fraudulently billed the VA because residents often did not show up for their assignments or were being fraudulently signed in when they were not actually present. The relator—who had been a resident himself and who had participated in rotations at the Manhattan VA—further alleged that he reported the defendants' misconduct to the VA and the defendants retaliated against him and terminated him from the program. The defendants moved for summary judgment on both of the relator's claims.

Holding: The United States District Court for the Southern District of New York granted the defendants' motion.

Stating a Fraud Claim under the FCA

The court began by considering the defendants' argument that the relator's fraud claims failed because he did not offer any factual support for the contention that the defendants submitted false claims to the Manhattan VA. The relator argued that he properly stated a claim, because the defendants were required to provide five radiology residents at the Manhattan VA "around the clock" and to prorate its invoices for the time each resident was actually present. Further, the relator alleged that the residents were to be "physically present" during their shifts, but that doctors had testified that only one or two residents would appear for duty at the Manhattan VA, and for only two to three hours of coverage. He also claimed that it was common practice for residents who did appear to sign the names of residents who were absent. The relator alleged that, in spite of these improprieties, the defendants continued to bill VA for coverage by five residents, 24 hours per day.

The defendants argued that the relator failed to show that they were required to provide 24/7 coverage by residents, and stated that their invoices to the VA were "appropriate in all respects." They also argued that the VA reviewed and authorized all of the invoices, and thus, even if the invoices were somehow incorrect, the VA was fully informed of the particulars of the claims and thus those claims could not have been fraudulent. The court agreed with the defendants. First, the court determined that the

relator had misinterpreted the defendants' agreement with the VA, finding that the agreement only outlined the process by which the VA would pay the defendants, but did not require that a resident be physically present at the Manhattan VA around the clock or otherwise the defendants would be forced to prorate invoices for that period. Second, the court concluded that the relator failed to show that the invoices submitted by the defendants were actually false, finding that the relator relied on unsubstantiated numbers when he alleged that the defendants had improperly billed the VA for 24-hour, 7-day-a-week coverage. The court instead found that the defendants' invoices made no representations regarding the number of hours worked, and therefore, that information could not have been falsified. In addition, the court noted that the relator did not offer any evidence that the defendants had manipulated the invoices in any other manner. Third, the court observed that the defendants' agreement with the VA provided that the VA's records would be "the sole determinant" of whether or not residents fulfilled their requisite duties. The court found that the relator failed to show that residents had failed to perform their duties, particularly in light of testimony from the VA's most knowledgeable witness, whose deposition testimony stated that all of the defendants' invoices were satisfactory. The court rejected the relator's assertion that another VA witness had testified that only two or three residents showed up each day. The court noted that this witness had not testified that those residents ever failed to fulfill their duties, but instead testified that there had never been a problem with the residents. Accordingly, the court held that the relator failed to raise a genuine issue of material fact regarding the defendants' alleged submission of false claims to the VA, and thus, summary judgment in the defendants' favor was warranted.

Next, the court considered the defendants' argument that the relator's fraud allegations did not meet the FCA's scienter element, because he did not offer any factual support for the claim that the defendants "knowingly" submitted any false claims to the VA. The relator argued that the defendants knew their invoices were false, alleging that the defendants encouraged residents to enter the names of absent residents on the sign-in sheets. The court noted that the relator relied on an affidavit from a resident who acknowledged that residents would often sign in for others not present and that he also produced copies of sign-in sheets that allegedly showed multiple residents' names entered in the same handwriting, as well as one of the defendants' meeting agendas, which referenced the sign-in policy. The court, though, held that these documents had no bearing on the defendants' submission of invoices because supervising attending physicians at the Manhattan VA were ultimately responsible for ensuring residents' attendance, not the sign-in sheets. The court further found that the meeting agendas did not establish the defendants' knowledge, because those notes simply advised residents to comply with VA attendance guidelines and to make use of the sign-in sheets. The court also rejected the relator's claim that the defendants knew that residents were not satisfying their obligations at the Manhattan VA because the defendants' call schedules required residents to attend meetings, trainings, and other work assignments that would preclude them from being at the VA to provide the necessary coverage. The court held that this claim was deficient because the relator failed

to show that residents left the facility without the permission of supervisors—which was allowed under the defendants’ agreement with the VA—or that the defendants ever billed the VA for time when the residents were absent from the facility. Accordingly, the court held the plaintiff failed to show the defendants had knowledge of the alleged fraud, which also warranted summary judgment in favor of the defendants.

Stating a Retaliation Claim under the FCA

Finally, the court analyzed the relator’s retaliation claim, in which the relator alleged that shortly after he questioned the defendants’ relationship with VA and their policies regarding coverage, he was placed on remediation; he was later placed on probation after failing to pass mock oral examinations; and he was eventually terminated from the VA program. The relator argued that the timing of these events, coupled with the fact that the defendants did not terminate other residents with comparable academic performance, showed that he was terminated in retaliation for his complaints. The court began by examining whether or not the relator had engaged in “protected conduct” under the False Claims Act, and found that, with respect to this issue, he had raised a triable issue. The court determined that the relator submitted complaints to the VA, which in turn triggered an inquiry by the Veterans Health Administration. These actions, the court held, revealed an objectively reasonable basis that the relator was investigating matters that could have led to a viable FCA claim. The court also found that the relator raised an issue of fact regarding the defendants’ awareness of his protected conduct, since the relator was able to show that his superiors had knowledge of his complaints to the VA. However, the court ultimately held that the retaliation claim failed because the defendants submitted ample evidence that they had an independent, non-retaliatory reason for terminating the relator from the program. The defendants provided evidence that the relator performed below expectations and failed academic examinations, and notably, the relator was unable to provide evidence that other residents who were similarly situated were not also terminated from the program. Accordingly, the court determined that the defendants provided a legitimate non-retaliatory reason for the relator’s termination, and granted the defendants’ motion for summary judgment on the retaliation claim.

LITIGATION DEVELOPMENTS

A. Calculating Damages and Civil Penalties

***U.S. ex rel. Bunk v. Birkart Globistics GmbH & Co.*, 2012 WL 488256 (E.D. Va. Feb. 14, 2012)**

Two relators brought a *qui tam* action against several shipping companies and individuals, alleging that the defendants violated the False Claims Act and defrauded the federal government by engaging in collusive and anticompetitive arrangements in order to bid on and obtain a contract under the Direct Procurement Method (DPM), while filing a false Certificate of Independent Pricing (CIPD) that certified that the prices offered in their bids were arrived at independently. At trial, the jury found in favor of the relators. The relators did not seek damages at trial, nor did they present any evidence regarding the number of false claims that arose out of the contract and the jury found the defendants liable with respect to procurement of the contract, but not with respect to any false claims submitted to the government under the contract—instead, the relators relied on the parties’ stipulation that the defendants filed more than 9000 invoices under the contract.

Following the trial, the relators sought civil penalties of between \$5500 and \$11,000 for each of the more than 9000 invoices the defendants submitted under the contract, while the defendants challenged the sufficiency of the evidence as to the jury’s finding of liability. The United States District Court for the Eastern District of Virginia held that the evidence was sufficient to sustain the jury’s verdict of liability and that each of the 9,136 invoices submitted under the contract constituted a false claim. The court then determined that the minimum in civil penalties to be assessed against the defendants amounted to \$50,248,000 (\$5,500 multiplied by 9,136 false claims). The court, however, determined that this penalty violated the Eighth Amendment and was unconstitutionally excessive, when compared to the government’s minimal damages.

Holding: The U.S. District Court for the Eastern District of Virginia held that it did not have the discretion to reduce the minimum statutory civil penalty mandated by the False Claims Act, in order to assess a penalty that within constitutional limits. Therefore, the court held that no civil penalty would be imposed.

