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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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Freeman Health System

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FROM THE EDITOR

"The ultimate tragedy is not the oppression and cruelty by the bad people but the silence over that by the good people."
–Dr. Martin Luther King, Jr.

As each new year begins, America takes a day to reflect on the life and accomplishments of civil rights leader, Martin Luther King, Jr. Dr. King's legacy is marked by his ability to mobilize millions of people to fight against injustice. He reminds us that this country was founded by individuals who took action to address wrongs, and that our system of government contemplates that we will speak up when it's the right thing to do.

This principle resulted in many of our nation's most important achievements, including the abolishment of slavery, the establishment of women's right to vote, and the creation of laws that protect our children from exploitative labor practices. Of course, our ability to effect change is not restricted to social issues. For example, in the aftermath of the 2001 terrorist attacks, New York's Metropolitan Transportation Authority began its "See Something, Say Something" campaign. This effort, which encourages anyone who sees suspicious behavior or activity to call 9-1-1 or otherwise report it to law enforcement, was later adopted by the U.S. Department of Homeland Security and has been implemented throughout the country.

Qui tam laws are likewise grounded in our tradition of speaking out against injustice. Our earliest penal laws provided incentives to those who assisted law enforcement by coming forward with helpful information. These laws led to the creation of America's first False Claims Act, which provides rewards to those who expose fraud against the government.

The *qui tam* laws recognize that each of us can—and should—play a crucial role in advancing our collective prosperity, by speaking up when we see something suspicious. We cannot prosper as a nation if we allow a selfish minority to steal our tax dollars, especially as we continue to recover from an economic crisis largely fueled by fraudulent mortgage loan applications and billion-dollar Ponzi schemes. We must never remain silent in the face of injustice—our track record proves that we can achieve great things simply by speaking up.

I hope you enjoy this issue of the Quarterly Review, which as always, highlights the accomplishments of courageous whistleblowers who refused to remain silent, and in doing so, have made America a better place for all of us.

All the best,
Cleveland Lawrence III

Recent False Claims Act & *Qui Tam* Decisions

OCTOBER 1, 2012–DECEMBER 31, 2012

FALSE CLAIMS ACT LIABILITY

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

U.S. ex rel. Daugherty v. Bostwick Labs., 2012 6593804 (S.D. Ohio Dec. 18, 2012)

A *qui tam* relator filed a suit under the False Claims Act, alleging that a laboratory company and its founder and CEO defrauded federal healthcare programs and the healthcare programs of seven U.S. States and the District of Columbia by submitting false claims for reimbursement. More specifically, the relator alleged that the defendants submitted claims for services that were not ordered by a physician and provided illegal kickbacks to physicians to incentivize them to refer business to the defendants, in violation of the Stark Law and the Anti-Kickback Statute. The relator, who was president of a competing laboratory company, alleged that his company shared some customers with the defendants, and that some of those customers informed the relator of the defendants' alleged practices. None of the government entities intervened in the relator's suit. The corporate defendant moved to dismiss the relator's claims for lack of subject matter jurisdiction, pursuant to the False Claims Act laws' public disclosure bar provisions, and also moved to dismiss for failure to state a claim and for failure to plead the alleged fraud with particularity. The individual defendant also moved to dismiss the relator's complaint, arguing that the complaint failed to set forth facts from which the court could pierce the corporate veil and hold him personally liable for any acts of the company. The individual defendant also adopted and incorporated the corporate defendant's motion to dismiss.

Holding: The U.S. District Court for the Southern District of Ohio denied both defendants' motions.

Public Disclosure Bar

The corporate defendant argued that the relator's fraud claims were jurisdictionally barred, because the claims were based on information that had already been publicly disclosed. In support of its argument, the defendant alleged that the relator's complaint relied on a letter the defendant's general counsel sent to various providers, informing them of a "loophole" they could exploit by billing government entities for a particular test even if it was not ordered by the treating physician—supposedly the same "loophole" that the relator alleged constituted an FCA violation. Moreover, the defendant argued that several large laboratories and multiple laboratory associations met with federal government officials from the Centers for Medicare and Medicaid Services (CMS) to discuss the loophole, and that that meeting constituted a public disclosure for FCA purposes. In addition, the defendant pointed to several articles discussing the loophole, and noted that another healthcare association submitted a comment letter to the CMS on the issue, and that the letter was a public disclosure since it was available on the CMS website. The court held that none of these purported public disclosures precluded the relator's claims. The court found that the general counsel letter did not meet the FCA's definition of a public disclosure, since it was not part of a criminal, civil, or administrative proceeding; was not included in a congressional, administrative, or GAO report, hearing, audit, or investigation; and was not from the news media. While the court held that the news articles were public disclosures and that the CMS meeting and letter to CMS were arguably public disclosures, they did not bar the relator's suit, since "substantial identity between the disclosures and the complaint does not exist," and thus, the relator's allegations could not have been "based upon" those public disclosures. The court determined that the disclosures relied on by the defendants did not "detail[] the elements of the allegedly fraudulent transactions or the fraud itself," and did not describe "the particulars of the fraud alleged here or, importantly, the Defendants served here." In denying the defendant's motion to dismiss for lack of subject matter jurisdiction, the court summarized its holding by re-stating the relator's analogy: "A handbook describing how to crack a safe does not mean that the fact that a particular safecracker robs banks is publicly disclosed."

Failure to State a Claim

The corporate defendant argued that the relator's complaint failed to state an FCA claim, arguing that the defendant's claims for the testing at issue were not false—the defendant argued that even if the testing was not ordered by a treating physician, the relator could not show that any of the tests at issue were not medically necessary. Since the tests were medically necessary, the defendant's argument continued, its claims for reimbursement were not false. In support of this argument, the defendant pointed to a specific exception to the rule requiring a treating physician's signature, and asserted that the lack of a physician's signature did not, in and of itself, necessarily make its reimbursement claims false. The court rejected the defendant's argument, agreeing with the relator that the defendant's argument challenged the relator's factual allegations—which must be accepted as true at the motion to dismiss stage—not the viability of the relator's cause of action itself. The court held that "[t]ests billed without a physician's order under the circumstances alleged in the complaint could be found to be medically unnecessary and thus fraudulent under the FCA, and that is the only question before the Court at this stage." The court noted that the extent to which any exceptions to the general rule might apply would become clearer through the discovery process, but held that the relator's factual allegations regarding the defendant's testing and billing practices were sufficient to overcome the defendant's motion to dismiss for failure to state a claim.

Similarly, the court held that the relator's allegations regarding the defendant's illegal kickbacks to physicians stated a claim under the FCA laws. The defendant argued that the relator failed to establish that the defendant falsely certified that it had complied with the Stark and Anti-Kickback laws in connection with actual claims that were submitted to federal and/or state healthcare programs. Additionally, the defendant alleged that the relator failed to provide factual support for his contention that the defendant provided improper remuneration to physicians in exchange for referrals. The court rejected these arguments. First, the court held that when the defendant submitted its application to participate in the federal healthcare programs, it signed an agreement that included a certification stating that the defendant understood that payment under those programs was conditioned on compliance with applicable laws and regulations—including the Stark and Anti-Kickback laws. The court also noted that compliance with these laws is material to the government's payment decision as a matter of law, stating that "[i]t is not a large leap at all to conclude that compliance with the AKS and the Stark Laws would have a natural tendency to influence the federal government's decision to pay a claim. Second, the court held that the relator adequately pled the defendant's illegal remuneration to doctors, as the relator detailed the arrangement whereby the defendant would provide value—in the form of completing various administrative tasks on behalf of physicians, offering physicians opportunities to bill the government for certain components of tests at a marked-up price, and offering physicians discounts on private insurance business—in exchange for referrals to its laboratory. Again, the court observed that, after discovery, the defendant's arguments might give rise to a motion for summary judgment, but held that the relator's allegations were sufficient at the motion to dismiss stage. Consequently, the court denied the defendant's motion to dismiss for failure to state a claim.

Failure to Plead Fraud with Particularity

Next, the court turned to the corporate defendant's motion to dismiss the relator's complaint for failure to plead the alleged fraud with particularity, as required by Federal Rule of Civil Procedure 9(b). The defendant argued that the relator's complaint was deficient because the relator failed to identify any specific fraudulent claim that the defendant actually submitted to the government. The court quickly resolved this issue, determining that the relator's fraud allegations were adequately pled, as the relator's complaint was sufficient to put the defendant on notice of the relator's claims. The court noted that the relator was an outsider to the defendant's company, and that "the full panoply of claims submitted to the government by [the defendant] for payment [would only be] available through discovery," but concluded that the relator still provided some details regarding the alleged fraud, including an example of testing for a specific patient on a specific date that was not ordered or consented to by the appropriate provider, as well as an admission from one of the defendant's representatives that the defendant's policy was to conduct the testing without a physician's order. The court held that the relator's failure to describe actual false claims was not fatal to his case, as the court determined that the relator's allegations, taken as a whole and accepted as true would lead to a strong inference that false claims were submitted to the government entities involved as a result of the defendant's alleged misconduct. Moreover, the relator's kickback allegations not only included information gleaned from the defendant's own marketing materials, but the relator also identified—by date and location—specific examples of improper inducements the defendant allegedly made to physicians. As a result of these findings, the court held that the relator's claims were pled with particularity and denied the defendant's motion to dismiss on that basis.

Piercing the Corporate Veil

Finally, the court considered the individual defendant's motion to dismiss. The court held that to the extent that the individual defendant adopted the corporate defendant's motion to dismiss, the court's denials of that motion applied with equal force to the individual defendant. Therefore, the court was only left with the individual defendant's corporate veil argument. The relator countered that argument, claiming that the corporate veil should be pierced and FCA liability should attach to the individual defendant personally, since the individual defendant also committed fraud on the government in his individual capacity and since his identity was inseparable" from the corporate defendant's with respect to the alleged fraud. The court agreed with the relator, finding that the relator pled adequate fact from which the court could infer that the individual defendant personally participated in the alleged fraud, and that the corporate defendant's allegedly fraudulent actions could be imputed to the individual defendant, as the relator alleged that the individual defendant controlled and directed the fraud scheme, and personally benefitted from it. The court held that these allegations were sufficient to withstand the individual defendant's motion to dismiss. The court noted, however, that this question could be revisited after discovery. Consequently, the court denied the individual defendant's motion to dismiss.

B. What Constitutes a False Claim

U.S. ex rel. Spay v. CVS Caremark Corp., 2012 WL 6645537 (E.D. Pa. Dec. 20, 2012)

A physician and pharmacist brought a *qui tam* action against three related companies that provide prescription and pharmaceutical services, alleging that the defendants committed Medicare fraud. The relator alleged that his company was retained to audit the defendants' Medicare claims, and that the audit revealed that the defendants had submitted fraudulent Medicare claims—including claims for prescriptions that had not undergone the required drug utilization review, among other things. Based on this information, he filed a *qui tam* action, alleging that the defendants violated multiple provisions of the False Claims Act. The defendants moved to dismiss the relator's complaint for failure to state a claim and for failure to plead fraud with particularity. They also moved to dismiss the relator's action for lack of subject matter jurisdiction, pursuant to the False Claims Act's public disclosure bar provision.

Holding: The U.S. District Court for the Eastern District of Pennsylvania denied the defendants' motion on all grounds.

Failure to State a Claim

The defendants argued that the relator's complaint failed to state a claim, contending that the relator did not: (1) plead "falsity" as a matter of law; (2) allege that the defendants submitted, or caused to be submitted, any claims to the government for payment; or (3) plead a violation of the FCA's "reverse" false claims provision. The court considered each of the defendants' arguments in turn.

1. Were the claims false?

First, the court evaluated the defendants' contention that the relator could not establish the falsity of any Medicare claims at issue. The court noted that in the context of Medicare claims, "falsity" under the FCA can be established in two ways: a claim can be "legally" false under a false certification theory, or a claim may be false under a worthless services theory. Ultimately, the court concluded that the relator's alleged FCA violations under both theories.

a. False Certification Theory

With respect to the false certification theory of FCA liability, the relator alleged that the defendants submitted, or caused to be submitted, Medicaid claims that included, as a condition of payment, a certification that the prescription for which the claims were made were "true, accurate, and complete." The relator alleged that the defendants knew that their Medicare prescriptions were not "true, accurate, and complete," since the claims were for prescriptions that had not been properly reviewed, and thus, the claims were false. The defendants countered, arguing that the "true, accurate, and complete" certification does not create a condition of payment that can form the basis of FCA liability; that the regulation was not applicable to pharmacy benefit managers (PBMs) like the defendants, but only applied to Medicare Part D Plan Sponsors; and that the relator failed to plead that they submitted any false, inaccurate, or incomplete information. The court distinguished violations of Medicare conditions of participation—which may deprive entities of the ability to participate in the Medicare program, but which do not create FCA liability—with violations of Medicare conditions of payment—which will only result in FCA liability if the violation might cause the government actually to refuse payment. The court held that the plain language of the "true, accurate, and complete" regulation made clear that the required certification created a condition of payment. In addition, the court held that the regulation applied to the defendants. The defendants had argued that, as PBMs, they were not bound by the regulation relied on by the relators. Instead, they argued that a separate regulatory provision—which stated that PBMs must "similarly certify" the truthfulness, accuracy, and completeness of their claims data—applied to them, and that this regulation does not create a condition of payment. The court rejected that argument, as it determined that both regulatory provisions appeared in a section entitled "Certification of data that determine payments," and reasoned that all subparts of that section must relate to certifications that determine—or are conditions of—Medicare Part D payments. Based on this finding; the Centers for Medicare and Medicaid Services' (CMS) interpretation of the regulation, as published in a CMS manual; and caselaw, the court concluded that the regulations at issue established that, as a condition of receiving payment, Medicare Part D Plan Sponsors must certify the truthfulness, accuracy, and completeness of their prescription claims data, and when such data is supplied by a PBM (such as the defendants), then the PBM must similarly certify, as a condition of payment, the truthfulness, accuracy, and completeness of the data. The court then held that the type of data submitted by the defendants with respect to the allegedly false claims act issue was data "related to payment," and therefore, the "true, accurate, and complete" condition of payment applied to the defendants' conduct. Consequently, the court held that the relator properly alleged an FCA violation based on a false certification theory of liability and denied the defendants' motion to dismiss those claims.

b. Worthless Services Theory

With respect to the relator's "worthless services" theory of FCA liability, the relator alleged that the defendants submitted claims, or caused claims to be submitted, for Medicare reimbursement even though the government did not receive the full services it was being asked to pay for, since the defendants failed to provide the proper drug utilization review for the prescriptions underlying those claims and committed other regulatory violations. The court held that the relator properly pled a claim under this theory, rejecting the defendants' arguments that the relator failed to allege that the defendants billed, or caused others to bill, the government for services that were not provided; that the relator only alleged that the defendants failed to perform their duties perfectly, not that they failed to provide the services at all; and that the relator could not demonstrate that the defendants were required to conduct the drug utilization review for the prescriptions at issue. Instead, the court found that the *qui tam* complaint specifically alleged that due to the defendants' conduct, claims were submitted to the government for services that were not provided; that discovery would determine whether or not the defendants completely failed to provide services to the government; and that the relator's allegations, accepted as true for motion to dismiss purposes, established that, by contract and regulation, the defendants <u>were</u> required to perform drug utilization review services. As a result, the court denied the defendants' motion to dismiss the relator's worthless services claims.

2. Did defendants actually submit claims or cause claims to be submitted?

The court then turned to the defendants' second argument in support of their motion to dismiss—that the relator failed to allege that the defendants themselves submitted claims or caused claims to be submitted for payment. Rather, the defendants argued that the prescription information they provided was merely used for accounting and reconciliation purposes, and thus does not meet the FCA's definition of "claim"—a request or demand for government money. Moreover, the defendants argued that the relator could not allege that they violated the FCA by making a false record or false statement "to get" a claim paid.

a. Was a "claim" alleged?

The court rejected the defendants' argument that the data they provided did not satisfy the FCA's definition of "claim," noting that, according to CMS's instructions, the type of prescription data provided by the defendants "will enable CMS to make payment," and "allow[s] calculation of payment." Moreover, CMS made clear that subcontractors like the defendants must certify that their data is true and accurate, and specifically tied the submission of knowingly false information to liability under the False Claims Act. As a result, the court held the defendants' data did indeed fall within the FCA's definition of "claim," as such information "is the only record submitted from PBMs or Part D sponsors that triggers CMS's payment obligation to the Part D sponsor."

b. Did the defendants make records or statements "to get" claims paid?

Next, the court considered the defendants' argument that the relator failed to state a claim because he could not show that the defendants made any misrepresentations for the specific purpose—and with the specific intent—"to get" the government to pay false claims. Although the FCA no longer includes this "to get" language, the court held that the amendment which removed the language did not retroactively apply to the relator's claims, since there were no still-pending Medicare reimbursement claims to the government based on the defendants' alleged misconduct; the court's view in this regard underlies a split of authority regarding whether or not the amendment's use of the term "claims" in its retroactivity provision refers to "claims" as defined by the FCA, or simply refers to causes of action filed under the FCA. The court, though, ultimately held that the relator's allegations still survived the defendants' motion to dismiss, as the relator pled sufficient facts that, taken as true for motion to dismiss purposes, created an inference that the defendants knew and intended that the government would make payments on claims that included false information supplied by the defendants.

As a result of the above findings, the court rejected the defendants' argument that the *qui tam* complaint did not adequately allege that the defendants submitted false claims or false records to the government, or caused others to do so. The defendants' motion to dismiss on that basis was denied.

