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Quarterly Review

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

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

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

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FROM THE EDITOR

"You must never be fearful about what you are doing when it is right."
–Rosa Parks, Civil Rights Activist

Each time I prepare this publication, I am inundated with story after story of courageous whistleblowers who put their jobs, personal and professional relationships, and in some cases their personal safety at risk, to take a stand and stop fraudsters from stealing billions of our tax dollars. According to numbers released by federal and state agencies, in fiscal year 2012, cases filed under federal and state False Claims Act laws returned a record $9 billion in civil and criminal recoveries to the government. For example, the single largest FCA recovery this fiscal year was a $3 billion payment by GlaxoSmithKline—which, incidentally, also made the single largest FCA payment in FY2011. Similarly, Abbott Laboratories agreed to pay $1.5 billion to settle fraud claims, Bank of America paid a $1 billion settlement, and Merck agreed to pay $950 million. Each of these settlements was the result of whistleblower-initiated cases. In fact, the overwhelming majority of <u>all</u> False Claims Act cases are initiated by courageous whistleblowers, who allege not only frauds against our tax dollars, but frauds affecting the drugs we're prescribed, the medical devices implanted in our bodies, the equipment provided to our troops abroad, the safety of our roads, and on and on.

And whistleblowers don't only protect us through the False Claims Act. The value of the IRS Whistleblower Program was recently underscored highlighted by the IRS's acknowledgement that a whistleblower first exposed that Swiss bank UBS was encouraging and assisting wealthy American clients to illegally hide billions of dollars and thereby avoid paying hundreds of millions in taxes. After the IRS investigated the whistleblower's claims, the bank paid $780 million and turned over account information for some 4500 American clients, in order to avoid criminal prosecution in the U.S. Moreover, the IRS subsequently introduced an offshore tax amnesty program that the Service reports has already resulted in approximately 35,000 taxpayers turning themselves in and repaying more than $5 billion in unpaid taxes. The SEC whistleblower program is also paying dividends, as the newly-formed SEC Whistleblower Office recently announced its first award to a whistleblower whose efforts stopped a multi-million fraud on the securities markets.

Yet, even with all of this undeniable success, whistleblowers are often characterized as disgruntled employees, or "snitches," which simply makes no sense. Here at TAF Education Fund, we applaud the efforts of those who are willing to take a stand—or take a seat, if you're Rosa Parks—against injustice, even when doing so is unpopular and may come at significant personal expense. This publication endeavors to highlight many of the important contributions that whistleblowers make each year. Please keep those contributions in mind as you read this issue.

All the best,
Cleveland Lawrence III

Recent False Claims Act & *Qui Tam* Decisions

JULY 1, 2012–SEPTEMBER 30, 2012

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

See *U.S. ex rel. Freedman v. Suarez-Hoyos, MD*, 2012 WL 4344199 (M.D. Fla. Sept. 21, 2012), at page 73.

See *Gonzalez v. Fresenius Med. Care North America*, 2012 WL 3065314 (5th Cir. July 30, 2012), at page 63.

See *U.S. ex rel. Osheroff v. Tenet Healthcare Corp.*, 2012 WL 2871264 (S.D. Fla. July 12, 2012), at page 69.

B. What Constitutes a False Claim?

U.S. ex rel. Feldman v. Van Gorp, 2012 WL 3832087 (2d Cir. Sept. 5, 2012)

A relator brought a *qui tam* suit under the False Claims Act, alleging that a medical college and one of its professors defrauded the National Institutes of Health (NIH) by providing false information in an application for research grant funds. The relator had been selected to participate in the research program as a fellow, but left the program before his two-year fellowship ended. He alleged that the defendants deviated from what they described in their grant application and failed to inform NIH of those deviations. After a jury trial, a verdict was returned partially in favor of the plaintiff and the U.S. District Court for the Southern District of New York awarded the government over $850 million in treble damages—representing the full value of government grant for the years in which the violations alleged by the relator were found to have occurred. The defendants moved for judgment as a matter of law and for a new trial, but the district court denied both motions. The defendants appealed to the U.S. Court of Appeals for the Second Circuit, arguing that the district court did not apply the proper methodology for determining the government's damages; that the jury did not have sufficient evidence from which to conclude that the false statements at issue were material to the government's funding decision; and that the district court erred when it excluded evidence of NIH's "inaction" in response to the relator's complaint to the agency.

Holding: The Second Circuit affirmed the district court's rulings.

Damages

The defendants argued that the district court failed to apply the "benefit-of-the-bargain" method for calculating the government's damages, and erred by deciding the amount of damages as a matter of law, rather than allowing the jury to assess damages. According to the defendants, the proper measure of damages was the difference between the amount the government paid minus the value of the goods or services the government received. The relator—supported by the United States as *amicus curiae*—countered that a different method of calculating damages was appropriate and that the benefit-of-the-bargain approach was improper, since the defendant was held liable for fraudulently seeking payments for participating in a program designed to benefit third parties, and the government received nothing of tangible benefit from the defendant. In accordance with this argument, the relator alleged that the correct measure of the government's damages was the full value of the grant funds, since the government lost the opportunity to award the grant funds to a recipient who would have used the money as the government intended. The circuit court noted that the "question of how damages should be measured in an FCA case where 'contracts entered into between the government and the Defendants did not produce a tangible benefit to the government,' is one of first impression." (internal citation omitted) However, relying on authority from sister circuits, the Second Circuit held that "the measure of damages advocated by the plaintiff and the United States is correct. The court noted that when, as here, "the government bargain[s] for something qualitatively, but not quantifiably," it is entitled to receive as damages the full amount it paid based on materially false statements.

The circuit court rejected the defendants' argument that the district court's view of the government's damages was erroneously based on a fraudulent inducement theory of FCA liability. The appellate court, though, stated that it saw

> no principled distinction, however, between fraudulently inducing payment initially, thereby requiring all payments produced from that initial fraud to be returned to the government (trebled and with certain fees and costs added as provided by statute), and requiring payments based on false statements to be returned to the government when those false statements were made after an initial contractual relationship based on truthful statements had been established. . . . If the government made payment based on a false statement, then that is enough for liability in an FCA case, regardless of whether that false statement comes at the beginning of a contractual relationship or later. The only difference would be that liability begins when the false statement is made and relied upon, rather than at the beginning of the contractual relationship, as it would be in a fraudulent inducement case.

Moreover, since this was not a benefit-of-the-bargain situation and since the amount of each payment of government funds for which liability was assessed was not in dispute, the circuit court held that there were no further findings of fact necessary with respect to damages, and the district court properly determined damages as a matter of law. Thus, the district court's rulings on damages were affirmed.

Materiality

The defendants also challenged the district court's denial of their motion for judgment as a matter of law and for a new trial, arguing that the alleged false statements to the government at issue were not material to the government's payment of grant funds. The circuit court again affirmed the district court's ruling, finding that the parties stipulated that, in order to receive funding after the initial grant year, the defendants were required to submit renewal applications containing various progress report information. The defendants contended that the statements contained in these reports did not establish what information was material to the government's decision on renewal applications. The circuit court, though, held that the FCA's materiality requirement is an objective standard that applies when a statement has a "natural tendency" to influence the government's payment decision. The circuit court agreed with the district court that a reasonable jury could have found that the defendants' false statements to the government with respect to renewal applications were material, since the defendants knew—based on the instructions for submitting renewal applications—that NIH considered the information included in the progress reports when making funding decisions. As a result, the Second Circuit affirmed that the district court did not abuse its discretion when denying the defendants' motion for a new trial.

Government Inaction

The circuit court also affirmed the district court's ruling to exclude evidence of NIH's alleged failure to take remedial action in response to the plaintiff's complaints to the agency. The defendants argued that the agency saw no validity in the relator's complaints and that the district court erred when it denied them an opportunity to present such evidence to the jury, which would have established that the defendants' false statements were immaterial to the government. The appellate court, though, held that the district court did not abuse its discretion when it determined that the excluded evidence was irrelevant, since "the NIH's failure to act in response to [the relator]'s complaints did not speak to the seriousness of those complaints or the likelihood that false claims had been made," particularly since the jury was not presented with any evidence regarding the standards used by NIH to determine the existence of misconduct and whether or not those standards are in line with the elements of fraud claims under the FCA.

Hooper v. Lockheed Martin Corp., 2012 WL 3124970 (9th Cir. Aug. 2, 2012)

A relator filed a *qui tam* suit, alleging that a defense contractor defrauded the U.S. Air Force by filing false claims under a hardware/software contract project he was working on. He claimed that the defendant knowingly underbid the contract; failed to properly convey to the government all intellectual property rights in the software; and failed to follow required testing procedures. He further claimed that he was terminated from his job after investigating and threatening to report the alleged fraud to the government. His lawsuit alleged claims under the False Claims Act for fraud and retaliation. The suit was originally filed in the U.S. District Court for the District of Maryland, but was transferred to the U.S. District Court for the Central District of California on forum non conveniens grounds. The California district court dismissed the retaliation claim, finding that it was time-barred, pursuant to California's two-year statute of limitations. The court later granted summary judgment in favor of the defendant on the fraud claims, finding that the relator's evidence was insufficient to establish fraudulent underbidding; that his intellectual property claims were "completely unsupported;" and that he failed to produce evidence of fraud in the required testing procedures. The relator appealed the district court's rulings to the U.S. Court of Appeals for the Ninth Circuit, arguing that the court erred when it dismissed his retaliation claim, because Maryland's three-year statute of limitations—not California's two-year limitations period—should have applied to that claim. He further argued that the district court erred when it dismissed his fraud claims.

Statute of Limitations for FCA Retaliation Claims

The Ninth Circuit noted that, at the time of the relator's alleged retaliation, the False Claims Act did not include a statute of limitations for retaliation claims, and that the U.S. Supreme Court held that the most closely analogous state statute of limitations would apply to each respective claim. The circuit court also determined that the relator properly filed his *qui tam* action in Maryland, where the defendant's corporate headquarters were based, and that the Maryland court was authorized to transfer the case to California on forum non conveniens grounds. The relator argued that the California court, as the transferee court, should have applied the law that the Maryland court would have applied—including Maryland's statute of limitations. The appeals court agreed. Although the court recognized some disagreement among the circuits, it held that, with respect to state law, changes of venue should be nothing more than changes of courtrooms—even for cases that arise under federal question jurisdiction but have embedded state law issues. The court remanded the relator's retaliation claim to the California district court, with instructions to apply Maryland's three-year statute of limitations and to allow the claim to proceed on its merits.

What Constitutes a False Claim?

The defendant argued that the relator's claim of fraudulent underbidding failed because false estimates of future costs cannot ever be the basis for FCA liability—the defendant argued that such estimates are opinions or predictions and cannot be "false" within the meaning of the FCA. The Ninth Circuit noted that this was a question of first impression, and turned to sister circuits, finding that the First and Fourth Circuits have held that FCA liability may attach to knowingly false estimates, under a fraudulent inducement theory. The Ninth Circuit held that "false estimates, defined to include fraudulent underbidding in which the bid is not what the defendant actually intends to charge, can be a source of liability under the FCA, assuming that the other elements of an FCA claim are met." The circuit court then addressed the question of whether or not the district court erred in granting summary judgment in favor of the defendant on the relator's underbidding claim, noting that the district court concluded that the relator failed to provide sufficient evidence to show that the defendant *knowingly* submitted a false bid to the government. The relator argued that his evidence met the FCA's definition of "knowledge" and that the district court applied the wrong legal standard by improperly requiring him to demonstrate that the defendant had the intent to deceive the government—an element that is specifically excluded from the FCA's definition of "knowledge." The circuit court agreed. The court found that the relator provided evidence that the defendant instructed employees to reduce its bids on the contract without regard to actual costs, after its initial bid was rejected. This evidence, the court held, raised a genuine issue of material fact regarding the question of whether or not the defendant acted knowingly, either by having actual knowledge, deliberately ignoring the truth, or acting in reckless disregard of the truth when it submitted its bid to the government. The court reversed the district court's grant of summary judgment on the underbidding claim.

The circuit court, though, affirmed the district court's dismissal of the relator's other fraud claims, in which the relator argued that the defendant fraudulently used freeware in violation of the government's intellectual property rights, and employed defective testing procedures. The district court found that the relator provided no evidence to show that the defendant improperly used the freeware, as it concluded that it was "undisputed" that the defendant was allowed to use it. The district court similarly found that the relator could not support his fraudulent testing claim, noting that the defendant made the Air Force aware of its testing procedures and thus, could not have knowingly submitted a false claim based on testing. The relator argued that the district court erred by excluding various pieces of evidence obtained in discovery, but the circuit court rejected that argument, as it determined that the relator failed to properly admit the materials into evidence, and therefore, the district court was within its discretion to exclude them.

See *U.S. ex rel. Liotine v. CDW Gov't, Inc.*, 2012 WL 2807040 (S.D. Ill. July 10, 2012), at page 41.

JURISDICTIONAL ISSUES

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

U.S. ex rel. Simpson v. Bayer Corp., 2012 WL 3600302 (D.N.J. Aug. 21, 2012)

Two relators separately filed *qui tam* actions under the federal False Claims Act and several state FCA laws, alleging that a group of affiliated pharmaceutical drug companies illegally marketed one of their drugs. The two lawsuits were filed in different districts courts, about three months apart. The United States declined to intervene in either case. While the second-filed case was still under seal, the relator who filed that case sought the defendants' consent to the consolidation of the two cases. The defendants refused. The relator then moved to consolidate the two cases anyway, arguing that, to save judicial and government resources, the U.S. Attorney in the district where the second case was filed approved the consolidation and transfer of that case to the United States District Court for the District of New Jersey, where the first case was filed. The New Jersey district court granted the motion unsealed the relators' consolidated complaint and ordered them to serve the complaint on the defendants. Subsequently, the defendants opposed the transfer and consolidation, arguing that they had no notice of the relator's motion or an opportunity for a hearing on the issue.

The defendants argued that consolidation was improper because the False Claims Act's "first-to-file" provision divests courts of subject matter jurisdiction over claims by individuals who intervene in or bring related actions based on the same essential facts that were alleged in a prior, pending *qui tam* action, and that this provision bars the second-filed complaint. The relators countered that while the first-filed complaint alleged the federal False Claims Act claims, the second-filed complaint was the first to alleged certain state FCA claims. Thus, they contended, consolidation allowed the court to exercise its jurisdiction over the state FCA claims, pursuant to the FCA or the court's authority to hear supplemental state law claims, which led to a more efficient result that would not result in conflicting rulings or duplicative proceedings and a waste of resources.

First, the court dismissed the federal FCA claims brought in the second-filed complaint, noting that the relators agreed with the defendants that those claims were barred by the first-to-file rule. The court then refused to exercise jurisdiction over the state FCA claims brought in the second-filed complaint. The relators argued that those state law claims should be consolidated with the first-filed case, pursuant to section 3732(b) of the federal FCA, which provides that 'district courts shall have jurisdiction over any action brought under the laws of any state for the

recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under [the federal False Claims Act]." The court rejected this argument, finding that the provision relied on by the relators did not apply when the federal and state law claims arose in separate lawsuits; instead, the court determined that the provision applied when a single complaint alleged violations of both federal and state false claims act provisions, and the court has jurisdiction over the federal FCA claims. Since the court dismissed the federal FCA claims filed in the second case, it held that it did not have jurisdiction over the state law claims included in that complaint. The court then declined to exercise supplemental jurisdiction over the state FCA claims, noting that it was within the court's discretion not to do so, since the court did not have original jurisdiction over the federal FCA claims included in the second-filed complaint. The court observed that the state FCA claims can still go forward in the court in which they were filed, and that the state governments involved will be allowed to intervene in those claims, if they choose do so.

As a result of these findings, the court granted the defendants' motion to vacate the consolidation and to strike the consolidated complaint.

U.S. ex rel. Powell v. American Intercontinental Univ., Inc., 2012 WL 2885356 (N.D. Ga. July 12, 2012)

A group of four relators brought a *qui tam* action against a for-profit higher learning institution and its affiliates, alleging that the defendants violated the False Claims Act by making false statements in "Program Participation Agreements" with the Department of Education regarding their compliance with the Higher Education Act's prohibition against incentive-based compensation for enrollment counselors; applicable accreditation standards; and student eligibility requirements under federal law. The defendants moved to dismiss the relators' complaint for lack of subject matter jurisdiction, arguing that the relators' claims are barred by the FCA's public disclosure and first-to-file provisions, as their complaint contained information that had already been included in five prior *qui tam* suits. The defendants also moved for summary judgment on the claims brought by three of the four relators, arguing that each of those three relators agreed not to bring any claims against the defendants, and signed releases to that effect prior to filing their *qui tam*.

Holding: The United States District Court for the Northern District of Georgia granted the defendants' motion to dismiss for lack of subject matter jurisdiction, and denied their motion for summary judgment.

First-to-File Rule

The defendants argued that the relators' fraud claims were precluded by the FCA's first-to-file bar, which prohibits *qui tam* actions based on underlying facts in a pending action. They pointed to multiple prior *qui tam* actions which they claimed barred the relators' suit. The relators countered that the first-to-file provision did not preclude their claims, since the prior actions had all been dismissed prior to the filing of their lawsuit, and thus, none of those prior suits was still "pending" at the time the relators' suit was filed. The court looked to the plain language of the statute to determine whether or not the relators' claims were barred and concluded that, for purposes of the first-to-file rule, "pending" does not simply mean "active." The court held that such a definition "would create perverse incentives," and would encourage potential relators to "sit on the sidelines hoping that the first relators' claims would be dismissed so that they could then file their own complaint later and receive the bounty." The court noted that the first-to-file rule is designed to create a "race to the courthouse" among relators who wish to assist the government in exposing fraud, and that a rule that incentivized relators to wait until prior actions were dismissed would subvert that purpose, while allowing fraud to continue to occur. Moreover, the court stated that the relators' view that "pending" means "active" would allow relators to engage in forum shopping by filing *qui tam* actions in one jurisdiction, and then dismissing those actions and re-filing them in another jurisdiction. The court also noted that the government, whom the court called "the actual plaintiff in a *qui tam* suit," has already been made aware of potential fraud once the first *qui tam* action is filed and that in this instance, the government, as the ultimate plaintiff, has already sued the defendants several previous times regarding the same alleged fraud. The court stated that "[i]f a subsequent relator's claims are exactly the same as prior relators' claims, the policies behind the state do not support successive suits simply because the first suits were dismissed." The court noted that the first-to-file bar only precludes subsequent *qui tam* suits, but does not prejudice the government's ability to file subsequent actions under the FCA, to protect its own interests. As a result of these determinations, the court held that "pending" as used in the FCA's first-to-file provision, include prior, previously dismissed action. Since the relators' allegations regarding the defendants' allegedly false certifications of compliance with the ban on incentive-based compensation and with the criteria for student eligibility had been previously brought in prior *qui tam* actions, the court held that those claims were "related" to the prior suits for first-to-file purposes. As a result, the court dismissed those claims, without prejudice.

Public Disclosure Bar

Since the court dismissed the relators' claims for lack of subject matter jurisdiction under the first-to-file rule, it declined to address the defendants' argument that the claims should be dismissed under the FCA's public disclosure provision.

Waivers/Releases of FCA Liability

Finally, the court considered the defendants' summary judgment motion, in which they argued that the claims brought by three of the four relators should be dismissed since those relators had signed broad releases when they left their employment with the defendants, in which they agreed not to bring any claims against the defendants arising out of their employment. These three relators did not dispute the language of their respective employment agreements, but argued that these contractual provisions should not be enforced for public policy reasons. The court, agreeing with the position announced by the United States in *amicus curiae* briefs filed in other cases, held that when the government has already been made aware of potential FCA claims, policy considerations weigh in favor of enforcing pre-filing releases, but when the government is unaware of potential FCA claims prior to the filing of a *qui tam* actions, then public policy considerations weigh against enforcing pre-filing releases. The court rejected the defendants' argument that pre-filing releases should always be enforced, unless the government intervenes in the *qui tam* action, noting that non-intervention is not a signal of the government's disinterest in a *qui tam* suit and observing that fewer relators would come forward with fraud allegations, if they needed assurances that the government would intervene in their suits.

The court noted that only the relators' claims regarding the incentive-compensation ban and the student eligibility criteria were dismissed under the first-to-file rule. The defendants never made a similar argument with respect to the relators' claims that the defendants falsely certified compliance with applicable accreditation standards. Since there was no evidence that the government had been made aware of those potential fraud claims before any relator signed a pre-filing release, the court allowed the relators to maintain their fraud claims based upon those allegedly false certifications.

U.S. ex rel. Hoggett v. Univ. of Phoenix, 2012 WL 2681817 (E.D. Cal. July 6, 2012)

Two relators sued an educational institution under the federal False Claims Act and the California False Claims Act, alleging that the defendant submitted false claims for federal and California student financial aid funds. Specifically, the relators' alleged that the defendant fraudulently asserted that it had complied with the provisions of the Higher Education Act's ban on compensation to recruiters that is based solely on enrollment numbers. The defendant moved to dismiss the relators' action, arguing that a prior *qui tam* suit—a suit that had already been settled—deprived the court of subject matter jurisdiction over the relators' claims, pursuant to the FCA's first-to-file rule and public disclosure provision. In addition, the defendant argued that the relators' did not state a viable claim under the FCA.

Holding: The United States District Court for the Eastern District of California denied the defendant's motion to dismiss.