Calculating Civil Penalties

As the court determined that each of the defendants’ invoices constituted a false claim, it concluded that it was obligated under the FCA to assess a civil penalty for each of the more than 9000 separate claims, which amounted to between approximately \$50-100 million. The court then decided that, for Eighth Amendment purposes, it needed

to determine whether the minimum civil penalty of approximately \$50 million was “grossly disproportional to the gravity of [the defendants’] offense.” In order to make that determination, the court was required first to determine the harm caused by the defendants’ conduct—which included both economic and non-economic harm.

The court observed that the relators did not attempt to prove any damages to the government at trial; only after trial did the relators attempt to quantify the economic harm to the government, by comparing the defendants’ pricing under the contract with the pricing offered by various contractors—including the defendants—for comparable past government contracts. Based on their analysis, the relators concluded that the defendants caused approximately \$3-5 million in damages to the government. The court, however, held that the relators failed to establish that the defendants’ conduct caused the government any economic harm, noting that there was no evidence that any bidder on the contract at issue would have offered a lower overall bid than did the defendants, or that the government would have necessarily accepted such a bid. The court found that the defendants’ pricing on the contract at issue was substantially the same as its pricing for comparable services to the government during previous years. The court also found that the contracts relied on by the relators for comparison purposes were structured differently than the contract at issue, which made overall cost comparisons difficult. Consequently, the court held that the relators’ evidence was not sufficient to prove that the government paid more for services under the defendants’ contract than it would have paid without the defendants’ fraudulent activity that led to the jury’s finding of FCA liability. Therefore, the court held that the evidence was insufficient to quantify any economic harm sustained by the government under the defendants’ contract.

The court then examined the non-economic harm sustained by the government, which would include any inadequate services the government received and the impact of the defendants’ conduct on the integrity of the government contracting process. The court first found that the relators offered no evidence, nor even claimed, that the defendants’ services were deficient in any way. The court then stated that “the kind of price-fixing conspiracy that the jury found existed in this case is fundamentally inimical to the integrity of the procurement process and the public interest,” but then referenced various “facts and considerations” regarding the extent to which the defendants’ conduct actually compromised the government contracting process. Among those considerations was the fact that the government was to hire only one company for the contract and would require that company to have the capacity to handle short-notice packing and shipping projects throughout five countries. Due to this arrangement, the court concluded that the nature of the contract required bidders to negotiate and subcontract pricing with other companies in order to fulfill all of the government’s shipping needs, reasoning that “[w]hile this requirement did not suggest or justify collusive subcontract pricing, it did require a certain amount of communication and collaboration among otherwise competing companies. The court also found that the government determined that the defendants’ contract included a fair price, as the government twice exercised options to renew the contract. The court further de-

terminated that none of the 9,136 invoices contained or referenced the false Certificate of Independent Pricing and none contained any factually false information, and thus, the number of invoices the defendants filed was not reflective of the defendants' level of culpability, but merely reflected the number of jobs the government assigned over the life of the contract.

The court then examined whether or not the FCA's mandatory civil penalties were grossly disproportional to any harm caused by the defendants' conduct. Ultimately, the court held that the government had not sustained any demonstrable damages and therefore not even the minimum \$50 million civil penalty could be expressed or justified as a multiple of the government's damages. Further, the court found that the defendants' received a presumed profit under the contract of approximately \$150,000—an amount that would not justify the minimum mandated \$50 million penalty. Therefore, the court concluded the minimum civil penalty was grossly disproportional to the harm caused by the defendants and refused to impose the minimum civil penalty.

The court then analyzed whether it could impose a civil penalty less than that minimum mandated by the FCA, in order to avoid an unconstitutional result. The court found the FCA authorizes courts to set the amount of civil penalties within a \$5,500 to \$11,000 range, but does not grant courts the authority to “fashion some other civil penalty other than the one required by statute”—including reducing the number of false claims that would be subject to a civil penalty. The court held that the FCA it would need to rewrite the FCA in order to impose a total penalty below the statutory per claim minimum, which it refused to do. Therefore, the court held, it was left with no other option but to refuse to enforce the civil penalties provision of the FCA in this case.

Notably, the court did acknowledge three possible alternative rulings regarding the amount of civil penalties to award to the government, given the lack of binding precedent regarding the court's authority when the mandatory civil penalties are grossly disproportional to the government's damages. First, the court first noted that “the FCA does not explicitly state that a civil penalty is to be assessed per false claim,” but only states that a person who violates the FCA is “liable for a civil penalty between \$5,500 and \$11,000.” The court reasoned that the plain language of the FCA could allow for the imposition of a civil penalty for each of the defendants' false statements to the government, not for each claim the government paid as a result of those false statements. Here, the court held that the defendants made only one false statement—the false CIPD—and consequently, “were it appropriate to consider an alternative reading of the FCA in order to avoid an unconstitutional result, the Court would conclude that one civil penalty should be imposed and assess an award of \$11,000.” The court also considered a second alternative: imposing a civil penalty up to the constitutional outer limits that reflected an acceptably low multiple of the defendant's harm to the government. Based on its finding that the government suffered no demonstrable damages and that the defendants realized only \$150,000 in financial gain, the court held that a \$1.5 million civil penalty would pass constitutional muster. The court rejected the relators' argument for a \$24 million civil penalty, as that amount was based on the

relators' assertion that the government suffered at least \$3 million in damages. Finally, the court considered a third alternative that other courts appear to have used: crafting a constitutional civil penalty that is appropriate under the circumstances of the particular case, including "the specifics of the Defendants' conduct, the gain obtained, the need to deter others as well as sanction the Defendants, and the public interest in protecting the integrity of the public procurement process." The court determined that, if it had the authority to impose such an alternative civil penalty, then it would award the government a civil penalty of \$500,000.

B. Costs and Attorney's Fees

***U.S. ex rel. Leveski v. ITT Educ. Servs. Inc.*, 2012 WL 1028794 (S.D. Ind. Mar. 26, 2012)**

A relator brought a *qui tam* action against her former employer, a for-profit educational institution, alleging that the defendant violated the False Claims Act by falsely certifying its compliance with the Higher Education Act's "incentive compensation" ban, in order to improperly receive federal student loan funds. The defendant moved to dismiss the relator's complaint, arguing that the relator's allegations were based on previously filed lawsuits and other publicly disclosed information, and was therefore barred by the False Claims Act's public disclosure rule. The United States District Court for the Southern District of Indiana granted the defendant's motion. The relator then moved to alter or amend the judgment. The court denied the relator's motion. The defendant then moved to recover its attorneys' fees and moved for sanctions against the relator and her counsel, asking the court for more than \$4 million in attorneys' fees and sanctions from the relators' various attorneys, and \$25,000 in sanctions against the relator.

Holding: The U.S. District Court for the Southern District of Indiana concluded that the relator's attorneys should have known that the *qui tam* suit was destined to fail; the court held that the complaint was both frivolous and was brought for an improper purpose within the meaning of Rule 11 of the Federal Rules of Civil Procedure. Therefore, the court granted the defendant's motion and allowed the defendants to recover a portion of their attorneys' fees against one of the relator's attorneys and three law firms, but denied the motion for sanctions against the relator.

Award of Defendant's Attorneys' Fees

The defendant argued that it was clear that the relator's lawsuit would fail because the relator's primary attorney had lost two prior cases with similar allegations against other for-profit educational institutions. Also, the defendant argued that the relator's attorneys should have known that failure was imminent when the relator admitted during a deposition that she had no intention of bringing an FCA action until she was contacted by the attorney, and that the factual basis for her allegations came from the attorney and from public materials. The defendant claimed that the relator's suit was barred by the FCA's public disclosure rule and that the relator did not qualify as an original source of her allegations. The relator countered that the public disclosure bar did not apply because her suit was different from a previous case filed by her attorney. However, the court disagreed and found the allegations in the previous case were sufficient to put the government on notice of the defendant's alleged fraudulent scheme. The relator then argued that she qualified as an original source for her allegations, claiming that she had first-hand knowledge of the fraud scheme, as she had been paid by the defendant based on the number of recruits she enrolled—in violation of the

incentive compensation ban. However, the court found the relator only became aware that the defendant's alleged conduct violated the FCA or that she could bring an FCA action against the defendant when she was approached by her attorney.