3. Was a "reverse" false claim pled?

In addition to the causes of action discussed above, the relator brought a claim under the FCA's "reverse" false claims provision, which prohibits knowingly making or using (or causing to be made or used) a false statement or record to conceal, avoid, or decrease an obligation to repay money to the government. The relator alleged that the defendants violated this provision by knowingly withholding government funds that they were not entitled to receive. The defendants argued that the relator's reverse false claim allegation failed as a matter of law—once again they argued that the relator could not demonstrate that they made any false statements or records; they argued that the relator failed to plead any "clear" obligation on the part of the defendants to return money to the government; and they argued that the relator's allegation did not satisfy Federal Rule of Civil Procedure 9(b)'s heightened pleading requirement.

a. Falsity

The court quickly disposed of the defendants' first argument, based on its findings discussed above that the relator adequately pled that the defendants knowingly submitted materially inaccurate and incomplete prescription information that was included in Medicare claims to the government.

b. Obligation

The court then considered the defendants' second line of attack—that the defendants were under no obligation to return funds to the government, since the funds it received for its services were paid by its Medicare Part D sponsor, and not directly by the government. They contended that after their Part D sponsor completed a reconciliation process with the government, any overpayments by the government were to be returned by the sponsor, but not by the defendants. The court, though, relying on Fifth Circuit precedent involving at least one of the same defendants, held that the relator's allegations were sufficient to survive a motion to dismiss. The court held that even if the defendants did not owe an obligation to the government to return overpayments, they could still be held liable under the FCA's reverse false claims provision if they made false statements or records that caused others in turn to submit false information that impaired an obligation to repay government funds. Notably, the court determined that the FCA does not specify that the false statement or record at issue must impair the defendant's own obligation to repay funds to the government—instead, the statute simply references "an obligation," which can include obligations of non-defendants.

c. Rule 9(b)

Lastly, the court analyzed the defendants' Rule 9(b) argument, wherein the defendants contended that the relator's reverse false claim allegation was deficient because the relator did not plead with particularity the amounts for which the government was asked to repay. The court disagreed, noting that the relator's theory of liability was that the defendants should not have submitted claims to CMS for amounts associated with such claims at all, and held that the relator made "repeated, detailed allegations," that "expressly allege[d] that Defendants dispensed medications and submitted claims that should have never been submitted. Overall, the court observed that the relator's complaint included allegations that the defendants had adjudicated and submitted nearly 50,000 false claims, with a total cost of more than $4 million to the government. The court held that these allegations satisfied Rule 9(b)'s pleading requirements.

Consequently, the court denied the defendants' motion to dismiss the reverse false claims allegations.

Failure to Plead Fraud with Particularity

The defendants also moved to dismiss all the relator's claims under Rule 9(b), arguing that the relator could not plead a nationwide scheme of fraud with the requisite particularity. The defendants noted that the relator's company did not conduct an audit of the defendants' nationwide practices, and that the relator's allegations of nationwide fraud were speculative and not pled with specificity. The court held that "allegations of specific claims in one state or region satisfy Rule 9(b) requirements by establishing a nationwide inference of fraud," and concluded that the relator's allegations, which identified almost 50,000 problematic claims in multiple states and included detailed information including the drugs prescribed, the pharmacies involved, the date the prescription were filled, drugs expiration dates, patient co-pays, and prescriber names, created a strong inference that the defendants the defendants submitted false claims on a nationwide scale. The court held that, without any discovery, the relator could not be expected to "plead with particularity each and every false claim nationwide . . . as such information rests solely within Defendants' control." Thus, the court denied the defendants' motion to dismiss the relator's nationwide claims for failure to plead the alleged fraud with particularity.

Public Disclosure Bar

As their final attempt to dismiss the relator's *qui tam* complaint, the defendants argued that the court did not have subject matter jurisdiction over the relator's claims due to the FCA's public disclosure bar provision, which generally precludes *qui tam* actions that are based upon information that had been previously publicly disclosed in civil hearings and government reports. The defendants argued that the relator's complaint was based on information that had been publicly disclosed as part of discovery in a prior lawsuit between the parties, as well as information that the defendants reported to CMS (which the defendants asserted were "reports" for FCA public disclosure purposes).

The court observed that the defendants did not make any showing that the information produced during discovery in the prior lawsuit was ever used in court proceedings, which raised the question of whether or not the information was ever made "public." And even if the information had been proposed to be used during the court proceedings, the court found that it was unclear whether either of the parties would have sought a protective order to shield the information from the public. Therefore, the court refused to hold that the exchange of information between the parties through discovery as part of a prior lawsuit constituted a public disclosure for FCA purposes. The court similarly held that the defendants' self-reports to the government of the information uncovered in the relator's audit were not public disclosures. The defendants claimed that their disclosures to the government were "reports" for FCA purposes, particularly since the information was available to the public through FOIA requests—and the U.S. Supreme Court has held that information obtained from the government through FOIA requests would constitute government "reports" for FCA purposes. The court, though, distinguished the Supreme Court's ruling—which focused on "reports" obtained <u>from</u> the government—and self-disclosures made <u>to</u> the government. The court stated that adopting the defendants' rationale would mean that the content of all government files would be deemed public disclosures for FCA purposes. Under this view, the court observed, even defendants' actual false claims to the government would be considered public disclosures and would serve to shield them from *qui tam* suits—a result the court held did not serve the purposes of the FCA. The court further noted that the type of information included in the defendants' self-reports was not generally made available to the public, and when it was made available, it was only to be disclosed to specific entities for specific purposes, subject to regulations to prevent improper disclosures. The court held that the defendants' reports to the government were not public disclosures.

Since the court held that neither disclosure relied on by the defendants constituted a public disclosure for FCA purposes, it declined to reach the questions of whether or not the relator's allegations were "based upon" the disclosures and whether or not the relator qualified for the "original source" exception to the public disclosure rule. Based on its findings, the court denied the defendants' motion to dismiss for lack of subject matter jurisdiction.

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

U.S. ex rel. Shea v. Verizon Bus. Network Servs., Inc., 2012 WL 5554792 (D.D.C. Nov. 15, 2012)

A relator brought a *qui tam* action against a group of affiliated telecommunications companies, alleging that the defendants violated the False Claims Act by knowingly billing the government for non-allowable surcharges. Two years earlier, the relator had previously filed a separate *qui tam* action alleging that the same defendants knowingly submitted prohibited surcharges to the government. The United States intervened in the earlier suit and the parties agreed to a $93.5 million settlement. The defendants moved to dismiss the relator's second *qui tam* complaint, arguing that the complaint was barred by the False Claims Act's first-to-file rule, which precludes *qui tam* complaints that are filed while a "related" action based on the same facts is still pending. The relator countered that his second *qui tam* complaint did not violate the first-to-file rule, since he filed both actions and the rule was designed only to bar other *qui tam* relators from filing a related action; the first *qui tam* suit was no longer pending at the time the second suit was filed; and the two suits are not related, since they allege fraud by the defendants against different government agencies, under different contracts, and involving different surcharges.

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

The court observed that the plain language of the first-to-file bar states that "no person other than the Government" is allowed to bring a *qui tam* action that is related to another, pending *qui tam* action. The court held that this language makes clear that "the first-to-file bar applies to successive related actions brought by the same relator," thereby rejecting the relator's first argument. The court also found that the first *qui tam* action was still pending when the relator filed his second complaint, finding that the first action was not dismissed until well over a year after the second action was filed. Thus, the court also rejected the relator's second argument. Finally, the court held that both *qui tam* suits were related. Relying on D.C. Circuit Court precedent, the district court held that the first-to-file provision precludes subsequent *qui tam* actions that allege "the same material elements of fraud" as a prior, pending action. The court concluded that the first *qui tam* suit put the government on sufficient notice to discover the fraud alleged in the relator's subsequent complaint, and therefore the two suits were based on the same material facts.

The court granted the defendants' motion to dismiss for lack of jurisdiction as to the relator, but without prejudice to the government.

U.S. v. Aseracare, 2012 WL 5289475 (N.D. Ala. Oct. 24, 2012)

A relator filed a *qui tam* action against a group of defendants, and the government declined to intervene in the case. Subsequently, the government moved to intervene in the relator's suit for good cause, pursuant to section 3730(c)(3) of the False Claims Act. The defendants opposed the government's motion, arguing that the relator's *qui tam* case was barred by the FCA's first-to-file rule, and therefore, the court did not have subject matter jurisdiction over the matter in order to grant the government's motion. The defendants further argued that the government did not meet the "good cause" standard for intervening in a *qui tam* case at a later time.

Holding: The U.S. District Court for the Northern District of Alabama granted the government's motion.

The court first addressed the subject matter jurisdiction issue and held that "[e]ven though a *relator's* claims may be barred by the first-to-file rule, the government's intervention in a *qui tam* action may change the claims that are currently asserted." (emphasis in original) The court decided to defer ruling on the subject matter jurisdiction question until after the government had intervened in the relator's suit and decided which claims it would pursue.

Next, the court addressed the defendants' contention that the government had not shown good cause for intervening after initially declining to do so. The court noted that the False Claims Act does not define "good cause," but observed that "courts have found good cause in cases where the government realized the magnitude of the alleged fraud was much larger than it had originally anticipated; where the government received additional and new evidence about the case; and where intervention would protect the interests of the relators." Here, the government asserted that it discovered new information, namely a set of reports that the government claimed provided new evidence of the defendants' alleged fraud. The defendants argued that the government already had the information contained in the reports, and therefore, the reports offered no new evidence. The court, though, held that the government met its burden and granted the government's motion to intervene.

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

Berg v. Honeywell Int'l, Inc., 2012 WL 6759950 (9th Cir. Dec. 19, 2012)

A group of five relators filed a *qui tam* suit against two affiliated corporations, alleging that the defendants violated the False Claims Act in their dealings with the U.S. Army. The defendants moved to dismiss the relators' complaint for lack of subject matter jurisdiction, arguing that Army Audit Agency (AAA) reports and a Government Accountability Office (GAO) report publicly disclosed the information on which the relators' fraud claims were based prior to the relators filing their *qui tam* action, and that none of the relators qualified as an "original source" that could overcome the FCA's public disclosure bar provision. The U.S. District Court for the District of Alaska agreed and dismissed the relators' suit. The relators appealed the district court's ruling to the U.S. Court of Appeals for the Ninth Circuit.

Holding: The Ninth Circuit reversed the district court's ruling and remanded the matter for further proceedings, finding that neither of the disclosures relied on by the defendants constituted "public disclosures" for FCA purposes.

Public Disclosure Bar

The circuit court began its analysis by examining whether any of the information at issue was a "public disclosure" under the FCA. The court noted that the AAA reports had been provided to a private company hired by the government, but held that such a private disclosure to a third party acting on behalf of the government did not implicate the FCA's public disclosure bar provision. The court also noted that the AAA reports were potentially available to the public through FOIA requests, but held that unless a member of the public requested and actually received the reports from the government prior to the filing of the relators' *qui tam* suit, the reports were not publicly disclosed under the FCA. Since no member of the public had requested and received the reports prior to the relators' complaint being filed, the circuit court held that the AAA reports did not bar the relators' suit, and reversed the district court's ruling.

The appellate court then turned to the GAO report. While the court recognized that the GAO report generally disclosed information about government contractors engaging in the type of fraud alleged by the relators, that report discussed more than 250 contracts over a 4-year period, and made no reference to specific contractors or specific locations where fraud may have occurred. The appeals court held that, given its lack of specificity, the report was insufficient to enable the government to pursue an investigation against the specific defendants named in the relators' suit. Therefore, the court held that the GAO report was not a public disclosure under the FCA either, and again reversed the district court's ruling.

As a result of these findings, the district court's judgment dismissing the relators' complaint for lack of subject matter jurisdiction was reversed and the matter was remanded to the district court for further proceedings.

Amphastar Pharm. Inc. v. Aventis Pharma SA, 2012 WL 5512466 (C.D. Cal. Nov. 14, 2012)

A pharmaceuticals company filed a *qui tam* lawsuit against one of its competitor companies. Long before the suit was filed, the defendant received a U.S. patent for an anti-coagulant drug, which it gave a brand name and sold. The defendant company argued to the Food and Drug Administration (FDA) that the patented drug was essential to its manufacturing process and that any generic versions of the product should only be approved if they could be shown to contain the same drug as the defendant's product. Subsequently, the relator company sought FDA approval of a generic version of the defendant's drug, arguing that the defendant's patent was invalid, unenforceable, or not infringed upon. In response, the defendant filed a patent infringement action against the relator, which by regulation, prevented the FDA from approving the relator's application for 30 months, thereby excluding the relator from the market. The relator responded to the defendant's suit by filing an antitrust counterclaim. The Federal Circuit Court affirmed the district court's finding that the defendant's patent was unenforceable on the grounds of inequitable conduct. The antitrust counterclaim was dismissed based on the *Noerr-Pennington* doctrine, which generally immunizes private entities from liability under antitrust laws for conduct related to lobbying the government for redress.

The relator then filed the present suit, alleging that the defendant violated the False Claims Act by making false statements to the U.S. Patent & Trademark Office (PTO) while prosecuting its patent action, by making false statements to the FDA, and by misrepresenting data and manufacturing modes in an unlawful attempt to exclude competitors from seeking market approval for generic drugs. The relator alleged that the defendant's allegedly false statements fraudulently inflated the price of the defendant's drug, causing the federal and state governments to overpay when paying for the drug through their respective healthcare programs. The defendant moved to dismiss the relator's complaint for lack of subject matter jurisdiction, failure to state a claim, and failure to satisfy the FCA's requirements.

Holding: The U.S. District Court for the Central District of California granted the defendant's motion to dismiss, but granted the relator leave to amend its complaint.

Public Disclosure Bar

The defendant argued that the relator's prior antitrust litigation, other court filings and judicial decisions, as well as FDA submissions publicly disclosed the relator's fraud allegations before the relator filed its complaint and therefore, the complaint was barred by the False Claims Act's public disclosure provision. The court agreed that the documents constituted public disclosures and further held that the relator's allegations were based on the publicly disclosed information, since the information presented "the essential elements of the fraud" sufficiently to allow the Government to investigate. The court acknowledged that the public disclosures "did not state that the government was paying brand-name prices for a non-patented drug, or that false claims were submitted to the government," but held that "fraud need not be explicitly alleged to constitute public disclosure adequate to raise the jurisdictional bar." The court, however, declined to dismiss the relator's action on public disclosure grounds, finding that the relator alleged sufficient facts to establish that it satisfied the criteria for the "original source" exception to the public disclosure rule. When applying the original source criteria, the court accepted that the relator's knowledge of the alleged fraud was "independent" of the public disclosures, noting that the relator possessed knowledge before the public disclosures occurred. But the court was unable to determine whether or not the relator's knowledge was "direct"—which the court defined as "firsthand," and obtained through the relator's "own labor unmediated by anything else." The court observed that the relator was "not the typical relator—an insider—but competitor," but gave credence to the relator's contention that its knowledge was "direct" because it conducted its own investigation into the defendant's patents; the court noted that an evidentiary hearing might be necessary to confirm that fact. Moreover, the court found that the relator voluntarily provided the government with information regarding the alleged fraud before filing the *qui tam* action. Thus, the court denied the defendant's motion to dismiss for lack of subject matter jurisdiction.

Failure to State a Claim

Next, the court determined whether the relator properly pled a claim under the False Claims Act, by examining each of the elements of pleading an FCA fraud claim. The court began by evaluating pled the FCA's "falsity" and scienter elements, and applying it to the relator's theory of liability: that the defendant falsely certified its compliance with patent and FDA regulations, or alternatively, promissory fraud. The court held that the relator's allegations were sufficient to plead falsity and scienter under either theory of liability, since the relator alleged that the defendant knowingly made false representations to and concealed information from the PTO and FDA, which allowed the defendant to obtain patent protection, exclude generics and monopolize the market for its drug—and then knowingly overcharge the government. The court then held that the relator's complaint satisfied the FCA's "materiality" element as well, since its allegations of the defendant's false statements had the "natural tendency to influence" the PTO and FDA's decisions with respect to the defendant's drug.

The court, though, ultimately dismissed the relator's complaint, holding that the relator's failure to allege even a single, actual false claim submitted to the government was fatal. The court observed that the relator's allegations of false statements were likely "relevant to, or [ ] capable of influencing, the government's decision to enter contracts or make payments," but determined that the allegations did not adequately plead that false claims were submitted to the government. The court recognized that *qui tam* complaints may satisfy Rule 9(b)'s heightened pleading requirements even without including representative examples of false claims, but held that such complaints must allege sufficient details with "reliable indicia that lead to a strong inference that claims were actually submitted." The court held that the relator's complaint did not meet this standard, since the relator's allegations did not allege details regarding a scheme to submit false claims to the government.

As a result of these findings, the court granted the defendant's motion to dismiss for failure to plead the alleged fraud scheme with particularity. However, the court provided the relator with an opportunity to amend its complaint and cure the deficiency.

Malhotra v. Steinberg, 2012 WL 5497978 (W.D. Wash. Nov. 13, 2012)

Two relators filed a *qui tam* suit under the False Claims Act, alleging that a former bankruptcy trustee and a group of real estate agents and their employers defrauded the government by orchestrating an illegal kickback scheme connected to sales of real estate in bankruptcy proceedings—including in the relators' own bankruptcy proceeding. The defendants moved to dismiss the relators' claim, arguing that it was barred under the FCA's public disclosure rule, and that the claim did not belong to the relators and should have been included in their bankruptcy estate.

Holding: The U.S. District Court for the Western District of Wisconsin denied the defendants' motion.

Public Disclosure Bar

The court rejected the defendants' public disclosure argument, finding that the defendant's only allegation of a public disclosure was that the allegedly false statements were made in public. Moreover, the court determined that the relators would have qualified for the original source exception to the public disclosure rule, since they alleged that they searched thousands of documents and conducted interviews as part of their own investigations into the defendants' alleged misconduct.

