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FROM THE EDITOR

"It is the nature of ambition to make men liars and cheats, to hide the truth in their breasts, and show, like jugglers, another thing in their mouths."
–Sallust, Roman historian and politician (86 – c. 35 BC)

It appears that Sallust, writing more than 2000 years ago, may have been correct when he observed that ambition can often lead to lying and cheating; and he might have had reason to know, as history tells us that after being appointed governor of one Julius Caesar's territories, he then plundered the fisc and extorted his way to ill-gotten riches. Regardless of whether or not cheating and stealing are unfortunate by-products of human nature, we see every day that fraud is rampant throughout our society and that frauds against government entities (including Medicare/Medicaid fraud, defense contractor fraud, tax fraud, mortgage fraud, and on and on) are more prevalent and significant now than ever before. Recently, we've seen several multi-BILLION dollar fraud cases brought under the False Claims Act – a number that was unheard of only 5 years ago.

The year 2014 is now upon us (Happy New Year!) and not surprisingly, lying, cheating and fraud still persist. But Federal and State government officials, and whistleblowers and their attorneys will continue to combat fraud and shine a light on the liars, cheats, and thieves who steal from all of us. Taxpayers Against Fraud Education Fund is committed to assist in those efforts by promoting, protecting, and defending whistleblower-initiated fraud-fighting actions, such *qui tam* suits under False Claims Act laws and submissions of information through the IRS, SEC, and CFTC whistleblower programs. And this publication will continue to highlight the trends and outcomes in False Claims Act litigation, in hopes of encouraging more whistleblowers to reveal fraud schemes and recover our stolen tax dollars, while deterring fraudsters from engaging in such schemes as well. I hope you enjoy this issue.

All the best,
Cleveland Lawrence III

RECENT FALSE CLAIMS ACT & *QUI TAM* DECISIONS

October 1, 2013 – December 31, 2013

I. FALSE CLAIMS ACT LIABILITY

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

***U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 2013 WL 6196562 (M.D. Fla. Nov. 26, 2013)**

A relator filed a *qui tam* suit against a hospital and its affiliated staffing company, alleging that the defendants defrauded the Medicare program when the staffing company hired six oncologists and entered into employment agreements with incentive compensation provisions that constituted "illegal remuneration" under the Anti-Kickback Act (AKS). The relator claimed that, due to the AKS violations, the medical center's Medicare claims for the oncologists' services were tainted by the AKS violations, and were therefore false for False Claims Act purposes. The relator had also alleged that the defendants' employment agreements with the oncologists violated the Stark Law. The government intervened in those claims and successfully moved for summary judgment, as the U.S. District Court for the Middle District of Florida agreed that the agreements violated the Stark law and that the defendants' corresponding Medicare claims gave rise to liability under the False Claims Act. With the current motion, the relator moved for partial summary judgment on his AKS allegations.

The defendants opposed the motion, arguing that the agreements satisfied the "Bona Fide Employment Exception" to the AKS. The relator countered that the exception did not apply to the agreements with the oncologists, since those individuals executed employment agreements with the staffing company and not the hospital—and it was the hospital that paid the incentive bonuses after the oncologists were "leased" to the hospital. The court rejected the relator's argument, finding that the staffing company was an instrumentality and alter ego of the hospital, and held that the oncologists were actually employees of the hospital, not the staffing company. As a result, they were "employees" of the hospital and the hospital's Medicare claims for their services were covered by the exception to the illegal remuneration rule. The court also rejected the relator's argument that the bonus payments were made improperly to induce the oncologists to make referrals to the hospital, finding that the evidence the relator relied on did not necessarily demonstrate that the bonuses were in exchange for referrals, as the payments could also have been made simply to keep the oncologists from leaving the hospital for private practice. After reviewing the relevant AKS provisions, the district court held that the exception applied to the agreements with the oncologists. Consequently, the court held that the defendants did not violate the AKS—or the False Claims Act. The relator's summary judgment motion was denied.

- Opinion

***U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 2013 WL 6017329 (M.D. Fla. Nov. 13, 2013)**

A relator filed a *qui tam* suit against a medical center and one of its affiliated companies, alleging that the defendants employed six oncologists. According to the relator, the defendants provided incentive bonuses to the oncologists in exchange for patient referrals, in violation of the Stark's Law prohibition against improper financial relationships. Consequently, the relator alleged, the defendants' claims to the federal healthcare programs for reimbursement for the oncologists' services were false. The United States intervened in the relator's suit, added its own common law claims, and moved for summary judgment. The defendants opposed the motion, arguing that the oncologists' compensation arrangement did not violate the Stark Law and that the plaintiffs failed to offer any evidence that the oncologists actually made referrals to the medical center during the period of the alleged fraud.