The relator then argued her *qui tam* action could not have been filed frivolously, noting that the case had survived a motion to dismiss for failure to state a claim—before ultimately being dismissed for lack of subject matter jurisdiction, pursuant to the public disclosure rule—and that, as evidenced by its motion, the defendant had spent considerable money defending itself. The court rejected the relator's request that the court adopt a bright-line rule whereby a defendant's expenditure of substantial fees would always preclude a finding of frivolousness. While the court acknowledged that the relator's argument could be viable under some circumstances, it ultimately disagreed with the relator in this instance, finding that the defendant was only forced to incur significant expenses to defend itself because the relator's "lack of firsthand knowledge could not be determined until she was deposed . . . [the defendant] was required to do some digging before ferreting out the frivolousness of this case." Accordingly, the court held that the relator's *qui tam* lawsuit was frivolous.

The court further held that the relator's suit was brought for an improper purpose, based on its findings that the suit originated when the relator's attorney "troll[ed] public dockets and us[ed] a private investigator to cold-call ex-employees of for-profit educational institutions who had sued their former employer"—conduct the court declared was both unethical and unseemly. As a result of the court's findings, the court held that an award of attorneys' fees to the defendant was proper.

When determining the appropriate amount of attorneys' fees to award to the defendant, the court found that, from the beginning of the litigation, the defendant's counsel should have been aware that the relator was not an original source of the information upon which her fraud allegations were based. The court noted that the defendant's attorneys' fees would have been smaller if the defendant had not waited over three years to depose the relator. The court also found that, although the relator's main attorney's conduct was improper, and although other courts had cautioned the attorney for similar abuses in past *qui tam* actions against other for-profit educational institutions, no other court had issued an award of fees against the attorney. Accordingly, the court held that the appropriate award to the defendant was 15% of the attorneys' fees it incurred after the date of the relator's deposition, when the defendant first learned that the relator did not have firsthand knowledge of the alleged fraud. The court's final award of attorneys' fees amounted to \$394,998.33—and was awarded jointly and severally against the relator's primary attorney and the three law firms who represented the relator with him.

Sanctions

Finally, the court examined whether sanctions against the relator were appropriate. The court found the relator had no intention of bringing this case before being approached by her attorney, but considered the costs and benefits and decided that it

worth pursuing. However, the court held that it would not impose any sanctions on the relator because it had already granted the defendant a percentage of its attorneys' fees, and imposing additional sanctions was not appropriate. Thus, the court granted the defendant's motion for attorneys' fees but denied its motion for sanctions.

***Halasa v. ITT Educ. Servs., Inc.*, 2012 WL 639520 (S.D. Ind. Feb. 27, 2012)**

After a jury ruled in favor of a defendant in a retaliation case under the False Claims Act, the defendant moved for attorneys' fees, costs, and expenses. The plaintiff opposed the defendant's request, and argued that awarding the defendant's costs would violate the purpose of FCA's protection against retaliatory action and would deter wrongfully discharged employees from filing actions against their employers. The United States District Court for the Southern District of Indiana rejected the plaintiff's argument and granted the defendant's motion, stating that "[i]t is up to Congress to make those types of policy decisions, and Congress has not chosen to exempt False Claims Act cases from the general presumption that an award of costs to the prevailing party is appropriate." The court then examined each of the defendant's claimed fees, costs, and expenses.

First, the court analyzed the claim for witnesses' fees. The plaintiff opposed this claim and argued that the defendant lacked invoices for witness fees. The court found that the defendant had provided invoices, but denied the claim because the defendants' request for fees relating to subpoenas for the production of documents—not depositions—were not compensable as witness fees. Accordingly, the court reduced the amount awarded for witness fees. The plaintiff then argued that the defendant was not entitled to recover claimed fees for expert witness deposition preparation, travel to and from a deposition and time spent for reviewing the deposition transcript. The plaintiff argued that the defendant could only recover the \$40 witness fee provided under statute. The court disagreed, and held that the defendant was entitled to recover the reasonable amount paid to the expert witness.

Next, the court analyzed the claim for transcript and deposition costs. The plaintiff argued that the defendant was not entitled to recover deposition costs because it failed to provide any statement regarding the necessity of the depositions. The court found that in the absence of any suggestion that a particular deposition transcript was unreasonable, it declined to require the defendant to demonstrate their reasonableness. The plaintiff then argued that the defendant was not entitled to recover the cost for his videotaped deposition and the cost of the printed transcript. The defendant argued that the video captured the plaintiff's demeanor, facial expression, and body language which it intended to use as a contrast to plaintiff's court appearance and impeach his credibility at trial. The court found that there was strategic reason for the video but it was not reasonably necessary to the

defendant's case. Accordingly, the court reduced the claim by the amount incurred in videotaping the plaintiff's deposition. The court then rejected the plaintiff's request that the court fix the rate of deposition transcripts as per the rate fixed by the Judicial Conference (JC). Instead, the court held that the defendant was entitled to recover the actual costs of its deposition transcripts, even though those rates exceeded the rates fixed by the JC, because the plaintiff had noticed most of the depositions and selected the court reporter—whose rates, according to the court, the plaintiff presumably believed were reasonable. Additionally, the court held the elevated price was reasonable due to the fact that medical depositions typically take longer to prepare for, due to medical terms; in addition, the court found that extra time was spent on the transcripts because of the plaintiff's accent and long-winded answers.

Next, the court analyzed the defendant's request for fees for exemplification and copying costs. The plaintiff argued that the claimed photocopying costs were excessive and that the defendant failed to provide sufficient information regarding whether or not the copies were reasonably necessary for the litigation. The plaintiff also objected to the claimed costs incurred to use a database service to facilitate e-discovery production. The court held that the defendant adequately supported its request for photocopying fees, noting that the defendant described the \$.10/page rate, provided information regarding the dates, the numbers of pages and the numbers of documents produced and filed in the case, and provided a certification by counsel of its copying costs. The court, however, excluded the defendant's database expenses, upon a finding that the defendant did not provide sufficient information to determine whether the database was used primarily for document review and selection—which is not reimbursable—or for converting and producing documents—which would be reimbursable as a substitute for photocopying.

The court also allowed the defendant to maintain a small portion of its claimed fees associated with service of process. While the defendant sought more than \$19,000 in fees, the court agreed with the plaintiff that fees for service of process were limited to the cost the U.S. Marshal Service would have incurred had it effected service of process. The court observed that the U.S. Marshal Service charges a \$55/hour fee for service of process, and limited the defendant's claim for service of process fees to \$55/subpoena served or the defendant's actual costs per subpoena, whichever was less. The court allowed the defendant to recover all of its claimed expenses for serving third-party subpoenas in which it sought information regarding the plaintiff's attempts to find new employment in an effort to reduce his claimed damages. The plaintiff argued that these fees were unnecessary and duplicative, as the defendant would have received all of this information through discovery from the plaintiff, but the court held that the defendant's efforts to verify that information from third parties was reasonable and therefore, the court allowed the defendant to recover those fees.

***U.S. ex rel. Frazier v. Iasis Healthcare Corp.*, 2012 WL 130332 (D. Ariz. Jan. 10, 2012)**

A relator brought a *qui tam* claim against his former employer, a healthcare corporation. The United States District Court for the District of Arizona dismissed that action with prejudice, but reserved jurisdiction over the collateral issue of sanctions, which arose when the defendant argued that the relator improperly removed privileged documents from the defendant and turned them over to his attorney, who refused to return the documents to the defendant. The defendant then brought a renewed motion for sanctions and attorney fees against the relator and his counsel, arguing that the relator's claims were either frivolous or vexatious and that his counsel had abused the judicial process.

Holding: The U.S. District Court for the District of Arizona granted the defendant's motion in part. The court denied as moot the defendant's motion for sanctions against the relator, citing a settlement agreement between the two parties. The court also denied the defendant's motion for attorneys' fees and expenses. However, the court did sanction the relator's counsel for failing to return certain privileged documents to the defendant, once the *qui tam* action had been unsealed.