Bankruptcy Proceedings

The defendant contended that the relators did not have standing to pursue their FCA claim, arguing that since the alleged misconduct that gave rise to the relators' FCA claim occurred before the relators filed for bankruptcy, the relators had an "interest" in the FCA claim at that time and the bankruptcy estate took ownership of the relators' interest in their FCA claim when they filed for bankruptcy protection. The court appeared to validate the defendant's theory, but ultimately rejected it, noting that the relators' FCA claim was based on alleged conduct that occurred after they filed for bankruptcy protection, which is when the relators' first became acquainted with the defendants. Consequently, the court held that the bankruptcy estate did not take possession of the relators' FCA claim, and denied the defendants' motion to dismiss on that basis.

See *U.S. ex rel. Spay v. CVS Caremark Corp.*, 2012 WL 6645537 (E.D. Pa. Dec. 20, 2012), at page 7.

See *U.S. ex rel. Daugherty v. Bostwick Labs.*, 2012 6593804 (S.D. Ohio Dec. 18, 2012), at page 3.

See *U.S. ex rel. Watson v. King-Vassel*, 2012 WL 5272486 (E.D. Wis. Oct. 23, 2012), at page 47.

FALSE CLAIMS ACT RETALIATION CLAIMS

Howell v. Town of Ball, 2012 WL 6680364 (W.D. La. Dec. 21, 2012)

A plaintiff brought a series of claims against a town and several individuals, alleging among other things, violations of the False Claims Act's anti-retaliation provision. The individual defendants moved to dismiss the plaintiff's FCA claims, arguing that they were not subject to suit, since they were not the plaintiff's "employer." The U.S. District Court for the Western District of Louisiana granted the defendants' motion. While the court noted that the FCA's anti-retaliation provision was amended and broadened in 2009, the court concluded that he statute was only expanded to broaden the scope of those who would be protected under the law—not those who could be held liable under the law. Thus, the amended law still only imposes liability on employers. The court held that the individual defendants were not the plaintiff's employer in either their official capacities or their personal capacities, and therefore, were not subject to the plaintiff's suit. The court did, however, allow the plaintiff's retaliation claim against the town—his actual employer—to go forward. The court also denied the plaintiff's request for reconsideration of its order.

Brazill v. California Northstate Coll. of Pharm., LLC, 2012 WL 5289330 (E.D. Cal. Oct. 24, 2012)

The plaintiff, a licensed pharmacist and professor of pharmacy with over twenty-five years of experience, filed an action against his former employers, a university and its college of pharmacy, alleging that the defendants wrongfully terminated his employment in violation of the False Claims Act's anti-retaliation provision, among other laws. He alleged that he had been hired by the defendants as a department chair and had received an outstanding performance review and salary increase after his first year on the job. However, he further alleged that when the defendants' accreditation board visited the college and asked him to assess the defendants, he responded that the college was not equipped to accomplish its education goals, due to cost-cutting measures that sacrificed students' education. He also alleged that he informed the accreditation board of the defendants' allegedly fraudulent tuition practices—practices about which he also confronted the college's administration. He claimed that the defendants' tuition practices were "fraud" and warned that the defendants could be subject to civil and criminal sanctions by the federal government. Specifically, the plaintiff alleged that the defendants encouraged students to apply for enrollment at an accredited school, then fraudulently to apply for excessive student loans from the federal government by

telling the government that the funds would only be used at an accredited school, and then to use part of the financial aid funds to pay for tuition at the defendants' still-unaccredited school. The plaintiff alleged that after learning about his comments to the accreditation board, the defendants advised him that he could resign or be fired, claiming that the plaintiff was being removed from his job for allowing faculty members to work in his retail pharmacy—even though the dean had expressly authorized the plaintiff to do so. After the plaintiff was terminated from his job, the university hired an assistant professor with far less experience to replace him.

The defendants moved to dismiss the plaintiff's FCA retaliation claim for failure to state a claim.

Holding: The U.S. District Court for the Eastern District of California denied the motion.

The court noted that plaintiffs need not have specific awareness of the False Claims Act in order to be protected by its anti-retaliation provision. However, the court stated, plaintiffs must be investigating matters that could reasonably lead to a viable FCA action. The court held that the plaintiff's allegations regarding the defendants' tuition practices were sufficient to meet that standard, since the plaintiff alleged that he reported to the defendants that their conduct could lead to civil and criminal liability. Moreover, the court determined that the plaintiff alleged that he brought his complaints to the attention of the defendants' dean, and as a result he was fired. The court held that the plaintiff's complaint satisfied each of the elements of stating a claim for retaliation under the False Claims Act. The defendants' motion to dismiss was denied.

See *U.S. ex rel. Miller v. Weston Educ., Inc.*, 2012 WL 6190307 (W.D. Mo. Dec. 12, 2012), at page 62.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Primary Jurisdiction

See *U.S. ex rel. Wall v. Circle C Constr., LLC*, 2012 WL 4477367 (6th Cir. Oct. 1, 2012), at page 52.

B. *Res Judicata* and Collateral Estoppel

See *U.S. ex rel. Dismissed Relator v. Lilwani*, 2012 WL 4739922 (C.D. Ill. Oct. 3, 2012), at page 28.

See *U.S. ex rel. Dismissed Relator v. Murchison*, 2012 WL 4739938 (C.D. Ill. Oct. 3, 2012), at page 29.

C. Sovereign Immunity

U.S. ex rel. Howard v. Shoshone Paiute Tribes, Duck Valley Indian Reservation, 2012 WL 6725682 (D. Nev. Dec. 26, 2012)

Two relators brought a *qui tam* action against their former employer—a health facility operated by a Native American tribe—alleging Medicare/Medicaid fraud. The United States declined to intervene in the relators' suit. The defendant moved to dismiss the relators' complaint, arguing that, as a federally-recognized Indian Tribe, it was immune from *qui tam* suits. Alternatively, the defendant argued that the relators' complaint was not properly pled with particularity, in accordance with Federal Rule of Civil Procedure 9(b).

Holding: The U.S. District Court for the District of Nevada granted the defendant's motion.

Sovereign Immunity

The court first observed that in general, Indian tribes are viewed by courts as sovereigns and enjoy common-law immunities of sovereign powers. Tribes' immunity is not absolute, though, and tribes may be subject to suit under federal law where they have waived sovereign immunity or where Congress has authorized the suit. The relators did not argue that the defendant tribe waived its sovereign immunity; instead, they asserted that, as *qui tam* plaintiffs suing on behalf of the United States, their lawsuit overrode the defendant's immunity. The defendant, though, argued that although the FCA authorizes relators to file *qui tam* suits, it does not vest relators with the authority of the United States to override sovereignty, and even if it does, the relators' suit still must fail because tribes are "persons" subject to liability under the FCA.

The court, relying on the U.S. Supreme Court's ruling in *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, analogized the defendant's sovereignty to that of states, and concluded that "Congress did not intend Indian tribes to be subject to *qui tam* liability under the FCA. Indian tribes, like states, are separate sovereigns only subject to suit when, absent a voluntary waiver, Congress has abrogated their immunity. Consequently, Indian tribes are also entitled to the application of the 'longstanding interpretive presumption' that they are not 'persons' subject to *qui tam* liability under the FCA absent a showing of statutory intent to the contrary." (internal citations omitted) Based on that reasoning, the court held that the relators failed to state a claim under the FCA and dismissed the relators' complaint for lack of subject matter jurisdiction.

U.S. ex rel. Oberg v. Pennsylvania Higher Educ. Authority, 2012 WL 6099086 (E.D. Va. Dec. 5, 2012)

A *qui tam* relator filed a suit under the False Claims Act against a group of corporations that were created and owned by several states and designed to facilitate higher education opportunities and financial aid funding. The relator alleged that these defendant corporations received improper payments from the government by submitting false claims to the U.S. Department of Education. The defendants all moved to dismiss the relator's suit, arguing that the U.S. Supreme Court has held that state agencies are not considered "persons" under the False Claims Act, and since they were created as state-owned entities with powers defined by their respective states' code, they were not "persons" subject to *qui tam* suits. The U.S. District Court for the Eastern District of Virginia initially granted the defendants' motion to dismiss, but the relator appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit vacated the district court's ruling, finding that the district court failed to apply the appropriate legal standard—the arm-of-the-state test that is used to determine sovereign immunity for Eleventh Amendment purposes. The issue was remanded to the district court.

After applying the arm-of-the-state test, the Eastern District of Virginia granted the defendants' motion to dismiss, finding that each of the defendants was an arm of its respective state, and thus, not a person for FCA purposes. The court stated that the arm-of-the-state test involves four nonexclusive factors: (1) whether any judgment against the entity will be paid by the state or whether any recovery by the entity will benefit the state; (2) how much autonomy the entity enjoys, including how the entity's directors and officers are appointed, who funds the entity, and whether the state retains veto power over the entity's actions; (3) whether the en-

tity is involved with state concerns as distinct from non-state concerns, including local concerns; and (4) how the entity is treated under state law.

The court found that all of these factors weighed in favor of the defendants. First, the court found that a judgment against any of the defendants would burden that defendant's state. The court noted that the fact that some of the defendants generated and used their own revenue to fund their operations was not dispositive, since those entities' states would need to appropriate additional funds to support the entities' operations, should the entities be required to use their own revenues to pay a judgment. Next, the court held that although the defendants enjoyed varying levels of operational independence, they were still largely subject to state control, as outlined in their respective statutory schemes that often authorized the governors of the states to appoints the entities' officers and directors, and the fact that the entities were required to seek approval from the state before engaging in certain conduct and/or transactions. The court then turned to the third factor, and determined that all of the defendants operated on a statewide basis and served citizens throughout their respective states. Finally, the court applied the last factor, and concluded that each of the defendants' states had somehow designated the defendants as an instrumentality or political subdivision of the state or as a state agency. As a result of these findings, the court granted the defendants' motion to dismiss.

D. Statute of Limitations

Malhotra v. Steinberg, 2012 WL 5342509 (W.D. Wash. Oct. 29, 2012)

Two relators filed a *qui tam* suit under the False Claims Act, alleging that a former bankruptcy trustee and a group of real estate agents and their employers defrauded the government by undervaluing real estate throughout the relators' bankruptcy proceeding, as part of an illegal kickback scheme. The government declined to intervene and one of the real estate company defendants—along with one of its employees who was named as a defendant—moved for summary judgment on the relators' claims, arguing that the relators' claims were time-barred, that the relators were improperly trying to hold the defendant company liable for its former employee's conduct, and that the relators' complaint failed to state a claim under the False Claims Act.

Holding: The U.S. District Court for the Western District of Washington denied the motion for summary judgment.

The court first held that the FCA's "complex statute of limitations" generally provides a six-year period, but noted that the provision also includes "a 10-year statute of repose and an 'equitable tolling' provision, under which the plaintiff has three years to bring an action" after the appropriate government official should have become aware of the government's right of action. The court determined that the parties disputed whether or not the equitable tolling provision applied, as they argued about when the government should have known all the relevant facts regarding its right of action. As a result of this dispute of material fact, the court held that summary judgment was not appropriate.

The court also denied the real estate company defendant's request for summary judgment with respect to its argument that the relator had improperly attempted to hold the company liable for the acts of an individual defendant who had begun working for a different real estate company during the time the alleged fraud was occurring. The court determined that the relator had not sued the company solely based on the conduct of this one former employee, but rather alleged that the company itself "was involved in the kickback scheme and 'actively concealed the fraud even after'" the former employee had stopped working there. Again, the court held that issues of disputed fact existed, warranting a denial of the summary judgment motion.

Finally, the court held that, when the relators' version of the facts was accepted as true, the relators stated a claim for relief under the False Claims Act, since the relators alleged that the defendants defrauded the government out of its money. Further, the court found that issues regarding whether or not the funds in questions were unpaid taxes—and thus, not actionable under the False Claims Act—were in dispute, and therefore inappropriate for summary judgment.

U.S. ex rel. Klein v. Omeros Corp., 2012 WL 4874031 (W.D. Wash. Oct. 15, 2012)

A relator sued a company, alleging violations of the False Claims Act. The relator alleged that a subsidiary of the defendant company purchased another company and that the purchased company that falsely certified to the government that it was a "small business" and was eligible to receive a Small Business Innovation Research (SBIR) grant, since it knew that it was ineligible for the grant because it was majority-owned by the defendant company. The relator alleged that the defendant company, as successor to the purchased company, is liable for those false claims. Both parties moved for summary judgment, with the defendant arguing that the relator's claims were time-barred and with the relator arguing for successor liability.

Holding: The U.S. District Court for the Western District of Washington denied both motions.

Statute of Limitations

The defendant argued that the relator's fraud claim was barred by the FCA's six-year statute of limitations. While the defendant recognized that the FCA provides for tolling the statute of limitations up to ten years, it argued that the tolling provision is only available to an "official of the United States," and since the relator does not meet that criterion, his claim was time-barred. The court, though, noted that the Ninth Circuit has held that the tolling provision does apply to *qui tam* relators. The defendant countered that the Ninth Circuit jurisprudence was overruled by the U.S. Supreme Court's opinion in *U.S. ex rel. Eisenstein v. City of New York*, in which the Court held that the government is not a party to *qui tam* litigation unless it affirmatively intervenes in the relator's suit; until then, the United States remains the "real party in interest." The district court held that *Eisenstein*—which dealt with the length of time relators have to file notices of appeal in non-intervened *qui tam* suits—did not overrule the Ninth Circuit's ruling, stating that the Ninth Circuit's "holding that the statutory language of the FCA evinces Congress' intent that the tolling provision apply to *qui tam* plaintiffs is not irreconcilable with *Eisenstein's* holding that the United States is not a 'party'" for purposes of filing notices of appeal "to a *qui tam* lawsuit in which it has declined to intervene." Consequently, the court held that the relator's claim was not time-barred and denied the defendant's motion for summary judgment.

Successor Liability

The relator argued that the defendant, as successor to the majority-owned subsidiary that allegedly made false statements to the government, was liable under the FCA. The court noted that the traditional exceptions to successor non-liability under both federal common law and Washington state law were identical, and that under these laws, asset purchasers are not liable as successors unless they expressly or impliedly agree to assume the predecessor's liability; they transaction amounts to a "de-facto" merger; the successor is merely a continuation of the predecessor; or the transaction was fraudulently entered into in order to escape liability. The court held that these exceptions apply in the context of FCA claims, noting that the relator failed to direct the court to any clear expression of congressional intent not to allow these exceptions to apply to FCA cases. The court refused to decide the relator's summary judgment motion on successor liability, as it held that the parties failed to adequately address whether any of the exceptions to successor non-liability applied.

U.S. ex rel. Dismissed Relator v. Lilwani, 2012 WL 4739922 (C.D. Ill. Oct. 3, 2012)

A relator brought a *qui tam* action under the federal False Claims Act and the Illinois False Claims Act, alleging that a medical transportation services provider and an affiliated individual defrauded the federal healthcare programs. The United States and the State of Illinois intervened in the relator's lawsuit and the plaintiffs filed an amended complaint alleging that the defendants knowingly submitted: duplicate claims for payment; claims for services that were not provided; and claims for services without a corresponding medical service. The defendants moved to dismiss the plaintiffs' fraud claims as untimely and for failure to plead the alleged fraud with particularity. The defendants also contended that the plaintiffs' claims should be dismissed because of prior settlements and principles of claim preclusion.

Holding: The U.S. District Court for the Central District of Illinois denied the defendants' motion.

Statute of Limitations

The court observed that the relator filed his *qui tam* action on November 7, 2006. The government entities received several extensions of the initial 60-day FCA seal and finally filed their complaint-in-intervention on August 8, 2011. The defendants argued that, pursuant to the FCA's statute of limitations provision, the plaintiffs' claims should only go back to August 8, 2008—three years from the date when the government entities had all the necessary information to bring their complaint. The court disposed of that argument, noting that the FCA's statute of limitations provision makes clear that plaintiffs have a 6-year limitations period from the time the FCA violation occurs, as well as a three year period from the date when the government official authorized to act should have known about the fraud—"whichever occurs last." The court held that the three-year limitations period did not apply. The court also noted that both the Federal Rules of Civil Procedure and the Illinois counterpart allow for "relation back" of amended pleadings to the date of the original pleading, when the amendment asserts claims that arose out of the same conduct as described in the original pleading. The court held that the complaint-in-intervention alleged claims that arose out of the same conduct as the claims alleged in the relator's original *qui tam* complaint. As a result of these findings, the court held that the plaintiffs' claims were not time-barred.

Pleading Fraud with Particularity

Next, the court took a single paragraph to state its holding that the plaintiffs' allegations were pled with the requisite particularity, noting that the complaint "satisfies these requirements by pleading the who, what, when, where, and how of the alleged fraud."

Res Judicata

Finally, the court considered the defendants' argument that the State of Illinois had already accepted the defendants' offer to settle claims of overpayments covering 2000 through 2004, had collected additional funds from the defendants to cover the period of 2005 to 2008, and has shared those funds with the federal government, the plaintiffs' claims were barred by *res judicata*. The court, though, determined that *res judicata* is an affirmative defense, and cannot serve as the basis for a motion to dismiss. The court declined to turn the defendants' motion to dismiss on *res judicata* grounds into a motion for summary judgment, but mentioned that the defendants could raise that defense again at the appropriate time during the litigation.