The U.S. District Court for the Middle District of Florida denied the government's motion. First, the court analyzed the Stark Law's exceptions—including the "bona fide employment relationship" exception relied on by the defendants—and concluded that none of the exceptions applied. Instead, the court determined that the defendants' incentive compensation plan was based, at least in part, on the number of referrals the oncologists made to the medical center, which violated the Stark Law. The court then addressed the defendants' argument that the plaintiffs failed to show that the oncologists actually made referrals to the medical center, since the Medicare claims forms the government submitted as evidence—which identify "attending" physicians and "operating" physicians—did not necessarily identify the physician who made the referral to the medical center. The court, though, relying on rulings from other courts that held that "physicians identified as attending or operating physicians on Medicare claims forms are referring physicians as a matter of law," found that the plaintiff's evidence was sufficient to demonstrate that the oncologists made patient referrals to the medical center—particularly since the defendants could point to no contrary authority or evidence. As a result, the plaintiffs were able to show that the defendants violated the Stark Law and submitted healthcare claims to the government that were tainted by the Stark Law violations. The court then turned to the plaintiffs' damages assertion. The court held that genuine issues of material fact regarding this issue, since the parties disputed the proper methodology for determining the number of allegedly tainted Medicare claims at issue, and the court could not figure out the extent of the Stark Law violations. Furthermore, the court held that a genuine issue of fact existed regarding whether or not the defendants acted "knowingly."

As a result, the court denied the government's summary judgment motion.

- Opinion

***U.S. ex rel. Bartlett v. Ashcroft*, 2013 WL 5817655 (W.D. Pa. Oct. 29, 2013)**

Two *qui tam* relators filed suit against a group of individuals—primarily doctors—and a healthcare company, alleging violations of the False Claims Act. Specifically, the relators claimed that the defendants defrauded Medicare and Medicaid by submitting false healthcare claims; engaging in illegal kickbacks, remuneration, and referral schemes (in violation of the Anti-Kickback Statute and the Stark law); and submitting fraudulent hospital cost reports among other things. After extensive discovery, the defendants moved for summary judgment on the relators' allegations.

The U.S. District Court for the Western District of Pennsylvania denied the defendants' motion, finding that the defendants failed to comply with applicable local rules, requiring the filing of a concise statement of material facts or an appendix of exhibits; while the relators opposed the defendants' summary judgment motion, they also failed to file a statement of material facts or an appendix. As a result of these omissions, the court held that it could not determine whether a genuine issue of material fact existed, and therefore, could not analyze the pending legal issues. Consequently, the court denied the defendants' motion for summary judgment.

- Opinion

***U.S. ex rel. Drakeford v. Tuomey*, 2013 WL 5503695 (D.S.C. Oct. 2, 2013)**

A relator alleged that a healthcare company violated the False Claims Act by submitting false claims for Medicare and Medicaid reimbursements; the claims were allegedly false because they were the product of the defendant's improper financial relationships with physicians, in violation of the Stark Law. The United States joined the relator's suit and added its own common law claims. Eventually, a jury returned a verdict against the defendant on the FCA claims, finding that the company had violated the Stark Law and that, as a result, more than 20,000 of the defendant's healthcare reimbursement claims were false. The parties then filed various post-trial motions, including the defendant's motion for judgment as a matter of law or in the alternative, for a new trial; and the government's motion for damages and penalties under the FCA.

The U.S. District Court for the District of South Carolina denied the defendant's motion and granted the government's motion.

The court first noted that motions for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) follow the same standard as motions for summary judgment filed under Rule 56. Thus, courts will only grant a judgment as a matter of law if, after viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in favor of that party, it determines that a reasonable jury could only reach a decision in favor of the moving party. The court then held that the defendant failed to meet the Rule 50(b) standard, finding that the evidence presented by the government was sufficient to allow a reasonable jury to find that the defendant (1) entered into prohibited financial relationships with physicians—in violation of the Stark Law; (2) did not rely on the advice of counsel—and thus, could not negate the FCA's scienter requirement—and instead disregarded outside counsel's advice regarding "red flags" with the defendant's physician contracts and then terminated the attorney's representation and directed him not to prepare a written opinion; (3) not only submitted numerous false claims for which civil penalties would be imposed, but also caused damages to the government—notwithstanding the fact that the services billed for were actually provided—since the applicable healthcare regulations make clear that claims tainted by Stark Law violations are not reimbursable and since "[t]he court is aware of no exception or qualification that the amount of damages can be mitigated by the value of the medical services."