Motions for Sanctions Against the Relator and His *Qui Tam* Counsel

Although the court had already dismissed the relator's case, the defendant sought a separate dismissal of the case and a disqualification of the relator based on the relator's alleged attorney-client relationship with the defendant, his alleged misappropriation of hundreds of pages of documents marked "attorney-client privilege," and his and his counsel's alleged use of confidential information obtained during the course of the litigation. The relator admitted that he was an attorney, but argued that he only served as a compliance officer for the defendant, and was not the defendant's attorney. He also argued that he did not remove any of the defendant's confidential documents. At oral argument, the parties informed the court that they had reached a settlement agreement, in which: (1) the relator would withdraw his pending appeal of the court's earlier rulings and would withdraw from any further participation as a relator in the *qui tam* case; (2) the defendant would withdraw its motion for sanctions against the relator; (3) the parties would provide mutual releases to one another to preclude further litigation; and (4) the parties would seek a 30-day adjournment to execute the settlement agreement because it was based upon the relator's withdrawal of his appeal. Therefore, the court denied the defendant's motion for sanctions against the relator as moot.

The court then examined the defendant's motion for sanctions against the relator's *qui tam* counsel, in which the defendant argued that the relator's counsel knew or should have known that the relator had removed confidential documents from the defendant, and should have informed the defendant that this had occurred, and should have either sought a ruling from the court regarding the continued use of those documents, or simply returned the documents to the defendant. Instead, the defendant

claimed, the relator's counsel continued to review documents it knew were privileged and pretended not to know which documents the defendant was referencing when the defendant asked about the privileged documents in the relator's counsel's possession. The relator's counsel countered that it had no duty to return the documents in question, as the documents did not seek legal advice, and therefore were not privileged; they were not meant to be kept confidential by the original intended recipients; and that they were not communicated to attorneys or used in any attorneys' discussions with the defendant.

The court observed that *qui tam* cases are a bit different than average civil actions, because the FCA requires relators to file their complaints under seal for at least 60 days and prohibits relators from serving the defendant with those complaints until the court so orders. Therefore, the court found that upon initial discovery of the alleged privileged documents, the relator's counsel could not reveal the existence of a potential *qui tam* lawsuit prior to the unsealing of the relator's complaint. Hence, the court held that the relator's counsel could not be sanctioned for failing to inform the defendant that they had potentially privileged documents at that stage of the litigation. However, the court continued, even after the *qui tam* complaint had been unsealed, the relator's counsel still failed to inform the defendant of the potentially protected documents, and still did not seek a ruling from the court on what to do with the documents. Consequently, the court held that the relator's counsel did breach an ethical duty. The court granted the defendant's motion for sanctions against the relator's counsel for the attorneys' fees and expenses incurred by the defendant in its attempt to retrieve its privileged documents back.

Award of Attorneys' Fees to Prevailing Defendant

Finally, the court examined the defendant's motions for attorneys' fees, pursuant to the False Claims Act's fee-shifting provision. The defendant argued that it was entitled to recover its attorneys' fees under the FCA, because the relator's claims were frivolous and had no reasonable chance of success, due to the relator's alleged abuse of his attorney-client relationship with the defendant. Additionally, the defendant argued that the relator's claims were vexatious because the relator wanted to tarnish the defendant's reputation. The relator, though, argued that there was no statutory prohibition on him becoming a relator in a *qui tam* action, even if he was the defendant's in-house counsel—which he claimed he was not. He also argued that although his *qui tam* complaint had been dismissed, it was not dismissed as frivolous, nor was there any evidence that he brought the action in an attempt to tarnish anyone's reputation. The court denied the defendant's motion as moot in light of the settlement agreement between the relator and the defendant.

C. False Certification of Compliance

***U.S. ex rel. Washington v. City of New Orleans*, 2012 WL 956497 (E.D. La. Mar. 19, 2012)**

A relator brought an action against the city of New Orleans, alleging that the city submitted false statements to the U.S. Department of Housing and Urban Development (HUD) and falsely certified its compliance with fair housing guidelines in order to receive federal block grant funds. Specifically, the relator alleged that the city was required to conduct periodic investigations and make corresponding reports to HUD, as well as certify to HUD that its “grant will be conducted and administered in conformity with the Civil Rights Act of 1964 and the Fair Housing Act, and the grantee will affirmatively further fair housing.” The relator alleged that the city did not analyze how its placement of affordable housing affected racial segregation or ethnic diversity and failed to take appropriate actions to overcome the effects of discrimination and segregation on fair housing choice. Both the defendant and the relator moved for summary judgment.

Holding: The United States District Court for the Eastern District of Louisiana granted the defendant’s motion and denied the relator’s motion.

False Certifications of Compliance

The court determined that the city’s periodic reports to HUD identified racial impediments to fair housing, and summarized the city’s efforts related to housing and community development. The court held that these documents outlined a wide spectrum of actions designed to overcome identified racial impediments. The relator relied on *U.S. v. Westchester County, N.Y.*, 668 F.Supp.2d 548 (S.D.N.Y.2009) to argue that the defendant made a false statement when it certified that it was advancing fair housing concerns. The court, though, did not find *Westchester* to be dispositive, finding that the facts of that case were different from the present case, since the defendant in the current case reported various racial factors that impeded fair housing and set forth specific plans to address those issues. Accordingly, the court held that the defendant was entitled to summary judgment because its actions had in fact promoted fair housing. The court also noted that the relator failed to provide any evidence of false statements, and thus, his complaint was deficient.

***U.S. ex rel. Kappenman v. Compassionate Care Hospice of the Midwest, L.L.C.*, 2012 WL 602315 (D.S.D. Feb. 23, 2012)**

A relator brought a *qui tam* action against her former employer, a hospice services provider, alleging that the defendant engaged in a conspiracy to defraud the government and submitted false claims to Medicare. She also brought a claim under the False Claims Act for retaliation, as well as numerous state law claims. With re-

spect to the fraud claims, the relator alleged that while working for the defendant, she audited patient medical files to ensure Medicare compliance and discovered that the defendant had submitted Medicare claims for patients for whom the defendant had insufficient documentation regarding those patients' Medicare eligibility. She alleged that she notified her direct supervisor and other employees of her concerns and reported the matter to the defendant's corporate headquarters when she was not taken seriously by her regional office. She alleged that upon her return from headquarters, her desk had been moved to a different location, her computer and telephone were gone, she was excluded from a private staff meeting, and was terminated within days. The defendant moved for summary judgment on the relator's fraud claims, arguing that the relator could not maintain a cause of action under the FCA because the conduct she complained about was not fraud, but merely regulatory noncompliance. The defendant also sought summary judgment on the relator's retaliation claim, arguing that the relator did not engage in any protected conduct under the FCA, that the defendant had no notice of any protected conduct she may have engaged in, and that her firing was for a legitimate, non-retaliatory reason.

Holding: The United States District Court of South Dakota granted the defendant's motion in part, dismissing the relator's conspiracy claim but allowing the relator's false certification theory of fraud liability and her retaliation claim to go forward.