U.S. ex rel. Dismissed Relator v. Murchison, 2012 WL 4739938 (C.D. Ill. Oct. 3, 2012)

The relator from the case immediately above filed a separate *qui tam* action alleging that another transportation company and an affiliated individual violated the federal False Claims Act and the Illinois False Claims Act by knowingly submitting: duplicate claims for payment; claims for services that were not provided; and claims for services without a corresponding medical service. Again, the United States and the State of Illinois intervened in the relator's suit and filed a complaint-in-intervention. These defendants also moved to dismiss the plaintiffs' claims, arguing that the claims were time-barred and not pled with the required particularity.

Holding: The U.S. District Court for the Central District of Illinois applied the same rationale as described in the case immediately above in concluding that the plaintiffs' claims were not time-barred and that their claims were pled with the requisite particularity. The defendants' motion to dismiss was denied.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Ellis v. City of Minneapolis, 2012 WL 6652885 (D. Minn. Dec. 21, 2012)

Three relators brought a *qui tam* suit against two cities, a municipal council, and several individuals, alleging that the defendants falsely certified to the United States Department of Housing and Urban Development that they were acting to further fair housing, when in fact, they had taken actions that reduced the availability of low-income housing for their constituents. The defendants moved to dismiss the relators' complaint.

Holding: The U.S. District Court for the District of Minnesota dismissed the relators' complaint for failure to satisfy the pleading requirements of Federal Rules of Civil Procedure 8(a), 8(d) and 9(b). The court observed that the complaint—which was 64 pages and 187 paragraphs long—failed adequately to distinguish the various allegations among the multiple defendants, often included "broad, imprecise claims," and included superfluous allegations that were unrelated to the alleged violations of the FCA. The court stated that "much of the complaint is written so poorly that it is very difficult to know what relators are trying to say." The court then dismissed the relators' complaint, but offered the relators one opportunity to file an amended complaint—of no more than 10,000 words—that comports with the Rules.

U.S. ex rel. Piscitelli v. Kaba Ilco Corp., 2012 WL 6553274 (N.D. Ohio Dec. 14, 2012)

A relator filed a suit under the federal False Claims Act and the equivalent statutes of eighteen States and the District of Columbia, alleging that a locks and keys company committed fraud by marketing and selling locks to various governments even though the defendant knew that the locks included a "design flaw" that allowed them to be easily opened by anyone with a small magnet. The defendants moved to dismiss the relator's complaint on three grounds: (1) that the court lacked subject matter jurisdiction over the relator's claims; (2) that the relator's complaint failed to identify any false claim that the defendant allegedly submitted to the government; and (3) that the relator failed to plead the alleged fraud scheme with particularity, as required by Federal Rule of Civil Procedure 9(b).

Holding: The U.S. District Court for the Northern District of Ohio granted the defendant's motion to dismiss and denied the relator leave to amend his complaint.

Subject Matter Jurisdiction

The defendant argued that the relator represented a class of plaintiffs in a multi-district litigation proceeding against the defendant, and that the multi-district litigation (MDL) proceeding was filed before the relator's *qui tam* suit was filed. The defendant argued that, for False Claims Act purposes, the prior MDL suit publicly disclosed the information on which the relator's fraud claims were based, and consequently, the court did not have subject matter jurisdiction over those claims. In addition, the defendant argued that the relator could not qualify for the "original source" exception to the public disclosure. The court determined that although no government entity was a party in the MDL suit, since the relator completely failed to respond to the defendant's public disclosure argument, "dismissal for lack of jurisdiction is required."

Pleading Fraud with Particularity

The court noted, that even if subject matter jurisdiction existed, the complaint was still deficient because the relator failed to identify anyone who heard or received the defendant's allegedly false statements, and only made general allegations that referenced "governments" paying for the defendant's allegedly defective locks, but failed to identify any specific government entity that received claims for the defendant's products or that ever purchased those products. Furthermore, the complaint did not describe the timing of any of the relevant events (such as when false statements were made, false claims were submitted, etc.), and instead merely references a 34-year span during which the fraud allegedly occurred. The court held that the relator's complaint "falls far short of satisfying Rule 9(b)'s pleading requirements and dismissal is warranted on that basis." Since the relator contended that his complaint contained as much specificity as it possibly could, without additional discovery, the court denied his request for leave to amend his complaint. The court found that the request was futile, since the relator could not use discovery in order to properly lead his claim—especially since the governments on whose behalf the suit was filed (and which likely possessed additional information), declined not to join the relator's suit.

A1 Procurement, LLC v. Hendry Corp., 2012 WL 6214546 (S.D. Fla. Dec. 13, 2012)

A corporate relator alleged that, with respect to some 185 government contracts, a group of other corporations falsely certified to the federal government that they were at least 51% owned by a veteran, resulting in liability under the False Claims Act. The defendants moved to dismiss the relator's complaint on three grounds: (1) the relator failed to state a claim because it did not allege any objectively false

representation that was made to the government; (2) the relator failed to plead the alleged fraud with particularity; and (3) the relator improperly added defendants when filing its second amended complaint.

Holding: The U.S. District Court for the Southern District of Florida granted the defendants' motion in part and denied it in part.

Amending *Qui Tam* Complaint

First, the court considered the defendants' motion to dismiss on the basis of the relator's failure to comply with Federal Rule of Civil Procedure 15, when filing a second amended complaint to join additional defendants. The court agreed with the defendants, finding that the relator never sought or received leave of court to join the new defendants. As a result, the court held that the relator's claims against those defendants were abandoned. The court, though, refused to dismiss the relator's claims against the original defendants, a remedy that the court considered a "drastic sanction."

Failure to State a Claim/Plead Fraud with Particularity

The defendants argued that the relator failed to state a claim under the FCA because it did not allege any objectively false representation made by the defendants to the government. The defendants argued that the relator misconstrued the law and was mistaken in contending that the defendants' owners were required to possess documentation proving their veteran status. The court agreed to some extent, and rejected the relator's theory that the defendants were liable under the FCA because they were ineligible to bid on contracts under Small Business Administration programs, since they did not have proper documentation regarding the veteran status of their owners. But while the court held that the defendants were not necessarily required to possess certain documentation, as claimed by the relator, it held that the relator's complaint *did* allege an objective falsity, namely, the defendants' representations that they were at least 51% owned by a veteran. This allegation alone, when viewed in the light most favorable to the relator, was sufficient to overcome the defendants' motion to dismiss.

Finally, the court considered the defendants' argument that the relator's complaint was not pled with particularity, because the relator failed to allege who engaged in the fraud and what each individual actually did. The court disagreed and held that the relator pled the alleged fraud scheme with sufficient specificity. Notably, although the relator's allegations generally only identified "high level officer[s] owner[s], manager[s], or subsidiar[ies]" as the specific individuals who submitted the defendants' false claims to the government, the court held that the relator's complaint still identified "who" allegedly committed the fraud. The court also rejected the defendant's argument that the relator's complaint did not contain any "indicia of reliability" that false claims were actually submitted to the government. The court held that an "indicia of reliability" analysis is required when a relator asks the court to make assumptions about a defendant's billing practices. In this case, the court noted, the relator did not allege a fraud that might have led to the submission of false claims; rather, the fraud alleged by the relator in the present case was the submission of the defendants' claims themselves, which the court deemed sufficient to satisfy Rule 9(b).

The relator's claims against the newly joined defendants were dismissed, while the claims against the original defendants were allowed to go forward.

U.S. ex rel. Bibby v. Wells Fargo Bank, N.A., 2012 WL 5866137 (N.D. Ga. Nov. 19, 2012)

Two relators filed a *qui tam* action under the False Claims Act, alleging that a group of fourteen affiliated banking and mortgage companies engaged in a scheme to defraud a U.S. Department of Veterans Affairs refinancing program. Specifically, the relators, both of whom were mortgage brokers, alleged that retired and active duty veterans who have a VA mortgage on their home can apply for a special refinancing loan program for veterans, which includes a guaranty from the government, lower interest rates and shorter repayment periods. The relators claimed that lenders were restricted in the closing costs they could charge on such loans and that such costs could not exceed one percent of the loan amount. Moreover, the relators alleged that lenders were required to affirmatively certify to the VA that they had complied with these rules as a pre-condition to the VA's issuance of a loan guaranty. The relators alleged that while working with these federally-backed loans on behalf of veterans who were attempting to refinance through the defendants' institutions, they discovered that the defendants routinely violated the rules by including impermissible closing costs, and then falsely certified their compliance to the VA. They asserted that the defendants' misconduct constituted false claims and caused the government to guaranty thousands of unqualified loans. The defendants moved to dismiss the relators' claims for failure to state a claim under the False Claims Act and for failure to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Northern District of Georgia granted the defendants' motion in part and denied it in part. The court allowed the relators to maintain their claims that were based on the defendants' alleged false statements that induced the government to provide guaranties for loans that included unallowable closing costs. But the court dismissed the relators' claims that were based on the defendants' alleged submission of false claims to the government for payments under the loan guaranty program for loans that had defaulted.

Failure to State a Claim/Plead Fraud with Particularity

As an initial matter, the court noted that while a fraudulent application or certification used improperly to obtain a government-backed loan "does not result in immediate drain on the federal fisc, it does result in the government taking on an obligation to expend funds if the loan goes into default. Thus, the initial fraudulent conduct in obtaining a government guaranty creates an inchoate FCA violation that becomes choate if an when a loan subsequently goes into default and results in a demand for government payout." The court also rejected the defendants' preliminary argument that the relators' claims should be dismissed because the relators failed to allege specific conduct to specific defendants, and instead "lumped together" all of the defendants. Instead, the court noted that the relators described the fraud scheme, provided an example loan that they alleged was fraudulently procured and resulted in a default and submission to the VA for payment and contended that their fraud claims applied equally and identically to each of the defendants. The court said that the relators' "collective pleading" did not result "in a lack of clarity as to what conduct is alleged against each individual defendant," and therefore, the complaint was not deficient on that basis.

Next the court considered the defendants' argument that the relators' claims should be dismissed because they failed to provide particularized facts to support their claim that the defendants actually presented false claims for payment to the government. The court determined that in the Eleventh Circuit, "a somewhat more flexible, case-by-case approach . . . may be properly applied where the relator's complaint provides 'indicia of reliability' that support the relator's allegations that the defendant submitted actual fraudulent claims to the government." The court noted that the relators had active roles as mortgage brokers in preparing the mortgage paperwork at issue in the case and worked directly with veterans applying for loans through the program at issue and with the defendant companies. The court also observed that although the relators did not attend loan closings, the defendants sent them copy of each post-closing settlement statement, and the relators alleged that those documents confirmed the defendants' scheme to hide closing cost overcharges. The court held that the relators' manifestation of personal knowledge of the defendants' alleged false certifications to the government added reliability to their allegations that the defendants made false statements to the government, sufficient to overcome any need for producing actual claims containing those statements. However, the court held that the relators' knowledge only extended to whether or not false claims were presented to the government. Quoting Eleventh Circuit precedent, the district court stated that in order to satisfy Rule 9(b)'s pleading requirements, "[r]elators must alleged with particularity 'that [Defendant's] false statements ultimately led the government to pay amounts it did not owe.'" The court held that the relators did not demonstrate any indicia of reliability regarding whether or not the defendants presented false claims on *defaulted* loans for which the government was asked to provide guaranty payments, since the relators had no involvement with how the defendants handled defaulted loans. So while the court held that the relators' could maintain their fraud allegations regarding the defendants' alleged false statements to the government, they could not maintain claims based on the defendants' alleged presentment of false claims for payment.

Next, the court turned to the FCA's "materiality" element and held that the relators' complaint satisfied this element. The defendants contended that since the VA "Lender Handbook" does not require that loan guaranties tainted by unauthorized closing costs be automatically voided, the defendants' allegedly false statements to the

VA were not necessarily material to the government. The court rejected that argument, finding that the handbook was superseded by regulations that made clear that the government would not provide a guaranty for loans that were procured by fraud, and which explicitly stated that lenders' certifications of compliance with the rules regarding allowable closing costs would be a condition precedent to receiving a VA loan guaranty. The court held that the relators pled false certifications that could plausibly materially affect the VA's decision to honor a loan guaranty, and therefore, satisfied the FCA's materiality element.

As a result of these findings, the court held that the relators' claims regarding the defendants' alleged false statements to induce the government to provide loan guaranties—but not with respect to any subsequent claims for payment that the defendants may have presented to the government when/if any of those loans defaulted—were properly pled and could proceed.

Bankruptcy Proceedings

Two years after the relators' *qui tam* suit was filed, one of the two defendants filed a Chapter 7 bankruptcy case. The defendants moved to dismiss the relators' complaint on that basis, arguing that the relator in bankruptcy failed to disclose the claims to the bankruptcy court and therefore, the claims are the property of the bankruptcy estate and the relator lacked the standing to pursue the claims. The court concluded that at the time the *qui tam* suit was filed, the relator had not yet filed his bankruptcy case and thus, still owned his interest in the suit. However, at the moment the bankruptcy case was filed, the Chapter 7 Trustee became the real party in interest in the bankrupt relator's case and was entitled to pursue that relator's claims. This finding was not problematic, though, as the court observed that although the Trustee was never formally joined or substituted into the *qui tam* suit, he ratified the action by obtaining an order from the bankruptcy court, authorizing the relator to pursue the *qui tam* action on behalf of his estate. The court denied the defendants' motion to dismiss on the basis of the bankruptcy proceeding.

U.S. ex rel. Boros v. Health Mgmt. Assocs., Inc., 2012 WL 5304172 (S.D. Fla. Oct. 25, 2012)

Two relators filed an action under the False Claims Act, alleging that a group of healthcare companies presented false claims for unnecessary cardiac catheterizations to Medicare and other federal government healthcare programs. The defendants moved to dismiss the relators' complaint for failure to state a claim and for failure to plead the alleged fraud with particularity. The U.S. District Court for the Southern District of Florida granted the defendants' motion, finding that the relators did not allege sufficient facts in support of their complaint. The court observed that although the relators identified various patients who allegedly received unnecessary catheterizations, and although the complaint alleged that

claims were submitted to the government regarding these patients' treatment, the complaint was still deficient, since the relators did not "identify any details about Defendants' alleged submission of a false claim to the government or the government's payment of that claim." The court noted that such details would include the identity of specific person or entities who participated in the various steps of the claims submission process, as well as the dates, times, and amounts of allegedly false claims. As a result, the court held that the complaint was not pled with particularity, as Rule 9(b)'s heightened pleading standard requires, and the complaint was dismissed.

U.S. ex rel. Tucker v. Christus Health, 2012 WL 5351212 (S.D. Tex. Oct. 23, 2012)

A relator filed a *qui tam* action alleging that four affiliated healthcare companies she previously worked for as a registered nurse violated the False Claims Act by submitting false claims to Medicare and other government healthcare programs. Specifically, the relator alleged that the defendants submitted claims: (1) reflecting stays for patients that were improperly extended beyond medical necessity, resulting in increased reimbursements and misclassifications of the defendants as long term care hospitals; (2) for patients who were unnecessarily admitted; (3) for equipment that was not medically necessary; and (4) for medical procedures that were delayed in order to increase reimbursements from the government. The government declined to intervene in the suit. The defendants moved to dismiss the relator's claims for failure to state a claim under the False Claims Act and for failure to plead the fraud claims with particularity.

Holding: The U.S. District Court for the Southern District of Texas denied the defendants' motion.

The court first held that the relator properly stated a claim under the False Claims Act, as her complaint alleged that the defendants presented false Medicare claims to the government themselves, or caused others to do so. Moreover, the relator's complaint included allegations regarding why and how the defendants' claims were false, with specific examples. Finally, the court determined that the relator alleged resulting damages o the government.

The court also held that the relator's complaint satisfied Rule 9(b)'s heightened pleading requirement, since the relator "identifies by name individuals who participated in submitting the false claims to Medicare, and she describes the manner in which the Medicare billing was false and/or fraudulent. She specifies the time period during which the false claims were submitted to Medicare. She provides specific examples of each category of fraudulent billing, and explains that Defendants received millions of dollars thereby." Although the court noted that the relator did not identify each of the defendants' allegedly false claims by date and patient name, nor did she identify every individual who allegedly participated in the fraud, the court held that her allegations "are adequately particular to survive" the defendants' motion to dismiss. In addition, the court rejected the defendants' argument that the relator's complaint was deficient because it did not assert claims against each defendant individually. Instead, the court held that "[t]o the extent possible without discovery, Relator has adequately alleged the complicated relationship among the four remaining defendants. Additionally, certain allegations are against only certain Defendants, while others are asserted against Defendants as a group. The allegation that Defendants are inter-related and that they acted together does not alone require dismissal under Rule 9(b)."

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

U.S. ex rel. Sanchez v. Abuabara, 2012 WL 5193415 (S.D. Fla. Oct. 19, 2012)

A relator filed a *qui tam* suit under the False Claims Act, alleging that a group of affiliated defendants made false statements to the government in order to secure a contract with the U.S. Army to provide communications network functions. The relator alleged that he possessed the technical expertise to complete the job, but since he had a prior affiliation with the Army, he was ineligible to directly contract with the government. As a result, he stated, he partnered with the defendants, who would bid on the government contract, and then allow the relator to work "behind-the-scenes," which both sides believed was legally permissible. The defendants bid on the contract, stating, in part, that they intended to leverage the relator's expertise, and the government awarded the contract to the defendants. The relator and the defendants executed a preliminary agreement that outlines their respective rights and obligations, but the two sides were unable to reach a final agreement and cut ties with one another. The defendants went on to complete the contract without the relator's assistance. Subsequently, the relator filed suit against the defendants, alleging, among other things, a violation of the FCA. The relator's FCA allegation asserts that the defendants never intended to utilize his expertise and services, but made such representations to the government in order to induce the Army to award the contract to them. He alleged that the defendants knowingly presented false claims to the government, knowingly used false statements that were material to their allegedly false claims, and conspired to violate the FCA. The defendants moved to dismiss all three claims.