Similarly, the court denied the defendant's motion for a new trial, pursuant to Rule 59 (a). In addition to again rejecting the arguments addressed above, the court held that the defendant was not entitled to a new trial based on its argument that evidence presented by one of the government's experts to establish the alleged improper financial relationships was unreliable and inaccurate data. The court noted that the defendant was free to attack the reliability of the data at trial, but chose not to do so, instead, denying the applicability of the Stark Law altogether. The court refused to afford the defendant a new trial to challenge the government with respect to the underlying data. Also, the court rejected the defendant's argument that it was entitled to a new trial on damages, since the jury did not determine which of its more than 20,000 healthcare reimbursement claims were tainted by Stark Law violations. Again, the court concluded that the defendant had the right to offer its own alternate damages calculations, but chose not to do so. In addition, the court noted that the defendant "thoroughly" cross-examined the government's damages expert and challenged his conclusions, and that the jury reasonably decided that the government's expert was credible and adopted his damages calculation. Finally, based on the above findings and conclusions, the court held that no new trial was warranted to prevent a miscarriage of justice, because the jury's verdict and the amount awarded were reasonable and not against the clear weight of the evidence.

The defendant's motions were denied.

The court then turned to the government's motion to enter judgment for civil penalties and damages. Specifically, the government sought the minimum civil penalty ($5500) for each of the defendant's false claims (totaling nearly $120 million), plus three times the damages included in the jury's verdict (totaling about $118 million). Altogether, the government sought more than $237 million from the defendant. In opposition to that motion, the defendant raised many of the same arguments it had raised in its Rule 50(b) and 59(a) motions. The court summarily rejected those arguments. The defendant also argued that the government's demand for civil penalties exceeded the "excessive fines" clause of the Eight Amendment to the U.S. Constitution. The court disagreed, finding that it could not determine that the civil penalties sought were grossly disproportional to the gravity of the defendant's offense, which, according to the court, the jury concluded "calls into question the efficacy of administering the Medicaid and Medicare programs and promotes self-interest to the detriment of federal taxpayers."

The court granted the government's motion and entered judgment under the FCA in the amount of $237,454,195, plus interest.

- Second Amended Complaint-in-Intervention
- Defendant's Motion for Judgment as a Matter of Law or for New Trial
- Relator's Response in Opposition to Defendant's Motion

- [Defendant's Reply in Support of Motion]
- [Opinion]

See *Thompson v. Lifepoint Hosps., Inc.*, 2013 WL 5970640 (W.D. La. Nov. 8, 2013).

See *U.S. ex rel. Grenadyor v. Ukranian Vill. Pharmacy, Inc.*, 2013 WL 6009261 (N.D. Ill. Nov. 7, 2013).

See *U.S. ex rel. Antoon v. Cleveland Clinic Found.*, 2013 WL 5657597 (S.D. Ohio Oct. 16, 2013).

See *U.S. ex rel. Barker v. Columbus Reg. Healthcare Sys., Inc.*, 2013 WL 5550430 (M.D. Ga. Oct. 9, 2013).

B. What Constitutes a False Claim

See *U.S. ex rel. Stephenson v. Archer W. Contractors, LLC*, 2013 WL 6225221 (5th Cir. Dec. 2, 2013).

II. JURISDICTIONAL ISSUES

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

See *U.S. ex rel. May v. Purdue Pharma L.P.*, 2013 WL 6501327 (4th Cir. Dec. 12, 2013), at page 35.