False Certification of Compliance

The court began by analyzing the relator's allegation that the defendant's Medicare claims were false because they included false certifications of the defendant's compliance with underlying Medicare regulations. The relator argued that the defendant provided services to ineligible patients and knowingly presented false claims for Medicare reimbursement. The defendant argued that the relator only alleged regulatory noncompliance and failed to show that the alleged regulatory violations were conditions of payment under Medicare that would render its Medicare claims fraudulent. The relator countered that there was a causal link between the defendant's failure to report patients' ineligibility for Medicare and the defendant's Medicare claims, since the defendant's alleged noncompliance was directly related to federal reimbursements. The court found that Medicare contained an express condition that all services be reasonable and necessary, and held that if the defendant's patients were ineligible for Medicare services, then any services provided to them and billed to Medicare were not reasonable or necessary. The court also noted that the defendant's compliance director testified that the relator's concerns were reasonable because paperwork in the defendant's possession might not have supported some patients' eligibility. Ultimately, the court held that a dispute of material fact existed as to whether fraudulent claims were presented to the government and that an issue of material fact existed as to whether the defendant's claims were actually false. Moreover, the court determined that the evidence raised issues of material fact regarding the defendant's knowledge of any false

claims that may have been submitted, as the defendant denied any such knowledge but the court concluded that many of the defendant's employees and supervisors knew of the allegations, but did nothing in response, and that the defendant admitted that it knew about the alleged claims, took them seriously, and investigated them. Thus, the court denied the defendant's motion for summary judgment on the relator's false claims that the defendant falsely certified its compliance with material underlying Medicare regulations.

Next, the court considered the relator's claim that the defendant conspired to defraud the government by getting fraudulent claims paid. The defendant argued that the relator failed to name the alleged conspirators and argued that it could not conspire with itself. The relator did not respond to the defendant's argument and the court granted the defendant's motion for summary judgment on the conspiracy claim.

Retaliation

The court then analyzed the relator's retaliation claim under the FCA. The defendant argued that the relator did not engage in any protected activity because her motivation for investigating the alleged fraud was not for the purpose of bringing an FCA claim, but rather was within the scope of her duties as the defendant's quality of care coordinator—a job that required her to review and audit patient medical files. However, the court held that the relator's whistleblowing conduct was not part of her employment duties and that she went above and beyond her job description when investigating and reporting the defendant's alleged Medicare fraud. Hence, the court held that the evidence created a genuine dispute of whether the relator was engaged in protected conduct. The court also found that a genuine issue of material fact existed regarding whether the defendant was on notice of any protected conduct by the relator, as the defendant had admitted that it took the relator's reports of the alleged fraud seriously and implemented changes as a result. Finally, the court examined the nexus between the relator's purported protected conduct and the defendant's decision to terminate her employment. The defendant argued that the relator was fired for insubordination and for harassing her co-workers, not in retaliation for raising concerns about Medicare fraud. The court determined that there was no evidence that the relator's co-workers felt harassed by her. Moreover, the court found that the relator's job description was revised, that there were closed-door meetings about her, and that she was fired shortly after her trip to company headquarters. The court held that there was a genuine dispute of fact regarding whether the relator was terminated because of her protected activity. Therefore, the court denied the defendant's summary judgment motion with respect to the retaliation claim.

See *U.S. ex rel. Jamison v. McKesson Corp.*, 2012 WL 487998 (N.D. Miss. Feb. 14, 2012), at page 8.

D. Relators' Share Issues

***U.S. ex rel. Shea v. Verizon Commc'ns., Inc.*, 2012 WL 592047 (D.D.C. Feb. 23, 2012)**

A relator brought a *qui tam* action alleging that a telecommunications company submitted false claims for illegal surcharges under two government contracts. The government intervened and settled the action for \$93.5 million. The government then recovered an additional \$3 million for State Universal Fund Surcharges (SUFS). The government also received about \$1.3 million from the defendant after the defendant self-reported an additional violation (GMS recovery). The relator and the government then disputed the relator's share of the government's recovery. In the interim, the government paid the relator 15%—the statutory minimum—of the settlement amount as an advance on his ultimate share. The relator then moved for a total award of about 22% of the government's entire recovery. The government countered with offers of 16% of the original settlement and 15% of the SUFS recovery, with nothing from the GMS recovery.

Holding: The United States District Court for the District of Columbia held that the relator was entitled to 20% of the settlement, 15% of the SUFS recovery, and none of the GMS recovery.

Relator's Share

The court began by identifying two sets of guidelines for determining relator's share: the legislative history of the Senate's version of the 1986 amendments to the FCA, which set forth factors to consider when determining the relator's share; and the Department of Justice's (DOJ) relator's share guidelines. The court analyzed the Senate factors first. The Senate factors include: (1) the significance of the information provided by the relator; (2) the relator's contribution to the final outcome; and (3) whether the government previously knew of the relator's information. Applying the first two factors, the court found that the relator contributed significant information to the action and that the allegations he originally made served as the template for the government's complaint. The court also found that the relator and his experienced legal counsel worked extensively with the government during all aspects of its investigation and during the settlement, which saved a great deal of time and resources. Applying the third Senate factor, the court found that the government had no prior knowledge of the fraud scheme, as its auditors had never identified the alleged overcharges or even audited the relevant sections of the invoices or contracts.

The court then examined the fifteen DOJ guidelines—issued by the DOJ to assist its attorneys when trying to agree on relators' share. The court noted that although the DOJ guidelines are not official federal regulations and therefore are non-binding, courts often consider them when resolving disputes over relators' share. Applying these factors, the court determined that: (1) the relator reported the fraud promptly,

and that his two-year delay was justifiable since the relator was conducting a thorough investigation of a complex fraud scheme; (2) the relator reported or tried to stop the fraud when he notified the government as soon as he was satisfied that he had sufficient documentation to support his claims; (3) it was unclear to what extent the relator's *qui tam* action halted the fraud; (4) there was no safety issue involved; (5) the relator's complaint exposed a nationwide practice; (6) the relator gave the government extensive first-hand details of the fraud when he conducted a thorough investigation of the defendant's "inside" information and, with the assistance of his counsel researched the applicable laws and regulations and provided comprehensive charts detailing why the defendant's surcharges were fraudulent under the law and helping the government refute the defendant's assertions; (7) the government had no knowledge of the fraud; (8) the relator provided substantial assistance to the government during the investigation and pre-trial phases of the case, as the relator spent hundreds of hours on the case, met with the government numerous times, aided government auditors in investigations of other possible illegal surcharges, attended status conferences, and made himself available to help the government analyze audit information; in addition, the relator's attorneys prepared legal memoranda for the government, helped the government draft proposed subpoena categories, hired a telecommunications to assist the team, and prepared comprehensive presentations for the government; (9) although the relator was not deposed, there was no reason to doubt his credibility; (10) the relator's counsel provided substantial assistance to the government, as already described; (11) the relator and his counsel supported and cooperated with the government throughout the proceeding, especially since the relator identified a category of damages the government had missed, resulting in an additional \$5 million recovery to the government; (12) the case did not go to trial; (13) the FCA recovery was not relatively small, particularly when the government's future savings are considered; (14) filing the *qui tam* complaint had a substantially adverse impact on the relator, since he gave up his job and salary to invest hundreds of hours investigating the defendant's fraud and assisting the government in resolving the case; in addition, his counsel expended substantial resources while assisting the government in its investigation and settlement of the case; and (15) no factor weighed in favor of a decrease in the relator's share. Based on those findings, the court held the relator substantially contributed to the prosecution of the case and deserved more than the minimal 15% share of the government's recovery.

The government argued for a 15% relator's share, claiming that the relator had no first-hand knowledge of the defendant's billing practices and that his complaint was just an educated guess. The court rejected the government's assertions as an unfair characterization of the nature and extent of the expertise, experience, knowledge, analysis and hard work that the relator and his lawyers contributed. The government then noted that the action was settled while still under seal and without a trial, but the court determined that the relator deserved a substantial percentage of the government's recovery even though no trial was necessary. The government also argued that the relator's documents failed to disclose any new information, because the govern-

ment already had the documents in its possession. But the court pointed out that the government had no understanding of the documents before the relator explained their significance. The government also argued that the relator's share depended only upon his own contributions and not those of his counsel. The court, though, held that the relator should be compensated for all the ways he contributed to the government's recovery, even through contributions from his attorneys. As the court held that the relator made a substantial contribution to the government's recovery of the settlement amount, it awarded the relator a 20% share of the recovery from the settlement.

Next, the government argued that the relator should receive 15% of the government's SUSF recovery. The court found that the defendant unilaterally disclosed and repaid this amount to the government, and that while the relator included this improper charge in his complaint, he made no substantial contribution to its recovery. Therefore, the court awarded the relator the minimum 15% share of the government's SUSF recovery.