Holding: The U.S. District Court for the Southern District of Florida granted the defendants' motion.

Pleading Fraud with Particularity

First, the court analyzed the relator's claim that the defendants' representations to the government were merely a sham, or "bait-and-switch" attempt to fraudulently induce the Army to accept the defendants' bid on the contract at issue. The court, though, determined that the relator failed to alleged "specific facts" from which the court could infer that this allegation was true. The court stated that it would not impute a "sinister motive" to the defendants, based on deficient factual allegations—the court noted that delays in reaching final agreements are common when parties negotiate contracts, and that the delay in reaching a final agreement in this case doesn't necessarily serve as evidence that the defendants never intended to hire the relator. The court distinguished the "bait-and-switch" cases relied on by the relator, noting that in each of those cases, the defendants were found to have made "objectively false" statements to the government. Here, the relator failed to allege facts indicating that the defendants made any objectively false statements to the government, particularly since the relator did not allege that the defendants continued to represent to the government that he would be involved in the contract, even after the defendants knew that he would not. Instead, the court determined, the defendants informed the government that the relator would not be working on the contract, as soon as that fact became clear. The court concluded that the relator "alleg[ed] fraud by hindsight," and held that his complaint did not plead the alleged fraud with particularity.

Conspiracy

The court dismissed the relator's conspiracy claim, finding that the relator failed to allege the elements of conspiracy, since the complaint did not allege a meeting of the minds to commit fraud among the defendants nor any overt act in furtherance of any alleged conspiracy. Furthermore the court observed the relator's allegation that all of the defendants were inter-connected—he even alleged that one defendant was the "alter ego" of another. As a result, the court held that the intra-corporate conspiracy doctrine applied and warranted the dismissal of the relator's conspiracy claim, since in accordance with the doctrine, a corporation cannot conspire with itself or its employees, and employees acting in their official capacities cannot conspire with each other.

The relator's complaint was dismissed with prejudice.

U.S. ex rel. Upton v. Family Health Network, Inc., 2012 WL 4577553 (N.D. Ill. Oct. 1, 2012)

Four relators brought a *qui tam* action on behalf of the United States and the State of Illinois, alleging that a managed care organization, its president and CEO, and its COO violated the federal False Claims Act and the Illinois False Claims Act by falsely certifying to the Medicaid program that the organization was in compliance with its Medicaid contract and with federal law, and was not aware of any fraud,

abuse, or misconduct. The relators alleged that these quarterly certifications were required by the government before the defendant organization would receive Medicaid payments, based on an established capitation rate for each person enrolled in the organization's healthcare program. The relators further alleged that these certifications to the government were false because the defendants engaged in a scheme of enrolling a disproportionately healthy population of Medicaid-eligible individuals into its healthcare program, in order to increase profits from its Medicaid payments by saving on healthcare costs for patients. Specifically, the relators alleged that the defendants "cherry picked" the Medicaid recipients the healthcare company would provide services to and refused to enroll particularly needy, chronically ill, or diseased individuals—for whom services would be more expensive—even though the defendants were required to provide healthcare services to "Illinois Medicaid recipients who requested to participate in [the organization's] program." The relators—who worked for the defendant organization during the time of the alleged fraud—alleged that they were instructed not to enroll certain categories of patients, including pregnant women who were not past their second trimester and patients who would likely require treatment by specialists; the claimed that when they enrolled such individuals anyway, the defendants immediately dis-enrolled them. One relator even alleged that before she began working for the defendant organization, she was an Illinois Medicaid recipient and attempted to enroll herself and her two children in the defendants' program, but was denied once the defendants learned that she had endometriosis and required quarterly medicinal injections.

The relators also alleged that the defendants concealed their fraudulent scheme by destroying unprocessed applications to the program in order to make it appear that the applicants never applied, and by creating a sham compliance committee in which the defendant COO served as the liaison between the defendant organization and the government; the relators alleged that when an employee reported to the compliance committee that the defendant organization was systematically refusing to enroll pregnant women in its program, the defendant COO told the employee that no corrective action would be taken, and subsequently fired the employee upon learning that the employee had prepared a written complaint to submit to the state. The relators claimed that the alleged fraud scheme was ongoing from 1999 through the time their complaint was filed in 2009. The defendants moved to dismiss the relators' claims for failure to state a claim under the False Claims Act statutes and for failure to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Northern District of Illinois granted the defendants' motion to dismiss, but gave the relators three weeks to file an amended complaint.

Failure to State a Claim/Plead Fraud with Particularity

The court found that the relators' complaint properly pled the defendants' alleged FCA violations for the period of 2002 through 2008, since, when viewed as a whole and after drawing all inferences in favor of the relators, the complaint plausibly alleged that the defendants discriminated against Medicaid recipients with potentially costly medical conditions. The court noted that the relators alleged multiple instances of the fraud scheme in practice during that time period and rejected the defendants' alternative explanations for the refusal to enroll certain patients in their program, stating that the court would not make factual determinations at the motion to dismiss stage. Notably, the court dismissed the relators' claims based on alleged fraud between 1999 and 2002 and after 2008, noting that the relators failed to plead those claims with particularity, since they did not cite any specific examples of the alleged fraudulent scheme during those time periods.

The court also rejected the defendants' contention that their practices did not violate their Medicaid contract, which, the defendants argued, did not require them to enroll every Illinois Medicaid recipient who applied, and which even provided specific exclusions. The court, though, held that the defendants' contention did not contradict the relators' allegations that the defendants refused to enroll certain eligible individuals because of the cost of providing services to them, and noted that the defendants failed to assert that any provision of the contract allowed them to refuse to enroll individuals on that basis. Moreover, the court stated that, at the motion to dismiss stage, the relators were not required "to plead around all potential defenses." The court further rejected the defendants' claims that the State of Illinois ultimately decided which applicants would be enrolled in the defendants' program, and thus, the defendants could not unilaterally dis-enroll participants or terminate their benefits. Instead, the court again found that the defendants' explanation did not contradict the relators' allegation, since the defendants were still in a position to deny initially any applicant with a costly medical condition, and were also in a position to discourage such individuals from even applying in the first instance or to dis-enroll from the program on their own. In addition, the court noted that the defendants conceded that the protocol authorizing the state to enroll applicants was not put into place until 2008—long after the alleged fraud began.

Moreover, the court held that the relators' claims were timely, rejecting the defendants' argument that the claims should be dismissed because the alleged conduct occurred outside the FCAs' six-year statute of limitations. The relators countered that the FCAs' ten year limitations period provision applied, and argued that their claims were filed within that period. The court determined that regardless of which period applied, the relators' claims were timely, since at least some of the conduct alleged occurred within the applicable limitations period.

Similarly, the court held that the relators properly pled that the defendants not only violated their duty to report suspected fraud, abuse or criminal activity regarding its healthcare program, but actually falsely certified their compliance with applicable contractual and regulatory provisions. The court held that the relators' specific allegations of the defendants' "cherry-picking" was sufficient to plead their false certification claim, and that they were not required to provide the dates, identification numbers, or verbatim contents of the defendants' allegedly false certifications to the government.

Finally, however, the court held that the relators failed to adequately plead that the defendants' Medicaid payments were conditioned on their certifications to the government. The court held that the relators did not cite any contractual or regulatory provision in support of their conclusory allegation that the certifications were tied to payments from the government and that the government would not have provided capitation payments to the defendants had it known that the defendants' certifications were false or had the defendants not submitted any certifications at all. The court rejected the relators' argument that even if the certifications at issue were merely conditions of participation in the government healthcare program, any such certifications that are false would lead to FCA liability in the Seventh Circuit. The court, rather, held that, pursuant to Seventh Circuit precedent, conditions of participation can only lead to FCA liability under a fraudulent inducement theory—and the relators did not allege a fraudulent inducement theory of liability.

As a result of these findings, the court dismissed the relators' fraud claims, but without prejudice. The court granted the relators 21 days to amend their complaint.

See *Amphastar Pharm. Inc. v. Aventis Pharma SA*, 2012 WL 5512466 (C.D. Cal. Nov. 14, 2012), at page 16.

See *U.S. ex rel. Dismissed Relator v. Lilwani*, 2012 WL 4739922 (C.D. Ill. Oct. 3, 2012), at page 28.

See *U.S. ex rel. Dismissed Relator v. Murchison*, 2012 WL 4739938 (C.D. Ill. Oct. 3, 2012), at page 29.

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

U.S. ex rel. Dunn v. North Memorial Health Care, 2012 WL 6552791 (D. Minn. Dec. 14, 2012)

A relator filed a *qui tam* suit against affiliated health care companies, alleging violations of the False Claims Act in connection with alleged Medicare billing fraud. Specifically, the relator alleged that the defendants submitted claims for Medicare reimbursement that falsely stated that the defendants provided the requisite physician supervision of their rehabilitation programs; in fact, the relator alleged that the defendants arbitrarily selected physicians' names to include on the required Medicare forms and assured the respective physicians that they would not be held personally liable for this alleged fraud scheme. In addition, the relator alleged that the defendants systematically falsely certified that their physicians had seen various patients, when, in fact, the physicians had not personally seen those patients. The relator had been employed by the defendants as an administrator during the time of the alleged fraud and asserted that his allegations were based on his own observations. The United States declined to intervene in the relator's lawsuit and the defendants moved to dismiss the relator's complaint for failure to state a claim and for failure to plead the alleged fraud with particularity.

The defendants argued that the relator's complaint should be dismissed because it failed to allege a regulatory violation that would give rise to False Claims Act liability. The court agreed, noting that the regulations relied on by the defendants were implemented *after* the fraud was alleged to have begun and did not reference the types of rehabilitation programs operated by the defendants. Moreover, the court noted that the applicable regulations presumed that the direct supervision requirement was satisfied when the rehabilitation services were provided in a hospital setting, since "staff physicians would always be nearby within the hospital." Since the defendants' services were performed in a hospital, the court held that there was a presumption of compliance with the applicable regulations. Since the relator did not plead any facts to rebut that presumption, the U.S. District Court for the District of Minnesota granted the defendants' motion to dismiss and dismissed the relator's fraud claims with prejudice.

U.S. ex rel. Davis v. U.S. Training Center Inc., 2012 WL 6052051 (4th Cir. Dec. 6, 2012)

Two relators filed a *qui tam* suit alleging that a group of contractors violated the False Claims Act by overbilling the federal government in connection with two contracts the defendants entered into with the U.S. Department of Homeland Security and the U.S. Department of State to provide security services in Iraq and Afghanistan,

and in the aftermath of Hurricane Katrina. With respect to the Iraq/Afghanistan contract, the relators alleged that the defendants submitted false "muster sheets" in order to receive compensation for work that was never performed, and submitted false travel records in order to receive additional improper compensation. The relators further alleged that the defendants provided "worthless services" to the government under the Hurricane Katrina contract, by not managing their personnel, monitoring the distribution of weapons, or ensuring that weapons were not given to felons or guards who were otherwise disqualified from carrying firearms. The U.S. District Court for the Eastern District of Virginia granted summary judgment in favor of the defendants on the relators' claims with respect to the Hurricane Katrina contract. After a jury trial, a verdict was returned in favor of the defendants on the remaining claims. The relators appealed the summary judgment ruling and the jury verdict to the U.S. Court of Appeals for the Fourth Circuit. The relators also appealed the district court's denial of their motion for a new trial, arguing that one of the defense witnesses committed perjury.

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

The circuit court held that the district court did not err when it granted summary judgment in favor of the defendants on the relators' Hurricane Katrina claims. The circuit court determined that the contract at issue did not require the defendants to manage personnel, monitor the distribution of weapons, or ensure that weapons were not given to disqualified individuals—with respect to the third allegation, the court noted that the government retained the function of performing criminal background checks on the defendants' security guards, and thus, the defendants were not responsible for determining whether or not weapons were being given to disqualified persons. The appeals court further rejected the relators' additional argument that the district court's summary judgment ruling was erroneous because a genuine issue of material fact existed regarding whether or not the defendants falsely certified to the government that it was providing contractually-conforming services. The Fourth Circuit held that the relators did not make any such allegation in their complaint and could raise this issue for the first time on appeal.

The appellate court also denied the relators' motion for a new trial, applying an abuse of discretion standard and giving "substantial deference" to the district court's judgment. Consequently, the circuit court refused to overturn the district court's rulings excluding certain evidence the relators sought to introduce, as either hearsay, as lacking probative value, as unduly prejudicial, as improper evidence of prior bad acts, or as evidence from an expert who had not been designated under Federal Rule of Civil Procedure 26. The Fourth Circuit also affirmed the district court's ruling that the relators' contention that one of the defense witnesses committed perjury did not entitle them to a new trial. The court observed that the relators' sought a new trial based on a sworn declaration of another witness that directly contradicted the defense witness' testimony, but held that the competing

testimony did not necessarily establish perjury, but rather simply showed that the two witnesses had different recollections.

As a result of these findings, the Fourth Circuit affirmed the district court's judgments.

U.S. ex rel. Stone v. Omnicare, Inc., 2012 WL 5877544 (N.D. Ill. Nov. 20, 2012)

A relator filed a *qui tam* action alleging that a healthcare company violated the False Claims Act by knowingly submitting reimbursement claims for pharmaceuticals to the government without possessing the necessary supporting documentation. The government declined to intervene in the case. Subsequently, the relator's original complaint and his first amended complaint were dismissed for failing to state a claim, as the U.S. District Court for the Northern District of Illinois held that the relator failed to adequately allege that the defendant falsely certified to the government that it had complied with the regulations regarding the document retention requirements, and failed to allege that the defendant had the requisite mental state to violate the FCA. The relator was granted leave to file a second amended complaint, and the defendant again moved to dismiss the complaint for failure to state a claim. This time, the United States filed a statement of interest in the case, and joined the relator's argument—which the court called "new and relatively novel"—that defendants need not always make an express false certification of compliance to the government, but may still be subject to FCA liability for making an *implied* false certification of compliance with applicable regulations.

The court observed that several circuit courts and even some of the district courts within its own circuit have recognized the implied certification theory of FCA liability. The court, though, also noted that the Seventh Circuit had not yet done so. Ultimately, the court declined to reach the question of the validity of the relator's theory of liability, as the court determined that the relator's second amended complaint still failed properly to allege the defendant's scienter, as the complaint only provided "anecdotal accounts given by unidentified" witnesses, and not the required "individualized transaction level" allegations—the court noted that the complaint could have identified specific supervisors who instructed the defendant's employees to submit false claims to the government, or it could have referenced specific instances in which such false claims were submitted and the defendant's supervisors were notified, but it did not.

Consequently, the court granted the defendant's motion to dismiss the second amended complaint. The court stated that it "did not know what Plaintiff or any other interested party could say to improve the complaint," and therefore dismissed the complaint with prejudice.

U.S. ex rel. Hepburn v. Northrop Grumman Sys. Corp., 2012 WL 5877545 (M.D. Fla. Nov. 20, 2012)

A relator filed a *qui tam* action against his former employer—a defense contractor—alleging that the company knowingly shipped weapons to the government that had failed testing and did not comply with contract specifications. The defendant moved to dismiss the relator's complaint, arguing that the relator failed to state a claim under the False Claims Act since he failed to allege that the government contract at issue required the defendant to meet the standards that the relator alleged. Moreover, the defendant argued that, at most the relator's claims amounted to a breach of contract, not a False Claims Act violation.

The U.S. District Court Court for the Middle District of Florida granted the defendant's motion, holding that the contract specifications relied on by the relator did not require the defendant's weapons to pass the tests alleged by the relator; in addition, the relator did not allege that the defendant's weapons failed any of the tests that were included in the contract. The court dismissed the relator's complaint, stating that the realtor was "in essence asking the Court to imply contractual terms and specifications that do not exist."

U.S. ex rel. Polansky v. Pfizer, Inc., 2012 WL 5595933 (E.D.N.Y. Nov. 15, 2012)

A relator filed a *qui tam* complaint alleging that a pharmaceuticals company violated the False Claims Act by engaging in an illegal marketing campaign for one of its drugs. Specifically, the relator alleged that the defendant misrepresented to doctors the types of patients the drug should be prescribe to and encouraged doctors to prescribe the drug to patients who did not need it, pursuant to a national set of guidelines. The relator argued that the defendant improperly induced doctors to prescribe the drug to Medicare and Medicaid patients for non-approved, off-label uses, resulting in a fraud when the government was asked to provide reimbursements for those prescriptions. The defendant moved to dismiss the relator's fifth amended complaint, arguing that the guidelines relied on by the relator were non-compulsory, and therefore, their recommendations that doctors prescribe the drug outside the guidelines did not amount to "off-label marketing" for FCA purposes. The court also noted that the Food and Drug Administration did not condition approval for reimbursement from the government on compliance with the guidelines. Consequently, the court dismissed the relator's complaint.

U.S. ex rel. Walker v. Corporate Mgmt., Inc., 2012 WL 5287065 (S.D. Miss. Oct. 24, 2012)

Two relators filed a *qui tam* suit alleging that the hospital and an affiliated health center they previously worked for violated the False Claims Act by causing false claims to be submitted to the federal government for healthcare services. The relators alleged claims under the FCA for fraud and for conspiracy. The hospital defendant moved to dismiss the relators' claims, arguing that the relators could not have witnessed the fraud they alleged, because that defendant did not even exist at the time of the relators' alleged employment.

Holding: The U.S. District Court for the Southern District of Mississippi granted the defendant's motion to dismiss in part and denied it in part—the relators were allowed to maintain their fraud claims, but their conspiracy claim was dismissed.