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

***U.S. ex rel. Siegel v. Roche Diagnostics, Corp.*, 2013 WL 6847689 (E.D.N.Y. Dec. 30, 2013)**

A relator filed a *qui tam* suit against a medical equipment company, alleging that the defendant manufactured and distributed a testing machine for bodily fluids, and that healthcare providers used the data generated from the machine in support of their bills to Medicare and Medicaid reimbursement claims. The relator contended that due to a glitch in the defendant's software, the machines inaccurately reported the date and time the tests were performed, which caused providers to overbill the government. He further claimed that he informed the defendant of the problem, and therefore, the defendant was liable under the False Claims Act for every inaccurate Medicare and Medicaid claim a provider submitted in connection with the defendant's machine. The defendant moved to dismiss the relator's claim, arguing that the FCA's public disclosure bar provision deprived the court of subject matter jurisdiction and that the *qui tam* complaint did not state a claim for relief under the FCA because it did not plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Eastern District of New York granted the defendant's motion to dismiss. The court rejected the defendant's public disclosure argument, finding that "nothing in the parties' submissions suggests that the Plaintiff's *qui tam* complaint is based on prior public disclosures." But the court agreed with the defendant that the relator failed to plead the defendant's alleged FCA violations with the requisite particularity. The court found that the relator made conclusory statements regarding providers' Medicare and Medicaid claims for inaccurate tests using the defendant's machines; he did not plead the details of any specific false claim a provider submitted to the government. The court further held that the circumstances did not warrant relaxing the heightened pleading standard, since the facts regarding providers' submissions to the government was not peculiarly within the defendant's knowledge and the alleged fraud was neither complex nor extensive. Moreover, the court determined that the *qui tam* complaint did not establish the scienter element of FCA liability, because the relator did not plead that the defendant knew or should have known that providers were overbilling the government in connection with its tests. Based on those findings, the court dismissed the relator's complaint.

- Opinion

***U.S. ex rel. Bloedow v. Planned Parenthood of the Great Nw. Inc.*, 2013 WL 6631771 (W.D. Wash. Dec. 16, 2013)**

A relator alleged that a local Planned Parenthood office defrauded the State of Washington's Medicaid program and violated the False Claims Act by overbilling the government for contraceptives, conspiring to conceal its fraud, and improperly retaining the excessive reimbursements it received. The U.S. government declined to intervene in the relator's *qui tam* suit. The defendant moved to dismiss the action, arguing that it was barred pursuant to the FCA's public disclosure bar provision; the defendant argued that the relator's fraud allegations had already been publicly disclosed in: (1) a prior *qui tam* action filed by a different relator against a different local Planned Parenthood office; (2) a report drafted by the U.S. Department of Health and Human Service's Office of Inspector General; (3) a report published on the internet; (4) various news articles; and (5) the response the relator received to his public records request to the State of Washington.

Holding: The U.S. District Court for the Western District of Washington granted the defendant's motion and dismissed the *qui tam* complaint.

<u>Public Disclosure Bar</u>

Before discussing the substance of the defendant's public disclosure argument, the court examined whether the 1986 version or the "whistleblower-friendly" 2010 version of the public disclosure bar applied. Relying on U.S. Supreme Court precedent, the district court held that the 1986 version—the version in effect at the time of the alleged fraud—applied, notwithstanding the fact that the *qui tam* complaint was filed after the 2010 amendment was enacted. The court then evaluated each of the purported public disclosures. The court held that that the prior *qui tam* suit bore "an obvious resemblance" to the allegations in the present suit. Even though the prior suit alleged that different Planned Parenthood affiliates had engaged in the same contraceptives fraud scheme, and defrauded the State of California's—not Washington's—Medicaid program, the court held that the public disclosure bar was still triggered, noting that "Ninth Circuit cases demonstrate that it is not always necessary for the public disclosure to name the exact defendant, as long as the defendant's identity can be inferred." Since the allegations in the prior suit concerned similarly situated "sister organizations," the court held that those allegations—when combined with information from other public disclosures—were sufficient to create an inference that the Washington affiliate was engaged in similar conduct. Turning to the other purported public disclosures, the court determined that the OIG report—which explicitly indicated that it was directly influenced by the prior *qui tam* action (which alleged fraud by Planned Parenthood affiliates)—described the contraceptives fraud scheme within the industry of "family-planning clinics" that billed state Medicaid agencies. The report's conclusion, the court held, created the "inescapable" implication that Planned

Parenthood affiliates might be engaging in the contraceptives fraud. Having determined that the prior *qui tam* suit and the OIG report publicly disclosed the fraud allegations in the present suit, the court declined to analyze the purported public disclosures made on the internet and in the news media, and in the response to the relator's public records request.

The court then evaluated whether or not the relator qualified as an original source. The court held that he did not, finding that the relator did not have direct and independent knowledge of the fraud he alleged, since his "investigation consisted of communicating with an employee of Planned Parenthood, communicating with Washington State officials, and filing a public records act request." While the court recognized that the relator may have used his own efforts to confirm his suspicions of fraud, ultimately, it held that he was not an original source under the FCA because his "labor was not unmediated by other people and he did not see the alleged fraud with his own eyes."