Finally, the government argued that the relator should not receive any share of the government's recovery of GMS fees, since the defendant self-disclose those charges and the relator's complaint made no mention of them. The court agreed and denied the relator any share of the GMS recovery.

E. Seal/Service Issues

***Jacobs v. Lambda Research, Inc.*, 2012 WL 748578 (S.D. Ohio Mar. 8, 2012)**

A relator brought a *qui tam* action against two research organizations and their president. The government declined to intervene in the relator's suit, but reserved its right to intervene at a later date. Although the relator's *qui tam* complaint had been filed under seal, once the government made its intervention decision, all case documents were filed in the public record. The defendants moved to dismiss the relator's complaint, but the United States District Court for the Southern District Ohio denied their motion. The defendants then moved to seal the entire record. Both the United States and the relator opposed this motion. The defendants also moved for a protective order, arguing that the specific documents contained trade secrets. The relator opposed this motion as well.

Holding: The United States District Court for the Southern District of Ohio denied the defendants' motion to seal the record, but granted their motion for a protective order in part.

FCA Seal

The defendants argued that re-sealing the entire case was necessary, because they would otherwise suffer direct harm as a result of unfounded statements and allegations made by the relator. The court stated that only "extraordinary circumstances or significant interests" could justify re-sealing the entire case. The court held that the defendants' fear of embarrassment or harm to its reputation could not overcome the strong presumption in favor of public access to judicial records. Thus, the court denied the defendants' motion to re-seal the entire record.

Protective Order

The court then turned to the defendants' motion for a protective order. The defendants argued that the protective order was necessary to protect their trade secrets and other confidential business records. The relator opposed the defendants' motion, arguing that a protective order was unnecessary. The court agreed with the defendants and granted the defendants' request for a protective order; the court, however, refused to enter the protective order submitted by the defendants and instead ordered the parties to submit an agreed upon order.

F. Vicarious Liability

See *U.S. ex rel. Jamison v. McKesson Corp.*, 2012 WL 487998 (N.D. Miss. Feb. 14, 2012), at page 8.

See *U.S. ex rel. Watine v. Cypress Health Sys. Fla., Inc.*, 2012 WL 467894 (N.D. Fla. Feb. 14, 2012), at page 58.

Judgments & Settlements

JANUARY 1, 2012–MARCH 31, 2012

Universal Health Services Inc. (W.D. Va. March 28, 2012)

Universal Health Services Inc. (UHS) and subsidiaries, Keystone Education and Youth Services LLC and Keystone Marion LLC (which conducted business in Marion, VA as the Keystone Marion Youth Center), agreed to pay the United States and the Commonwealth of Virginia \$6.85 million to resolve False Claims Act allegations. The organization allegedly provided substandard psychiatric counseling and treatment to adolescents in violation of Medicaid requirements, and also allegedly falsified records and submitted false claims to the Medicaid program. This settlement resolves a *qui tam* suit filed by Megan Johnson, Leslie Webb and Kimberly Stafford-Payne, former therapists at the now-closed Keystone Marion Youth Center. The relators were represented by TAFEF member Mark Hurt.

Cypress Pharmaceutical Inc., Hawthorn Pharmaceuticals Inc., and Max Draughn (E.D. Tex. March 28, 2012)

Cypress Pharmaceutical Inc., its subsidiary, Hawthorn Pharmaceuticals Inc., and its CEO, Max Draughn, have agreed to pay the United States \$2.8 million to resolve allegations that, between 2003 and 2009, they violated the False Claims Act and caused the submission of false quarterly reports to the Centers for Medicare and Medicaid Services by improperly marketing three prescription drugs: Hylira, Zaclir and Zacare as being eligible for reimbursement by Medicaid and other government health care programs even though the drugs had not been approved as safe and effective by the Food and Drug Administration. This settlement resolves a *qui tam* suit filed by Robert Heiden, a former district sales manager for Hawthorn. Heiden, who was represented by TAFEF members Colette Matzzie and Stephen Hasegawa of Phillips & Cohen LLP, will receive a reward of more than \$300,000.

Gary-Williams Energy (D. Colo. March 26, 2012)

Gary-Williams Energy agreed to pay \$2,764,749 to settle allegations that, from October 2008 to September 2009, the company underpaid the U.S. Department of the Interior in connection with oil drilling on leased federal lands in the Gulf of Mexico. Specifically, the company claimed that it was entitled to certain price reductions and credits, based on the costs of shipping the acquired oil to various market centers. However, since the company did not actually transport the acquired oil, but instead transferred title to the oil at the wellhead to a third party, it was not entitled to the price reductions and credits that it claimed against the federal government.

LifeWatch Services Inc. (S.D. Ohio and W.D. Wash. March 23, 2012)

LifeWatch Services Inc. agreed to pay the United States \$18.5 million to resolve allegations of improperly billing Medicare for Ambulatory Cardiac Telemetry services using a false diagnostic code. In addition to the monetary settlement, LifeWatch agreed to enter into a 5-year Corporate Integrity Agreement with the Office of Inspector General of the U.S. Department of Health and Human Services. This settlement resolves two *qui tam* suits filed by LifeWatch sales representatives: a 2009 suit filed by Ryan Sims in the U.S. District Court for the Western District of Washington, and a 2011 suit filed by Sara Collins in the U.S. District Court for the Southern District of Ohio. Sims and Collins will receive a total reward of about \$3.4 million. Simms was represented by TAFEF member Mark Walters of Walters Law Firm PLLC and Dan DeLue of Ferring & DeLue, LLP. Collins was represented by TAFEF member Frederick M. Morgan, Jr. of Morgan Verkamp LLC.

EUSA Pharma (USA) Inc. (March 23, 2012)

EUSA Pharma (USA) Inc. agreed to pay the United States \$180,000 to resolve claims that it violated the False Claims Act by encouraging doctors to submit improper claims to Medicare for imaging scans. EUSA Pharma, which makes and sells the radiopharmaceutical ProstaScint, allegedly advised health care providers to submit multiple claims for certain imaging scans performed following use of ProstaScint. This conduct occurred after the Society of Nuclear Medicine informed the company that only one claim should be submitted for these scans. This settlement resolves a *qui tam* suit filed by Ann-Marie Williams, a former EUSA Pharma employee. Williams will receive a \$30,600 share of the federal government's recovery.

Lockheed Martin Corporation (N.D. Tex. March 23, 2012)

Lockheed Martin Corporation agreed to pay the United States \$15.85 million to resolve two False Claims Act *qui tam* suits alleging that between 1998 and 2005, Tools & Metals Inc. (TMI)—a Lockheed Martin subcontractor—overcharged the federal government for perishable tooling kits and related products it used in military aircraft construction and maintenance. In addition, Lockheed Martin was accused of acting recklessly, by failing to adequately oversee TMI's charging practices and by mishandling information revealing those practices. The relators in this matter, Robert Spencer and John Becker, will receive a combined \$2 million share of the federal government's recovery. Spencer was represented by TAFEF member Sam Boyd of Boyd & Associates.

Harbert Corporation, Harbert International, Inc., Bill Harbert International Constructions Inc., Harbert Construction Services (U.K.) Ltd. and Bilhar International Establishment (D.C. March 20, 2012)

Harbert Corporation, Harbert International, Inc., Bill Harbert International Constructions Inc., Harbert Construction Services (U.K.) Ltd., and Bilhar International Establishment agreed to pay the United States \$47 million to settle allegations that they submitted false claims to the U.S. Agency for International Development (USAID), by conspiring to rig bids involving a USAID-funded construction contract to build a sewer system in Cairo, Egypt in the late 1980s and early 1990s. The settlement also resolves a *qui tam* suit filed in 1995 by Richard F. Miller.