The court noted that the relators' complaint alleged that the fraud occurred both before and after the hospital was incorporated, and held that "although [the relators] provided no specific details of fraudulent activity after [the date the hospital was incorporated], the Court believes that the details of fraudulent activity prior to Defendant's incorporation are sufficient indicia of reliability for Relators' claim that the fraudulent activity continued." The court further noted that the relators are not required to present evidence of the alleged fraud at the pleading stage, and held that the relators alleged sufficient facts to withstand the defendant's motion to dismiss the fraud claims. The court, though, did dismiss the relators' conspiracy claim, finding that the relators failed to plead specific facts showing an agreement among the defendants to defraud the government.

U.S. ex rel. Watson v. King-Vassel, 2012 WL 5272486 (E.D. Wis. Oct. 23, 2012)

A doctor filed a *qui tam* action alleging that another doctor violated the federal and Wisconsin False Claims Act statutes by prescribing medications to a Medicaid patient over a four-year period for reasons that were not medically necessary. The government entities declined to intervene in the suit. The defendant moved for summary judgment, arguing that the *qui tam* action was barred by the FCA statutes' public disclosure bar provisions and that the relator who filed the case failed to offer an expert witness who could establish that the medications at issue were prescribed for off-label uses or that claims for the corresponding prescriptions were ever submitted to Medicaid and/or that Medicaid ever paid any such claims.

Holding: The U.S. District Court for the Eastern District of Wisconsin granted the defendant's motion.

Public Disclosure Bar

The defendant argued that the relator's fraud allegations had been previously publicly disclosed through news accounts of Medicaid fraud and other, similar lawsuits across the country. The court rejected this contention, noting that none of these purported public disclosures referenced the facts of the case at hand, as they did not discuss the defendant, her practice, or even her geographic region. Consequently, the court held that the relator provided information that the government entities otherwise would not have been aware of, and stated that the public disclosures "could not have formed the basis of this lawsuit, and therefore lack the particulars that the Court must look for to find the public disclosure bar triggered." As a result of these findings, the court denied the defendant's motion for summary judgment for lack of subject matter jurisdiction due to the public disclosure bar.

Failure to State a Claim

The defendant next argued that the relator failed to provide expert witness testimony to establish that process by which the defendant allegedly submitted Medicaid reimbursement claims for the drugs in question, whether any such claims were paid, and whether or not the drugs were prescribed for non-approved, off-label uses. The court determined that in order to maintain his fraud claims, the relator must satisfy the FCA statutes' scienter element, by showing that the defendant knew that Medicaid claims for the prescriptions at issue were false, <u>and</u> knowingly caused such claims to be submitted to Medicaid. The court held that the relator failed to establish these elements, as he conceded that he did not know whether or not the defendant received Medicaid reimbursements for the claims at issue or would be entitled to any such reimbursements; the court noted that the relator could not even establish the defendant's knowledge that Medicaid claims would be submitted for the patient in question or that Medicaid would be responsible for covering the costs of the patient's prescriptions. As a result, the court held that the relator's lack of expert testimony was "fatal to his case."

The court further held that the relator could not show that the defendant caused false Medicaid claims to be submitted, without expert testimony, noting that the defendant's "mere prescription of . . . medications would not, in and of itself, *cause* the submission of a false claim." (emphasis in original) The court noted that several additional steps were required before any such claim would have been submitted to Medicaid, including having the patient submit the claim to a pharmacy and claim entitlement to Medicaid; and then having the pharmacist check the patient's Medicaid coverage, ensure the validity of the prescription, fill the prescription, and submit the claim to Medicaid for reimbursement. The court stated that "[w]ithout an expert to testify, there is a grand mystery between the time of the prescription and the claim being made to Medicaid." Consequently, the court held that the relator could not establish that the defendant caused false Medicaid claims to be submitted, and granted the defendant's summary judgment motion on that basis.

The court also held that summary judgment in favor of the defendant was appropriate, since the relator could not establish that the drugs in question were prescribed for off-label uses, without expert testimony, stating that "medical documents typically are not readily understandable by the general public and would require an expert to explain their application to a particular set of circumstances."

U.S. ex rel. Williams v. Renal Care Group, Inc., 2012 WL 4748104 (6th Cir. Oct. 5, 2012)

Two relators brought a *qui tam* case against a dialysis provider, its wholly-owned subsidiary, and its successor, arguing that the defendants violated the False Claims Act. The federal government intervened in the relator's suit. Specifically, the plaintiffs alleged that the subsidiary company—which supplied home dialysis equipment—was created solely for the purpose of exploiting loopholes in the Medicare regulatory scheme that allowed the defendants to bill for the subsidiary's home dialysis supplies services at higher reimbursement rates, since the subsidiary purportedly was not also a provider or dialysis services and purportedly was not under the direct supervision of such a provider. The plaintiffs alleged that the subsidiary was not eligible for these higher reimbursements, since it was not separate from its parent company—which did provide dialysis services. They argued that the parent company's employees, officers, and directors held key roles in the subsidiary company's corporate structure; that the companies shared office space, payroll, insurance benefits, contracts, and human resources services; that the subsidiaries funds were transferred to the parent company's account on a nightly basis and that the parent company paid the subsidiary company's vendors; and that all of the subsidiary company's employees were managed or directed by employees of the parent company.

The government's complaint-in-intervention included, among other things, four counts alleging FCA violations. Two of those counts were at issue in these proceedings: (1) the plaintiffs' allegation that the defendants submitted Medicare claims while knowing that the subsidiary company was a sham created solely to increase Medicare reimbursements; and (2) the plaintiffs' allegation that the defendants submitted Medicare claims while knowing that the subsidiary company was not in compliance with Medicare rules.

After a COO for one of the parent company's division's left the company amid disagreements over the legality of the use of the subsidiary company, outside counsel for the parent company began researching the issue and even sent a letter to a federal government official with the Health Care Financing Administration, seeking clarification. The letter also referenced a conversation the outside counsel claimed to have with the HCFA official, in which the government official supposedly confirmed that the defendants' use of the subsidiary company was allowable under the

law. The outside counsel received no response to her letter. Moreover, the subsidiary company subsequently underwent a Medicare site investigation, during which the company disclosed that it was owned by the parent company, with whom it shared personnel, contracts, and insurance policies. During discovery, the defendants sought evidence regarding the government's knowledge of the subsidiary company's relationship with the parent company, including any evidence regarding the government's consideration of the letter sent by the subsidiary company's outside counsel, requesting guidance from the government.

The government initially responded that it never received the letter and that the conversation between the subsidiary company's outside counsel and the HCFA official never occurred. About six months later, the government confirmed that it had indeed received the letter, but that it had been inadvertently archived. The government refused to produce some of the evidence in its possession regarding its consideration of the letter, citing attorney-client privilege and "deliberative process" protections. The defendants moved the U.S. District Court for the Middle District of Tennessee to compel the government to produce the documents in question and to issue sanctions against the government. The district court denied both motions without explanation.

In the interim, the government moved for partial summary judgment on the issues of falsity and materiality, with respect to its first FCA count—that the defendants submitted Medicare claims for the subsidiary company while knowing that the company was created as a sham corporation for the sole purpose of increasing Medicare reimbursements. The defendants moved for summary judgment on all counts. The district court granted the government's motion and denied the defendants' motion, finding that the defendants acted with "reckless disregard" of relevant Medicare regulations and statutes. The court adopted the government's damages calculation, declared that it was "unnecessary to consider the United States' other claims," and ultimately awarded the government judgment on its other claims. The defendants appealed the district court's order to the U.S. Court of Appeals for the Sixth Circuit.

Holding: The Sixth Circuit reversed the district court's judgments with respect to counts one and two and granted the defendants' motion for summary judgment with respect to those two counts. The circuit court reversed and remanded the district court's rulings with respect to the government's remaining counts, alleging additional FCA violations as well as common law violations.

Count One—Submitting False Medicare Claims for a Sham Corporation

The defendants argued that count one was based on the government's erroneous interpretations of the applicable federal laws and regulations. They argued that their Medicare claims were not in fact false, and therefore, they did not violate the FCA. They further argued that even if their Medicare claims were deemed technically false, the relevant statutory guidance was ambiguous and thus, they did not have the requisite knowledge to be held liable under the FCA. The circuit court addressed each argument in turn. First, the appeals court noted that while the district court held that the subsidiary company was created and operated so that the defendants could receive increased Medicare reimbursements. However, the circuit court also noted that the district court failed to determine whether or not the subsidiary company did anything improper, regardless of the defendants' motives. The circuit court stated: "Why a business ought to be punished solely for seeking to maximize profits escapes us." Since the government was unable to demonstrate how the defendants had violated the applicable Medicare regulations—or even the purposes of those regulations—it held that the government could not maintain its alter ego theory. As a result, the circuit court held that the district erred when it granted the government's motion for summary judgment on the issue of falsity with respect to count one.

The circuit court then turned to the district court's grant of summary judgment on the issue of the defendant's knowledge that its claims for the subsidiary company were false—the appellate court observed that although the government moved for summary judgment on the issues of falsity and materiality, the district court specifically found that the defendants satisfied the FCA's scienter requirement, as the district court held that the defendants acted with "reckless disregard" for the relevant Medicare statutes and regulations. The Sixth Circuit reversed this district court ruling also, as it held that the government failed to allege that the defendants actually knew that the subsidiary company's Medicare claims ran afoul of applicable regulations, nor could the government show that the defendants acted with "reckless disregard" for those regulations, since: the defendants consulted outside counsel regarding the issue; the outside counsel sought clarification on the applicable rules from appropriate federal government officials, both in a conversation and in a letter; the defendants were aware of other large dialysis providers that had created similar wholly-owned subsidiaries to receive Medicare reimbursements and industry publications encouraged the practice to maximize profits; the subsidiary company had its own Medicare supplier number under which to submit claims; and responsible federal government officials were aware of the defendants' corporate structure.

As a result of these findings, the circuit court held that "[t]he defendants did not act with reckless disregard of the alleged falsity of their submissions to Medicare. And given that there is no evidence in the record that they acted with actual knowledge, or in deliberate ignorance of the truth, they are therefore not liable under Count One of the complaint for False Claims Act liability." The district court's judgment on count one was reversed.

Count Two—Submitting Medicare Claims for a Non-Medicare Compliant Company

The Sixth Circuit then addressed the district court's rulings on the government's remaining counts. The circuit court noted that the district court awarded judgment in favor of the government on these counts, but with little explanation, and held that it was "unable to review substantively the district court's judgments as to the majority of those claims." The appeals court, though, was able to reach some conclusions with respect to the district court's analysis of count two of the government's complaint—that the subsidiary was not in compliance with various regulatory standards for durable medical equipment suppliers. The defendants argued that irrespective of whether or not the subsidiary company violated any of these regulatory standards, their Medicare claims would not have been materially false and thus, not subject to the FCA. The circuit court agreed, noting that the applicable Medicare regulations provide the government's remedy for non-compliance with the standards at issue—namely, that the supplier's Medicare billing privileges could be revoked. The circuit court held that "[t]he False Claims Act is not a vehicle to police technical compliance with complex federal regulations," and concluded that the regulations cited by the government were "conditions of participation, the violation of which do not lead to False Claims Act liability." The circuit court reversed the district court's ruling with respect to count two and granted the defendants' motion for summary judgment.

The court held that there was insufficient evidence in the record to evaluate the government's remaining counts, and consequently reversed and remanded the district court's rulings with respect to those counts for further proceedings.

U.S. ex rel. Wall v. Circle C Constr., LLC, 2012 WL 4477367 (6th Cir. Oct. 1, 2012)

A relator filed a *qui tam* suit against the prime government contractor company that hired him, alleging violations of the False Claims Act. Specifically, the relator alleged that the prime contractor was hired by the Army to construct buildings on a military base and that the agreement between the two sides included determinations of hourly wages for electrical workers and required the defendant to submit complete and accurate payroll certifications to the government in order to be paid. Notably, the relators contended that the defendant was required to submit payroll certifications for all employees on the project, including subcontractors.

The relator argued that the company he worked for was hired by the defendant as a subcontractor for at least 98% of the electrical work on the project, but did not sign a written contract with the defendant. The relator further contended that the defendant did not monitor the subcontractors' work and did not take measures to ensure that those employees were paid proper wages. The defendant also did not include the subcontractors in its payroll certifications to the government. The re-

lator alleged that the defendant's payroll certifications to the government—upon which payment under the contract with the Army were based—were false, since the defendant failed to disclose the subcontractors who worked on the project and since the certifications falsely stated that the defendant was paying proper wages to electrical workers, when it was not. The United States intervened in the relator's suit and added common law claims.

The defendant and the plaintiffs filed cross-motions for summary judgment, with the defendant arguing that the U.S. Department of Labor—not the district court—has primary jurisdiction over the plaintiffs' claims. The defendant also moved to dismiss the plaintiffs' claims for failure to state a claim and for failure to plead the alleged fraud with particularity.

The U.S. District Court for the Middle District of Tennessee granted the plaintiffs' summary judgment motion and awarded a judgment against the defendant in the amount of $1.6 million—this figure represented three times the government's actual damages, as determined by the district court, based on the court's calculation of "the difference between what the government actually paid out by reason of the false claim over and above what it would have paid had the government known the true facts." The court declined to impose civil penalties against the defendant. The court denied the defendant's motions as moot, and denied the defendant's later motion to alter or amend the judgment. The defendant appealed the district court's rulings to the U.S. Court of Appeals for the Sixth Circuit.

Holding: The Sixth Circuit affirmed the district court's ruling with respect to the defendant's liability, but reversed and remanded the district court's ruling on damages.

Primary Jurisdiction

The circuit court first addressed the defendant's argument that the Department of Labor had primary jurisdiction over the plaintiffs' claims regarding the wages paid to the defendant's electrical workers. The district court summarily rejected that argument, and held that where the issue is the amount of wages paid, Department of Labor laws and regulations, such as the Davis-Bacon Act, do not preclude FCA remedies. The circuit court agreed, and held that "[t]he injuries and remedies under the FCA and Davis-Bacon are separate and distinct," and observed that "courts have drawn a dichotomy between a contractor's misrepresentation of wages and its misclassification of workers." The circuit court concluded that the district correctly held that the core dispute between the defendant and the plaintiffs "involves misrepresentation, not misclassification," and therefore, the plaintiffs' FCA claims were not precluded by the doctrine of primary jurisdiction. The circuit court noted that the government did not deliberately bypass administrative procedures and only actually became aware of the fraud when the relator's *qui tam* complaint was filed. Moreover, the determination of whether or not the defendant acted with the requisite scienter did not require any technical expertise that would necessitate agency involvement. Finally, the court noted that the applicable regulations explicitly provide that falsification of payroll certifications could subject a contractor to FCA liability.

Failure to State a Claim

The defendant argued that the district court erred in holding that the plaintiffs sufficiently demonstrated the essential elements of FCA liability: falsity, knowledge, and materiality. The circuit court disagreed, finding that the defendant had contracted with the government over a period of 20 years and was well aware of the applicable wage requirements for electrical workers, and that the defendant knew that it was required to submit payroll certifications for all employees on the project but failed to submit certifications for the relator's company, while doing so for other subcontractors. The circuit court held that the district court properly held that the defendant's payroll certifications were false, since the defendant claimed that the certifications were complete even though they were failed to include the relator's company, and since the certifications falsely represented that proper wages were paid to the defendant's subcontractor employees, when they were not—and the defendant had not properly monitored the wages that it represented to the government were being paid, and therefore acted with reckless disregard for the truth or falsity of its certifications. The district court's ruling on FCA liability was affirmed.

Damages

The defendant argued that the district court's damages calculation was based on the speculative testimony of the government official responsible for administering the contract at issue between the defendant and the government. The defendant argued that the damages calculation was not based on actual amount paid to the relator's subcontractor employer—about $125,000—but was based on erroneous assumptions made by the government witness based on the total value of the contract, the approximate percentage of the contract attributable to electrical work, and the idea that the subcontractor performed 98% of that electrical work. The defendant further argued that a portion of the damages calculation was erroneously based on work performed at a different location from the location alleged in the plaintiffs' complaint. Moreover, the defendant argued that the government witness' testimony that the government would have withheld more than $500,000 from the defendant, had it discovered that problems with the defendant's payroll certifications. The circuit court agreed with the defendant that "there are deficiencies in the district court's calculation of damages that require a remand for recalculation."

See *U.S. ex rel. Spay v. CVS Caremark Corp.*, 2012 WL 6645537 (E.D. Pa. Dec. 20, 2012), at page 7.

See *U.S. ex rel. Daugherty v. Bostwick Labs.*, 2012 6593804 (S.D. Ohio Dec. 18, 2012), at page 3.

See *U.S. ex rel. Miller v. Weston Educ., Inc.*, 2012 WL 6190307 (W.D. Mo. Dec. 12, 2012), at page 62.

See *U.S. ex rel. Ge v. Takeda Pharm. Co. Ltd.*, 2012 WL 5398564 (D. Mass. Nov. 1, 2012), at page 64.

See *Malhotra v. Steinberg*, 2012 WL 5342509 (W.D. Wash. Oct. 29, 2012), at page 26.

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

U.S. ex rel. Sanders v. Allison Engine Co., Inc., 2012 WL 5373532 (6th Cir. Nov. 2, 2012)

Two relators filed a *qui tam* suit in the U.S. District Court for the Southern District of Ohio, alleging that several defense contractors and subcontractors defrauded the U.S. Navy. Among the issues decided by the court was whether the relators were required to plead that false claims were presented to the government to maintain their claim under the False Claims Act alleging that the defendant made or used false statements. The issue was appealed to the U.S. Court of Appeals for the Sixth Circuit, and eventually was decided by the U.S. Supreme Court, which remanded the matter and held that FCA liability required the presentment of a claim to the government.