Based on these findings, the court dismissed the relator's *qui tam* suit for lack of subject matter jurisdiction.

- Opinion

U.S. ex rel. Adams v. Wells Fargo Bank Nat'l Assn, 2013 WL 6506732 (D. Nev. Dec. 11, 2013)

Relators alleged that a group of sixteen banks, lenders, and loan servicers violated the False Claims Act by violating applicable law as well as various terms of "Mortgage Selling and Servicing Contracts" (MSSCs) they entered into Fannie Mae and Freddie Mac that allowed these government sponsored entities to purchase mortgage loans from the defendants and convert the loans into mortgage-backed securities that were sold to investors. Pursuant to these agreements, the government sponsored entities agreed to repurchase defaulted mortgage loans for 100% of the principal amount (to make the investors whole) and then suffer any loss resulting from "short sales" of the properties. The relators alleged that as part of the MSSCs, the defendants agreed to take responsibility for any unpaid homeowner association assessments (HOA), but routinely passed those costs on to the government sponsored entities when mortgagors failed to make the necessary payments. The relators claimed that the defendants falsely certified to the government sponsored entities that they had complied with the MSSCs, in violation of the FCA. The defendants moved to dismiss, arguing that the relators' claims were barred by the FCA's public disclosure provision and that the relators failed to state a claim or to plead the alleged fraud with particularity.

The U.S. District Court for the District of Nevada granted the defendants' motion, finding that the Fannie Mae and Freddie Mac—although government sponsored enterprises—are not instrumentalities of the United States and therefore are not protected under the False Claims Act.

Public Disclosure Bar

The court first considered the defendants' argument that the FCA's public disclosure bar blocked the relators' *qui tam* suit. The court agreed with the defendants that the fraud scheme alleged by the relators had also been publicly disclosed in news articles reporting the same HOA fee issues the relator identified. The court rejected the relators' argument that since the disclosures were not as detailed as their fraud allegations, they could not bar the *qui tam* complaint. Instead, the court held that although the relators' complaint "may be more specific, the articles clearly discuss the same alleged malfeasance or fraud, even if the articles do not call it that." Consequently, the court held that the public disclosures were sufficiently "substantially similar" to the *qui tam* complaint. But the court ultimately held that the public disclosures did not bar the *qui tam* complaint, since all of the disclosures were made after the relators' original *qui tam* complaint was filed; it was of no consequence that some of the disclosures pre-dated the relators' first amended complaint.

Failure to State a Claim

The court then turned to the defendants' argument that the *qui tam* complaint failed to state a claim under the FCA. The court held that the relators likely pled adequately that the defendants should be made to reimburse the government sponsored entities for improperly passing along HOA costs to them. But ultimately, the court held that the relators did not have standing to bring those allegations under the False Claims Act, finding that by statute, "the GSE are not 'agencies, establishments, or instrumentalities' of the United States. The GSE are private corporations created by the government." The relators' *qui tam* complaints were dismissed.

- Third Amended Complaint
- Defendants' Motion to Dismiss Third Amended Complaint
- Relator's Response in Opposition to Motion to Dismiss
- Defendants' Reply in Support of Motion to Dismiss
- United States' Statement of Interest (FERA)
- Defendants' Response to United States' Statement of Interest
- Order

***U.S. ex rel. Morgan v. Express Scripts, Inc.*, 2013 WL 6447846 (D.N.J. Dec. 9, 2013)**

A pharmacist who operated a company that audited pharmacy benefit managers (PBMs) filed a *qui tam* suit alleging that a group of defendants violated the federal False Claims Act and numerous state FCA laws by conspiring to manipulate the published average wholesale prices (AWP) for thousands of drugs sold by wholesalers to retail pharmacies, thereby causing the federal and state government healthcare programs to reimburse for prescription drugs at inflated rates. The defendants included wholesaler companies, companies that published AWP, and PBMs. Several months before filing his *qui tam* suit, the relator disclosed the details of the alleged fraud scheme to the government. The United States intervened and settled the claims against one of the defendants, for over $190 million. The remaining defendants moved to dismiss the relator's claims, arguing that the *qui tam* complaint was barred pursuant to the FCAs' public disclosure bar provisions. Additionally, the defendants argued that the fraud allegations did not meet Federal Rule of Civil Procedure 9(b)'s particularity standard, and that the relator failed to state a claim for relief.

Holding: The U.S. District Court for the District of New Jersey granted the defendants' motion, finding that the *qui tam* complaint was precluded by the public disclosure bar.