First-to-File Rule

The defendants pointed to a previously-filed—and settled—*qui tam* suit that alleged the same fraud scheme and argued that the FCA's first-to-file rule barred the present relators' action. While the relators acknowledged the existence of the prior suit and its similar claims, the contended that the defendant's misconduct was not deterred or altered by the prior settlement and that the defendant continued to knowingly defraud the federal government and the State of California. The relators further asserted that their claims allege fraud that occurred after the earlier *qui tam* case was settled, and therefore, their claims were not encompassed by the prior settlement. Since the previous case was settled nine months before the relators filed the present action, they argued, that prior case was no longer "pending" under the first-to-file rule, and thus, could not preclude their suit. The defendant argued that, under the first-to-file rule, the prior complaint precludes the relators' present action, since the same fraud scheme was alleged in both suits—even though the present relators alleged that the fraud continued during a different time period.

The court agreed with the relators that since the prior *qui tam* action was dismissed before the present relators filed suit, the prior case was not "pending" under the first-to-file rule. The court declared that "[u]sing the first-to-file rule to bar whistleblower suits that allege new fraud perpetrated by a wrongdoer after completion of a previous suit would thwart the statute's purpose to encourage whistleblowers to come forward." The court noted that the defendant's argument could lead to the "absurd result" of encouraging fraudsters who have been caught to merely perpetrate related frauds, so as to shield themselves from subsequent *qui tam* suits. The court denied the defendant's motion to dismiss pursuant to the first-to-file rule.

Public Disclosure Bar

Next, the court considered the defendant's argument that the relators' action was barred by the public disclosure rule. The court quickly disposed of this defense argument, noting that the relators' complaint alleged that the defendant continued to defraud the government even after the previous case was settled. The court stated that the relators' suit was not barred under the public disclosure rule because the relators "have provided information that is independent of and materially adds to the information publicly disclosed," and therefore, qualified for the "original source" exception to the public disclosure bar.

The court denied the defendant's motion to dismiss under the public disclosure rule.

Failure to State a Claim

Next, the court denied the defendant's motion to dismiss for failure to state a claim, in which the defendant argued that the relators did not plead the alleged fraud scheme with particularity, and that the defendant's actions were allowed under a safe harbor provision under the Higher Education Act. The court first determined that the relators' claims were pled with the requisite particularity, as the relators named individuals who were alleged to have participated in the fraud and provided detailed information regarding how the fraud was allegedly carried out. Next, the court determined that the relators' complaint, at the pleading stage, was sufficient to state plausible allegations that the defendant violated the FCA. The court noted that additional facts regarding the application of the HEA's safe harbor provision would be revealed during discovery, and denied the defendant's motion to dismiss for failure to state a claim.

State Law Claims

Finally, the court considered the defendant's argument that the relators' claims under the California False Claims Act were barred by the applicable statute of limitations and that the relators' failed to state a claim under that statute because, for a portion of the time period in question, California law explicitly allowed recruiter compensation based on enrollment numbers. First, the court rejected the defendant's argument that the claims under the California False Claims Act were untimely, finding that there was no reason to infer that, as a matter of law, appropriate California officials were put on notice of the defendants alleged violations of the California FCA by the prior *qui tam* action alleging violations of the federal FCA. The court also rejected the defendant's argument that the relators failed to state a claim under California law, stating that even if California law did allow for the defendant's alleged practices for part of the time period at issue, "that does not justify dismissing Relators' claims in their entirety at the pleading phase."

The defendant's motion to dismiss the state FCA claims was denied.

U.S. ex rel. Heineman-Guta v. Guidant Corp., 2012 WL 2582359 (D. Mass. July 5, 2012)

A relator filed a *qui tam* action on behalf of the United States and twenty-three U.S. States, alleging that her former employers engaged in a scheme of providing illegal kickbacks—including trips, entertainment, grants, lavish meals, monetary payments, and job placement assistance—to induce physicians to select and recommend their cardiac rhythm medical devices to patients. She alleged that these improper inducements violated the False Claims Act, as they caused physicians to present false reimbursement claims to Medicare and Medicaid and that the defendants conspired to defraud the government. The defendants moved to dismiss the relator's complaint, arguing that her claims were barred pursuant to the FCA's first-to-file provision because two earlier-filed *qui tam* actions pled the essential elements of the present relator's alleged fraud scheme.

Holding: The United States District Court for the District of Massachusetts granted the defendants' motion to dismiss.

First-to-File Rule

The court examined both previously-filed complaints and quickly determined that the first complaint did not preclude the present relator's complaint, since it did not tie any alleged kickback scheme to the promotion or sale of the defendant's cardiac rhythm products. However, the court found that the second prior *qui tam* action "disclosed a scheme nearly identical to" the one alleged by the present relator. The relator contended that her action was not barred by this earlier suit because the earlier action was itself deficient, as it did not satisfy the particularity requirements of Federal Rule of Civil Procedure 9(b). The court disagreed with the relator, concluding that the purpose of *qui tam* actions is to put the government on notice of potential fraud and stating that it is plausible that a complaint that does not satisfy Rule 9(b) might still provide sufficient information to cause the government to investigate potential fraud. Moreover, the court observed that the prior-filed complaint at issue was not dismissed for lack of specificity, but was voluntarily dismissed. Thus, there was never an opportunity for a court to evaluate the sufficiency of the allegations raised in that complaint.

Consequently, the court granted the defendants' motion to dismiss.

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

U.S. ex rel. Heath v. Wisconsin Bell, Inc., 2012 WL 4128020 (E.D. Wisc. Sept. 18, 2012)

A relator filed a *qui tam* suit against a telecommunications services provider, alleging that the defendant fraudulently obtained government subsidies by falsely certifying that it was providing services to schools and libraries at the lowest rate charged to similarly-situated customers. The defendant moved to dismiss the complaint for lack of subject matter jurisdiction pursuant to the False Claims Act's public disclosure bar provision, for failure to state a claim, and for untimeliness.

The U.S. District Court for the Eastern District of Wisconsin granted the defendant's motion to dismiss for lack of subject matter jurisdiction, finding that the relator's fraud allegations had previously been publicly disclosed when information showing that the defendant charged a lower rate to one of its other similarly-situated customers was posted to a state government webpage; the court noted that the state government disclosure constituted a "report" for public disclosure bar purposes, and that the disclosure occurred before the public disclosure bar provision was amended to make clear that only federal government reports deprive courts of subject matter jurisdiction over *qui tam* claims brought under the FCA. The court determined that the relator actually derived the information on which his complaint was based after reviewing the publicly disclosed information and thus did not qualify for the "original source" exception to the public disclosure provision. As a result of these findings, the court dismissed the complaint for lack of subject matter jurisdiction. The court declined to address the defendant's other arguments for dismissal.

State of California ex rel. Bates v. Mortgage Elec. Registration Sys., Inc., 2012 WL 4054142 (9th Cir. Sept. 17, 2012)

A relator filed a *qui tam* action under the California False Claims Act (CFCA) alleging that a mortgage registration company and a group of financial institutions defrauded numerous California counties by naming the registration company as a beneficiary in recorded mortgage documents in order to avoid or decrease recording fees. The defendants moved to dismiss the suit for lack of subject matter jurisdiction and for failure to state a claim. The relator moved to amend his complaint. The U.S. District Court for the Eastern District of California—the defendant successfully removed the action to federal court on diversity jurisdiction grounds—granted the defendants' motion, finding that the CFCA's public disclosure bar provision required dismissal of the action for lack of subject matter jurisdiction. The relator appealed the district court's ruling to the U.S. Court of

Appeals for the Ninth Circuit, arguing that the district court erred when it denied his motion to remand the action to California state court and when it held that his suit was precluded by the CFCA's public disclosure bar provision.

First, the relator argued that the district court should have remanded the action to state court, since the State of California was the real party in interest in his *qui tam* suit and that this factor outweighed diversity jurisdiction. The circuit court rejected that argument, agreeing with the district court that several California counties—but not the state itself—were the real parties in interest, since the recording fees at issue would have been payable to and usable by to the counties exclusively, and because if the suit were successful, the state would not realize any benefit.

The appellate court also agreed with the district court's dismissal of the relator's complaint on public disclosure grounds. The court found that the facts underlying the relator's allegations had already been disclosed in the public domain through other cases an in news articles. The court also found that the relator did not qualify for the "original source" exception to the CFCA's public disclosure rule, since he did not discover the fraud until after many of the public disclosures had occurred and therefore could not have provided the information that led to the public disclosure, as required under the CFCA.

The district court's rulings were affirmed and the relator's action was dismissed for lack of subject matter jurisdiction.

U.S. ex rel. Monaghan v. New York City Dep't of Housing, Preservation and Dev., 2012 WL 4017338 (S.D.N.Y. Sept. 10. 2012)

A relator alleged that New York City's housing agency and a group of affiliated corporate defendants defrauded the federal government and the State of New York by withdrawing a housing complex they developed from a state program that offered low-interest government mortgages and tax exemptions to private developers in exchange for the developers' agreement to maintain the properties as low-income housing for a specific period of time. Following the corporate defendants' announcement that they would withdraw the housing complex from the program, the tenants of the complex—whose rent was subject to increases—filed suit against the corporate defendants, seeking injunctive relief. Ultimately, those defendants reached settlements with various tenants who qualified for federally-subsidized Section 8 housing vouchers and the remaining tenants' claims were dismissed for lack of standing. The relators' suit was filed years later and alleged that the corporate defendants made false claims and statements in connection with the submission of tenants' claims for Section 8 vouchers, since the submissions were based on the defendants' improper withdrawal of the housing complex from the low-income housing program; the relator alleged that the corporate defendants'

application for Section 8 vouchers were fraudulent, because the need for the subsidies was due to the defendants' improper withdrawal from the state program.

The defendants moved to dismiss the relators' complaint, arguing, among other things, that the court lacked subject matter jurisdiction over the relator's complaint, pursuant to the public disclosure bar. The U.S. District Court for the Southern District of New York agreed, finding that the tenants' earlier suit against the corporate defendants publicly disclosed the facts underlying the relator's fraud allegations. The court further held that the relator did not qualify for the "original source" exception to the public disclosure bar because he did not assert that he had direct and independent knowledge of the information upon which his fraud claims were based—instead, the court noted, the relator confirmed that he became aware of the defendants' alleged fraud when he reviewed various documents that had also been included in the tenants' earlier lawsuit against the corporate defendants. The court dismissed the relator's complaint for lack of subject matter jurisdiction.

U.S. ex rel. Black v. Health & Hosp. Corp. of Marion County, 2012 WL 3538820 (4th Cir. Aug. 17, 2012)

A relator filed a *qui tam* complaint in the U.S. District Court for the District of Maryland, alleging that healthcare entity operated by a municipal corporation and political subdivision of the State of Indiana committed Medicaid fraud and violated the federal False Claims Act. The United States declined to intervene in the suit. The defendant moved to dismiss the relator's complaint, arguing, among other things, that the court did not have subject matter jurisdiction over the relator's claims pursuant to the FCA's public disclosure bar provision; that the relator failed to state a claim under the FCA and failed to plead the alleged fraud with particularity, as required by Federal Rules of Civil Procedure 12(b)(6) and 9(b). The relator responded to the defendant's motion and also moved to defer any potential motion for leave to amend his complaint until after the motion to dismiss was decided. The district court agreed with all three defense arguments, dismissed the relator's amended complaint with prejudice, and denied the relator's motion to defer. The relator then moved to amend his complaint and moved for reconsideration of the court's denial of his motion to defer. The court denied both motions. The relator then appealed the district court's rulings to the U.S. Court of Appeals for the Fourth Circuit.

Holding: The Fourth Circuit affirmed the district court's ruling on subject matter jurisdiction pursuant to the public disclosure bar, and the dismissal of the relator's complaint. The court declined to examine the other district court rulings on appeal on mootness grounds.

Public Disclosure Bar

The circuit court agreed with the district court that the relator's claims were barred by the FCA's public disclosure provision, finding that the relator's claims "largely mimic" information that had been previously publicly disclosed in various materials produced by the Centers for Medicare and Medicaid Services, through public congressional hearings and legislative reports, and in the media. The relator had argued that the district court's public disclosure ruling was erroneous because "the district court did not parse in detail the alleged similarity between the [public disclosures], as compared with the highly specific allegations" made in his *qui tam* complaint. But the circuit court found that the public disclosure bar provision does not require that relators' allegations match public disclosures "with specificity." The appeals court held that the relator's allegations had been previously publicly disclosed and that the district court did not err when it determined that it did not have subject matter jurisdiction over the relator's claims, since the relator's claims were at least partly based upon the public disclosures. The appellate court also held that the relator failed to show that he qualified for the original source exception to the public disclosure bar, since he was unable to establish that he had direct and independent knowledge of the alleged, as his allegations were based on documents and communications with others, and since he admitted that he did not have access to specific documents and information that would demonstrate the alleged fraud, and instead relied on his "gut."

Leave to Amend *Qui Tam* Complaint

The relator argued that the district court erred when it denied his motion to defer a motion for leave to amend his complaint; denied his subsequent motion for leave to amend his complaint; and denied his motion for reconsideration. The Fourth Circuit agreed with the district court that the purpose of a motion to amend a complaint is to "provide the district court with a means by which to determine whether the amendment would cure the defects in the initial complaint." The circuit court affirmed the district court's holding that the relator failed to meet this standard. The court further held that the district court did not abuse its discretion when it denied the relator's motion for reconsideration, since the relator had already amended his complaint three times before.

U.S. ex rel. Rostholder v. Omnicare, Inc., 2012 WL 3399789 (D. Md. Aug. 14, 2012)

A relator brought a *qui tam* action under the federal False Claims Act and the corresponding statutes of 22 states against Heartland Repack (his former employer) and Heartland's parent company, Omnicare. The relator alleged that the defendants violated the false claims act laws by knowingly billing Medicare and Medicaid for products that had been cross-contaminated and adulterated. The re-

lator claimed that Omnicare formed Heartland to provide "repackaging" services to its patients and long-term care facility residents—repackaging is the process by which Heartland individually segregated Omnicare's patients' particular regimens of daily drugs—and that Heartland sold adulterated products to Omnicare, which then sought reimbursement from the federal government and various state governments. Specifically, the relator, who had been employed as a senior director of repackaging operations at Heartland, alleged that, at Omnicare's direction, Heartland added penicillin to the list of drugs it repackaged, and that all of the drugs were repackaged in the same warehouse, which often kept its doors open and used the same heating and ventilation system throughout the building. He claimed that he discovered that Food and Drug Administration (FDA) regulations prohibited Heartland from repackaging penicillin in the same facility as other drugs, due to concerns about cross-contamination and allergic reactions, and that he notified an Omnicare Senior Vice President as well as the manager of Heartland's warehouse about the FDA violations. He claimed that the defendants did nothing to remedy the quality control issues, and that he eventually resigned from his job as a result of the inaction, and that he later filed his *qui tam* action. Both defendants moved to dismiss the relator's claims for failure to state a claim for relief and for lack of subject matter jurisdiction pursuant to the FCA's public disclosure bar.

Holding: The U.S. District Court for the District of Maryland granted the defendants' motions.

Public Disclosure Bar

The relator alleged that a few after resigning from his job, he contacted the FDA to report Heartland's alleged violations and the FDA sent inspectors to Heartland's repackaging facility. He claimed that Heartland attempted to deceive the FDA regarding its practices, but that, after he provided more information, the FDA eventually discovered that penicillin was being repackaged at the same facility as other drugs, and issued a warning letter to Heartland regarding cross-contamination. The defendants claimed that under the False Claims Act, the warning letter constituted a public disclosure and barred his *qui tam* complaint. The relator did not dispute that the letter was a public disclosure, but he argued that since his complaint was not "based upon" the letter, he was not precluded from filing his suit. In addition, he claimed that he qualified for the "original source" exception to the public disclosure bar. The court agreed that the relator was an original source of the information on which his complaint was based, and rejected the defendants' argument on subject matter jurisdiction.

The court found that the relator satisfied the original source elements. First, the court determined that the relator voluntarily gave the government information regarding the alleged fraud before filing his suit. The court noted that, before filing suit, the relator reported the "core" information regarding the defendants' alleged wrongdoing to the FDA and later assisted the FDA with its investigation—information the relator provided was later verified by the FDA and included in its warning letter. In addition, the court found that the relator had direct and independent knowledge of the facts on which his claims were based. The defendants had argued that the relator was not an original source because he did not have direct and independent knowledge of specific false claims to the government. The court, however, noted that the FDA warning letter did not contain information about the defendants' Medicare and Medicaid claims, and thus, the relator was not required to prove that he was an original source of that information. While the court recognized that Rule 9(b) of the Federal Rules of Civil Procedure usually requires FCA plaintiffs to plead facts regarding specific false claims to the government, it also declared that the heightened pleading standard can be relaxed when the existence of a fraudulent scheme has been adequately pled. The court held that the relator met that standard.

Consequently, the court held that the public disclosure bar did not apply to the relator's allegations and that the court was not deprived of subject matter jurisdiction over his claims.

Failure to State a Claim

After assuming jurisdiction over the relator's claims, the court granted the defendants' motions to dismiss them, for failure to state a claim. The court concluded that the relator failed to state an FCA claim based on his theory that all of Omnicare's claims to federal and state governments were false, since the defendants had committed material violations of Medicare/Medicaid regulations. The court suggested that the relator could not maintain his claims without alleging a false statement or some fraudulent conduct by the defendants, but acknowledged that "clearer guidance from the Fourth Circuit" was needed. The court further held that the relator failed to state a claim because he: failed to plead facts regarding the process by which Omnicare allegedly submitted false claims to the government based on Heartland's alleged regulatory violations, including facts concerning the applicable regulations, forms, manuals, etc.

Based on its findings, the court granted the defendants' motions to dismiss the complaint for failure to state a claim. The court refused to grant the relator leave to amend his complaint, noting that he had already been permitted to amend the complaint twice before. However, the dismissal was without as against the United States or the states on whose behalf the relator's complaint was filed.

U.S. ex rel. Newell v. City of St. Paul, Minn., 2012 WL 2979061 (D. Minn. July 20, 2012)

A relator filed a *qui tam* suit alleging that a city violated the False Claims Act by submitting false certifications of compliance with various HUD regulations in order to receive federal funds. The United States declined to intervene in the suit. The city moved to dismiss the action for lack of subject matter jurisdiction, failure to state a claim, and failure to plead the alleged fraud with particularity.

Holding: The United States District Court for the District of Minnesota granted the motion and dismissed the relator's complaint with prejudice pursuant to the FCA's public disclosure bar.

Public Disclosure Bar

The city first argued that the relator's claims were based on information that had been publicly disclosed in several documents before the relator filed his *qui tam* suit, and that the court did not have subject matter jurisdiction over those claims, pursuant to the FCA's public disclosure bar. The city stated that, more than 25 years before the relator's complaint was filed, another individual filed a complaint against the city with HUD, alleging noncompliance with the same HUD regulations. In addition, this individual and others subsequently filed three lawsuits against the city, alleging similar claims. Moreover, the city asserted that the relator's fraud claims were based on an internal city memorandum that had been released to the public via a request under the state's FOIA law. Furthermore, the city pointed to an audit report commissioned by the city council that found that it was unclear whether or not the city had complied with the HUD regulations at issue—the report was posted on the city's website. Finally, the city focused on the relator's FOIA requests to HUD for documentation corroborating his claims, as well as a HUD complaint the relator filed and a lawsuit the relators and other plaintiffs filed, alleging the city's failures to satisfy the HUD requirements.

The court noted that the FCA's public disclosure bar provision was amended a year after the relator's *qui tam* complaint was filed and applied the provision as it existed at the time the complaint was filed. The court then examined each of the purported public disclosures. The court determined that the prior lawsuits publicly disclosed information regarding the city's alleged failures to comply with the HUD regulations at issue. Even though the relator's allegations involved a different time period—some 20 years apart—from the prior HUD complaint and lawsuit, the court held that the two sets of allegations were "substantially similar," since the relator was "complaining that the City performed the same fraudulent acts in succeeding years." The court further held that the relator's allegations were "based upon" those public disclosures for FCA purposes, since the relator's allegations were "supported by" those prior complaints. Similarly, the court held that the relator's complaint was supported by, and thus based upon, the internal city memorandum.

Next, the court held that the relator's prior litigation against the city constituted a public disclosure of his *qui tam* claims, since the allegations had been previously disclosed in a public civil hearing and since the prior claims were "essentially the same" as the relator's current claims. The court also concluded that the relator's FOIA request resulted in a publicly disclosed HUD "report," pursuant to U.S. Supreme Court precedent, and that his *qui tam* claims were supported by and based upon the publicly disclosed information.

After finding that the relator's allegations were based upon these various public disclosures, the court held that the relator did not have direct and independent knowledge of any of the information on which his fraud claims were based. Therefore, the court held that the relator did not qualify as an "original source," exempt from the public disclosure bar. Instead, the court held that "the information on which Relator bases his fraud claim was acquired second-hand, from other sources and prior public disclosures, and that the "Relator's own contributions are limited to: relaying public information to HUD and City employees to instigate investigations; and recognizing the alleged fraud after compiling information gathered from others. Such contributions do not qualify him as an original source because the information was available to anyone who chose to look for it." As a result of these findings, the court held that it did not have subject matter jurisdiction over the relator's *qui tam* action and granted the city's motion to dismiss the relator's suit with prejudice.

Stennett v. Premier Rehabilitation, LLC, 2012 WL 2526619 (5th Cir. July 2, 2012)

A relator filed a *qui tam* action alleging that a rehabilitation hospital and affiliated corporations and individuals engaged in fraudulent Medicaid billing, in violation of the False Claims Act. The relator alleged that he had been hired as the administrator of the hospital, and in that capacity, he oversaw the defendants' Medicaid billing and reimbursement practices, which he alleged included fraudulent billing. He claimed that he notified the individual defendants of his discovery, and soon after, was terminated from his job. During the time of the relator's employment, the State of Louisiana conducted an in-depth survey, audit, inspection, and examination of the hospital's files and published a report noting multiple deficiencies with the hospital's compliance with Medicare and Medicaid regulations.