Devon Energy Corporation (E.D. Tex. March 12, 2012)

Devon Energy Corporation and its affiliates agreed to pay the United States \$3.5 million to resolve claims that PennzEnergy (a predecessor to Devon), violated the False Claims Act by knowingly underpaying royalties owed on natural gas produced from federal and Indian lands. PennzEnergy, formerly known as Pennzoil Company, was acquired by Devon in May 1999.

PennzEnergy allegedly improperly deducted from royalty values costs associated with boosting gas up to pipeline pressures and failed to report and pay royalties on gas used to fuel boosting compressors. This settlement resolves one of the last in a series of settlements arising out of a False Claims Act *qui tam* suit filed by Harrold Wright, who is now deceased. Wright's heirs will receive his relator's reward—a \$908,040.38 share of the federal government's recovery.

Odyssey Healthcare Inc. (E.D. Wis. March 1, 2012)

Odyssey HealthCare Inc., a subsidiary of Gentiva, agreed to pay the United States \$25 million to resolve two *qui tam* suits alleging that between 2006 and 2009, the company fraudulently billed Medicare for continuous home care services that were not covered, either because the services were unnecessary or because the services were not performed in accordance with Medicare requirements. In addition to the \$25 million payment, Odyssey entered into a 5-year corporate integrity agreement with the United States Department of Health and Human Services Office of the Inspector General. The relators in this matter, who were represented by TAFEF members Nola Hitchcock of Cross Law Firm, S.C., and Marcella Auerbach, Ken Nolan, and Jeb White of Nolan & Auerbach, P.A., will receive a total award of more than \$4.6 million.

Beth Israel Medical Center (S.D.N.Y. March 1, 2012)

Beth Israel Medical Center agreed to pay the United States \$13,031,355 to settle allegations that, from February 21, 2002 through August 7, 2003, it received millions of dollars in improper Medicare payments by fraudulently inflating its fees for services provided to Medicare patients in order to obtain larger supplemental reimbursements, known as outlier payments. The medical center was also accused of intentionally manipulating its fee structure to make it appear as though certain patient treatments were unusually costly, when in fact they were not.

Mylan Inc. (D. Mass. Feb. 28, 2012)

Mylan Inc. agreed to pay \$57 million to settle claims made in a *qui tam* action that the company caused the United States and the State of California's Medicaid program to overpay for drugs by reporting inflated drug prices, while knowing that the government entities would use those false reports to set higher reimbursement rates for Medicaid. The *qui tam* case was filed by Ven-A-Care of the Florida Keys Inc., which was represented by James Breen of The Breen Firm, P.A. The United States will receive \$22.2 million from the settlement, the State of California will receive \$26.3 million, and the relator, Ven-A-Care will receive a reward of \$8.5 million.

Total Fina S.A., Total Minatome Corporation, Total Exploration Production USA Inc., Fina Oil and Chemical Company, Elf Exploration Inc., and Total E&P USA Inc. (E.D. Tex. Feb. 22, 2012)

Total Fina S.A., Total Minatome Corporation, Total Exploration Production USA Inc., Fina Oil and Chemical Company, Elf Exploration Inc., Total E&P USA Inc., and their affiliates agreed to pay the United States \$15 million to resolve claims that they violated the False Claims Act by knowingly underpaying royalties owed on natural gas produced from federal and Indian leases. Specifically, the companies allegedly improperly deducted from royalty values the cost of boosting gas up to pipeline pressures and improperly reported processed gas as unprocessed gas in order to reduce royalty payments. This settlement resolves claims brought in a *qui tam* suit filed by Harrold Wright. Wright's heirs will receive a reward of \$23,000 plus interest.

CitiMortgage, Inc. (S.D.N.Y. Feb. 15, 2012)

CitiMortgage, Inc., a subsidiary of Citibank, N.A., agreed to pay the United States \$158.3 million to settle allegations of more than six years of misconduct against the Department of Housing and Urban Development (HUD) and the Federal Housing Administration (FHA), which caused HUD to pay millions of dollars to CitiMortgage when mortgage loans defaulted. Specifically, CitiMortgage allegedly failed to meet all of the HUD-FHA requirements for certain loans, failed to fully review loans that it endorsed for FHA insurance under the Direct Endorsement Lender Program, endorsed FHA insured loans that were ineligible under the program, and submitted false certifications to the federal government involving these ineligible loans. This settlement resolves allegations that arose in a *qui tam* suit brought by Sherry Hunt, a CitiMortgage employee in Missouri.

Gunnison Energy Corporation, SG Interests I Ltd. and SG Interests VII Ltd. (D. Colo. Feb. 15, 2012)

Gunnison Energy Corporation (GEC), SG Interests I Ltd. and SG Interests VII Ltd. (SGI) agreed to pay the United States a total of \$550,000 to settle antitrust and False Claims Act violations related to an agreement not to compete in bidding for four natural gas leases sold at auction by the U.S. Department of Interior's Bureau of Land Management (BLM). In 2005, GEC and SGI entered into a written agreement in which they agreed that only SGI would bid at the auctions and then assign an interest in the acquired leases to GEC. As a result of this agreement between GEC and SGI, the United States received less revenue from the sale of the four leases than it would have, had SGI and GEC competed with one another at the auctions. In addition, GEC and SGI were alleged to have made false statements to the government in connection with the agreement not to compete.

Rhode Island Hospital (D.R.I. Feb. 13, 2012)

Rhode Island Hospital (RIH) agreed to pay the United States \$5.3 million to settle allegations that from 2004 to 2009 the hospital ordered medically unnecessary overnight admissions for about 260 patients who underwent stereotactic radiosurgery (otherwise known as Gamma Knife treatment), but fraudulently billed Medicare and Medicaid as if the overnight stays were medically necessary. The hospital will reimburse Medicare and Medicaid \$2.6 million and will pay the federal government an additional \$2.7 million in damages.

Capmark Finance LLC (C.D. Cal. Feb. 10, 2012)

Capmark Finance LLC agreed to pay the United States \$3.9 million to resolve allegations that the company made false statements in connection with two nursing home mortgage loans insured by the U.S. Department of Housing and Urban Development (HUD). The two nursing homes were Canoga Care Center in Canoga Park, California and Hudson Valley Care Center in Ghent, New York. An investigation and audit by the HUD Office of Inspector General concluded that Capmark misrepresented material facts critical to the borrowers' creditworthiness in the two nursing home mortgage loan applications, which induced HUD to insure the loans—when the nursing homes later defaulted on the loans, it caused a loss to the government.

Bank of America Corporation, JPMorgan Chase & Co., Wells Fargo & Company, Citigroup Inc. and Ally Financial Inc. (Feb. 9, 2012)

The federal government and 49 state attorneys general reached a landmark \$25 billion agreement with the Bank of America Corporation, JPMorgan Chase & Co., Wells Fargo & Company, Citigroup Inc., and Ally Financial Inc. (formerly GMAC) to address allegations in six *qui tam* suits of mortgage loan servicing and foreclosure abuses, including: using “robo-signed” affidavits in foreclosure proceedings; engaging in deceptive practices when offering loan modifications; failing to offer non-foreclosure alternatives before foreclosing on borrowers with federally-insured mortgages; and filing improper documentation in federal bankruptcy court. The joint federal-state agreement also requires the loan servicers to implement comprehensive new mortgage loan servicing standards. The relators involved in the *qui tam* suits were: Gregory Mackler, Lynn Szymoniak, Sherry Hunt, Kyle Lagow, Victor Bibby and Brian Donnelly.

Dava Pharmaceuticals Inc. (D. Md. Feb. 8, 2012)

Dava Pharmaceuticals Inc. agreed to pay the United States \$11 million to settle allegations of underpaying its rebate obligations under the Medicaid Prescription Drug Rebate Program. The settlement also resolves allegations that between October 1, 2005 and September 30, 2009, Dava incorrectly classified certain pharmaceuticals and used incorrect methodologies in calculating average manufacturer prices for certain pharmaceuticals. These allegations were made in a *qui tam* action brought by Jim Conrad, who was represented by TAFEF members Marcella Auerbach and Kenneth Nolan, of Nolan & Auerbach, P.A.