Concurrent with the Supreme Court's ruling, Congress enacted the Fraud Enforcement and Recovery Act of 2009 (FERA) which included an amendment to the FCA that made clear that presentment was not an element of liability for making or using false statements in violation of the FCA. The amendment included a retroactivity provision that stated that the amendment "shall take effect as if enacted [two days before the Supreme Court issued its opinion], and apply to all claims under the False Claims Act . . . that are pending on or after that date."

The defendants moved the district court to preclude retroactive application of the amendment or to declare the amendment unconstitutional, arguing that the amendment only applied to "claims" submitted to the government that were pending at the time the Supreme Court issued its opinion or to future claims submitted to the government—but not to claims (including their own) that were submitted to the government and were no longer still pending. They further argued that retroactive application of the amendment would amount to an unconstitutional violation of their Fifth Amendment due process rights and the *Ex Post Facto* Clause.

The relators argued that the amendment's use of the word "claims" refers to causes of action filed under the False Claims Act, and thus, applied to the present case. They further argued that the amendments were constitutional, and the United States filed a statement of interest in support of the relators' positions. The district court, noting that FERA amended other sections of the False Claims Act and specifically used the word "cases" in the applicable retroactivity provision, granted the defendants' motion to preclude retroactive application of the FERA amendment. The question was subsequently certified to the Sixth Circuit for interlocutory appeal. The United States also moved to intervene in the action.

Holding: The Sixth Circuit reversed and remanded the district court decision, finding that the FERA amendment regarding the FCA's presentment requirement applies retroactively to FCA *cases* that were pending at the time the Supreme Court issued its decision, or to cases that were filed since that time.

The circuit court considered the district court's ruling and noted that although the FERA amendments to the FCA include retroactivity provisions that reference pending "claims" as well as pending "cases," the use of "claims" is not dispositive, since the amendment that referenced "claims" was drafted by a Senate committee, while the amendment that referenced "cases" was drafted by a House committee. The circuit court also rejected the contention that since the FCA defines the word "claim," then the FCA's definition of claim—a request or demand for government money or property—must have been intended when the retroactivity provision to the presentment amendment was drafted. Instead, the court agreed with the relators and the government that since the retroactivity provision referred to "claims under the False Claims Act," the FCA's definition of claim could not have been intended, since demands for payment are not made "under the False Claims Act."

The court also observed that on multiple occasions, the FCA itself generically uses the word "claim" to mean a civil action. Moreover, the court found that the rulings of the other circuit courts that have addressed the retroactivity question were of limited assistance, as the Second and Seventh Circuits held that "claims" means causes of action; the Ninth and Eleventh Circuits held that "claims" means demands for payment; and the Fifth Circuit "appears to have taken both positions." Similarly, the legislative history used "claims" to refer to demands for payment as well as to causes of action, which offered the circuit court little guidance. Ultimately, the Sixth Circuit held that "claim," as used in the retroactivity provision at issue, refers to a civil action.

The circuit court then considered the defendants' argument that retroactive application of the FERA amendment would be unconstitutional. The court first declared that "[t]he *Ex Post Facto* Clause is only implicated by criminal statutes or acts intended to punish." Next, the court concluded that the FCA is not intended to impose punishment, observing that the statute makes references to "civil penalties" and "civil actions" that are subject to the Federal Rules of Civil Procedure, and includes a preponderance of the evidence burden of proof standard, and that the legislative history reveals Congress' intent to use the FCA to make the government whole for fraud losses. The court continued its analysis by determining whether the FCA is punitive in purpose or effect. The court applied the non-exhaustive factors announced by the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S.

144 (1963) and stated that "some aspects of the FCA weigh in favor of finding a punitive purpose or effect, while others weigh in favor of finding a civil purpose or effect," but "viewed as a whole, the *Mendoza-Martinez* factors fail to demonstrate a sufficiently punitive purpose or effect" to make the *Ex Post Facto* Clause applicable. In addition, the court found that retroactive application of the FERA amendment would not violate the defendants' due process rights, since such application is justified by a rational legislative purpose, namely, correcting what Congress believed were erroneous interpretations of the FCA.

Based on its findings, the Sixth Circuit reversed the district court's judgment and remanded the matter for further proceedings.

B. Bankruptcy Proceedings

See *U.S. ex rel. Bibby v. Wells Fargo Bank, N.A.*, 2012 WL 5866137 (N.D. Ga. Nov. 19, 2012), at page 34.

See *Malthotra v. Steinberg*, 2012 WL 5497978 (W.D. Wash. Nov. 13, 2012), at page 18.

C. Calculating Damages and Civil Penalties

See *U.S. ex rel. Wall v. Circle C Constr., LLC*, 2012 WL 4477367 (6th Cir. Oct. 1, 2012), at page 52.

D. Civil Investigative Demands

U.S. v. Kernan Hosp., 2012 WL 5879133 (D. Md. Nov. 20, 2012)

The United States filed an action under the False Claims Act, alleging that a hospital knowingly defrauded the Medicare, Medicaid, and Tricare programs by systematically "upcoding" reimbursement claims. The hospital successfully moved to dismiss the government's complaint for failure to plead the alleged fraud with particularity, as required by Rule (b) of the Federal Rules of Civil Procedure. The government then issued a civil investigative demand (CID) to the hospital pursuant to the False Claims Act, contending that the demand was necessary to cure the deficiencies in its complaint.

The defendant hospital moved to set aside the government's civil investigative demand. The hospital noted that before filing its lawsuit, the government conducted a three-year investigation, which included subpoenas and other requests by the government for the production of the defendant's documents and a CID to depose one of the defendant's directors. The defendant argued that the government's present CID should be set aside, since it seeks the same information that was included in the government's earlier subpoena and CID. In addition, the defendant argued that the False Claims Act only authorizes the government to issue CIDs "before commencing a civil proceeding," and that the government's second CID improperly related to a proceeding that had already been commenced. The government countered that the False Claims Act only deprives the government from issuing a CID in a pending suit, and since the government's original complaint was dismissed, the parties were in the same position they were in before the suit and the government therefore had the authority to issue a new CID in pursuit of evidence to overcome its earlier pleading deficiencies.

Holding: The U.S. District Court for the District of Maryland granted the defendant's motion and set aside the government's civil investigative demand.

Civil Investigative Demands

The court found that the D.C. circuit court had previously held that the filing of a *qui tam* case did not preclude the government from issuing a CID to the defendant. But the court could find no authority with respect to the government's ability to issue a CID after having already initiated an investigation into potential FCA violations, filing a lawsuit under the FCA on the basis of that investigation, and having that lawsuit dismissed without prejudice. Ultimately, the court rejected the government's argument, finding that the plain language of the FCA—while not dispositive—weighed against the government's view. In addition, the court noted that the legislative history of the FCA's CID provision references the government's "inadequate investigative tools" and the need for CIDs to uncover "information that might have turned up through presuit investigation if the tools were available." The court concluded that "when Congress circumscribed the period during which the Government could issue a civil investigative demand to the prefiling stage, it did not mean to provide the Government with that power any time a suit was not pending. At the prefiling stage, the Government is able to gather the information it needs 'to determine whether enough evidence existed to warrant the expense of filing suit.' After the suit has been filed, the civil investigative demand no longer serves this purpose." The court noted that before deciding to file its lawsuit, the government conducted a lengthy investigation, targeting specifically-identified medical records and resulting in the production of more than 19,000 documents from the defendant. The court held that the government had a sufficient opportunity to gather information to support its allegations and was granted leave to amend its complaint to satisfy Rule 9(b)'s requirements. Moreover, the court noted that the government could file a breach of contract action if its information could not support a fraud claim. But the court refused to allow the government to issue another CID to the defendant regarding claims that had already been filed and dismissed, and granted the defendant's motion to set aside the government's CID.

E. False Certifications of Compliance

U.S. ex rel. Miller v. Weston Educ., Inc., 2012 WL 6190307 (W.D. Mo. Dec. 12, 2012)

Two relators brought a *qui tam* action against an educational institution, alleging that the defendant made fraudulent representations to the government regarding its compliance with various statutes and regulations in order to receive financial aid funds. In addition, the relators each filed claims against the defendant under the False Claims Act's anti-retaliation provision, in addition to state law employment claims. The defendant moved to dismiss all of the relators' claims, arguing that the relators failed to state a claim under the False Claims Act and failed to plead their claims in accordance with the Federal Rules of Civil Procedure.

Holding: The U.S. District Court for the Western District of Missouri denied the defendant's motion.

Fraud Claims

The defendant argued that the relators' fraud claims should be dismissed because the regulatory violations alleged by the relators cannot give rise to FCA liability. The court declared that "regulatory noncompliance may give rise to FCA liability, but only if the noncompliance at issue was material to the government's payment decision." The court then considered each of the relators' contentions regarding the defendant's alleged regulatory non-compliance.

First, the court examined the relators' claim that the defendant falsely certified to the government that it was eligible to receive federal financial aid funds. The relators argued that eligibility is based on accreditation or state authorization, and that since the defendant knew that it did not meet the criteria for accreditation or state authorization, its representations to the federal government that it was eligible to receive funds was false. The court rejected this theory of liability, noting that the relators never alleged that the defendant lost its accreditation or state authorization. Since the relators failed to demonstrate that the defendant was not eligible to receive federal financial aid funds—regardless of whether or not the defendant should have been eligible—the defendant's certifications of eligibility were not false. The court then considered the relators' second theory of liability, namely, that when the defendant entered into its agreement with the government to participate in the financial aid program, it knew that it had no intention of complying with the terms of the agreement. Thus, the relators' argued, the defendant's promise to perform its end of the agreement was a false statement for FCA purposes. The court agreed that this allegation stated a claim under the False Claims Act, noting that the relators alleged that the defendant's misconduct predated the execution of the agreement, which supported the relators' contention that the defendant did not intend to comply with the agreement.

The court then turned to the relators' third argument—that the defendant's alleged false statements contained in the participation agreement were material to the government, since the defendant would not have been eligible to receive any federal government funds unless it entered into the participation agreement. The court agreed, and observed that execution of the participation agreement was not merely a condition of participation in the government program, but was also a condition of payment, stating that "execution of the [agreement] would be a meaningless gesture if compliance with its terms was never material to the government's payment decision." The court also rejected the defendant's argument that it was not liable under the False Claims Act because it never certified its compliance with the terms of the participation agreement when it made specific requests for federal funds, and thus, it did not submit false claims. The court observed that the participation agreement governed every request for funds made by the defendant and that the defendant's express promise to comply with applicable statutes and regulations was "an absolute prerequisite to initial or continued participation" in the program. The court also noted that eligibility for the federal funds at issue automatically terminates upon expiration of the agreement. As a result, the court held that "it is reasonable to infer that the government paid [the defendant] based on the assumption that [the defendant] was fulfilling, or at least not intentionally violating, the promises made in the [agreement]." The court ultimately held that the relators' alleged an "implied false certification" theory of liability—whereby "a party agreed to comply with a statute or regulation and that obligation is implicated when the party submits a claim for payment, even though the express certification of compliance is not required for each individual claim"—stated a claim under the FCA.

The court also held that the relators' pled their fraud claims with particularity, as required by Rule 9(b) of the Federal Rules of Civil Procedure. The court noted that the complaint provided a "detailed account" of how the fraud scheme was alleged to have been executed, including specific allegations about the defendant's manipulation and falsification of records and discussions of this and other improper practices by high-ranking administrators. Although the defendants tried to introduce facts to dispute the relators' allegations, the court held that it was premature to consider such information on a motion to dismiss. The court also made clear that since the relators' fraud allegations were based on the defendant's alleged false statements in executing the participation agreement and the government's reliance on those statements when disbursing financial aid funds, the relators were not required to identify specific false claims for payment that the defendant submitted to the government. Consequently, the court held that the relators' fraud allegations satisfied Rule 9(b).

Retaliation Claims

The court rejected the defendant's argument that the relators' retaliation claims did not satisfy Rule 8's pleading requirements. The defendant contended that the relator's retaliation claims amounted to nothing more than complaints about being criticized and feeling stressed. The court found that while the relators did allege these things, their complaint also included allegations that after trying to expose and prevent the defendant's fraud, they were excluded from meetings that had previously been mandatory, had their work transferred to others, were denied promotions, forced resignation, and terminated. In addition, the complaint identified specific individuals who were involved in the alleged retaliation. The court held that the relator's allegations of retaliation satisfied Rule 8's notice pleading requirement.

The court also held that the relators could maintain their state law employment claims, finding that those claims were not preempted by the federal claims. The court held that the two statutory schemes "seek to vindicate fundamentally different rights," noting that the state law claims are not premised on alleged FCA violations, but extend to the relators' efforts to prevent other violations of federal and state law as well. The court also stated that public policy weighed in favor of allowing the relators to maintain both federal and state employment claims.

The defendant's motion to dismiss was denied.

U.S. ex rel. Ge v. Takeda Pharm. Co. Ltd., 2012 WL 5398564 (D. Mass. Nov. 1, 2012)

A relator filed two *qui tam* actions alleging that a group of affiliated pharmaceutical companies failed to report adverse events associated with several of its drugs to the Food and Drug Administration, as required by law. The actions were brought under the federal False Claims Act and twenty four state false claims act laws, and alleged frauds against Medicare, Medicaid, Tricare, and other federally-funded government healthcare programs. The defendants moved to dismiss the relator's complaints for failure to state a claim and for failure to plead the alleged fraud with particularity.

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

The court determined that while the relator alleged facts that would demonstrate that the defendants committed a "fraud-on-the-FDA" by intentionally failing to report adverse events as required, she failed to describe any specific false claims to the government that arose from the defendants' alleged conduct. The court noted that the relator provided aggregate federal expenditures regarding one of the drugs at issue, but held that this information was insufficient to cure the pleading deficiencies, since the relator failed to include any information regarding the payees for these expenditures. Moreover, the relator did not detail the time periods during which the alleged fraud occurred, failed to describe the locations and amounts of any allegedly false claims, and did not specify which government programs were implicated by any such claims—notably, the relator did not describe any allegedly false claims paid by state government programs. The relator contended that all claims during the relevant years that were submitted to the government for the drugs at issue were false, since the defendants failed to properly report adverse events associated with the drugs. The court rejected that argument, since the rela-

tor failed to show that the FDA would have withdrawn its approval for the drugs if the defendants had properly reported the adverse events, and since the relator could not show that claims filed before adverse events were discovered were false. Consequently, the court held that the relators' complaints failed to plead the alleged fraud with particularity, and would be dismissed pursuant to Federal Rule of Civil Procedure 9(b).

In addition, the court held that the relator's complaints failed to state a claim under the false claims act laws. According to the court, the relator argued that the defendants caused claims for its drugs to be submitted to federal and state healthcare programs, and that those claims were impliedly false because the defendants' compliance with the FDA's reporting requirements was an implied condition of continued FDA approval for the defendants' drugs—since the defendants failed to satisfy this condition, its drugs would not have received continuing FDA approval, and therefore, claims submitted to the government for those drugs were false. The court, though, found that the relator could not support her assertion that compliance with the FDA reporting requirements was a "material precondition of payment under the healthcare programs. Instead, the court concluded that the FDA is afforded wide discretion when dealing with drug manufacturers that fail to comply with reporting requirements, and that withdrawing drug approval is the harshest of possible sanctions. Since the relator could not establish that compliance with the reporting requirements was a condition of payment for any allegedly false claims, the court dismissed her complaints for failure to state a claim.

The court further determined that the state false claims act laws at issue did not differ in any material respect from the federal statute, and held that since the relator failed to state a claim under the federal law, she also failed to state a claim under any of the state laws. As a result, all of the relator's claims brought under state false claims act statutes were dismissed. The court noted that even if a state healthcare regime provided that compliance with the FDA reporting requirements was a condition of payment, the relator's complaints would still be deficient, as they failed to adequately allege the fraud with particularity.

See *U.S. ex rel. Daugherty v. Bostwick Labs.*, 2012 6593804 (S.D. Ohio Dec. 18, 2012), at page 3.

See *U.S. ex rel. Stone v. Omnicare, Inc.*, 2012 WL 5877544 (N.D. Ill. Nov. 20, 2012), at page 45.

See *U.S. ex rel. Bibby v. Wells Fargo Bank, N.A.*, 2012 WL 5866137 (N.D. Ga. Nov. 19, 2012), at page 34.

F. Vicarious Liability

See *U.S. ex rel. Daugherty v. Bostwick Labs.*, 2012 6593804 (S.D. Ohio Dec. 18, 2012), at page 3.

See *U.S. ex rel. Klein v. Omeros Corp.*, 2012 WL 4874031 (W.D. Wash. Oct. 15, 2012), at page 27.

Judgments & Settlements

OCTOBER 1, 2012–DECEMBER 31, 2012

Victory Pharma (S.D. Cal. Dec. 27, 2012)

Victory Pharma, a specialty pharmaceutical company headquartered in San Diego, executed a deferred prosecution agreement and paid a criminal forfeiture of $1.4 million to resolve allegations of federal Anti-Kickback Statute violations. In addition the company paid $9,938,310 to resolve False Claims Act allegations, bringing the total payment to $11.4 million. Victory Pharma was alleged to have paid kickbacks to physicians to induce them to write prescriptions—including prescriptions for patients covered by Medicare and other federal health programs—for Victory Pharma drugs Naprelan, Xodol, Fexmid, and Dolgic. The alleged kickbacks included dinners, entertainment tickets, paid vacations, assistance with personal expenses including home payments, and spa outings. Chad Miller, the whistleblower who brought the FCA suit, was a former sales representative for Victory Pharma and will receive $1.7 million for his role in the government's recovery.