The defendants moved to dismiss the relator's fraud claims, arguing that he failed to state a claim under the FCA. The U.S. District Court for the Western District of Louisiana dismissed the complaint, based on its finding that the plaintiff's "factual allegations fail to allege, with the specificity required by Rule 9(b) of the Federal Rules of Civil Procedure, that Plaintiff is the 'original source' of the information forming the basis of the complaint or that any of the Defendants acted with the requisite scienter to establish a cause of action under the [FCA]." The relator appealed the district court's ruling to the United States Court of Appeals for the Fifth Circuit.

Holding: The Fifth Circuit affirmed the district court's dismissal of the relator's complaint, finding that the *qui tam* action was barred by the FCA's public disclosure rule.

Public Disclosure Bar

The circuit court first observed that the relator's complaint stated that the Louisiana audit report served as the primary foundation on which the fraud claims were based.

Notwithstanding the fact that the audit report was released by a state government—not the federal government—and without explanation, the circuit court agreed with the district court that the relator's allegations were publicly disclosed by the audit report, for purposes of the FCA's public disclosure provision. The circuit court also agreed with the district court that the relator's allegations were "based upon" the public disclosure. Although the relator conceded that his claims were actually derived from the purported public disclosure, the court reiterated the Fifth Circuit's view that, for purposes of the FCA's public disclosure rule, "based upon" means "substantially similar to," and thus, the relator's claims would have been barred even if he had never become aware of the audit report. Finally, the appellate court held that the relator did not qualify for the "original source" exception to the public disclosure bar, since he admitted that "he did not become aware of the regulations regarding billing practices or their applicability to [the defendants] until after he reviewed the Government Audit Report," and thus, had no direct or independent knowledge of the information on which his fraud claims were based.

See *Little v. Shell Exploration & Prod. Co.*, 2012 WL 3089777 (5th Cir. July 31, 2012), at page 38.

See *U.S. ex rel. Osheroff v. Tenet Healthcare Corp.*, 2012 WL 2871264 (S.D. Fla. July 12, 2012), at page 69.

FALSE CLAIMS ACT RETALIATION CLAIMS

Fisch v. New Heights Academy Charter School, 2012 WL 4049959 (S.D.N.Y. Sept. 13, 2012)

A plaintiff filed suit against his former employer—a charter school—and several of the school's officers and directors, alleging various employment claims, including a retaliation claim under the False Claims Act. The plaintiff alleged that the charter school receives federal funding to support its operations and that after he was hired as the school's chief operating officer, he discovered that the school had engaged in various financial improprieties that resulted in the mismanagement of government funds. He alleged that he reported his discovery to the individual defendants named in the suit, but was instructed by the defendants not to reveal his findings, as the school as "too small to get caught." He claimed that he continued to complain to his superiors, voiced his concerns about the inaccurate audit report the school planned to submit to the federal government included the alleged improprieties in his report to the school's board of trustees, told the defendants that "someone could go to jail," and contacted an attorney about what he'd found. He alleged that the defendants retaliated against him for his efforts to investigate and report what he had observed, beginning with a negative performance review he subsequently received. He further alleged that the school submitted its audit report and other statements regarding federal payments and reimbursements to the federal government over his objections, and that those submissions resulted in violations of the fraud provisions of the False Claims Act. He stated that when he again informed the school's board of trustees, the board's treasurer finally agreed with him and indicated that he would raise the matter with the board. Two days later, the plaintiff was terminated from his job, supposedly because he was "not a good fit" at the school. The defendants moved to dismiss his claims.

Holding: The U.S. District Court for the Southern District of New York dismissed the plaintiff's FCA retaliation claims against the individual defendants, but denied the charter school's motion to dismiss.

Retaliation

The individual defendants argued that they were not subject to the FCA's anti-retaliation provisions, since they were not the plaintiff's "employers," as required by the FCA. The court agreed, noting that the FCA's anti-retaliation provision—as written at the time of the alleged retaliation—only applied to "employers." The court determined that "it is the corporation, only, not its officers, that is the employer of the corporation's employees." The court rejected the plaintiff's argument that his claims against the individual defendants should go forward, because Congress amended the FCA to remove the word "employer" from the anti-retaliation provision, and that at least one other court in the circuit had interpreted the new anti-retaliation provision to apply to individual defendants. Instead, the district court noted that the revised FCA anti-retaliation provision—which was not retroactive—was enacted a few days after all the plaintiff's alleged retaliation occurred, and therefore did not apply to the plaintiff's claim.

The court, though, allowed the plaintiff to maintain his claim against the school itself, since he satisfied all of the elements of an FCA retaliation case. First, the court held that the plaintiff properly alleged that he engaged in protected conduct by investigating a variety of alleged financial improprieties and false statements by the school with respect to the receipt of federal funds—an investigation that reasonably could have led to a viable FCA action. The court rejected the defendants' argument that the plaintiff did not engage in protected conduct, since he was merely fulfilling his job duties as COO, and since he did not cite any specific false statement the defendants submitted to the government or allege that the school's purchase orders and invoices were false on their face. The court disagreed, finding that FCA retaliation claims are not subject to Rule 9(b)'s heightened pleading standard, and thus, the plaintiff was not required to plead the alleged underlying fraud with particularity. The court declared that plaintiffs in FCA retaliation cases only need to establish that they were investigating matters that could lead to viable FCA actions, and that the plaintiff's investigation of large-scale financial and accounting irregularities that were included in submissions to the federal government to justify payments and reimbursements of federal funds satisfied that standard. Next, the court held that the plaintiff properly pled that the school was on notice of his protected conduct, since the plaintiff claimed that he repeatedly complained to the board about the alleged financial improprieties, and even cautioned that "someone could go to jail" as a result. He even claimed that the defendant acknowledged his complaints, but stated that no changes would be made, since the school was "too small to get caught." Irrespective of the plaintiff's job duties, the court held that his actions were sufficient to put the school on notice of a potential *qui tam* suit. Finally, the court held that the plaintiff properly alleged facts that would permit a jury to conclude that his employment was terminated in retaliation for his protected conduct, and not for the reasons the school offered.

As a result of these findings, the FCA retaliation claims against the individual defendants were dismissed, but the claims against the school were allowed to go forward.

Layman v. Met Labs., Inc., 2012 WL 4018033 (D. Md. Sept. 12, 2012)

A plaintiff brought an action under the anti-retaliation provision of the False Claims Act, alleging that his former employer—an independent electrical testing and certification lab—terminated his employment as manager of various test engineers after he refused to approve a testing report for equipment he believed would be sold to the U.S. military, since the report included fraudulent data. He alleged that the defendant was hired by another private company to perform vari-

ous testing for a "military client," and that he informed his supervisor of issues with the equipment and his reasons for refusing to approve the test report. He alleged that the supervisor responded by instructing the engineers working under the plaintiff to continue their work and threatened the plaintiff with disciplinary action. The plaintiff further alleged that when he confronted his engineers for falsifying data, they replied that they were merely following the supervisor's orders. He alleged that the supervisor eventually submitted a final report to the company that hired the defendant, and that the report contained false information that he believed would be passed on to the U.S. government. He also alleged that about two weeks later, the supervisor began soliciting complaints about his work performance, which led to a demotion and 15-20% pay cut, no supervisory authority, and no opportunity for advancement, even though he never reviewed the complaints against him nor had he ever received a negative performance review. He claimed that he resigned on the day that he was demoted, which amounted to a constructive discharge. The defendant moved to dismiss the retaliation claim, arguing that the plaintiff failed to state a claim under the FCA, since his allegations did not establish that he engaged in protected conduct by taking actions in furtherance of a *qui tam* suit.

Holding: The U.S. District Court for the District of Maryland granted the defendant's motion and dismissed the plaintiff's FCA retaliation claim without prejudice.

Retaliation

The court began its evaluation of the plaintiff's claim by noting that the plaintiff never alleged that any false information was ever submitted to the U.S. government or that any claim for payment based on false information was ever submitted to the government. Instead, he only alleged that he believed that the equipment for which the testing was conducted would be sold to some branch of the U.S. military. The court held that the plaintiff could not maintain his retaliation claim because he did not alleged that anyone "knowingly present[ed] to the government a false or fraudulent claim for payment or approval." Moreover, even if he had met this pleading requirement, the court held that his retaliation claim would still be deficient, since he failed to adequately allege that he engaged in protected conduct or acted in furtherance of a viable FCA action. The court held that the plaintiff's allegations of reporting problems with the testing were insufficient to meet the standard of "protected conduct," and that it appeared that the plaintiff was merely performing his job. Furthermore, the court determined that even if the relator could have established that he had engaged in protected conduct, he could not show that the defendant was on notice of his efforts. Although the plaintiff alleged that he told his supervisor that the defendant's conduct amounted to fraud, those allegations were made in the context of the defendant's contractual relationship with another private company—and were not raised in the context of a contract with the government or claims submitted to the government. Consequently, the court dismissed the retaliation claim, but without prejudice.

McCollum v. Jacobs Eng'g Group, Inc., 2012 WL 3811750 (S.D. Miss. Sept, 4, 2012)

A plaintiff brought a claim under the False Claims Act's anti-retaliation provision, alleging that his former employer—an engineering company—terminated his employment in retaliation for his whistleblowing activity. Specifically, the plaintiff alleged that the defendant was contracted by the Federal Bureau of Prisons to provide management services related to the construction of a new federal women's correctional facility, and committed fraud by allowing the company that was building the prison to falsify and inflate its bills to the government. He further claimed that he informed his supervisor of the alleged fraud, but soon after was placed on temporary leave of absence and ultimately was terminated from his job as a field engineer.

The defendant moved for summary judgment and the dismissal of the plaintiff's claim, arguing that the plaintiff could not show a causal link between any protected whistleblowing activity he may have engaged in and the alleged retaliation he suffered. The plaintiff responded by arguing that, before the court rules on summary judgment, he should be allowed an opportunity to engage in discovery in order to further develop his case. He also argued that an affidavit and additional materials he submitted to the court create a genuine issue of fact regarding the causal connection between his protected conduct and his termination, precluding summary judgment in the defendant's favor. The court agreed with the plaintiff, noting that the case was "in its infancy," as the defendant had not yet answered the complaint, no initial disclosures had been exchanged between the parties, and no case management conference had taken place. Consequently, the court held that the defendant's summary judgment motion was premature and would be denied without prejudice to the defendant's right to move for summary judgment after the plaintiff had been given an opportunity to conduct discovery and to prepare his case.

Jonassen v. Port of Seattle, 2012 WL 3812016 (W.D. Wash. Sept. 4, 2012)

A plaintiff brought an action against the Port of Seattle—which, among other things, operates a waste water treatment plant for the Seattle-Tacoma International Airport—alleging a claim for retaliation under the False Claims Act. He alleged that while working as a waste water treatment plant operator, he discovered that the plant for the airport was not operating properly, resulting in pollution of the Puget Sound Waterway, in violation of the plant's permit. He claimed that he alerted management about this problem, as well as his discovery of thefts and other abuses by contractors, but suffered retaliation as a result of his complaints. The defendant moved for summary judgment on the plaintiff's claim, arguing that the facts pled by the plaintiff do not amount to retaliation under the False Claims Act.

The U.S. District Court for the Western District of Washington granted the defendant's motion, finding that the plaintiff did not meet the elements for an FCA retaliation claim. First, the court noted that, in order to engage in protected conduct under the FCA's anti-retaliation provision, a plaintiff must have a reasonable, good faith belief that his employer was possibly committing fraud against the government. The court noted that while the plaintiff may have subjectively believed that the defendant was committing fraud against the government, he could not establish that his belief was *objectively* reasonable, since he only complained about alleged violations of environmental permit provisions and other regulations, and thefts of the defendant's property and services. Such complaints, the court held, are not protected activity, since a reasonable employee in the same circumstances would not have believed that the defendant's alleged conduct amounted to a fraud against the government.

While the court agreed that the plaintiff did engage in protected conduct when he filed a *qui tam* suit against the defendant alleging fraud, it observed that, before the alleged retaliation occurred, "there is no evidence that he informed his superiors that he was going to file a *qui tam* action or that the litigation he contemplated filing has anything to do with the FCA or fraud against the federal government." Consequently, the court determined that the defendant did not know that the plaintiff was engaged in any protected conduct prior to terminating him from his job. The court further noted that, in order to properly do his job, comply with all applicable environmental regulations, and keep his license to process and treat water, the plaintiff was required to raise any concerns he may have had about plant operations—including fraudulent activity—with his superiors. Therefore, the plaintiff needed to take "additional steps to put the [defendant] on notice that he was acting in furtherance of an FCA action, rather than merely alerting the [defendant] to mechanical, operational, and defective issues." Since he did not take any additional steps to put the defendant on notice of his protected conduct, the court held that his retaliation claim failed. The defendant's motion for summary judgment on the plaintiff's FCA retaliation claim was granted and the claim was dismissed.

U.S. ex rel. Gentilello v. Univ. of Texas Southwestern Health Sys., 2012 WL 3638676 (N.D. Tex. Aug. 24, 2012)

A relator filed suit under the False Claims Act, alleging that the state university system and its medical center and other affiliates submitted fraudulent claims to the U.S. government and retaliated against him for engaging in protected whistleblowing activity. Subsequently, the relator's fraud claims were resolved through a settlement between the government and the defendants. Only the retaliation claim remained. The defendants argued that that claim should be dismissed, since they, as state government entities are not subject to FCA suits brought by indi-

viduals, due to sovereign immunity and Eleventh Amendment protections. The plaintiff countered that the defendants only enjoy such protections from *qui tam* suits brought on behalf of the federal government, but not to suits brought under the FCA's anti-retaliation provision. He also argued that the defendants waived their sovereign immunity and Eleventh Amendment arguments when they settled the *qui tam* claims alleging fraud.

The court agreed with the defendants, noting that the U.S. Supreme Court has held that "a private individual has standing to bring suit in federal court on behalf of the United states under the False claims Act [citation omitted], but that the False Claims Act does not subject a state (or state agency) to liability in such actions," and made no distinction between suits brought under the FCA's fraud provisions or its anti-retaliation provisions. The court stated that if Congress wants to alter the constitutional balance between the States and the Federal government with respect to retaliation claims brought under the False Claims Act, it must clearly do so. Since the court could find no clear modification of states' sovereign immunity or Eleventh Amendment protections with respect to suits under the FCA, it held that the plaintiff's retaliation claim should be dismissed.

The court rejected the plaintiff's waiver argument, finding that the case relied on by the plaintiff held that a settlement agreement constitutes a waiver of jurisdiction with respect to disputes over the claim that was settled as part of the agreement. The present dispute, however, involved the defendants' settlement of fraud claims and did not effect a waiver of separate retaliation claims. In addition, the court observed that the defendants' settlement with the government included language that made clear that the defendants were not waiving defenses that might be available in other cases or controversies—including under the FCA." As a result, the court granted the defendants' motion to dismiss and dismissed the retaliation claim with prejudice.

Halasa v. ITT Educ. Servs., Inc., 2012 WL 3290217 (7th Cir. Aug. 14, 2012)

A plaintiff sued his former employer under the False Claims Act's anti-retaliation provision. The defendant was a for-profit educational institution and the plaintiff formerly served as the director of one of the defendant's colleges. He alleged that the defendant violated federal regulations and submitted false claims to the federal government for student financial aid funds and that he was fired from his job after reporting the defendant's regulatory violations. The defendant moved to dismiss the plaintiff's claim, The defendant asserted that the plaintiff was fired for exhibiting poor management skills—among other things, he allegedly smoked a hookah pipe in the campus parking lot during a student orientation event, referred

to himself as "King," and concocted a plan to close all restrooms on campus simultaneously—and for delivering poor results.

The U.S. District Court for the Southern District of Indiana granted summary judgment in favor of the defendant and the plaintiff appealed that ruling to the U.S. Court of Appeals for the Seventh Circuit.

Holding: The Seventh Circuit affirmed the district court's decision.

Retaliation

The circuit court first determined that the plaintiff was required to provide evidence showing that he engaged in protected conduct and that he was fired because of that conduct. The court noted that the plaintiff investigated alleged regulatory violations and misconduct and reported them to his superiors—actions the court held "would permit a trier of fact to find that he engaged in 'efforts to stop' potential FCA violations." The appeals court, though, did not find that the plaintiff demonstrated that he was fired because of his protected conduct. The court determined that the evidence indisputably showed that the decision to fire the plaintiff was made by individuals who were not alleged to have had knowledge of the plaintiff's protected conduct. The court refused the plaintiff's request to impute to the defendant the knowledge of those employees to whom the plaintiff made reports regarding alleged misconduct; the court stated doing so "would defeat the specific statutory requirement that an employee's termination be 'because of' [his] protected conduct." The circuit court held that the district court's grant of summary judgment in the defendant's favor was proper.

U.S. ex rel. Parks v. Alpharma, Inc., 2012 WL 3291705 (4th Cir. Aug. 14, 2012)

A relator filed an action against her former employer, a pharmaceuticals company, alleging fraud under the False Claims Act. She also alleged that the defendant violated the FCA's anti-retaliation provision by terminating her pharmaceuticals sales representative job—a job in which she had received many awards—after she questioned her superiors' instructions to illegally market the defendant's drug for off-label purposes and began gathering facts to disclose the alleged fraud. The relator's fraud claims were settled as part of a $42.5 million settlement agreement she and the United States reached with the defendant, leaving only her retaliation claim. The defendant moved for summary judgment on the retaliation claim and the U.S. District Court for the District of Maryland granted the motion. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit.

Holding: The Fourth Circuit affirmed the district court's ruling.

Retaliation

The Fourth Circuit determined that "[i]n order to defeat summary judgment on her FCA claim, [the relator] must establish a genuine issue of fact showing that (1) she took acts in furtherance of an FCA suit; (2) [the defendant] knew of those acts; and (3) [the defendant] treated her adversely because of these acts." The defendant argued that the relator's retaliation claim failed to satisfy any of the three elements. The district court determined that her claim met the first element, since she made internal complaints regarding issues that were identifiable as disclosures of fraud, but that her claim did not meet the other two elements. The circuit court examined the second element—that the defendant was aware of the relator's acts in furtherance of her FCA suit. The court found that this element must be viewed from the perspective of the defendant and that the defendant must be put on notice that FCA litigation is a reasonable possibility. The relator argued that since the district court determined that her retaliation claim satisfied the first element, it must have satisfied the second element out of necessity—in essence, the relator argued that she could not have acted in furtherance of an FCA action by reporting alleged fraud to her superiors, without the defendant having been made aware of her conduct. The circuit court disagreed, finding that the relator failed to show that any of her actions put the defendant on notice that she was contemplating or acting in furtherance of an FCA action. The court determined that her complaints to her superiors "were couched in terms of concerns and suggestions, not threats or warnings of FCA litigation." The court further held that the relator failed to demonstrate that the defendant alleged illegal conduct led to a physician writing a prescription for the drug and then submitted a false claim to the government for reimbursement, or to produce evidence showing that the defendant's alleged off-label promotion would inevitably lead to the submission of false claims to the government. Thus, the Fourth Circuit agreed with the district court that the relator failed to satisfy the second element of FCA retaliation claims, and affirmed the district court's dismissal of that claim.

Sharma v. District of Columbia, 2012 WL 3195141 (D.D.C. Aug. 8, 2012)

A plaintiff filed a claim against the District of Columbia, alleging violations of the False Claims Act's anti-retaliation provision, the D.C. Whistleblower Protection Act, and other laws. D.C. moved to dismiss the FCA allegation for failure to state a claim, arguing that the claim was not pled with particularity and that the relator failed to allege that D.C. presented a false claim to the federal government. The U.S. District Court for the District of Columbia granted the defendant's motion. The court rejected D.C.'s particularity argument, noting that only fraud claims—and not retaliation claims—are subject to Rule 9(b)'s heightened pleading standards. However, the court agreed that the relator could not maintain his retaliation claim without alleging that the defendant presented a false claim to the

federal government. Since the relator failed to include any such allegation in his complaint, the court granted D.C.'s motion and dismissed it.

McBride v. Peak Wellness Ctr., 2012 WL 3156325 (10th Cir. Aug. 6, 2012)

A plaintiff filed several employment law claims against her former employer, including a claim under the False Claims Act's anti-retaliation provision. The FCA claim was based on the plaintiff's allegations that she exposed various accounting improprieties to the defendant's board of directors and was fired because the defendant believed she was considering bringing a *qui tam* suit. The defendant moved for summary judgment on the plaintiff's claim and the U.S. District Court for the District of Wyoming granted the motion. The plaintiff appealed the district court's ruling to the U.S. Court of Appeals for the Tenth Circuit.

The circuit court affirmed the district court's ruling, finding that the plaintiff failed to produce sufficient evidence to show that the defendant was on notice that she might pursue a *qui tam* action. Without such evidence, the plaintiff could not show that her termination was retaliatory and the circuit court held that her claim could not survive summary judgment.

Brazill v. California Northstate College of Pharmacy LLC, 2012 WL 3204241 (E.D. Cal. Aug. 2, 2012)

A pharmacist and pharmacy professor brought various employment law claims against his former employers—a university and its college of pharmacy—including a claim under the False Claims Act's anti-retaliation provision. Although the plaintiff recognized that the college is unaccredited and thus, does not receive federal student financial aid funds, he alleged that some of the college's tuition practices violated federal law. He stated that he did not support the college when he was interviewed regarding the college's candidacy for accreditation, and stated that the college put profits before education. He claimed that he was treated hostilely by the president and administration of the college, once they learned of his complaints about the school's tuition practices and his replies to accreditation questions. He said that from that point on, the administration implied that it would seek to replace him, and he was eventually offered the choice of resigning or being fired—purportedly because he had allowed faculty members to work in his retail pharmacy. The U.S. District Court for the Eastern District of California dismissed the FCA retaliation claim, as it determined that the complaint only alleged that the plaintiff challenged the defendant's tuition practices, which did not amount to an attempt to recover money for the government or to investigate fraud against the government.