Fourteen Hospitals (W.D.N.Y. Feb. 7, 2012)

A group of fourteen hospitals located in New York, Mississippi, North Carolina, Washington, Indiana, Missouri and Florida agreed to pay the United States over \$12 million to settle allegations that they submitted false claims to Medicare from 2000 to 2008 by overcharging for kyphoplasty procedures. Kyphoplasty can be performed safely as a less-costly outpatient procedure, but the hospitals performed the procedure on an inpatient basis to increase their Medicare billings. The facilities involved are: Plainview Hospital, Plainview, N.Y. (\$2,307,265); North Shore Syosset Hospital, Syosset, N.Y. (\$192,735); North Mississippi Medical Center, Tupelo, Miss. (\$1,894,683.30); Mission Hospital, Asheville, N.C. (\$1.5 million); Wenatchee Valley Medical Center, Wenatchee, Wash. (\$1,224,709.96); Community Hospital Anderson, Anderson, Ind. (\$500,561.36); St. John's Mercy Hospital, Creve Coeur, Mo. (\$365,000); Gulf Coast Hospital, Fort Myers, Fla. (\$173,005.86); Lee Memorial Hospital, Fort Myers, Fla. (\$159,571.87); and Cape Coral Hospital, Cape Coral, Fla. (\$73,279.47). The settlement also involves four hospitals affiliated with Adventist Health System/Sunbelt Inc. in Florida. These four hospitals include: Florida Hospital Orlando; Florida Hospital-Oceanside; Florida Hospital Fish Memorial; and Florida Hospital Heartland Medical Center. The settlement resolves claims raised in a *qui tam* suit filed in 2008 by Craig Patrick and Charles Bates. Patrick is a former reimbursement manager for Kyphon, and Bates is a former regional sales manager for Kyphon. The relators will receive a \$2.1 million reward from the total settlement amount. The relators were represented by TAFEF member Mary Louise Cohen of Phillips & Cohen LLP.

Mylan Laboratories, Inc. and Mylan Pharmaceuticals, Inc. (Idaho Jan. 30, 2012)

Mylan Laboratories, Inc. and Mylan Pharmaceuticals, Inc. agreed to pay the State of Idaho \$625,000 to resolve claims that they published inflated average wholesale drug prices, which caused the State's Medicaid program to overpay for drugs. For example, in 2003, one unit of Mylan's pharmaceutical product, Bumetanide, had a published average wholesale price of \$0.752, but an investigation revealed that the actual average wholesale price in 2003 was only \$0.191. More than \$460,000 of the settlement amount will be deposited in the state's general fund and \$50,000 will be placed in the state's consumer protection account to reimburse the office for investigative and legal costs.

Cayuga Medical Center (N.D.N.Y. Jan. 25, 2012)

Cayuga Medical Center agreed to pay the United States and the state of New York \$3.5 million to resolve allegations that the medical facility submitted false claims to Medicare and Medicaid in connection with improper physician recruitment agreements entered into between Cayuga Medical Center and various medical practices. The State of New York will receive \$426,305.00 from the settlement and the federal health care programs will receive \$3,149,751.00. This settlement resolves a *qui tam* lawsuit filed by Daniel S. Jorgenson, M.D., a plastic surgeon who formerly practiced in Ithaca, NY. Jorgenson will receive a \$566,955.18 reward.

The Boeing Company (E.D. Pa. Jan. 20, 2012)

The Boeing Company agreed to pay the United States \$4,392,779.74 to resolve allegations that the company improperly billed the Department of Defense for work at Boeing's facility in Ridley Park, Pennsylvania, under a government contract to produce, maintain, repair and modify the Chinook CH-47D and MH-47 helicopters. The settlement resolves claims brought in a *qui tam* suit by current Boeing employee Vincent A. DiMezza, Jr. DiMezza was represented by TAFEF members Marc S. Raspanti and Michael A. Morse and their co-counsel, Christopher A. Iacono, all of Pietragallo Gordon Alfano Bosick & Raspanti, LLP.

Cancer Genetics, Inc. (D. Mass. Jan. 19, 2012)

Cancer Genetics, Inc. agreed to pay the United States \$1 million dollars to settle allegations that from July 2003 to March 2005 the company improperly billed Medicare for chromosome karyotyping studies that were not medically necessary and as a result, the company received higher reimbursements than it should have.

Johnson & Johnson and Janssen Pharmaceuticals Inc. (W.D. Tex. Jan. 19, 2012)

Johnson & Johnson and one of its subsidiaries, Janssen Pharmaceuticals Inc., agreed to pay the United States \$158 million to settle a *qui tam* lawsuit alleging that from 1994 to 2008 the companies defrauded Texas Medicaid by overstating the safety of the anti-psychotic drug, Risperdal, and by improperly influencing officials and doctors to prescribe the drug for unapproved uses. The *qui tam* suit was filed in 2004 by relator Allen Jones.

Eastern Connecticut Hematology and Oncology, P.C. (E.D. Conn. Jan. 13, 2012)

Eastern Connecticut Hematology and Oncology, P.C. (ECHO) agreed to pay \$316,513 to resolve allegations that it fraudulently billed Medicare, Medicaid, and TRICARE from January 1, 2001 through March 31, 2008. ECHO alleged billed the healthcare programs for injections of medications (including Epogen, Neupogen, Neulasta and Aranesp) administered by medical assistants, even though Medical assistants are not authorized to administer medication in Connecticut. The matter was investigated by the Office of Inspector General for the Department of Health and Human Services; the Federal Bureau of Investigation; the Defense Criminal Investigative Service; the United States Food and Drug Administration, Office of Criminal Investigations; the United States Railroad Retirement Board, Office of Inspector General; and the Medicaid Fraud Control Unit, Office of the Chief State's Attorney.

Denver Health and Hospital Authority (D. Colo. Jan. 5, 2012)

Denver Health and Hospital Authority (DHHA), doing business as Denver Health Medical Center, agreed to pay the United States and the State of Colorado \$6.3 million to settle allegations of overbilling Medicare and Medicaid by misclassifying patients as inpatients when they were more appropriately classified as outpatients or observation patients. The State of Colorado will receive \$1,106,608 of the settlement funds, while the United States will receive \$5,193,192. The settlement resolves a *qui tam* suit filed by Joanne Curren, who was represented by TAFEF member Eric L. Young of Egan Young, Attorneys-at-Law. Curren will receive an \$817,959 share of the settlement funds.

Actavis Mid-Atlantic, LLC and Actavis Elizabeth, LLC (D. Mass. Jan. 4, 2012)

Actavis Mid-Atlantic, LLC and Actavis Elizabeth, LLC agreed to pay the United States and the States of New York, Florida, South Carolina and Iowa \$118.6 million to resolve allegations that they committed fraud by reporting inflated pharmaceutical prices. The U.S., Florida and Texas allegations were contained in *qui tam* cases filed by Ven-A-Care of the Florida Keys Inc. Ven-A-Care was represented by TAFEF member James Breen of The Breen Law Firm P.A., and was awarded a \$15.6 million share of the recovery.

Maersk Line Ltd. (N.D. Cal. Jan. 3, 2012)

Maersk Line Ltd. agreed to pay the United States \$31.9 million to resolve allegations of overcharging the Department of Defense in connection with cargo transportation contracts. Maersk was contracted to transport thousands of containers from ports to destinations in Iraq, Pakistan, and Afghanistan, and allegedly actively overcharged the government for these services by inflating and tampering with its invoices in various ways, including: billing over the contractual rate for refrigerated containers; billing for excessive late fees; failing to account for cargo transit times and a contractual grace period; billing for container GPS-tracking and security services that were not provided or only partially provided; and failing to credit the government for rebates of container storage fees received by Maersk's subcontractor at a Kuwaiti port. The settlement resolves a *qui tam* suit filed by former industry insider, Jerry H. Brown II. Brown will receive a \$3.6 million share of the settlement amount.