Education Holdings 1 (S.D.N.Y. Dec. 20, 2012)

Education Holdings 1, which had been doing business as The Princeton Review until May 2012, has agreed to pay the federal government up to $10 million in damages and penalties under the False Claims Act. While doing business as The Princeton Review, Education Holdings 1 fabricated student attendance records in order to bill the government for tutoring services that were never provided. According to the settlement, from 2002 to 2010, Education Holdings 1 participated in a federally-funded program to provide after-school tutoring to underperforming schools in New York City. During this time, the company was paid a fixed amount per hour for each student tutored. Site managers at these after-school programs falsified entries on student attendance forms and made it appear as if more students had attended the class. The *qui tam* suit was filed by relator Dana Smith, who was represented by TAFEF member Tim McInnis of McInnis Law.

Crown Roofing Services (S.D. Tex. Dec. 21, 2012)

Crown Roofing Services will pay $3 million to settle allegations that it made improper kickback payments to National Aeronautics and Space Administration (NASA) contracting officers in order to secure roofing contracts at NASA's Johnson Space Center in 2005. Specifically, in order to obtain these contracts, Crown Roofing subcontracted part of the work to an engineering firm owned by one of the NASA subcontractors. The whistleblowers, Bobby Garrison and Rudolfo Goana, were ex-employees of Crown Roofing and will jointly receive $540,000 of the government's recovery. Garrison and Goana were represented by TAFEF members Vincent McKnight and Altomease Kennedy of McKnight & Kennedy, LLC.

Sanofi-Aventis US Inc. and Sanofi-Aventis U.S. LLC (D. Mass. Dec. 19, 2012)

Sanofi-Aventis U.S. Inc. and Sanofi-Aventis U.S. LLC, subsidiaries of France-based drug manufacturer Sanofi, have agreed to pay $109 million to settle claims that they violated the False Claims Act by providing kickbacks in the form of free units of the knee-injection drug Hyalgan in order to induce physicians to purchase and prescribe the product instead of a lower-priced competitor. The companies also allegedly violated the False Claims Act by knowingly submitting false average sales price reports for Hyalgan that failed to account for free units that had been distributed. These reports were used to set reimbursement rates and allegedly caused government programs to pay inflated amounts for Hyalgan and other drugs. The settlement resolves a lawsuit filed by whistleblower Mark Giddarie, a former Sanofi sales representative. Giddarie will receive a reward of $18.5 million of the government's recovery.

Toyo Ink SC Holdings Co. Ltd. (W.D.N.C. Dec. 19, 2012)

Japan-based Toyo Ink SC Holdings Co. Ltd. agreed to pay the federal government $45 million to resolve allegations that it violated the False Claims Act by falsifying documents presented to the US Customs and Border Protection and by knowingly misrepresenting the country of origin when importing the violet colorant, CVP-23, in order to avoid paying applicable import duties. Although the imports originated in China and India—countries that are subject to antidumping and countervailing duties—Toyo Ink falsely represented Mexico and Japan as the countries of origin to avoid paying those duties. The settlement resolves allegations brought in a whistleblower lawsuit filed by John Dickson, the president of a domestic producer of CVP-23. Mr. Dickson will receive more than $7,875,000 as his share of the government's recovery.

Structured Employment Economic Development Corporation (S.D.N.Y. Dec. 19, 2012)

The Structured Employment Economic Development Corporation (SEEDCO) will pay $1.7 million to the federal government for falsely claiming to place 1,400 New York City residents in jobs, while receiving millions of dollars in federal grants. SEEDCO allegedly claimed credit for job placements that never existed and submitted false reports of each placement to New York City. After receiving federal funds for each of the fraudulent job placements, SEEDCO then used its falsified reports to renew its contracts with New York City. As part of the settlement agreement, SEEDCO must implement a compliance plan with the purpose of preventing fraud, a new Code of Conduct, and a Whistleblower Policy. The allegations against the company were brought by whistleblower Bill Harper, who was the former Deputy Director of one of SEEDCO's centers. Harper was represented by TAFEF members Robert Sadowski and Raphael Katz of Diamond McCarthy, LLP.

Amgen (E.D.N.Y. Dec. 19, 2012)

Biotech company Amgen has agreed to pay a combined $618 million to resolve allegations that it submitted false claims to Medicare, Medicaid, and other government insurance programs by promoting the drugs Aranesp, Enbrel, Neulasta for off-label uses and dosages not approved by the FDA. Allegedly, Amgen also offered kickbacks to a variety of individuals to attempt to influence health care providers to choose its products, and engaged in false price reporting for several of its drugs. $587.2 million of the settlement proceeds will go to the United States, while $24.8 million will go to state governments. Former Amgen employee Kassie Westmoreland was the relator in the False Claims Act suit that this settlement resolved. She was represented by TAFEF members Bob Thomas of Thomas & Associates and Suzanne Durrell of the Durrell Law Office. Another whistleblower in the suit, Jill Osiecki, was a former marketing representative for the company. She was represented by TAFEF members Brian Kenney and Tavy Deming of Kenney & McCafferty, P.C.

Pfizer, Inc. (D. Mass. Dec. 12, 2012)

Pfizer, Inc. has agreed to pay the federal government $55 million to resolve claims that its subsidiary, Wyeth, which Pfizer bought in 2009, introduced and promoted the gastroesophegeal reflex disease drug Protonix for unapproved uses from 2000 to 2001. Pfizer has also agreed to pay a total of $49.2 to 33 states to settle allegations that it used deceptive practices in the marketing of two other drugs: Lyrica, a neuropathic pain treatment which Pfizer unlawfully marketed as a treatment for migraines and chronic pain; and Zyvox, an antibiotic.

APTx Vehicle Systems (D. Mass. Dec. 10, 2012)

APTx Vehicle Systems, a British contractor, pled guilty to conspiracy to defraud the United States, and entered into a settlement agreement with the federal government that includes a payment of a $1 million criminal fine and an additional $2 million to settle civil claims that the company submitted documents verifying shipments of 51 vehicles for the Iraqi Police Authority, when in fact none of the vehicles had been built, were in the process of being transported to Iraq or were even owned by APTx. The False Claims Act suit was filed by whistleblower Ian Rycroft, who had been retained by another contractor in the case to oversee the transport of the vehicles. Rycroft, who will receive $540,000 as his share of the government's recovery, was represented by TAFEF member Victor Kubli of the Grayson Law Center, P.C.

Healthpoint, Ltd. (D. Mass. Dec. 6, 2012)

Healthpoint, Ltd. a subsidiary of DFB Pharmaceuticals, has agreed to pay up to $48 million to settle claims brought in a *qui tam* suit that alleged that the company submitted false claims to Medicare and Medicaid for Xenaderm, a drug created to treat nursing home patients' bed sores, but which had not received FDA approval and thus, was ineligible for reimbursement from either healthcare program. The United States intervened in the whistleblower case and filed its own complaint. Under the terms of the settlement agreement, Healthpoint will pay $28 million to the federal government, plus an additional $20 million if there is a change in ownership in either Healthpoint or DTB Pharmaceuticals in the next three years. The relator in the case, Constance Conrad, was represented by TAFEF members Kenneth Nolan, Marcella Auerbach, and Joseph "Jeb" White of Nolan & Auerbach, P.A.

Metro North Newspapers, Inc. and Mile High Newspapers (D. Colo. Dec. 3, 2012)

Colorado-based Metro North Newspapers, Inc. and Mile High Newspapers agreed to pay $81,400 to the federal government to settle allegations that they violated the False Claims Act by knowingly submitting false information to the United States Postal Service (USPS) in order to obtain reduced mailing rates. Under USPS regulations, publications are only eligible for reduced "periodical rates" if they have at least 50% of their distribution to paid subscribers. The newspapers took advantage of these reduced rates and paid less than first-class mailing rates, even though the majority of their recipients were allegedly unpaid subscribers. These allegations were included in a *qui tam* lawsuit filed by whistleblower Tom Lucas, a former Mile High employee. Lucas was represented by TAFEF members Monica Navarro of Vezina Law, PLC and Mercedes Varasteh Dordeski of Frank Haron Weiner.

Baylor University Medical Center, Baylor Health Care System, and HealthTexas Provider Network (N.D. Tex. Nov. 27, 2012)

Baylor University Medical Center, Baylor Health Care System, and HealthTexas Provider Network have agreed to jointly pay the United States over $900,000 to settle allegations that they submitted false claims to Medicare, TRICARE, and the Federal Employees Health Benefit Program for radiation oncology services from 2006 through 2010. During that time, the companies allegedly double-billed Medicare for a variety of procedures affiliated with radiation treatment plans and billed for high reimbursement oncology services when a less expensive service should have been billed instead. The whistleblowers who brought the *qui tam* lawsuit against the companies, Dr. Brian Berger and Janice Delp, were former employees of Baylor University Medical Center. Berger and Delp were represented by TAFEF members Sarah Frazier, Rachel L. Grier, Stephanie A. Gutheinz, and Joe Androphy, of Berg & Androphy.

Harmony Hospice Care, Inc. (D.S.C. Nov. 20, 2012)

Harmony Hospice Care, Inc. and its chief executive officer Daniel J. Burton have agreed to pay the United States $1.286 million to resolve claims that the company submitted false claims to Medicare for patients who were not eligible for hospice care at its hospice facilities, usually because the patients had been given a terminal prognosis of more than six months. Under the settlement, Burton is individually responsible for $200,000 of the $1.286 million. Harmony Hospice Care and Burton also agreed to enter into a corporate integrity agreement with the Office of Inspector General, Department of Health and Human Services. This settlement resolves a *qui tam* suit that was originally filed by two former Harmony employees, Mona Singletary and Lynda Fulton. These relators will jointly receive a $244,000 share of the government's recovery.

Technological Research and Development Authority of Florida and the Melbourne Airport Authority (S.D. Miss. Nov. 20, 2012)

The Technological Research and Development Authority (TRDA) of Florida has agreed to pay $15 million to the federal government to resolve allegations that it violated the False Claims Act in connection with the use of grants from both NASA and the Economic Development Administration (EDA) of the Department of Commerce. TRDA owns and operates facilities meant to help small businesses by providing low-rent office space and development assistance. However, TRDA allegedly used grant funds to construct an office building at the Melbourne Airport for use as its own headquarters, which was outside the scope of the NASA and EDA grants awarded to both TRDA and the Melbourne Airport Authority. The Melbourne Airport Authority has also agreed to pay the United States $4 million to resolve its alleged False Claims Act liability based on the same events.

Five Banks: Countrywide Home Loans, Inc.; PNC Bank; First Tennessee Bank; SunTrust Mortgage; and CitiMortgage (N.D. Ga. Nov. 19, 2012)

A group of five banks agreed to pay the United States a combined $161.7 million to settle allegations that they violated the False Claims Act by illegally charging hidden fees on Veterans Administration-backed refinanced home loans to veterans. Pursuant to the settlement agreement, Countrywide Home Loans, Inc. will pay $45 million, PNC Bank will pay $38 million, First Tennessee Bank will pay $16 million, SunTrust Mortgage will pay $10.2 million, and CitiMortgage will pay $7.5 million. The relators in the case, Victor Bibby and Brian Donnelly, were represented by James E. Butler, Jr. of Butler Wooten & Fryhofer, LLP, and by TAFEF members Marlan Wilbanks of Wilbanks & Bridges LLP, and a team of TAFEF members from Phillips & Cohen LLP. Mortgage Investors Corporation and Wells Fargo still remain as defendants in the relators' *qui tam* case.

Donald Hallmark Sr., Donald Hallmark Jr., and Hallmark Meat Packing Co. (E.D. Cal. Nov. 16, 2012)

Donald Hallmark Sr. and Donald Hallmark Jr., two of the owners of the now-defunct Hallmark Meat Packing Co., have agreed to pay the federal government over $300,000 over five years to settle a lawsuit brought by the Humane Society of the United States that alleged fraud against the government. In 2008, the Human Society recorded an undercover video showing Hallmark workers using electric cattle prods, fork lifts, and high-pressure water hoses to move cattle, resulting in a recall of 143 million pounds of beef. Because a third of that beef had gone to United States public schools, the recall cost the government an estimated $150 million, and violated a requirement that school lunch contractors with the federal government treat animals humanely. The Hallmarks also agreed to a symbolic final judgment of $497 million, as their company declared bankruptcy after the 2008 recall.

Freeman Health System (W.D. Mo. Nov. 5, 2012)

Freeman Health System, a Joplin, Missouri healthcare provider and hospital system, agreed to pay the United States $9.3 million to settle allegations that it violated the False Claims Act and the Stark Law by knowingly billing Medicare for services referred by physicians who had a financial relationship with the hospital. Allegedly, Freeman Health System provided incentive pay to 70 different physicians employed at its clinics, based on the revenue generated by the physicians' referrals for specific types of diagnostic testing and other services performed at each clinic. According to the United States, this financial arrangement created an incentive to the physicians to refer patients to the clinics. Freeman Health System stated that a 2009 internal review revealed that the hospital system had inadvertently made errors in the way it structured its physician-compensation agreements and voluntarily disclosed its noncompliance with the law.

Orthofix International NV and Blackstone Medical, Inc. (D. Mass. Nov. 2, 2012)

Orthofix International NV has agreed to pay the government $30 million to settle claims that its subsidiary, Blackstone Medical, Inc., violated the False Claims Act by paying illegal kickbacks, including sham research grants, travel, and entertainment, to spinal surgeons in order to persuade them to use the company's spinal implants and other surgery products. The suit was originally filed by whistleblower Susan Hutcheson, who will receive $8 million as her share of the government's recovery. Hutcheson was represented by TAFEF members Jennifer Vekamp and Rick Morgan of Morgan Verkamp LLC. As part of the settlement, Orthofix also agreed to enter into a corporate integrity agreement with the Office of Inspector General of the Department of Health and Human Services.

Novartis (W.D. Tex. Oct. 30, 2012)

Novartis has agreed to pay a total of $19.9 million to resolve allegations that it violated the federal False Claims Act and the equivalent Texas state law by marketing its topical skin cream product—which had known harmful side effects—for off-label uses. Allegedly, Novartis attempted to induce physicians to prescribe the drug, Elidel, to children under two years of age for purposes that had not been approved by the FDA, which caused the Texas Medicaid program to overpay for Elidel prescriptions. Under the terms of the settlement agreement, the State of Texas will receive $6,638,250. The whistleblower who first brought these FCA claims, Donald Galmines, was represented by TAFEF members Jennifer Verkamp and Rick Morgan of Morgan Verkamp LLC.

Boehringer Ingelheim Pharmaceuticals (D. Md. Oct. 25, 2012)

Boehringer Ingelheim Pharmaceuticals agreed to pay the federal government $95 million to settle allegations that it improperly promoted the stroke-prevention drug, Aggrenox; the chronic pulmonary disease drugs, Atrovent and Combivent; and the hypertension drug, Micardis. Besides promoting these drugs to treat diseases other than those for which the drugs were designed, Boehringer also allegedly promoted the sale of Atrovent and Combivent at doses that exceeded those covered by federal health care programs; knowingly made unsubstantiated claims concerning the drugs' efficacy; and paid kickbacks to healthcare professionals in return for prescribing the drugs. Pursuant to the settlement agreement, the federal government will receive $78,455,048, and state Medicaid programs will receive $16,544,952. Boehringer will also enter into a corporate integrity agreement as part of the settlement. The *qui tam* lawsuit against Boehringer was filed by relator Robert Heiden, who will receive more than $17 million as his reward. Heiden was represented by TAFEF members Colette Matzzie and Peter Chatfield of Phillips & Cohen LLP.

Westchester County Health Corporation (S.D.N.Y. Oct. 24, 2012)

Westchester County Health Corporation, doing business under the name Westchester Medical Center (WMC), will pay the government $7 million in civil damages for violating the False Claims Act. WMC, a large public hospital in New York, allegedly repeatedly and knowingly billed Medicaid for outpatient mental health services from August 2001 until June 2010 without having the supporting documentation required by the Medicaid regulations. The case also concerned claims that WMC did not return millions of dollars it received from the Medicaid program, despite knowing that it had been substantially overpaid for years. As part of the settlement, WMC also agreed to pay the State of New York for its share in providing care to Medicaid recipients. The settlement resolves claims brought in a *qui tam* lawsuit filed by a "John Doe" relator, who was represented by TAFEF member Tim McInnis, of McInnis Law.

Weill Cornell Medical College (S.D.N.Y. Oct. 19, 2012)

Weill Cornell Medical College, at Cornell University, agreed to pay the government $1.6 million to settle claims that the school misused federal funds it received from three National Institutes of Health grants for HIV/AIDS research from 2001 to 2003. According to whistleblower Dr. Daniel Feldman, a former Cornell research fellow, the grants provided that a majority of clinical work would be with HIV-positive persons, but in reality, only 3 of the college's 163 patients were in fact HIV-positive.

RxAmerica, LLC (E.D.N.Y. Oct. 15, 2012)

RxAmerica, LLC, a subsidiary of CVS Caremark Corporation, has agreed to pay $5.25 million to the federal government to settle allegations that it made false claims to the Centers for Medicare and Medicaid (CMS). From January, 2007 until December, 2008, RxAmerica allegedly made false submissions to CMS regarding the pricing data of certain generic prescription drugs, resulting in the company receiving payments for these drugs at significantly higher prices than it should have received. The whistleblowers who brought the claims against the company, Max and Jan Hauser, will receive a reward of nearly almost $1 million. The Hausers were represented by TAFEF member Chet Rabon of Rabon Law Firm, PLLC.