Cabotage v. Ohio Hosp. for Psychiatry, LLC, 2012 WL 3064116 (S.D. Ohio July 27, 2012)

The plaintiff brought various employment law claims under the False Claims Act and Ohio law, alleging that her former employers—a psychiatric hospital and a behavioral center—wrongfully terminated her four-month employment as a registered nurse after she raised concerns that they were engaged in fraudulent and illegal activities. The plaintiff began recording her observations of alleged misconduct on forms that included patients' names, ages, and room numbers. She removed these documents and other patient information from the hospital, took the materials home, and subsequently provided copies to an investigator from the Department of Health and Human Services and to her attorney. The investigator determined that his agency would not pursue any claims against the hospital, based on the information the plaintiff provided. The hospital terminated the plaintiffs' employment, stating that she had improperly "fraternized" with patients' families outside of work and had wrongfully removed confidential patient-identifying information in order to make such contacts.

During discovery, the hospital learned that that the plaintiff possessed hospital documents that contained protected patient information. The plaintiff refused the hospital's request to return those documents and the hospital moved for the return of the materials, citing the confidentiality provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The plaintiff countered that she was authorized under HIPAA to retain the hospital's documents to establish a *prima facie* case of retaliation by the hospital, in support of her lawsuit. She asked the U.S. District Court for the Southern District of Ohio to deny the hospital's motion or, alternatively, to take possession of the documents at issue and to allow her to use them as needed to prove her claim or to rebut the defendants' testimony.

Holding: The U.S. District Court for the Southern District of Ohio denied the hospital's motion for the return of its documents.

Retaliation

The court determined that it lacked authority to award the hospital the relief it requested, noting that HIPAA does not grant the court such authority, as "HIPAA creates neither an express nor an implied cause of action for private citizens to enforce its terms." The court concluded that, to the extent the plaintiff's action violated HIPAA, the Secretary of Health and Human Services is the only entity authorized to enforce that law.

The court, though, held that it did have the authority to issue an order regarding the plaintiff's planned use of the documents at issue—documents the court noted were obtained outside the scope of discovery. The court held that the plaintiff was precluded from using the documents in connection with her lawsuit. However, the court mentioned that the plaintiff could seek the same information through discovery, if she believed that the documents were discoverable in connection with her lawsuit, and that the hospital would have an opportunity to seek a protective order, should it be compelled to produce the documents.

Dermott-Morrison v. Sacramento Employment Training Agency, 2012 WL 2704274 (E.D. Cal. July 6, 2012)

A plaintiff filed a *qui tam* action alleging that her former employer—which operated a head start program and a workforce development program—knowingly mismanaged federal grant funds. The plaintiff also alleged that she met with the defendants' fiscal chief, objected to the improper use of funds, and began trying to reach appropriate federal government officials to report the wrongful conduct. Soon after, she alleged that she was asked to tender her resignation. She claimed that she refused to resign and a week later, received a letter from the defendant explaining that she was deemed to have resigned. As a result, the plaintiff filed claims under the False Claims Act alleging fraud against the government, as well as a personal claim under the FCA for retaliation. While the plaintiff voluntarily dismissed her fraud allegations, she retained her retaliation claim. The defendant moved to dismiss that claim for failure to state a claim under the FCA.

The United States District Court for the Eastern District of California denied the defendant's motion, finding that the plaintiff alleged all three elements of an FCA retaliation claim, namely: (1) that she engaged in protected activity; (2) that her employer knew that she engaged in protected activity; and (3) that her employer retaliated against her because she engaged in protected activity. The court determined that the plaintiff satisfied all three elements since she pled that: (1) she engaged in protected activity by inquiring about her former employer's alleged misconduct—misconduct that she reasonably believed in good faith could have resulted led to an FCA claim; (2) she put her former employer on notice of her protected activity by conveying to the defendant's fiscal chief that she was unwilling to abide by the allegedly fraudulent practices; and (3) she alleged that the defendant requested her resignation—a retaliatory act—in response to her protected activity.

The defendant's motion to dismiss the plaintiff retaliation claim was denied.

See *Hooper v. Lockheed Martin Corp.*, 2012 WL 3124970 (9th Cir. Aug. 2, 2012), at page 6.

See *Gonzalez v. Fresenius Med. Care North America*, 2012 WL 3065314 (5th Cir. July 30, 2012), at page 63.

See *U.S. ex rel. Liotine v. CDW Gov't, Inc.*, 2012 WL 2807040 (S.D. Ill. July 10, 2012), at page 41.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Breach of Contract

U.S. ex rel. Santa Ana v. Winter Park Urology Assocs., P.A., 2012 WL 2886617 (M.D. Fla. July 13, 2012)

A relator filed a *qui tam* action against his former employer—a healthcare service provider—another affiliated company, and three individuals. The employer-defendant filed a counterclaim against the relator, alleging breach of fiduciary duty, breach of contract, and malicious prosecution. The relator moved to dismiss the defendant's counterclaims. The U.S. District Court for the Middle District of Florida granted the relator's motion.

The court found that the defendant failed to allege any specific acts that constituted the relator's breach of a fiduciary duty, but merely "conclusorily alleges that the Relator 'failed to exercise diligence and good faith in matters relating to his employment' and 'breached his duty of allegiance.'" The counterclaim for breach of fiduciary duty was dismissed without prejudice. The court also dismissed the defendant's claim for breach of contract, in which the defendant alleged that the relator was required to repay a prorated portion of relocation expenses the defendant had paid on his behalf. The court agreed with the relator that this term of the employment contract was only effective in the event that the relator—not the employer—terminated the relator's employment. Since the court found that it was undisputed that the employer-defendant terminated the relator's employment, it held that the contract provision was inapplicable and dismissed the defendant's claim for breach of contract with prejudice. The court then dismissed the defendant's claim for malicious prosecution without prejudice, noting that that claim was based on the relator's prosecution of the underlying *qui tam* suit, and that no determination could be made with respect to that claim until after the defendant's liability in the underlying case had been decided.

The relator further argued that the defendant's counterclaims were not subject to the court's supplemental jurisdiction, since they were not "part of the same case or controversy," as required by 28 U.S.C. § 1367. The court rejected that argument, as it held that the relator's underlying complaint included a claim for retaliatory termination and the employer-defendant's counterclaim was related to his past employment.

B. Government-Employee Relator

Little v. Shell Exploration & Prod. Co., 2012 WL 3089777 (5th Cir. July 31, 2012)

Two relators—Little and Arnold—filed a *qui tam* action against an oil company, alleging that the defendant violated the False Claims Act by failing to remit certain royalty payments to the U.S. Department of the Interior and by taking unauthorized deductions for expenses to gather and store oil on twelve of its offshore drilling platforms. At the time the suit was filed, relator Little was a Senior Auditor and relator Arnold was a Supervisory Auditor for the Minerals Management Service, which was at that time a federal government agency within the Department of Interior that administered the defendant's lease to drill for oil on federal government property and which was charged with uncovering fraud in corresponding royalty programs. Before filing suit, Little and Arnold reported the information they discovered to their mutual supervisor, as their jobs indisputably required. However, to the relators' knowledge, the government never acted on their information. After the relators filed their *qui tam* case, the government declined to intervene. The United States District Court for the Southern District of Texas granted summary judgment in favor of the defendant, finding that, as federal government employees, the relators were not proper "persons" to file *qui tam* suits under the FCA, and that their suit was barred by the FCA's public disclosure bar provision. The relators appealed the district court's rulings to the United States Court of Appeals for the Fifth Circuit and the United States filed a brief in the appeal, urging the circuit court to construe the FCA as barring government employees from being relators when they discover fraud within the scope of their official duties.

Holding: The Fifth Circuit reversed the district court's ruling regarding government employee relators and reversed and remanded the district court's ruling regarding the public disclosure bar.

Who Can Be a Relator?

The Fifth Circuit noted that this issue of whether or not government employees can serve as relators is a question of first impression in the Fifth Circuit, but that the defendant's and government's position is at odds with the Eleventh Circuit's and Tenth Circuit's holdings and would likely be at odds with jurisprudence in the Ninth and Sixth Circuits as well. The court, however, observed that the First Circuit has taken the position that at least some federal government employees may not serve as *qui tam* relators. The circuit court then turned to the language of the FCA, which includes a provision titled, "Certain actions barred," and which enumerates four statutory limitations on courts' jurisdiction over *qui tam* claims. None of these limitations prohibits government employees from being relators, which the circuit court called "instructive."

The court also considered and rejected the defendant's (and government's) argument that the FCA's section titled "Actions by *private* persons" limits the universe of relators to non-governmental person, since government employees are not "private" persons when acting in their official capacities as government employees. The appeals court concluded that the designation of "private" persons was not determinative, since that language could have been used simply to distinguish *qui tam* suits from suits filed by the Attorney General. The court also considered the relators' argument that the FCA explicitly excludes members of the armed services from being relators in suits against other military personnel, and such an exclusion would be completely unnecessary if "private person" extended to all federal government employees—which would include all members of the armed services. The court further considered the defendant's argument that since relator's are allowed to bring suits "for the person and for the United States," *qui tam* suits by government employees are precluded, since government employees *are* the United States in that instance. The court rejected the defendant's argument and held that government employees can have two legal identities—one official and one individual, and that the text of the FCA supported the relators' position that they could bring *qui tam* claims on behalf of the government.

The court then examined the defendant's and the government's argument that federal government employees are subject to statutory ethical obligations to report fraud against the government—reporting such fraud as a realtor, they argued, would result in a conflict of interest. The court recognized the potential difficulty these statutory obligations might impose on government employees who wish to be relators, but ultimately, the court concluded that "Congress should be assumed to have legislated [the FCA] with reference to the [statutory ethical obligations]." The court noted that "using the conflict rules to override the False Claims Act's terms would interfere with the other two coordinate branches of our government. We would thwart a cause of action Congress permitted." Moreover, the court noted that the "Relator Share Guidelines" created by the U.S. Department of Justice contemplate government employee-relators and allows for a decrease in relator's share when the "relator learned of the fraud in the course of his Government employment." Finally, the court mentioned that allowing government employees to serve as relators "does not prevent the government from promulgating new personnel guidelines (or enforcing old ones)," and noted that the government can intervene in such cases and move to dismiss them. Thus, the court reversed the district court's ruling that the relator's were precluded from filing their *qui tam* action because they discovered the alleged fraud in the course of their jobs as government employees.

Public Disclosure Bar

The appeals court then turned to the relators' second issue on appeal—that the district court did not have jurisdiction over their claims because of the FCA's public disclosure bar. The defendant pointed to five purported prior public disclosures, including: prior FCA civil proceedings, news media accounts, published articles, communications between the defendant and MMS, and a government audit report. The district court found similarities between the supposed public disclosures and the relators' allegations and determined that the relators were barred from pursuing their fraud claims. The circuit court, though, found that the district court's conclusion was based on an overly broad definition of the public disclosure bar and did not fully examine how the relators' specific allegations regarding the identity of the defendant, the time period in which the alleged fraud occurred, and the details of the alleged scheme were based on the prior information. Thus, the Fifth Circuit remanded the issue to the district court for further proceedings to determine whether the relators' allegations were based on public disclosures. Notably, the circuit court concluded that the relators did not qualify for the "original source" exception to the public disclosure bar, because they could not meet the FCA's requirement that original sources must "voluntarily" provide their information regarding fraud to the government. The Court reasoned that since the relators were both government auditors, charged with rooting out fraud within their agency, they could not voluntarily provide information regarding the fraud they alleged to the government, but were required to do so.

C. Not Knowingly False

U.S. ex rel. Liotine v. CDW Gov't, Inc., 2012 WL 2807040 (S.D. Ill. July 10, 2012)

A relator sued his former employer—a government contractor—alleging that the defendant violated the False Claims Act by submitting inflated invoices for sales to the General Sales Administration and by retaliating against him for investigating the alleged misconduct. Specifically, the relator alleged that the defendant committed fraud by charged the government for shipping in connection with sales, even when its contracts provided for free shipping; by failing to offer the government its "most favored price," as required by contract; by failing to remit required fees to the government; by selling items that it was not authorized to sell to the government; and by selling non-trade compliant items. He alleged that the defendant retaliated against him in response to his attempts to provide evidence to the government regarding the alleged fraud. He claimed that he was directed to engage in fraudulent practices in his dealings with the government and that when he questioned this directive and refused to follow it, he became a target for termination and was written up, suspended, and verbally abused. He contacted government officials regarding the fraud he observed—contrary to what he was directed to do by the defendant—and emailed evidence of the defendant's fraud to himself, as he realized he would soon be fired from his job. After being questioned by the defendant about what he knew and what he had provided to the government, he alleged that he was fired.

Both parties moved for summary judgment on the fraud claims, and the defendant moved for summary judgment on the retaliation claim.

Holding: The United States District Court for the Southern District of Illinois granted the motions in part and denied them in part.

Scienter

The defendant moved for summary judgment on the relator's fraud claims, alleging that the relator did not demonstrate a knowing violation of the False Claims Act. The court examined each of the relator's fraud claims in turn and found that the relator raised a genuine issue of fact with respect to the defendant's knowledge of sales of non-trade compliant goods to the government, as the relator's deposition testimony offered evidence that the relator had personal knowledge that the defendant had knowingly engaged in such behavior. In addition, the court rejected the defendant's argument that summary judgment was warranted because the relator could not show any damages to the government due to the sales of non-trade compliant goods, since the government kept those items. Instead, the court held that the government's purposes in imposing trade statutes would be thwarted if the defendant was allowed to profit from illegal sales of goods—the court declared that the defendant "is not allowed to keep money obtained from the government under false pretenses."

Similarly, the court held that genuine issues of fact existed regarding the relator's allegations that the defendant defrauded the government by charging inflated shipping fees and by failing to remit certain fees to the government. The court further noted the testimony of one of the defendant's representatives, who corroborated the relator's allegations, at least with respect to a subset of claims to the government that were reviewed by the defendant.

The court denied the relator's motion for partial summary judgment on the fraud claims, noting that a jury would make the final determination regarding whether or not the relator proved his claims. The court also granted the relator's motion for summary judgment with respect to the defendant's affirmative defenses of waiver, estoppel, and laches, as those defenses are not available against the United States—the real party in interest. The court also rejected the defendant's affirmative defense arguing that the relator must show damages to the government, since the FCA does not require measurable damages before liability for committing fraud can be imposed.

Retaliation

Lastly, the court considered the defendant's motion for summary judgment on the retaliation claim. The court found that material issues of fact existed with regard to the relator's allegations of each element of an FCA retaliation claim: (1) the relator alleged that he told his superiors that the defendant's conduct was wrong and resulted in the government being cheated; (2) the relator alleged that he refused to take advantage of the government, as directed by the defendant, and the relator was not employed in a position in which such conduct was part of his job, such that he had to make special efforts to ensure that the defendant was on notice of his protected whistleblowing conduct under the FCA; and (3) the relator alleged sufficient facts to support his contention that the defendant terminated him from his job in retaliation for his protected activity. The court denied the defendant's motion for summary judgment on the retaliation claim.

D. *Pro Se* Relator

Kelly v. Housing Auth. of Omaha, 2012 WL 2871750 (D. Neb. July 12, 2012)

A *pro se* plaintiff filed a *qui tam* action alleging that numerous agencies and individuals violated the False Claims Act by submitting false information to the U.S. Department of Housing and Urban Development. The United States declined to intervene in the relator's suit. Before allowing the action to proceed, the United States District Court for the District of Nebraska sought to determine whether summary dismissal of the suit was appropriate, due to the relators' *pro se* status. The court determined that "[t]he law in the Eighth Circuit is clear that a pro se plaintiff may not prosecute a *qui tam* action on behalf of the United States. Since the United States declined to intervene in the relator's suit, the court, on its own motion, granted the plaintiff 30 days to obtain the services of a licensed attorney and to have the attorney enter an appearance in the *qui tam* case, lest the case be dismissed.

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 U.S. 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.

E. Relator Released Defendant from FCA Claims

See *U.S. ex rel. Powell v. American Intercontinental Univ., Inc.*, 2012 WL 2885356 (N.D. Ga. July 12, 2012), at page 10.

F. *Res Judicata* and Collateral Estoppel

U.S. ex rel. May v. Purdue Pharma L.P., 2012 WL 4056720 (S.D. W. Va. Sept. 14, 2012)

Two relators filed a *qui tam* suit under the federal False Claims Act and several state false claims act statutes, alleging that two affiliated pharmaceuticals companies trained its sales force to falsely represent to doctors and other "institutional decision makers" that a single dose of one of its pain relievers was equivalent to two doses of the benchmark drug, and therefore, the defendant's drug was cheaper than the benchmark, even though its drug was more expensive per dose. The relators alleged that the defendant knew that these representations were false, since there was no scientific basis to support them, but still used the representations to market the drug to hospitals, physicians, pharmacies and hospices. They alleged that by systematically encouraging doctors to prescribe its drug over a period of more than 10 years, the defendant caused the submission of false healthcare claims to the various governments on whose behalf they filed suit—they claimed that <u>all</u> claims for prescriptions for the drug submitted to the government healthcare programs at issue were false, since those entities were being asked to pay for materially less of the defendant's drug, in terms of pain relief, than the defendant had represented to the prescribing physicians. Neither the federal government, nor any of the states involved, intervened in the relators' suit.

This was the second time the defendants were sued in a *qui tam* action alleging this fraud scheme. The first such suit—which was filed in the same court as the present case—was brought by the husband of one of the present relators—he was also a former co-employee and manager of the other relator. The prior suit was dismissed for failure to satisfy Rule 9(b)'s pleading requirements. The dismissal was affirmed by the U.S. Court of Appeals for the Fourth Circuit, but on different grounds—the circuit court determined that the relator was barred from filing the suit, pursuant to a pre-filing release agreement he signed as part of his severance package when he left his job with the defendants' company.

The defendants moved to dismiss the relators' allegations, arguing that their claims were barred by *res judicata*, since their complaint was merely a re-litigation of the earlier *qui tam* action. In addition, the defendants argued that the relators' complaint was barred by the FCAs' respective public disclosure bar provisions; that the fraud allegations were not pled with particularity; and that allegations regarding all allegedly fraudulent claims identified by the relators were time-barred.

Holding: The U.S. District Court for the Southern District of West Virginia granted the defendants motion to dismiss the federal FCA claims with prejudice. The supplemental state FCA claims were dismissed without prejudice.

Res Judicata

The court assumed, without deciding, that the relators' claim was not barred on public disclosure grounds, and that the relators' allegations were pled with the requisite particularity. The court then turned to the defendants' *res judicata* argument. The court noted that principles or *res judicata* apply when there is: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both suits; and (3) an identity of parties in the two suits. The defendants argued that all three elements were satisfied, and thus, the relators were precluded from re-litigating the claims. The relators did not challenge the second two elements of *res judicata*, leaving the court only to decide the first element—"whether there has been a judgment on the merits in a prior suit."

The relators argued that it was the circuit court's dismissal of the prior *qui tam* case—on the grounds that the suit was barred by the former relator's pre-filing release agreement with the defendants—that controlled the *res judicata* analysis; moreover, they contended that the circuit court's ruling was based on a lack of standing and not the merits of the former relator's claims. Thus, they argued, the prior suit did not result in a judgment on the merits and *res judicata* did not apply. The defendants countered that the circuit court's ruling was not based on a lack of standing, but rather on the defendants' affirmative defense of the release agreement. Therefore, they argued, the prior suit was decided on the merits and *res judicata* did apply. The court agreed with the relators that the Fourth Circuit's ruling controlled. The court, though, disagreed with the relators' characterization of the circuit court's ruling, and instead found that the circuit court did not dismiss the prior suit for lack of standing and that the parties appeared to agree that the former relator had standing to sue, subject to the ultimate enforcement of the release agreement. The court found support for the defendants' argument that the prior suit was dismissed based on their affirmative defense of the release agreement, particularly since the circuit court referenced the defendants' argument in favor of enforcing the pre-filing release as a "release defense." Furthermore, the court concluded that the circuit court's ruling was a summary judgment determination, which the court noted has always been a final disposition for *res judicata* purposes.

As a result of its findings, the court held that the instant federal FCA case was barred by the *res judicata* doctrine—the federal FCA claims were dismissed with prejudice. The court declined to consider the parties' statute of limitations dispute. Having dismissed the federal FCA claims, the court also declined to exercise supplemental jurisdiction over the relators' state FCA claims—those claims were dismissed without prejudice.

G. Sovereign Immunity

See *U.S. ex rel. Gentilello v. Univ. of Texas Southwestern Health Sys.*, 2012 WL 3638676 (N.D. Tex. Aug. 24, 2012), at page 29.

H. Statute of Limitations

U.S. v. BNP Paribas SA, 2012 WL 3234233 (S.D. Tex. Aug. 6, 2012)

The United States brought an action under the False Claims Act and common law doctrines, alleging that a group of corporate and individual defendants in the commodity exports business defrauded the Supplier Credit Guarantee Program—a program operated by the Commodity Credit Corporation, which is a federally-chartered corporation within the U.S. Department of Agriculture. The corporate defendants moved to dismiss the government's FCA claims for failure to state a claim and for failure to plead the alleged fraud scheme with particularity. They also argued that the government was judicially estopped from bringing its claims, and that the claims were time-barred. The individual defendant—a former vice president of one of the corporate defendants, moved to partially join the corporate defendants' motions to dismiss.

Holding: The U.S. District Court for the Southern District of Texas granted the corporate defendants' motions to dismiss for failure to plead the alleged fraud with particularity. The government was granted leave to file an amended complaint. The individual defendant's motion to adopt arguments of the corporate defendants was denied.

Judicial Estoppel

The corporate defendants argued that the government was estopped from alleging that they committed fraud, since the government had repeatedly explained to the court that those defendants were victims of the individual defendant's conspiracy and fraud. The court rejected that argument, since the corporate defendants failed to show that the government had taken a position that was clearly inconsistent with a position it had taken in any related criminal proceeding. Ultimately, the court held that the corporate defendants' claims of being victimized were not inconsistent with the government's allegations that they knowingly submitted false claims to the United States. The court rejected the judicial estoppel argument.

Statute of Limitations

The corporate defendants argued that the government's FCA claims were time-barred and should be dismissed, claiming that the government filed its complaint more than a month after the FCA's six-year statute of limitations expired. The court noted that the "FCA provides a six-year statute of limitations and a three-year tolling period, and bars the United States from filing FCA claims over ten years old." The defendants claimed that the three-year tolling provision did not apply, since the government should have known about the alleged fraud long before it filed suit. The government countered that many of its claims fell within the six-year limitations period; that the FCA's three-year tolling provision did apply; and, more comprehensively, that the Wartime Suspension of Limitations Act (WSLA) suspended all statutes of limitations for all claims of the United States. The court rejected the government's argument that it brought claims within the six-year limitations period, noting that the government's cause of action did not arise when the allegedly false claims were paid—as the government had argued—but rather when those claims were submitted. The court also held that the question of whether the United States knew or should have known the material facts regarding its claims could not be answered at the pleading stage, before any discovery; instead, the court held that the government's claims were not subject to dismissal on that basis.

The court, however, agreed with the government's third rationale—that all statutes of limitations regarding claims of the United States are suspended pursuant to the WSLA, which suspends statutes of limitations for claims "involving fraud or attempted fraud against the United States or any agency thereof" until five years after any war involving the U.S. has ended, as declared by the President or a congressional resolution. The defendants argued that the WLSA did not save the government's claims, because the WSLA does not apply to civil FCA cases and because the United States was not at war when the allegedly false claims were submitted to the government.

Regarding the first argument, the defendants argued that the WSLA only applies to "offenses" involving fraud, which they asserted limits application of the statute to criminal cases—they argued that the FCA itself provides the exclusive statute of limitations for FCA fraud claims and claimed that the Fifth Circuit has concluded that the FCA provides an "absolute limitations period," and has rejected any form of tolling not included in the FCA. The district court, though, held that the defendants' reliance on Fifth Circuit precedent was misplaced, as the cases cited by the defendants only make clear that relators who are not "in direct identity with the United States" cannot benefit from the FCA's tolling provision and that an older version of the FCA did not allow for equitable tolling. Neither of those situations had arisen in the present case. Consequently, the district court held that, because the WSLA, by its plain language, applies to "<u>any statute of limitations</u>," it applied to the FCA's statute of limitations. The court also rejected the defendants' argument that Congress would have specifically referenced the WSLA's applicability to civil proceedings if it had intended for the statute to apply to limitations provisions of civil laws like the FCA. The defendants cited a 50-year old district court opinion in support of their proposition. The court noted that the district court in that case had relied on a U.S. Supreme Court decision that did not directly address the question, and therefore, was of limited value. Moreover, the court observed that the case cited by the defendants was the only example it could find in which a court held that the WSLA only applies to criminal proceedings, declaring that "all other courts to have faced the issue . . . have concluded the WSLA applies to [civil] actions," including FCA. The court further held that "offense" is not synonymous with "crime," and that had Congress intended to restrict application of the WSLA to criminal proceedings, it could have specified that the statute only applies to "crimes," "criminal offenses," etc., rather than use the word "offenses." Furthermore, the court held that the legislative history of the WSLA supports application of the statute to civil claims, as the statute was amended in 1944 to remove descriptive "now indictable" language from "offense," indicating that the Act applied to claims for both criminal and civil offenses, including claims brought under the civil FCA.

With respect to their second argument, the defendants claimed that, even if the WSLA applies to FCA claims, it did not toll the limitations period for the government's claims because the United States was not at war in 2005, when the alleged false claims were submitted and gave rise to the government's fraud claims. Notably, the defendants asserted that the United States' conflicts in Iraq and Afghanistan were not "wars" as that term is used in the WLSA; alternatively, they claimed that even if those conflicts were deemed wars, the wars had concluded by 2003, well before the alleged false claims at issue were submitted to the government. Additionally, they argued that the WSLA was amended in 2008—after the government's fraud claims arose—to make the statute applicable to congressional enactments authorizing the use of the armed forces pursuant to the War Powers Resolution, and that the amendment is not retroactive and thus, does not apply to the conflicts in Iraq or Afghanistan. The court, however, agreed with the government that the United States was "at war" in 2005, when the government's fraud claims arose. The court found that, as a result of Congress's 2001 Authorization for Use of Military Force, which authorized President Bush to use all "necessary and appropriate force" against those responsible for the 9/11 attack; and Congress' 2002 Authorization for the Use of Military Force Against Iraq, which authorized military force, if necessary to remove the then-Iraqi government and replace it with a democratic regime, the United States was "at war" in Iraq and Afghanistan. The court then considered the defendants' assertion that the Afghanistan war ended in 2001 when Hamad Karzai's government was formally recognized, and that the war in Iraq ended in 2003 when President Bush declared that major combat operations had concluded. The court, relying on Fifth Circuit precedent, concluded that neither of these wars has ended yet. Consequently, the United States was "at war," for WSLA purposes, in 2005. In addition, the court determined that Congress' 2008 amendments to the WSLA applied to the government's FCA claims. Again relying on Fifth Circuit precedent, the court explained that the question of whether or not to apply a newly-enacted statute of limitations turns on whether or not the cause of action at issue expired before the newly-enacted statute became effective. Since the amended WSLA became effective in 2008, before the government's six-year statute of limitations expired, the court held that the amended WSLA applied to the government's fraud claims.

As a result of these findings, the court concluded that the government's fraud claims were not time-barred.

Failure to State a Claim/Plead Fraud with Particularity

The corporate defendants alleged that the government's fraud claims failed as a matter of law because their complaint did not allege vicarious liability for the actions of the individual defendant, whom they asserted victimized them by accepting bribes and by conspiring to defraud the government. In addition, they claimed that the government's brief did not allege that they submitted any false claims to the government, nor did the government plead the alleged fraud scheme with particularity. The court considered each of the defendants' arguments in turn.

The court first determined that the government properly alleged that the corporate defendants submitted false claims, as the government alleged that those defendants conspired with others to engage in a scheme to submit false claims. Moreover, the government specifically alleged that the corporate defendants made claims to the government that they knew were false. Thus, the court disposed of that defense argument. Similarly, the court determined that the government's complaint pled sufficient facts to allege that the corporate defendants knowingly violated the FCA. These defendants argued that their former vice president was responsible for all of the alleged fraud, and that the government's claims against them failed, since the government did not allege that any of the corporate defendants knew of or approved the vice president's alleged misconduct. They further claimed that they did not benefit from the vice president's actions, but rather, sustained substantial losses and reputational harm. They argued that the vice president's knowledge should not be imputed to them. The court disagreed, finding that the government alleged that the vice president was acting within the scope of his employment and for the benefit of the corporate defendants when he allegedly committed the wrongful acts at issue. Therefore, the court refused to dismiss the government's complaint on that basis.

The court then turned to the question of whether the government pled the alleged fraud scheme with particularity. The government argued that its claims were specific enough to put the defendants on notice of the facts alleged against them, as required by Rule 9(b) of the Federal Rules of Civil Procedure. The court agreed with the defendants on this issue, finding that the government's allegations did not distinguish between the alleged fraudulent conduct of the various defendants with any particularity.

Consequently, the court held that the government's complaint did not meet Rule 9(b)'s heightened pleading requirements and dismiss. Though court gave the government 30 days to amend its complaint and to provide greater specificity regarding the FCA claims against each of the respective defendants.

See *Hooper v. Lockheed Martin Corp.*, 2012 WL 3124970 (9th Cir. Aug. 2, 2012), at page 6.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Reiber v. Basic Contracting Servs. Inc., 2012 WL 3945803 (W.D. Wa. Sept. 10, 2012)

A relator filed a *qui tam* action against a company hired by the government to provide security services and an affiliated individual. He alleged that the defendants knowingly overcharged the government. The defendants moved to dismiss the complaint for lack of particularity. The U.S. District Court for the Western District of Washington agreed that the claims were not pled with specificity, but concluded that "dismissal is not proper at this time." Rather than dismiss the relator's complaint, the court noted that the relator had requested leave to amend the complaint to plead additional facts to support her claims. The court granted that request, observing that the relator had not exhibited undue delay or bad faith and that the defendant bore little risk of being prejudiced, since discovery had not yet begun. The relator was given 30 days to amend her complaint.

U.S. ex rel. Coots v. Reid Hosp. & Health Care Servs., Inc., 2012 WL 3949532 (S.D. Ind. Sept. 10, 2012)

A relator filed a *qui tam* suit against two healthcare companies alleging violations of the federal False Claims Act and the Indiana False Claims Act in connection with a purported Medicare/Medicaid fraudulent billing scheme. Specifically, the relator alleged that the defendants: used false billing codes; upcoded levels or treatments and services; sought duplicative payments; used false diagnostic codes; sought payments for ineligible *locum tenens* physicians (doctors who temporarily fill in when regular doctors or absent or when a facility is short-staffed); sought payment for services that were not provided; and falsely reported the location of services in order to receive increased payments. The defendants moved for a partial dismissal of the relator's allegations, arguing that her allegations that the defendants used false diagnosis codes failed to state a claim under the FCA statutes, and that her allegations that the defendants falsely reported the location of services were not pled with particularity.

Holding: The U.S. District Court for the Southern District of Indiana granted the defendants' motion in part, dismissing the relator's allegations that the defendants falsely reported the location of services, but allowing the relator to maintain her allegations that the defendants used false diagnosis codes.

Failure to Plead Fraud with Particularity

The defendants first moved to dismiss the relator's allegations that they falsely reported the location of services, arguing that in order to plead that claim with the requisite particularity, the relator was required to cite specific examples of claims for payment submitted by the defendants in which the location of services was falsely reported. The relator countered that her complaint included sufficient particularized facts, as she alleged numerous specific examples of the other types of purportedly fraudulent billing practices listed above and identified a specific problem within the defendants' electronic billing system that caused the defendants' reimbursement claims to include the highest-paying location for services by default. She further argued that her complaint referenced a defendants' intraoffice email that identified the billing problem. After applying Seventh Circuit precedent, the district court concluded that "[a]t least one example of the particular fraud alleged must be detailed in the pleading," and granted the defendants' motion to dismiss the false location allegations because the relator's reliance on the defendants' intraoffice email "[did] not lead to the inescapable conclusion that inaccurate bills were submitted and not corrected. There are too many details unaccounted for and this is the type of 'gestalt' method of alleging a *qui tam* claim that has been rejected by the courts in this circuit." The court also noted that the fact that the relator provided specific examples of the other types of billing fraud alleged in her complaint had no bearing on the validity of her false location allegations.

Failure to State a Claim

The defendants also sought to dismiss the relator's false diagnosis allegations, arguing that the court should take judicial notice of the Medicare Claims Processing Manual—which was referenced in the relator's complaint—which made clear that the defendants used acceptable coding practices, and thus, the relator failed to state a claim for relief under the FCA statutes. The relator did not object to the court taking judicial notice of the manual, but countered that the provisions cited by the defendants only applied in rare circumstances, and not to the defendants' alleged conduct. The court held that "full-scale fact pleading is not a requirement" of Rule 9(b). While the court noted that additional facts were necessary to determine whether and how the manual applied to the defendants' alleged conduct, it decided not to "attempt at this stage of the litigation to determine if the facts are such that any particular provision of the Medicare Claims Processing Manual is applicable to any particular circumstance. That is a question to be answered at a later date, perhaps upon a summary judgment motion or at trial, but not one which is ripe for ruling on a motion to dismiss. The defendants' motion to dismiss the false diagnosis claims was denied.

U.S. v. R.J. Zavoral & Sons, Inc., 2012 WL 3871344 (D. Minn. Sept. 6, 2012)

The United States filed an action alleging that a construction company and affiliated individual defendants violated the False Claims Act, other federal laws, and common law. With respect to the False Claims Act, the government alleged that the defendants formed a joint venture with another construction company in order to bid on a U.S. Army Corps of Engineers (COE) contract that was set aside for companies that met the Small Business Administration's (SBA) standards for "socially and economically disadvantaged individuals," which includes women and minorities. The second company involved in the joint venture—which was not a defendant—satisfied the SBA criteria, but the defendant company did not. Consequently, the joint venture was subject to additional conditions and approvals and was required to make periodic reports to the SBA to confirm that it was in compliance with various requirements. The government alleged that the defendants' operation of the joint venture violated the SBA's requirements, since the SBA-qualified company was excluded from most of the work on the contract, even though that company was supposed to do the majority of the work. The government claimed that the defendants fraudulently maintained the joint venture's contract with the COE by submitting false statements and records that falsely certified the joint venture's compliance with those SBA requirements, by engaging in illegal kickbacks and self-dealing schemes, and by falsifying invoices, among other things. The defendants moved to dismiss the government's complaint, arguing that the government failed to state a claim under the False Claims Act and failed to plead the alleged fraud scheme with particularity.

Holding: The U.S. District Court for the District of Minnesota denied the defendants' motion to dismiss.

Failure to Plead Fraud with Particularity

The defendants argued that the government's fraud claims failed because the government's complaint failed to identify who among the group of defendants made the alleged fraudulent statements at issue. The court, though, found that the government's allegations were particularized, as the government alleged specific conduct by each of the defendants, including describing which of the defendants signed the joint venture agreement that was submitted to the SBA, which defendants signed the COE contract on behalf of the joint venture, which defendants allegedly falsely certified that SBA requirements and/or contractual terms were being met, which defendants signed allegedly fraudulent invoices, etc. The court stated that "[w]hile some of the allegation against Defendants are stated in the conjunctive, the Government's lengthy and detailed complaint sufficiently differentiates between the defendants and sets out the 'who, what, where, when, and how' of the alleged fraud as required." (internal citation omitted) Thus, the court denied the defendants' motion to dismiss the FCA claims for failure to plead fraud with particularity.

Failure to State a Claim

The court then turned to the defendants' argument that the government's complaint failed to state a claim under the FCA. The court determined that "the Government's claim advances a false certification theory," whereby the government alleged that the defendants falsely certified to COE that their requests for payment under the contract were only for work performed in accordance with the contract—which required, among other things, that the defendants' joint venture comply with SBA requirements. The court further concluded that the government alleged facts which, if proven, would show that the defendants knew that the joint venture was not SBA-compliant and attempted to conceal this fact from the SBA and COE by making false representations. The court held that these allegations were sufficient to state a claim under the FCA. The defendants' motion to dismiss the government's FCA claims for failure to state a claim was also denied.

U.S. ex rel. Raynor v. Nat'l Rural Utils. Cooperative Fin., Corp., 2012 WL 36000303 (8th Cir. Aug. 23, 2012)

A relator filed a *qui tam* suit against a rural utilities finance corporation and several of its officers and alleged co-conspirators, alleging False Claims Act violations. More specifically, the relator alleged that the corporation made false statements to the government in order to receive Farmer Mac investments and various government-backed loans; failed to apply Generally Accepted Accounting Principles (GAAP) when accounting for losses on two loans; and failed to disclose an embezzlement scheme to the government. The U.S. District Court for the District of Nebraska dismissed the relator's complaint for failure to state a claim and failure to plead the alleged fraud with particularity. The relator appealed the district court's rulings to the U.S. Court of Appeals for the Eighth Circuit.

Holding: The Eighth Circuit affirmed the district court's dismissal of the relator's complaint for failure to satisfy Rule 9(b).

Failure to Plead Fraud with Particularity

The relator argued that the district court erred by applying Rule 9(b)'s heightened pleading standard to his allegations that the corporate defendant received investments, loans, and loan guarantees in violation of federal law, and that he should be allowed to prove that that defendant knowing received investments, loans, and loan guarantees in violation of federal law. The circuit court disagreed, finding that the relator's allegations were conclusory, and that he never described "how" the corporate defendant obtained investments, loans, or guarantees in violation of federal law. The appeals court further noted that the relator failed to offer evidence of false claims to the government, and rejected his argument that the corporation's alleged failure to adhere to GAAP accounting standards established falsity, since violations of GAAP alone do not demonstrate knowing fraud, and since the relator failed to show that the defendant failed to comply with <u>any</u> acceptable GAAP accounting treatment—but merely that the defendant failed to comply with <u>his</u> desired GAAP accounting treatment. Consequently, the Eighth Circuit affirmed the district court's dismissal of the relator's fraud allegations on Rule 9(b) grounds.

Jallali v. Nova Southeastern Univ., Inc., 2012 WL 3234278 (11th Cir. Aug. 9, 2012)

A relator filed a *qui tam* suit alleging that a university corporation submitted claims for federal student aid funds that falsely certified its compliance with certain federal regulations. The university moved to dismiss the claim, arguing, among other things, that the relator failed to plead the alleged fraud with the requisite particularity. The U.S. District Court for the Southern District of Florida granted the motion and the relator's third amended complaint was dismissed. The relator appealed to the U.S. Court of Appeals for the Eleventh Circuit.

The circuit court affirmed the district court's ruling, finding that the relator failed to "allege facts identifying the time, place, or substance of the allegedly fraudulent claims for payment." The court noted that the plaintiff did not allege facts showing that the university actually certified compliance with the underlying regulations at issue, nor did he allege that non-compliance would have rendered the university ineligible to receive federal student aid funds.

The circuit court also rejected the relator's argument that the district court erred by dismissing his complaint without the Attorney General's consent. The court concluded that the FCA only requires the Attorney General's consent to the voluntary dismissal of a *qui tam* action.

As a result, the Eighth Circuit affirmed the district court's ruling.

U.S. ex rel. Dittmann v. Adventist Health Sys./Sunbelt, Inc. 2012 WL 3105586 (M.D. Fla. July 30, 2012)

Two relators filed a *qui tam* action on behalf of the United States and the State of Florida, alleging that hospital operator committed Medicare, Medicaid, and Tricare/Champus fraud by improperly using three billing code modifiers, by inflating the dosage of drugs used, and by falsely billing for Computer Aided Detection (CAD) software analysis of mammograms, when no such software had been

used. The defendant moved to dismiss the relators' claims, arguing that the *qui tam* complaint was deficient and did not satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). The United States District Court for the Middle District of Florida, though, quickly denied the defendant's motion, noting that the relators were both company insiders who described the alleged fraud "in extensive and sufficient detail." The court concluded that the relators' complaint "satisfies Rule 9(b)'s requirements of describing the alleged fraudulent acts, why they were fraudulent, when they occurred, and who engaged in them." Consequently, the court denied the motion to dismiss.

U.S. v. Kernan Hosp., 2012 WL 3088210 (D. Md. July 30, 2012)

The United States filed an action under the False Claims Act and common law, alleging that a hospital orchestrated an illegal scheme to fraudulently bill Medicare, Medicaid, and Tricare whereby the hospital systematically increased the complexity of its "case mix"—a factor used to calculate the hospital's reimbursement rate—by improperly inflating the number and severity of cases in which malnutrition or Kwashiorkor (a wasting disease caused by insufficient protein intake) was included as a secondary diagnosis. The government argued that if the hospital added secondary diagnoses to patient's coding profiles, then it case mix would appear more complex, resulting in higher reimbursement rates from the government. The government further asserted that the hospital deliberately disregarded the industry-recognized steps to monitor its healthcare claims for quality control, which led to a 23% error rate in malnutrition and Kwashiorkor diagnoses. hospital moved to dismiss the government's complaint for failure to state a claim and failure to plead the alleged fraud with particularity.

Holding: The United States District Court for the District of Maryland granted the defendant's motion to dismiss the government's complaint without prejudice.

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

In its complaint, the government referenced four of the hospitals patients, for whom the hospital allegedly submitted false claims. In support of its argument that the government's complaint failed to state a claim under the False Claims Act, the hospital attached the medical records for these four patients to its motion to dismiss. Since those medical records had not been attached to the government's complaint, the government argued that the hospital's motion to dismiss for failure to state a claim should be converted into a motion for summary judgment, since the hospital had introduced evidence outside the four corners of the complaint. In response to the hospital's motion, the government filed an opposition brief and attached more than 500 pages of exhibits. The hospital countered that its motion to dismiss should not be treated as a motion for summary judgment, since the government's complaint specifically described the four patients whose medical records had been attached. The hospital moved to strike the government's opposition brief, including all of its exhibits. The court decided not to strike the government's submission, but to disregard the parties' new documents—the defendant's medical records and the government's exhibits. The court noted that the medical records were likely central to the government's complaint, but determined that they were not essential to deciding the sufficiency of that complaint. Instead, the court focused on the question of whether or not the government had sufficiently alleged that the hospital submitted false claims to the government, pursuant to the False Claims Act. The court concluded that the government did not.

The court first made clear that the government's FCA allegations were subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). The court then concluded that the government failed to satisfy that standard, stating that "the primary failure of the Government's Complaint is its lack of specificity as to the precise false claims at issue in this litigation—in fact, the Complaint does not identify a single false claim actually submitted to the government for payment." Although the government argued at a hearing that the allegedly false claims were the cost reports the defendant submitted to the government, the court observed that the government's complaint did not identify any of those cost reports either, nor did it explain the circumstances under which such reports were submitted to the government. The court, quoting Eleventh Circuit precedent, declared that "if Rule 9(b) is to be adhered to, some indicia of reliability must be given *in the complaint* to support the allegation of *an actual false claim* for payment being made to the Government." Since the court determined that the government's complaint failed to provide specific details regarding the "who, what, when, where, and how" of the alleged fraud, it held that the complaint failed to meet Rule 9(b)'s pleading requirements and should be dismissed. The court, however, dismissed the government's complaint without prejudice, allowing the government an opportunity to re-plead its fraud allegations.

U.S. ex rel.Streck v. Allergan, Inc., 2012 WL 2593791 (E.D. Pa. July 3, 2012)

A relator brought a *qui tam* action alleging that a group of pharmaceuticals companies violated the federal False Claims Act and the corresponding statutes of twenty-four states and the District of Columbia by fraudulently reporting their Average Manufacturer Price—the price the manufacturer charges to wholesaler and retailers—in an effort to pay a smaller Medicaid rebates. The defendants collectively moved to dismiss the relators complaint, arguing that his complaint was inadequate under Federal Rules of Civil Procedure 8(a) and 9(b).

Holding: The United States District Court for the Eastern District of Pennsylvania granted the defendants motion in large part, but allowed some of the relator's claims to go forward.

Failure to Plead Fraud

The defendants argued that the relator's allegations failed to meet the notice pleading standards of Rule 8(a) and failed to satisfy the heightened pleading standards of Rule 9(b), as they did not allege sufficient facts to show that the defendants knowingly violated the False Claims Act. The defendants claimed that they did not knowingly defraud Medicaid, but rather, relied on a good faith interpretation of the FCA's definition of Average Manufacturer Price. The court observed that the relator's complaint did not offer any direct evidence of the defendants' knowledge; the court stated that the relator's claims "rest on the indirect evidence that the statutory and regulatory provisions involved were so clear that Defendants' calculation of AMP was at least reckless," and held that in order to survive the defendants' motion to dismiss, the complaint must plausibly demonstrate that the defendants' "interpretation of how to calculate AMP 'ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.'" The court found that, with respect to calculating AMP in the context of manufacturer discounts on sales of drugs, "there was a definitive change in January 2007 to the guidance in AMP calculations" and analyzed the relator's claims from 2004 to January 2007 (the beginning of the time period alleged in the complaint) and then from January 2007 until the date of the relator's *qui tam* filing. After evaluating the relator's allegations of fraud before January 2007, the court determined that the defendants' interpretation of AMP was reasonable, as there was no guidance regarding the types of discounted services should be included in the calculation of AMP. The court noted that in 2007 statutory changes were made to the calculation of AMP. The relator asserted that these changes put the defendants on notice that their calculations of discounts were illegal. But the court concluded that "even when there is statutory and regulatory guidance, unless [the defendants'] interpretation is reckless, Plaintiff's claims must fail." The court, though, ultimately held that the defendants' interpretation was, at the very least, reckless, as the defendants tried to re-characterize their discounts in the face of the new statutory framework, so as to continue paying smaller Medicaid rebates.

The court then considered the process for calculating AMP in the context of fees for services and noted that there was a lack of guidance regarding the proper calculation of AMP throughout the time period alleged in the relator's complaint. Thus, the court held that the defendants' interpretation of AMP with respect to service fees was reasonable and warranted dismissal of the relator's claims regarding service fees, for failure to adequately plead scienter.

State Law Claims

The defendants argued that the state FCA claims should be dismissed for a variety of reasons, including: (1) any state FCA claims that correspond to dismissed federal FCA claims should likewise be dismissed; (2) state FCA claims brought under the

Delaware and New Mexico FCAs should be dismissed since the relator is not an "affected person" with the right to bring a *qui tam* suit under those laws and since those states neither intervened in the relator's suit nor provided a written determination that there was substantial evidence that a violation occurred; (3) state claims brought under the New Hampshire and Texas FCAs should be dismissed because the attorneys general in those states declined to intervene, as required by state law; and (4) state FCA claims brought under the FCAs of Connecticut, Georgia, Indiana, Montana, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, and Rhode Island should be dismissed because those statutes were enacted after the relator's complaint was filed and are not to be applied retroactively. The court agreed to dismiss the relator's claims brought New Mexico law, since that statute requires state intervention. The court noted that Delaware eliminated this requirement in 2009, and thus, only dismissed claims under the Delaware FCA that arose before the state amended its law to allow the relator to proceed without state intervention. Similarly, the court determined that New Hampshire and Texas previously required state intervention before *qui tam* actions could proceed, but eventually amended their statutes to allow relators to go forward without the government. As a result, the court dismissed the relator's claims under those laws that arose before the aforementioned amendments took effect. The court also acknowledged that many of the states on whose behalf the relator brought claims enacted their FCA laws after the relator's suit was filed—and none of those statutes applied retroactively. Thus, the court dismissed all state FCA claims that arose before those states' respective statutes were enacted and became effective.

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

U.S. ex rel. Lusby v. Rolls-Royce Corp., 2012 WL 4357438 (S.D. Ind. Sept. 24, 2012)

A relator filed a *qui tam* action against his former employer—a company that manufactured aircraft engine parts for sale to the U.S. government. The relator, who held a senior engineer position with the defendant, alleged that he was familiar with all stages of the manufacturing and inspection processes relating to the engine parts at issue and that, over a period of years, he cautioned the defendant that its manufacturing processes could not ensure conforming parts with repeatability. He alleged that the defendant ignored his complaints that it was supplying nonconforming parts to the U.S. government. Moreover, the relator alleged that, pursuant to at least some its contracts with the government, the defendant submitted certificates of conformance to the government regarding its parts. The defendant alleged that these certifications were false, and subjected the defendant to liability under the False Claims Act. The relator's initial complaint was unsealed, but after the relator's counsel withdrew, the relator filed a *pro se* amended complaint. He later retained new counsel, and again amended his complaint. The defendant successfully moved for judgment on the pleadings, and the U.S. District Court for the Southern District of Indiana denied the relator's motion for leave to file another amended complaint, ruling that his claims were barred by *res judicata* and that his fraud claims were not pled with the requisite particularity. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Seventh Circuit, which remanded the case in part, with instructions to the district court to rule on the merits of the relator's claim that the defendant presented false claims to the U.S. government. The relator then filed an amended complaint and the defendant moved for summary judgment.

Holding: The U.S. District Court granted the defendant's motion for summary judgment.

Statute of Limitations

The defendant first argued that since the government did not intervene in the relator's *qui tam* suit, his complaint was subject to the FCA's six-year statute of limitations and therefore, all of the relator's allegations regarding claims the defendant submitted to the government more than six years before the complaint was filed were time-barred. The relator did not dispute the defendant's analysis, and neither did the court. Thus, all allegations based on claims that occurred more than six years before the relator's complaint was filed were dismissed. The court then addressed the relator's remaining allegations.

Failure to State a Claim

The relator argued that in order to get paid by the government, the defendant regularly falsely certified that the parts it delivered to the government conformed to contractual requirements and had passed all required inspections. However, the court determined that the relator was unable to present any evidence of any knowingly false claim that the defendant actually submitted to the government for non-conforming parts. The court found that the "[r]elator concedes that he has no individualized knowledge that a particular part that failed to meet contract specifications was ever sold to the government. Thus, he has no proof of there ever having been a false claim for payment made by [the defendant] to the Government." The court held that it would not simply assume that nonconforming parts and corresponding false certifications of compliance must have been delivered to the government during the limitations period, particularly since certificates of compliance were not always required. The court rejected the relator's argument that he should not be required to show that the defendant actually submitted false claims for specific non-conforming parts because the defendant's parts are not serialized or assigned tracking numbers. The relator argued that the burden should shift to the defendant to prove that its actions were legal. The court, however, determined that this argument was not supported by caselaw and granted the defendant's motion for summary judgment with respect to the relator's remaining claims.

State of Nevada ex rel. Bates v. Mortgage Elec. Registration Sys., Inc., 2012 WL 4058052 (9th Cir. Sept. 17, 2012)

The relator from the case above also filed a qui tam suit under the Nevada False Claims Act (NFCA), alleging that the same defendants committed mortgage recordation fee fraud. Again, the defendants successfully removed the relator's action to federal court on diversity jurisdiction grounds, and defeated the relator's subsequent motion for remand to state court. The U.S. District Court for the District of Nevada dismissed the relator's complaint for failure to state a claim. The relator appealed that ruling to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the district court's ruling, as it found that the complaint failed to allege sufficient facts to support its claim that the defendants violated the NFCA by knowingly using false records to avoid obligations to pay mortgage recording fees to counties in Nevada. Specifically, the appeals court found that the relator failed to allege that the defendants had an "obligation" to the counties to remit the fees at issue—and that he could not do so, since no such obligation existed under Nevada law.

U.S. ex rel. Phillips v. L-3 Comm. Integrated, Sys L.P., 2012 WL 3649699 (N.D. Tex. Aug. 24, 2012)

A relator filed a *qui tam* suit, alleging that his employer—a company that specializes in the modernization and maintenance of aircraft—violated the False Claims

Act by knowingly selling aircraft to the United States that contained parts that did not conform to Federal Aviation Administration standards and/or were defective. He further alleged that when he reported these issues to his superiors, he was threatened and eventually resigned from his job as a team leader under pressure from the defendant. The United States declined to intervene in the relator's suit. The defendant moved to dismiss his amended complaint, for failure to state a claim and failure to plead fraud with particularity.

Holding: The U.S. District Court for the Northern District of Texas granted the defendant's motion and dismissed the relator's complaint with prejudice.

Failure to State a Claim

The defendant argued that the relator failed to state a claim under the FCA because the relator failed to allege the existence of a false statement or claim submitted to the government. The relator countered that his complaint did properly state a claim, since he referenced specific defects in the defendant's aircraft and alleged that the defendant knowingly delivered such aircraft to the government while representing that the aircraft were airworthy, as required by the defendant's contract with the government. The court, though, noted that the relator's complaint assumed that defective aircraft were delivered to the government—the court determined that the relator did not know whether any of the allegedly defective aircraft were actually sold to the government, because he resigned from his job before any such sale took place. In addition, the court observed that the relator was not privy to the defendant's statements to the government, mentioning that the defendant could have informed the government of any defects in the aircraft at the time of delivery. The court held that the relator's "allegations fall short of showing that [the relator] is entitled to relief." In addition, the court determined that the relator failed to establish that the alleged defects were material, such that the defendant's failure to alert the government to them would constitute fraud for FCA purposes. Thus, the court dismissed the relator's fraud claims for failure to state a claim for relief under the FCA.

Failure to Plead Fraud with Particularity

The court extended its reasoning to the defendant's argument that the relator failed to plead the alleged fraud with particularity. Since the court concluded that the relator only assumed that defective aircraft were sold to the government, he could not plead any details of any alleged fraudulent sale, such as "the time, place, or manner of delivery . . . what was stated to the government regarding the alleged defects." The relator argued that his allegations were sufficient to create a reasonable inference that the defendant provided defective goods to the government, and therefore, his complaint was sufficient under Rule 9(b)'s pleading standard. The court, though disagreed that the relator's complaint could create an inference that FCA violations occurred, since the "[r]elator does not allege who represented that the planes satisfied FAA guidelines, when such representation occurred, and how [the defendant]'s failure to comply with the FAA standards would have affected the government's payment decision. The court dismissed the fraud claims for this additional reason.

Moreover, the court dismissed the relator's conspiracy claim, since that claim was based on the relator's deficient fraud claims.

Retaliation

The court dismissed the relator's retaliation claim, finding that the relator failed to plead the necessary elements for maintaining such a claim. Specifically, the court held that the relator failed to establish that he engaged in any protected activity, and therefore, he could not establish that any retaliation he may have suffered was due to such activity. The court observed that the relator raised concerns about the defendant's aircraft. However, the court noted that the relator never alleged that he informed the defendant that he believed the defendant was defrauding the government. In addition, the court found that the relator failed even to respond to the defendant's motion to dismiss the retaliation claim.

Leave to Amend Complaint

The court dismissed the relator's claims with prejudice, concluding that he "has stated his best case." The court noted that the relator had already been given opportunities to cure deficiencies in his complaint, and refused to offer another opportunity to do so, since the relator could not apprise the court of what allegations he would assert in an amended pleading that would overcome a motion to dismiss.

Gonzalez v. Fresenius Med. Care North America, 2012 WL 3065314 (5th Cir. July 30, 2012)

A relator filed a *qui tam* complaint against her former employer—a healthcare service provider—as well as several of the company's affiliates and two individuals, alleging that the defendants performed various tasks and made patient-care decisions in violation of federal and state regulations, and that the defendants violated the federal anti-kickback law by allowing one of their doctors –also named as a defendant—to improperly bill Medicare for work performed by his assistants in exchange for patient referrals. In addition, the relator filed a separate complaint alleging that the corporate defendants and another individual defendant—her former supervisor—harassed and threatened her, and eventually forced her to resign from her job, in violation of the False Claims Act's anti-retaliation provision. The relator's two complaints were consolidated and the defendants moved to dismiss portions of those complaints.

The United States District Court for the Western District of Texas granted those motions, leaving the relator with the following counts under the False Claims Act,

among other non-FCA claims: (1) a claim against the corporate defendants and the doctor for knowingly presenting false claims to the government; (2) a claim against those same defendants for knowingly making false records or statements in support of false claims to the government; (3) a claim against those defendants for conspiring to submit false claims to the government; and (4) and (5) claims against her former employer and her former supervisor for retaliation and retaliatory constructive discharge. The parties all moved for summary judgment on these claims and after the relator presented her case-in-chief at trial, the district court granted the defendants' motions for judgment as a matter of law in part, dismissing the relator's claim against the corporate defendants for presenting false claims to the government, and dismissing her retaliation claims against all the defendants. The relator was only allowed to proceed at trial with her counts alleging that the corporate defendants and the doctor made false statements to the government in support of false claims, that those defendants conspired to submit false claims to the government, and that the doctor presented false claims to the government. The jury returned verdicts in favor of the defendants on all three counts. The defendants then moved to recover their attorneys' fees—with the corporate defendants requesting their attorneys' fees for the relator's retaliation claims, while the individual defendant sought to recover his attorneys' fees for the entire lawsuit. The district court awarded the corporate defendants their attorneys' fees against the relator's counsel, pursuant to the sanctions provisions of 28 U.S.C.§ 1927—not pursuant to the False Claims Act's fee-shifting provision—upon its finding that the relator's counsel unreasonably and vexatiously multiplied proceedings with respect to the retaliation suit. The relator appealed the district court's judgment on her claims, while her counsel appealed the district court's award of attorneys' fees. The U.S. Court of Appeals for the Fifth Circuit consolidated both appeals.

Holding: The Fifth Circuit affirmed all of the district court's rulings.

Failure to State a Fraud Claim

The circuit court first considered the relator's appeal of the district court's ruling granting the corporate defendants' motion for judgment as a matter of law on her claims for knowingly presenting false claims to the government. She argued that the district court erred because she established that the corporate defendants' annual cost reports included false certifications of the defendants' compliance with the anti-kickback law and other applicable healthcare statutes and regulations, and that the corporate defendants assisted with the presentment of fraudulent healthcare claims to the government. The circuit court noted that while evidenced adduced at trial showed that the submission of accurate cost reports is a condition of participation under Medicare, the trial evidence did not establish that such submissions are a condition of payment. But the court determined that it did not need to address this question, since it agreed with the district court that the relator failed to show that the corporate defendants entered into an illegal kickback agreement with one of their doctors whereby the doctor would be allowed to bill the government for work performed by assistants in exchange for referring patients to the corporate defendants—the appellate court found that the relator did not produce any evidence showing that the defendants had the intent to induce illegal referrals, nor did she offer evidence that showed that the doctor's volume of referrals remained constant regardless of whether or not he had an assistant working for him. The court also rejected the relator's argument that the corporate defendants' healthcare claims to the government were "tainted" even if those defendants did not certify statutory compliance; in essence, she argued that the corporate defendants caused the individual defendant to submit false claims. Instead, the Fifth Circuit noted that the relator was allowed to maintain at trial her claims against the corporate defendants for making false statements to the government and for conspiring to defraud the government, but concluded that the relator was not entitled to maintain her claim against those defendants for presenting false claims to the government, since she failed to "adduce[] evidence on the basis of which a reasonable jury could conclude that [the corporate defendants] in any way participated in the scheme and the scheme produced any potentially false claims." The circuit court affirmed the district court's ruling on the relator's fraud claims.

Retaliation

Next, the Fifth Circuit turned to the relator's appeal of the district court's dismissal of her retaliation claim. The district court held that this claim failed because the relator failed to show that the defendants involved knew that she was engaged in protected conduct under the False Claims Act, and therefore, she failed to show a nexus between her whistleblowing activity and any alleged retaliation she suffered. The circuit court found that, on appeal, the relator again, without supporting authority, "offer[ed] a bald assertion that management knew of the [*qui tam*] lawsuit and argue[d] in the alternative that we should presume knowledge because her FCA complaint was unsealed prior to her termination." The appeals court also noted that the defendants offered a non-retaliatory reason for taking disciplinary action against the relator, including that she violated their theft policies and that she claimed hourly wages while on workers' compensation. As a result, the Fifth Circuit held that the retaliation claims were without merit and were properly dismissed by the district court.

Attorneys' Fees

Finally, the court considered the relator's counsel's appeal of the district court's award of section 1927 sanctions in connection with the relator's retaliation claim. The circuit court reviewed the district court's award of sanction for abuse of discretion and concluded that the district court was within its authority to order the relators' counsel to cover the retaliation defendants' attorneys' fees. The circuit court noted that the relator gave inconsistent statements regarding whether or not she had refused participate in and/or to cover up the alleged fraud—she initially referenced a letter to her former supervisor in which she claimed that she refused to take part in the defendants' alleged fraudulent billing and that she would not return to work under those condition, but later changed her testimony during discovery and again changed her story when her counsel submitted a post-deposition errata sheet containing 101 corrections to her testimony. At that time, the defendants' moved to strike the errata sheet and to re-depose the relator. They also requested sanctions. The magistrate judge assigned to resolve the discovery dispute decided that the errata sheet need not be stricken from the record, but ordered that the relator be re-deposed at no cost to the defendants. The appeals court further noted that during her second deposition, the relator maintained her original claim that she sent a letter to her supervisor, refusing to take part in the alleged fraud. However, at trial, her testimony changed again and she asserted that the defendants never asked her to lie, that the answers she provided during her first deposition were accurate, and that her attorney provided some of the corrections on the errata sheet and had helped her write the letter to her supervisor. The district court awarded sanctions against the relator's counsel, inferring bad faith on their and concluding that they helped the relator bring a meritless claim to trial. The circuit court held that the district court did not abuse its discretion in imposing sanctions against the relator's counsel, as the evidence supported the district court's conclusion that counsel pushed the relator's retaliation claim to trial, notwithstanding the fact that the relator did not adhere to the allegations counsel made on her behalf.

U.S. ex rel. Folliard w. Government Acquisitions, Inc., 2012 WL 3089872 (D.D.C. July 27, 2012)

A relator brought a *qui tam* action alleging that a group of eight defendants violated the False Claims Act by knowingly submitting claims for payment to the federal government for various technology products that were sold to the government, even though the defendants knew that the products originated in non-designated countries, as defined by the Trade Agreements Act (TAA), and thus, the government was prohibited from purchasing them. The defendants moved to dismiss the relator's claims, and the U.S. District Court for the District of Columbia granted the motions of six of the eight defendants. The remaining two defendants—GAI and GP—moved for summary judgment on the relator's claims against them. The relator moved for additional discovery.

Holding: The D.C. District Court granted summary judgment in favor of GAI, while GP's summary judgment motion was granted in part and denied in part. The relator's motion for additional discovery was denied.

Failure to State a Claim

The court began by analyzing the claims against defendant GAI, which the relator alleged made six specific sales to the United States of products that originated in non-designated countries. The court limited the relator only to those six transactions and denied the relator's motion for expanded discovery regarding possible additional transactions. The court noted that pre-discovery motions for summary judgment are usually premature, but determined that the relator was provided with at least <u>some</u> discovery regarding GAI's transactions with the government. The court rejected the relator's argument that he did not receive any discovery from GAI, since GAI made "boilerplate" objections to his interrogatories. The court stated: "Just because plaintiff's interrogatories were not answered in the manner he would prefer, it does not logically follow that they were not answered at all . . . The court is unable to find caselaw supporting plaintiff's apparent contention that 'boilerplate' objections are equivalent to not answering the interrogatories at all, and thereby preclusive of summary judgment."

Since each of the six transactions alleged by the relator occurred before the False Claims Act was amended by the Fraud Enforcement and Recovery Act of 2009 (FERA), the court held that the pre-FERA version of the FCA applied to the relator's claims against GAI. GAI conceded that it sold the products at issue to the government, but disagreed with the relator's characterization of those products and instead asserted that the products originated in Mexico—an approved country—and the sales did not violate the TAA. On that basis, GAI moved for summary judgment. The relator argued that summary judgment was not proper, since material disputes of fact existed regarding the products it sold to the government and since GAI refused to provide sufficient discovery regarding those sales. The court, though, held that the relator had also been entitled to <u>enough</u> discovery regarding GAI's sales to the government claims, and that his presumption that the GAI's products originated in non-designated countries was insufficient to create a dispute of material fact, as GAI produced emails, declarations, purchase orders and serial numbers as evidence showing that it never sold the improper products as the relator alleged. Since the court determined that the relator was unable to explain, in detail, any additional facts regarding the alleged sales at issue that would be revealed through further discovery, or that these unidentified facts were even actually discoverable, it held that summary judgment on the relator's claims against GAI was proper. After evaluating the existing evidence that had been presented, the court determined that the relator had failed to establish that GAI actually sold any improper products. Since the relator was unable to create a genuine issue of fact regarding that allegation, and the only evidence before the court suggested that GAI had not sold the products in question to the government, the court granted GAI's motion for summary judgment.

Next, the court considered defendant GP's summary judgment motion. Again, the court noted that all ten of GP's specific transactions alleged by the relator occurred before the FERA amendments to the FCA, and thus, the pre-FERA version of the FCA applied to the relator's claims against GP. The relator also sought expanded discovery regarding its claims against GP and GP's defenses to those claims. The court determined that GP's arguments fell into four distinct categories, and evaluated each of those in turn.

First, the relator alleged that GP made two fraudulent sales to the government under a FirstSource contract. GP moved for summary judgment on claims based on those transactions, arguing that FirstSource contracts are set aside for small business, and as such, they are exempt from the TAA. The relator did not dispute GP's assertions, and instead sought discovery regarding the contract and how the transactions in question were exempt from the TAA. But the court observed that GP produced the contract as an exhibit to its summary judgment motion, and concluded that there were no remaining issues of fact—the only remaining issue was the legal question of whether the contract was exempt from the TAA. Since the relator failed to specify what facts he intended expanded discovery would produce and how those facts were necessary to the litigation, the court denied the relator's discovery motion. Since the relator offered no evidence refuting GP's contention that its FirstSource contract was exempt from the TAA, the court granted GP's motion for summary judgment with respect to those transactions.

Next, GP argued that summary judgment regarding *qui tam* claims based on a group of different sales to the government was warranted, because GP relied on the certifications of its distributor that the products included in those sales were TAA-compliant. Thus, GP argued, it did not have the requisite scienter to submit fraudulent claims to the government with respect to those sales, in violation of the FCA. Notably, GP did not dispute that it sold the products to the government or that the products were from non-TAA compliant countries. The relator sought additional discovery regarding GP's reliance on its distributor's representations, and the court granted that request, noting that the FCA defines "knowing" to include "reckless disregard of the truth," and finding that the relator demonstrated that additional discovery regarding GP's knowledge of the falsity of its claims was relevant to the litigation and that the information he sought was actually discoverable. Consequently, the court denied GP's motion for summary judgment with regard to these fives transactions and granted the relator's request for additional discovery regarding GP's reliance on its distributor.

Third, GP contended that summary judgment was proper regarding the relator's fraud claim regarding another sale, because the product involved was not listed on the government's schedule contract and was sold on the "open market." In addition, GP argued that the sale was for less than the applicable TAA threshold, and thus, the TAA did not apply. The relator did not refute GP's arguments, and instead sought additional discovery from GP regarding its "open market" sales. The court observed that GP produced its contracts for the product at issue as exhibits to its summary judgment motion, and again concluded that the parties' only dispute was the legal question of whether or not the sales violated the TAA. The court granted GP's motion for summary judgment and denied the relator's discovery motion.

Finally, GP argued that it was entitled to summary judgment on fraud claims regarding another sale, since the product at issue was sold by a third party, not GP, and the third party made all the relevant representations about the product. Again, the contract in question was produced as part of GP's summary judgment motion. The court observed that the relator did not seek any specific additional discovery regarding this transaction—instead, he sought information regarding "all other claims for exemptions from TAA requirements—nor did he demonstrate how any specific facts to be discovered would be relevant to the litigation of this particular claim. As a result, the court denied the relator's request for additional discovery regarding this final transaction. Since the relator failed to refute GP's argument for summary judgment on this *qui tam* claim, the court granted the defendant's motion.

U.S. ex rel. Osheroff v. Tenet Healthcare Corp., 2012 WL 2871264 (S.D. Fla. July 12, 2012)

A group of healthcare company defendants moved to dismiss a relator's *qui tam* complaint that alleged that the defendants violated the False Claims Act and defrauded the United States and the States of Florida, Georgia, Texas, Tennessee, and California by submitting claims for Medicare and Medicaid reimbursement that were based on the defendants' illegal financial relationships with one another. The relator alleged that the defendants owned and leased numerous medical office buildings near their hospitals and illegally leased office space to physicians at improper rates, in exchange for referrals of business. The relator alleged that these arrangements violated the Stark law and the Anti-Kickback Statute and that all of the defendants' Medicare/Medicaid claims that were based on any such illegal arrangements were false. The defendants moved to dismiss the relator's claims, arguing that the court did not have subject matter jurisdiction over the relator's complaint, due to the FCA's public disclosure provision; that the relator failed to state a claim for relief under the FCA; and that the relator failed to plead the alleged fraud scheme with particularity.

Holding: The U.S. District Court for the Southern District of Florida rejected the defendants' public disclosure argument, but granted their motion to dismiss for failure to state a claim. The relator's complaint was dismissed without prejudice.

Public Disclosure Bar

The defendants contended that an informational website containing leasing information about 34 of the defendants' medical office buildings—buildings and corresponding leasing terms that were at the heart of the relator's Stark law and Anti-Kickback Statute allegations—constituted a public disclosure for FCA purposes. The court disagreed with the defendants' characterization. The court determined that even if the webpage was deemed "news media" for public disclosure purposes, the relator's fraud allegations were not "based upon" any of that information, but instead "involves in depth allegations that Defendants are providing illegal perks and financial benefits to physicians in exchange for referral business. The court held that the relator's claims were "based upon an alleged fraud that was first discerned through Relator's synthesis and analysis of otherwise apparently innocuous, garden-variety real estate/financial information. The court made clear that, in the Eleventh Circuit, "the public disclosure of allegations that the defendant 'actually engaged in wrongdoing' is necessary before invoking the public disclosure bar." Since the publicly disclosed information did not allege any wrongdoing by the defendants, the court held that it was insufficient to bar the relator's claims. The defendants' motion to dismiss for lack of subject matter jurisdiction was denied.

Failure to State a Claim

The defendants offered four arguments for why the relator's allegations failed to plead a fraud claim under the FCA. First, they asserted that the relator failed to identify any specific claim to the government that was allegedly false. They argued that the relator could not maintain his fraud allegations without including information about the precise false statements contained in their claims to the government, as well as the time and place such statements were made, the person responsible for making any such statements, and the manner in which the statements misled the government. They stated that the relator's purported evidence of fraud—a sample of thousands of the defendants' Medicaid claims taken from public filings—was insufficient to meet this criteria and moreover, that the sample size was too small to support the relator's allegations of a fraud scheme involving hundreds of physicians under hundreds of leases across the country. The court acknowledged that FCA liability stems from the submission of false claims to the government, but ultimately held that the relator's allegations and evidence of the defendants' Medicare/Medicaid revenues provided a sufficient factual basis that the defendants submitted claims to the federal government.

Second, the defendants argued that the relator failed to adequately allege how any of its Medicare/Medicaid claims was actually false. The court observed that the relator's theory of FCA liability was that <u>all</u> of the defendants' claims were false, since the defendants were in violation of the Stark law and the Anti-Kickback Statute. However, the court also observed that the relator failed to allege that the defendants ever certified to the government that they had complied with the Stark law or the Anti-Kickback Statute, or that such certifications were a prerequisite for payment under the federal government healthcare programs. The relator first argued this "false certification" theory after the United States submitted a Statement of Interest in the case that raised this argument. Without reaching the question of whether or not violations of the Stark law and/or the Anti-Kickback Statute—without corresponding false certifications of compliance—are sufficient to create FCA liability, the court granted the relator leave to amend his compliant to explicitly include a theory of liability based on alleged false certifications of compliance. The court cautioned that the relator would still need to plead these underlying violations with particularity, noting that his present complaint did not meet that standard.

Third, the defendants contended that the relator failed to show that they <u>knowingly</u> presented any false claims to the government. The court quickly addressed this claim, noting that the relator had sufficiently alleged that the defendants had actual knowledge of the requirements of the Stark law and the Anti-Kickback Statute, and that "[t]o the extent Relator can properly plead violations of AKS and/or Stark in its amended complaint together with Defendants' certifications of compliance with AKS and Stark, such allegations would suggest knowledge of a false certification under the FCA."

Finally, the defendants asserted that the relator did not adequately allege a claim for conspiracy under the FCA. The court held that FCA conspiracy claims are subject to Rule 9(b)'s particularity requirements, and concluded that the relator's allegations were deficient, as he did not specifically allege that the defendants entered into any agreement to conspire to defraud the government, nor did he identify any members of the alleged conspiracy. The court dismissed the conspiracy claim, but granted the relator leave to amend that claim.

See *U.S. ex rel. Rostholder v. Omnicare, Inc.*, 2012 WL 3399789 (D. Md. Aug. 14, 2012), at page 19.

See *U.S. v. BNP Paribas SA*, 2012 WL 3234233 (S.D. Tex. Aug. 6, 2012), at page 46.

LITIGATION DEVELOPMENTS

A. Calculating Damages and Civil Penalties

U.S. ex rel. Freedman v. Suarez-Hoyos, MD, 2012 WL 4344199 (M.D. Fla. Sept. 21, 2012)

A relator and the United States government sued a dermatologist and his company, as well as a clinical lab and its owner, alleging violations of the False Claims Act. Specifically, the plaintiffs alleged that the defendants engaged in an illegal kickback scheme in which the dermatology defendants sent biopsy specimens to the laboratory defendants for the preparation and review of slides and the preparation of corresponding reports. In exchange for this business, the plaintiffs alleged that the laboratory defendants agreed to allow the dermatology defendants to bill Medicare for preparing and reviewing the slides—services the dermatology defendants did not perform—while the laboratory would only bill Medicare for preparing the slides. The plaintiffs alleged that since the dermatology defendants did not review the slides at issue or prepare the corresponding reports, its Medicare claims were false. They further alleged that because of the kickback arrangement, the dermatology defendants began performing unnecessary biopsies in order to increase its numbers, engaged in upcoding for other services, and billed the government for services that were not performed. In addition, the plaintiffs alleged that since the laboratory defendants' Medicare claims were tainted by the defendants' illegal kickback arrangement, those claims were also false, as they were not eligible for reimbursement. The government moved for summary judgment with respect to its claim that, as a result of the alleged illegal kickback scheme, the dermatology defendants knowingly presented false claims in violation of the False Claims Act. The dermatology defendants also moved for summary judgment on the government's claim.

Holding: The U.S. District Court for the Middle District of Florida granted the government's motion in part and denied it in part. The court denied the dermatology defendants' motion.

As an initial matter, the court noted that the issue of whether or not the defendants were engaged in an illegal kickback scheme was still in dispute, and thus, summary judgment on the government's presentment claim was not proper. However, the court held that it could rule on one sub-issue: the calculation of the government's damages in the event that the government could prove that the kickback arrangement existed and that the defendants submitted claims based on that arrangement to the government. The government argued that, should the illegal kickback scheme be proven true, then its damages should be equal to the

full amount Medicare paid on the defendants' claims, since the claims were not reimbursable. The defendants countered that the government did not suffer any damages as a result of the alleged kickback arrangement, since all the services for which Medicare was billed were actually performed, and the value of those services equaled the amounts for which the government was billed. The court noted that there was sparse caselaw regarding the appropriate damages calculation when Medicare claims are tainted by a kickback arrangement, but agreed with the government that *U.S. v. Rogan* was most on point. In that case, the U.S. Court of Appeals for the Seventh Circuit held that the government's damages in such cases is the entire value of the claim, since through Medicare, "[t]he government offers a subsidy (from the patients' perspective, a form of insurance), with conditions. When the conditions are not satisfied, nothing is due." Following the same rationale, the Florida district court held that the government's damages equaled the full amount that Medicare paid on the claims at issue—assuming that the government could prove that the kickback scheme existed and that Medicare would not have paid any claims tainted by the alleged scheme.

Consequently, the court granted the government's motion for summary judgment with respect to sub-issue of damages calculation. The government's summary judgment motion regarding the dermatology defendants' liability was denied. The dermatology defendants' motion for summary judgment was also denied.

B. Costs and Attorney's Fees

U.S. ex rel. Hobbs v. Medquest Assoc., Inc., 2012 WL 3561792 (M.D. Tenn. Aug. 16, 2012)

A relator brought a *qui tam* suit against a healthcare company and its affiliates, alleging Medicare fraud. The United States joined the suit and the U.S. District Court for the Middle District of Tennessee granted the plaintiffs' motions for summary judgment on most of their False Claims Act claims and awarded judgment totaling more than $11 million. The relator then moved for her attorneys' fees, pursuant to the FCA's fee-shifting provision for successful relators. The defendants opposed the relator's motion on several grounds, arguing that: (1) the motion was untimely; (2) the motion should be denied with respect to expenses associated with certain claims under a state False Claims Act, as those claims were voluntarily dismissed by the relator and were not joined by the federal government; (3) the relator claimed impermissible fees for expenses for her counsel's research and communications with the state attorney general; (4) requested fees for discovery expenses were invalid with respect to the relator's discovery requests that were duplicative of the government's; and (5) the relator's motion violated the "3% rule under Sixth Circuit precedent. The relator agreed with the last of these arguments and agreed to reduce her attorneys' fees to 3% of the total fees, as mandated by Sixth Circuit precedent in *Gonter v. Hunt valve Co., Inc.*

The court began its evaluation of the relator's motion by making some general observations regarding the FCA's fee-shifting provision, noting that the FCA entitles successful relators to recover from defendants "reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs." The court furthered noted that the "lodestar" method is used when courts must determine whether claimed expenses are "reasonable." The lodestar method multiplies a reasonable hourly rate for the attorney by a reasonable number of hours expended. The court found that a "national market" rate may be used when dealing with specialized areas of law.

The court then concluded that the relator's attorneys qualified for a national market hourly rate, since they were experienced, successful FCA litigators who operated a multistate business. Consequently, the court accepted the attorneys' respective hourly rates as reasonable. Next, the court examined the claimed attorneys' hours expended. The court first denied claims for hours expended on the relator's retaliation claim—a claim the court dismissed. The court also agreed with the defendants that certain expenses for hours expended working on the relator's state FCA claims were invalid, since those claims were voluntarily dismissed and were beyond the scope of the federal FCA claims that the government joined. Moreover, the court denied a group of time entries for work that was deemed duplicative of the govern-

ment's efforts; the court concluded that the government did the lion's share of the work in the case, based on the plaintiffs' respective filings and pleadings.

The relator responded to the defendants' argument that her motion was untimely, stating that her motion was not filed late, since the court did not set a deadline for such motions and since the defendant improperly included Saturdays and Sundays when calculating the due date. The court did not specifically address this issue, but apparently agreed with the relator, since the court reduced the relator's claim in the manner described above, then further reduced the total to the 3% maximum and granted the relator's motion.

See *Gonzalez v. Fresenius Med. Care North America*, 2012 WL 3065314 (5th Cir. July 30, 2012), at page 63.

C. Default Judgment

U.S. ex rel. Becker v. Tools & Metals, Inc., 2012 WL 3290405 (N.D. Tex. Aug. 13, 2012)

The United States intervened in various claims alleged in two consolidated *qui tam* actions against a group of corporate and individual defendants. The plaintiffs alleged that the defendants violated the False Claims Act in connection with sales of tools to be used on U.S. aerospace products. One of the individual defendants -- the former president of one of the corporate defendants—pled guilty to related charges of conspiracy to defraud the United States and was serving 7.5 years in prison. That defendant never entered an appearance in the present civil action and the United States alleged that he never attempted to contact counsel to represent him. Consequently, the plaintiffs jointly moved for a default judgment against him as to his FCA liability, and the U.S. District Court for the Northern District of Texas granted the motion. The plaintiffs later sought damages against that defendant. Based on an affidavit from a U.S. Attorney Office auditor, the government's actual damages totaled nearly $19 million. After that amount was trebled, pursuant to the FCA, the government was entitled to recover more than $56 million from the defendants. One of the corporate defendants settled with the government for nearly $16 million, leaving about $40 million in trebled damages to be collected. The court granted the plaintiffs' motion for final default judgment against the individual defendant, and awarded the government more than $40 million, plus post-judgment interest. The court acknowledged that the judgment would be offset by any recoveries from remaining defendants.

D. False Certifications of Compliance

U.S. ex rel. Onnen v. Sioux Falls Indep. School Dist. No. 49-5, 2012 WL 3206223 (8th Cir. Aug. 9, 2012)

A relator filed suit alleging that the public post-secondary technical school he previously worked for, as well as the school district that funded the school, the district's superintendent, and its board members violated the False Claims Act by submitting claims to the federal government for student grant funds and loan guarantees that falsely certified the school's compliance with various program requirements and Higher Education Act (HEA) regulations, and included falsified information. The U.S. District Court for the District of South Dakota granted summary judgment in favor of the defendants and the relator appealed that ruling to the U.S. Court of Appeals for the Eighth Circuit. The defendants filed a cross-appeal, challenging the district court's denial of their motion for attorneys' fees.

The Eighth Circuit affirmed the district court's summary judgment ruling. The relator argued that the defendants failed to make necessary disclosures and deprived the district court of a sufficient opportunity to make an appropriate decision the summary judgment motion. But the circuit court held that the relator's argument was untimely, as it was not presented to the district court. The appellate court also held that the district court erred when it decided that FCA claims based on violations of the HEA are inconsistent with the administrative remedies and sanctions available to the government under that Act. Instead, the Eighth Circuit agreed with the government—which filed an *amicus curiae* brief on the issue—that the FCA was intended by Congress to allow the government to choose among a variety of available remedies—both statutory and administrative.

Finally, the court considered the defendants' cross-appeal of the district court's denial of their motion for attorneys' fees. The circuit court affirmed that ruling, as it concluded that the relator's suit was not clearly frivolous, vexatious, or harassing. While the circuit court acknowledged that "the record contains indications that [the relator's] unsupported claims were asserted primarily for vengeful harassment," and stated that it would have also affirmed an award by the district court of the defendants' attorneys' fees, it ultimately held that the district court did not abuse its discretion, as the relator's complaint had survived a motion to dismiss and discovery had uncovered factual support for some of his allegations.

See *Jallali v. Nova Southeastern Univ., Inc.*, 2012 WL 3234278 (11th Cir. Aug. 9, 2012), at page 55.

See *Gonzalez v. Fresenius Med. Care North America*, 2012 WL 3065314 (5th Cir. July 30, 2012), at page 63.

See *U.S. ex rel. Newell v. City of St. Paul, Minn.*, 2012 WL 2979061 (D. Minn. July 20, 2012), at page 21.

See *U.S. ex rel. Osheroff v. Tenet Healthcare Corp.*, 2012 WL 2871264 (S.D. Fla. July 12, 2012), at page 69.

See *U.S. ex rel. Powell v. American Intercontinental Univ., Inc.*, 2012 WL 2885356 (N.D. Ga. July 12, 2012), at page 10.

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

In re Pharmaceutical Indus. Average Wholesale Price Litig., 2012 WL 3263922 (D. Mass. Aug. 7, 2012)

Two relators filed a *qui tam* action against a healthcare company, alleging that the company violated the False Claims Act by inflating the prices of drugs on reimbursements claims to Medicare and Medicaid. The defendant moved for partial summary judgment on the relators' claims and the U.S. District Court for the District of Massachusetts granted the motion. The court determined that the relators' FCA claims on behalf of the government had been released as part of a broad settlement agreement between the defendant, a different relator from a prior *qui tam*, and the government. The relators moved for reconsideration of the court's dismissal of their claims, arguing that they should have been allowed to challenge the settlement agreement in a fairness hearing. In addition, they sought a share of the proceeds of the settlement, pursuant to the FCA's "alternate remedies" provision.

Holding: The court denied the relators' motion without prejudice.

Relators' Share

The relators argued that they were entitled to a share of the government's settlement proceeds pursuant to the False Claims Act's "alternate remedies" provision, which preserves relators' right to a share of the government's recovery even if the government chooses to pursue an alternate remedy that resolves *qui tam* claims. They asserted that the prior *qui tam* action did not encompass their claims, but since the settlement agreement was so broad, it had the effect of waiving their claims without their consent. Relying on precedent from other circuits, the court concluded that the alternate remedies provision applies when the government pursues an alternative to intervening in the relator's *qui tam* case. The government claimed that it did not intend to settle the present relators' claims when it resolved the prior relator's suit, but the court noted that the government did not withdraw its consent to the settlement either. Consequently, the court held that the government's settlement of the present relators' claims was an alternate remedy under the FCA.

Fairness Hearing

The relators argued that since their claims were dismissed as a result of the government's settlement with the defendant, they were entitled to a hearing regarding the settlement, as the False Claims Act relators have a right to have a court examine the government's attempt to settle their claims, and to determine whether "the proposed settlement is fair, adequate, and reasonable under all the circumstances." The court agreed. The court noted that "it would have been preferable" if the relators had requested the hearing before their claims were dismissed on summary judgment—the relators had received actual notice of the settlement—but concluded that the relators were unaware of the court's interpretation of the settlement until the court ruled on the summary judgment and did not believe that the settlement applied to their claims. In addition, the court held that relators are entitled to a fairness hearing even if the government's proposed settlement does not resolve the relator's entire action, but only some of his/her claims, stating that "such a limitation would be inconsistent with" congressional intent.

Ultimately, the court still denied the relators' motion for reconsideration. Rather than reconsider its summary judgment ruling, the court suggested that, pursuant to Federal Rule of Civil Procedure 60(b)(6), the relators move to re-open the judgment in the prior *qui tam* action and obtain the fairness hearing they were entitled to with respect to that settlement. The court further noted that the prior relator's argument that the present relators' action was barred by the FCA's first-to-file rule would be also addressed at that time.

F. Relators' Share Issues

U.S. ex rel. Johnson v. Universal Health Servs., Inc., 2012 WL 3847276 (W.D. Va. Sept. 5, 2012)

The United States and the Commonwealth of Virginia intervened in a *qui tam* case filed by three relators alleging Medicaid fraud against a group of healthcare defendants. The governments and the defendants eventually settled the case. Subsequently, a dispute arose between the government and the relators over the proper percentage of the settlement amount to be paid to the relators as their reward. Since the government entities intervened in the relators' suit, pursuant to both the federal False Claims Act and the Virginia Fraud Against Taxpayers Act, the relators were entitled to an award of between 15% and 25% of the settlement proceeds.

The relators contended that they should receive a 24% award, arguing that they provided the government with critical information about the fraud in pre-filing disclosures and in interviews—information the governments would not have had but for the relators. In addition, the relators claimed that they were active participants in the litigation, as they attended nearly all of the depositions and hearings in the case; consistently conferred with counsel for the government; submitted briefs in support of the government; secured the participation of an important expert whose information substantially increased the defendants' potential liability and encouraged them to settle the case more quickly; and agreed to make substantial sacrifices in support of the governments' claim, which included agreeing to reduce their claimed damages with respect to their individual claims against the defendants in order to facilitate a global settlement and waiving their right to receive their attorneys' fees. The governments countered that a 17% award was warranted, arguing that the relators' information only covered a subset of the fraud, and that the governments' own investigation uncovered additional fraud; that the relators lacked specific information regarding the defendants' Medicaid claims and had no information tying one of the defendants—the defendant that was the primary source of the governments' recovery—to the fraud; that the primary responsibility for conducting discovery fell on the government; and that a 17% award was sufficient to protect Congress' intent to incentivize relators to report frauds against the government.

The U.S. District Court for the Western District of Virginia first noted that the minimum 15% award specified in both FCA statutes is essentially a "finder's fee" to which relators are entitled even if they do nothing more than file a successful *qui tam* suit. Aside from that, the court said, the FCA statutes don't provide much guidance to court regarding the 15% to 25% range for relators' awards. So next, the court looked to the legislative history of the federal FCA for assistance and found that one of the sponsors of the 1986 amendments to the False Claims Act—which first established the 15% to 25% range—stated that "[i]n those cases where

the person carefully develops all the facts and supporting documentation necessary to make the case and presents it in a thorough and detailed fashion . . . and where that person continues to play an active and constructive role . . . the Court should award a percentage substantially above 15% and up to 25%." In addition, the court observed three relators' award factors identified by the Senate Judiciary Committee when enacting the 1986 amendments, which the court characterized as: "(1) the significance of the information provided to the government, (2) the contribution of the person who brought the action and the results obtained, and (3) whether the information which formed the basis of the suit was known to the government before the suit was filed." After considering the legislative history, the court held that the relators were entitled to an award above the 15% minimum, since the governments had no knowledge of the fraud before it was exposed by the relators; the information the relators provided was significant and included first-hand information; and the relators suggested using an important expert whose information may have assisted in motivating the defendants to reach a settlement. The court, though, balanced these factors against factors that weighed against a higher award to the relators, including its finding that the relators' personal sacrifices were exaggerated since the relator did receive some satisfaction of their personal claims against the defendant as part of the global settlement; the fact that even though the relators gave up their right to statutory attorneys' fees, their attorneys' "substantial" contingent fee may have been reduced as a counterbalance; and the fact that the relators did not provide any information regarding one of the defendants' involvement in the fraud, which forced the governments to conduct their own extensive investigation into that defendant's misconduct.

In addition, the court noted that the Department of Justice created its internal, non-binding "DOJ Guidelines" which courts have looked to for assistance in determining the appropriate award to relators. These guidelines include 14 factors that weigh in favor of larger awards as well as 11 factors that weigh in favor of reduced awards, and the court determined that the guidelines are well known throughout the FCA community and are apparently consulted by the government and by relators when negotiating relators' awards. The court applied the DOJ Guidelines and determined that the factors ultimately weighed in favor of a higher award. As a result, the court held that the relators were entitled to a 20% share of the governments' recovery, as that amount "adequately recognizes [the relators'] contribution to the government's case, while also appropriately limits their recovery in light of the particular circumstances of this case."

Alderson v. United States, 2012 WL 2913861 (9th Cir. July 18, 2012)

A relator filed a *qui tam* suit, alleging that a hospital management company and several related entities committed Medicare fraud. The United States intervened in the suit and settled the case for $631 million dollars, and the relator received a

16% share of the government's recovery. The relator—who had already given portions of his potential relator's award to various family members through a family partnership he created—and his family members filed income tax returns for the year in which the relator's award was paid and reported the award as ordinary income. They later amended their tax returns and characterized the award as a capital gain, and sought refunds of about $5 million. The Internal Revenue Service denied the refund claims and the taxpayers filed suit against the United States in the U.S. District Court for the Central District of California. The court granted summary judgment in favor of the United States and held that the relator's award was ordinary income. The taxpayers appealed that ruling to the U.S. Court of Appeals for the Ninth Circuit.

Holding: The Ninth Circuit affirmed the district court's ruling that relators' awards under the False Claims Act are ordinary income, for federal income tax purposes.

Relators' Awards

The circuit court noted that the question of "[w]hether a relator's share under the FCA is ordinary income or capital gain is a question of first impression," and that neither party provided any caselaw supporting its characterization of the award for tax purposes. The court looked to the IRS' definition of "capital gain" for guidance, and determined that "[c]apital gains treatment only applies to 'a gain from [a] sale or exchange.'" The appellants argued that the relator sold and exchanged "his documents, information and know-how" for cash, and thus, his award should be treated as a capital gain. The circuit court rejected that argument, and concluded that the relator did not sell or exchange his information; instead, his right to receive an award was conferred by the FCA, which required him to provide such materials to the government in order to pursue his *qui tam* claims. The court noted that the government almost certainly would have rejected any offer by the relator to sell or exchange his information for a sum of money—and even if the government had agreed to such an arrangement, it could not have done so under the FCA, but could only do so based on some other authority.

The appellate court also held that neither the relator's information, nor his relator's award qualified as a "capital asset," rejecting two additional arguments by the appellants. The court held that the information the relator provided to the government was not his "property"—a requirement for capital asset treatment—because he had no legal right to exclude others from using the information. The court further held that the relator's award was not a capital asset. Although the circuit court recognized that even potential relators' awards can be characterized as "property" for some purposes, it concluded that they do not satisfy the "capital asset" definition, since they are not based on an "underlying investment of capital." The appellants argued that the relator incurred expenses in uncovering the fraud and acquiring confidential documents and information that he provided to the government, but the court noted that "taxpayers routinely incur expenses in the production of ordinary income," and thus, held that the fact that the relator incurred expenses in connection with his *qui tam* case was not dispositive. The court recognized that the relator's award increased in value during the ten-year period between the filing and settlement of his case. However, the court reasoned that this increase was not the sort of accretion that would characterize a capital gain, since the relator was not an investor who bought and held an asset for that ten-year period, but instead worked intensively to increase the likelihood that his suit would succeed.

As a result of these findings, the Ninth Circuit affirmed the district court's ruling that the government was entitled to summary judgment on the appellants' claims, since relators' awards under the FCA are ordinary income for federal tax purposes.

See *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 2012 WL 3263922 (D. Mass. Aug. 7, 2012), at page 80.

Judgments & Settlements

JULY 1, 2012–SEPTEMBER 30, 2012

Lucent Technologies World Services, Inc. (W.D. Wash. Sept. 21, 2012)

Lucent Technologies World Services, Inc. ("Lucent") a subsidiary of global communications provider Alcatel-Lucent, agreed to pay the United States $4.2 million to settle allegations that it violated the False Claims Act by submitting misleading test certifications to the United States Army concerning the design and construction of an emergency communications system in Iraq. Lucent had been awarded a $250 million U.S. Army contract to build the emergency system for Baghdad and 15 other cities in 2004 and allegedly falsely attested that certain testing had been completed in order to secure payment from the United States more quickly. The settlement resolves a 2008 *qui tam* lawsuit filed under the False Claims Act by whistleblower Geoffrey Willson, a former Lucent contract manager, who will receive a $758,000 reward for his role in the proceedings.

Georgia Cancer Specialists, I, PC (N.D. Ga. Sept. 19, 2012)

Georgia Cancer Specialists, I, PC, one of the largest private oncology practices in the United States, agreed to pay $4.1 million to resolve allegations that it repeatedly violated the False Claims Act by knowingly billing Medicare for various services that were not permitted by applicable Medicare rules.

HCA Inc. and Parkridge Medical Center (W.D. Tenn. Sept. 19, 2012)

HCA Inc., one of the largest private hospital chains in the United States, agreed to pay $16.5 million to settle claims of violations of the False Claims Act and several other federal and state laws and regulations in connection with the alleged actions of the Chattanooga-based Parkridge Medical Center—a subsidiary of HCA. The settlement resolves allegations that HCA, Inc. entered into a series of transactions with physician group Diagnostic Associates of Chattanooga in 2007, wherein HCA Inc. provided monetary and financial benefits intended to encourage the physician members of Diagnostic to refer patients to HCA facilities. From 2007 to 2011, HCA Inc. allegedly submitted claims to Medicare, TRICARE, and TennCare/Medicaid for outpatient services arranged by Diagnostic members who had benefitted from the relationship between HCA Inc. and Diagnostic Associates of Chattanooga. The settlement came as a result of a *qui tam* lawsuit filed in 2008 by relator Thomas Bingham, who was represented by TAFEF member Phillip Benson, of the Warren Benson Law Group. Pursuant to the settlement agreement, HCA Inc. will pay $15.69 million to the federal government and $807,000 to Tennessee, while Parkridge Medical Center will enter into a comprehensive five-year corporate integrity agreement with the Office of Inspector General of the U.S. Department of Health and Human Services.

Compass Group USA (N.D.N.Y. Sept. 19, 2012)

Compass Group USA, a food management services provider, agreed to pay the state of New York $18 million to resolve allegations that it overcharged 39 New York state schools and school districts from 2003 to 2010. Allegedly, Compass received numerous discounts from food vendors and suppliers, but did not pass on the savings to New York State's schools as was required by law. In addition to the monetary settlement, Compass agreed to a nutritional code of conduct, requiring that it work to comply with the enhanced nutritional standards of the Healthy, Hunger-Free Kids Act passed by Congress in January 2012.

Pinnacle Medical Solutions (N.D. Ala. Sept. 5, 2012)

Pinnacle Medical Solutions, a Southhaven, Mississippi-based medical equipment company, has agreed to pay close to $1.8 million in order to settle a lawsuit which claimed that the company violated the False Claims Act from September 2006 until May 2009 by submitting false claims to both Medicare and the Federal Employees Health Benefits Program for blood glucose monitoring strips and lancets. The settlement comes as a result of a whistleblower lawsuit filed in 2009 by two former employees of the company. After one of the whistleblowers reported problems to the U.S. Department of Health and Human Services, Pinnacle made a voluntary repayment of $236,204. Under the terms of this settlement agreement, the company will re-pay an additional $1,771,522. And as a condition of the settlement agreement, Pinnacle is also required to enter into a five-year Corporate Integrity Agreement with the Department of Health and Human Services Office of Inspector General. One of the whistleblowers, Wendy Horne, was represented by TAFEF member Jim Barger, of Froshin & Barger, LLC.

New York Downtown Hospital (E.D.N.Y. Sept. 5, 2012)

New York Downtown Hospital agreed to pay $13.4 million to the United States and the State of New York to settle allegations that the company operated a drug and alcohol detoxification clinic that provided medical stabilization to inpatients without the necessary certification required by the New York State Office of Alcoholism and Substance Abuse Services, and engaged in an illegal scheme to pay for the referral of Medicaid and Medicare patients to their facility. These allegations were raised by two whistleblowers—Mathew Gelfand, M.D., who was represented by TAFEF member David A. Koenigsberg of Menz Bonner Komar & Koenigsberg LLP, and Enrico Montaperto—who filed *qui tam* lawsuits under the False Claims Act in 2002 and 2005, respectively. The two whistleblowers will share 18% of the settlement amount as their reward.

Johnson & Johnson (Aug. 30, 2012)

Johnson & Johnson ("J&J") reached an "agreement in principle" with the United States to pay $2.2 billion—which reportedly includes a $400 million criminal fine—to resolve an investigation of Medicaid claims for several J&J drugs. The company allegedly illegally marketed the heart medicine, Natrecor, and the anti-psychotic drug, Invega, and paid illegal kickbacks to pharmacy operator Omnicare, Inc. in order to boost prescriptions for another anti-psychotic drug, Risperdal.

J&J also reached an agreement with 36 States and the District of Columbia to pay $181 million to resolve consumer protection-related claims that its subsidiary, Janssen, improperly advertised Risperdal and Invega for non-approved uses from 1998 through 2004. According to New York Attorney General Eric Schneiderman, this agreement is the largest multi-state consumer protection-based pharmaceutical settlement ever. As part of the agreement, J&J agreed not to make false claims about these drugs or to promote them for off-label uses.

AstraZeneca PLC (D.S.C. Aug. 24, 2012)

AstraZeneca PLC has agreed to pay the state of South Carolina $26 million to settle claims of misleading consumers about the risks associated with Seroquel, an anti-psychotic drug. In addition, in March 2011, AstraZeneca agreed to a $68.5 million settlement with 37 other states, and in 2010, the company reached a $520 million agreement with the United States Department of Justice—all stemming from the off-label marketing of Seroquel. Neither South Carolina nor six other states joined that settlement and continued to pursue their own claims. Since then, six of those states have reached settlement agreements.

Bechtel Jacobs Company LLC (W.D. Ky. Aug. 25, 2012)

The Bechtel Jacobs Company agreed to pay the United States $230,000 to settle claims brought in a *qui tam* complaint alleging that from 1998 to 2002, the company billed the United States for services in connection with the removal of hazardous wastes that were improperly listed as "nonhazardous;" improperly stored non-radioactive waste at a plant in Paducah, Kentucky and disposed of it at an unnecessarily expensive site for radioactive wastes; and improperly disposed of wastes at a sanitary landfill site. The settlement comes as a result of a *qui tam* action filed by whistleblower Gary S. Vander Boegh, former Lockheed Martin project manager for landfill operations at the Paducah, Kentucky plant.

Los Angeles Doctors Hospital, Inc. (C.D. Cal. Aug. 24, 2012)

Los Angeles Doctors Hospital Inc., a subsidiary of Pacific Health Corp., will pay $16.5 million to settle allegations that from 2004 to 2007 the corporation's facilities improperly recruited and treated homeless people—even if they did not require treatment—in order to defraud the federal and California Medicare and Medi-Cal programs. The hospitals included in the settlement are Los Angeles Metropolitan Medical Center; Newport Specialty Hospital; and Anaheim General Hospital.

SCAN Health Plan, Senior Care Action Network, and Scan Group (C.D. Cal. Aug. 23, 2012)

SCAN Health Plan, Senior Care Action Network, and Scan Group, collectively known as SCAN, will pay $323.67 million to settle allegations that the company violated the False Claims Act by failing to provide contractually-required financial information to the California Department of Health Care Services, thereby impairing the department from revising capitation rates for SCAN. More than $318 million of the settlement will resolve allegations related to the California state Medicaid program, while the remainder will resolve Medicare allegations raised in a 2009 whistleblower lawsuit filed by James M. Swoben, who worked for SCAN from 2004 to 2006. Swoben was represented by TAFEF member William Hanagami of the Hanagami Law Firm.

CareAll Management LLC (M.D. Tenn. Aug. 13, 2012)

CareAll Management LLC, a Tennessee-based home healthcare provider, agreed to pay $9.375 million to the federal government to resolve a lawsuit filed in 2009 alleging that the company violated the False Claims Act by submitting fraudulent reports to Medicare between 1999 and 2001. Allegedly, the reports hid the relationship between home health agencies and the management company—a relationship that would have reduced the Medicare reimbursements for company's management services. The relationship between the company and the home health agencies was improper because the company was owned by James W. Carell, who facilitated his friend Robert Vinning's purchase of the home health agencies as a "sham" owner and then loaned and transferred money back and forth from each company. The scheme allowed Carell to profit greatly, rewarded Vinning for his participation, and cost Medicare millions of dollars.

The Mayo Clinic (D. Minn. Aug. 2, 2012)

The Mayo Clinic has agreed to pay $1.26 million to settle a federal lawsuit which alleged that, over an eight-year period, it falsely billed the federal government for thousands of lab tests that never occurred. The suit will resolve claims that the Mayo Clinic knowingly submitted false claims for an estimated 10,000 pathology tests—costing $100 apiece—from 1999 to 2007. When the allegations first came to light in 2007, the clinic voluntarily repaid $263,000; under the settlement, the clinic will pay an additional $1 million. The allegations were raised 5 years ago by whistleblower David Ketroser, an attorney and physician who discovered billing errors while investigating possible malpractice cases on behalf of several Mayo patients. For his part in assisting the federal government, Ketroser will split $230,000 with the families of three patients who joined him in the suit.

McKesson Corp. (N.D. Cal. July 30, 2012)

McKesson Corp., which paid $190 million to the federal government to settle a False Claims Act case alleging that the company inflated prescription-drug price information to a publisher of drug market pricing, has agreed to pay an additional $151 million to 29 States and the District of Columbia to settle related claims. Allegedly, McKesson deliberately drove up the prices of around 1,400 brand-name drugs from 2001 until 2009, causing prices for many widely-used drugs such as Lipitor or Prozac to rise by as much as 25%. Representing the relators in this case were TAFEF members Eric Jaso of Seeger Weiss LLP, and David Stone and Bob Magnanini of Stone & Magnanini LLP.

District Council 1707, Local 95 Head Start Employees Welfare Fund Head Start Employees Welfare Fund (S.D.N.Y. July 26, 2012)

District Council 1707, Local 95 Head Start Employees Welfare Fund agreed to pay approximately $5 million to the federal government for allegedly violating the False Claims Act by overcharging a Head Start grantee for insurance premiums. The Employees Welfare Fund administers hospitalization insurance for employees that work for delegate agencies that carry out Head Start programs funded by the New York City Administration for Children's Services (ACS). Prior to 2008, the Employees Welfare Fund allegedly submitted invoices to the ACS for amounts higher than it actually paid the insurance provider, causing ACS to pay the Employee Welfare Fund approximately $3 million more than necessary.

Dartmouth-Hitchcock Clinic (D. Vt. July 24, 2012)

Dartmouth-Hitchcock Clinic has agreed to pay over $550,000 to the federal government to settle claims that it violated the False Claims Act by overbilling both Medicare and Medicaid. The government began an investigation into the fraudulent billing after Dartmouth-Hitchcock self-disclosed that a physician in its neurology department had billed the federal government improperly. After investigating this claim, the U.S. Attorney's Office for the District of Vermont discovered that from 2004 until 2008, five other physicians in the department had engaged in improper billing as well. The federal government received $500,000 from the settlement, while Vermont received $21,789 and New Hampshire received $8,242.

Louis Dreyfus Energy Services (D. Colo. July 3, 2012)

Louis Dreyfus Energy Services, a Connecticut-based energy company, agreed to pay the United States $4,084,000 to settle allegations that it violated the False Claims Act by failing to pay money owed on natural gas that had been acquired from the Department of the Interior. The company's contract with the government discounted the price the company would pay to the government when the natural gas pipeline was constrained and the company could not transport natural gas. The company allegedly claimed the discount on days when the pipeline was not constrained and natural gas could be transported, thereby defrauding the government.

DaVita, Inc. (E.D. Tex. July 3, 2012)

Davita, Inc. agreed to pay the United States $55 million to settle claims of improperly boosting profits by using more Epogen than was medically necessary and then double-billing the government for leftover vials of the drug. These allegations were raised in 2002 in a False Claims Act lawsuit by whistleblower Ivey Woodard, a former employee of a company that makes Epogen. Woodard was represented by TAFEF members Scott Shepherd of Shepherd, Finkelman, Miller & Shah, LLP and David Burkhalter of Burkhalter, Rayson & Associates, P.C.

NextCare Inc. (W.D.N.C. July 3, 2012)

NextCare Inc. has agreed to pay the United States $10 million to resolve federal and state allegations that it submitted false claims for unnecessary testing and inflated billing to Medicare, TRICARE, the Federal Employees Health Benefits Program, and the Medicaid programs of Colorado, Virginia, Texas, North Carolina, and Arizona. The settlement resolves a lawsuit filed under the False Claims Act by former NextCare employee, Lorin Cohen and Antonio Saidiani. Cohen was represented by TAFEF member Chet Rabon of The Rabon Law Firm PLLC, while Saidiani was resprented by TAFEF member Daniel Miller of Berger & Montague, P.C.

GlaxoSmithKline Inc. (D. Mass. July 2, 2012)

GlaxoSmithKline Inc. (GSK) agreed to plead guilty to two counts of introducing misbranded drugs into interstate commerce and one count of failing to report safety data to the Food and Drug Administration and to pay $3 billion to resolve criminal and civil liability stemming from its unlawful promotion of prescription drugs Paxil, Wellbutrin and Avandia, and its false price reporting practices. Under the terms of the agreement, GSK will pay a total of $1 billion—consisting of a criminal fine of $956,814,400 and forfeiture of $43,185,600. GSK will pay an additional $2 billion to resolve civil liabilities to the federal government and to the States under False Claims Act laws. According to the Department of Justice, this settlement is the largest healthcare fraud settlement in U.S. history, and the largest penalty ever paid by a drug company. In addition to the civil and criminal resolutions, GSK agreed to a five-year Corporate Integrity Agreement with the Department of Health and Human Services Office of Inspector General. The settlement resolves claims brought in *qui tam* suits by six different whistleblowers—all of whom previously worked for GSK. This group of whistleblowers consisted of Blair Hamrick and Greg Thorpe, who were represented TAFEF members Brian Kenney and Tavi Deming of Kenney & McCafferty; Thomas Gerahty and Matthew Burke, who were represented by TAFEF Member Erika Kelton of Phillips and Cohen; and Lois Graydon and Michael LaFauci, who were represented by Reuben Guttman of Grant & Einsenhofer, and TAFEF member David Stone of Stone & Magnanini, respectively.