Public Disclosure Bar

The defendants argued that the relator's fraud allegations had been previously publicly disclosed in congressional hearings and reports, as well as in Office of Inspector General reports stating that Medicare overpaid for prescriptions due to AWP manipulation. In addition, the defendants claimed that the relator's allegations had been made in two prior class action lawsuits against several defendants also named in the relator's suit, and which alleged gross inflation of AWP for drugs covered by Medicare. The defendants asserted that numerous other prior lawsuits—many of them against defendants named in the relator's complaint—disclosed the relator's fraud allegations. Moreover, the relator served as a consultant and expert witness in one of those prior cases. The defendants also claimed that the Wall Street Journal and other news outlets also described the purported AWP fraud before the relator's *qui tam* suit was filed. The relator countered that none of the purported public disclosures revealed the specific fraud allegations raised in his *qui tam* complaint, as the prior disclosures did not discuss the same scheme of AWP manipulation he alleged; the prior disclosures focused on drug manufacturers—not the groups of defendants included in his suit; and the prior disclosures did not allege any harm to the government. The court held that the prior lawsuits and federal government reports were "public disclosures" under the False Claims Act laws, since they were "substantially similar" to the relator's fraud allegations. The court further reasoned that "[e]ven though each Defendant may not appear in the prior disclosures discussed, as long as the Defendant is identifiable, the prior disclosure is valid as to that Defendant." The court then held that each of the defendants named in the relator's suit was either specifically named in a prior public disclosure or was "identifiable" from those disclosures.

Lastly, the court held that the relator did not qualify as an "original source" who could overcome the public disclosure bar. The court determined that the relator could not show that he had direct and independent knowledge of the information underlying his fraud allegations—his knowledge was not direct because it was acquired by performing "collateral research" on published AWP rates; his knowledge was not independent because at least some of the knowledge was likely acquired during the course of the relator's service as a consultant and expert witness in a prior lawsuit regarding AWP manipulation and since the relator's amended complaints demonstrated a pattern of echoing newly-disclosed information from public sources.

The relator's primary FCA allegations—both federal and state—were dismissed pursuant to the public disclosure bar. The court noted that the relator brought additional FCA fraud charges against the defendants, including allegations of double-billing and other fraudulent practices. These allegations, the court held, were too vague and conclusory to state a claim for relief, and as a result, were also dismissed.

- Opinion

***U.S. ex rel. Prather v. AT&T Inc.*, 2013 WL 5947131 (N.D. Cal. Nov. 5, 2013)**

A *qui tam* relator filed suit against multiple telecommunications companies, alleging that the defendants defrauded various U.S. law enforcement agencies by overcharging for electronic surveillance services. According to the relator, after Congress enacted the Communications Assistance to Law Enforcement Agencies Act (CALEA), which permitted law enforcement agencies to rely on telecommunications carriers to assist with wiretap services, the DOJ, the FBI, and the DEA sought clarification from the Federal Communication Commission regarding the "reasonable expenses" the telecommunications companies could charge law enforcement for CALEA services—specifically which expenses are encompassed by "implementation costs," for which the companies could not charge. The FCC invited comments on the issue from the public. The relator, who had been employed by the New York Attorney General's Office and had spent decades as a prosecutor, acquiring extensive knowledge of wiretapping, believed that the telecommunications companies were overcharging the government for wiretaps. He assisted his office in preparing comments to the FCC, which included a discussion of the overcharging issue. Subsequently, he filed his *qui tam* suit against the defendants, alleging violations of the federal False Claims Act and the FCA laws of sixteen states and municipalities.

The defendants moved to dismiss the relator's suit, arguing that the court lacked subject matter jurisdiction over the *qui tam* claims pursuant to the public disclosure bar. In the alternative, the defendants moved to dismiss the claims for failure to state a claim and to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Northern District of California dismissed the relator's complaint with prejudice.

<u>Public Disclosure Bar</u>

First, the court addressed the subject matter jurisdiction question. The court noted that the federal FCA's public disclosure bar provision was amended in 2010 and now includes new definitions for "public disclosure" and "original source." The court, though, determined that this new version of the provision did not apply to the relator's claims—which arose before the amendment was passed. Relying on Supreme Court precedent, the district court held that the amended provision does not apply retroactively, since it "creates jurisdiction over claims that would have previously been barred and therefore affects parties' substantive rights." The court then applied the prior version of the provision and concluded that it did not have subject matter jurisdiction over the relator's claims. Without discussing whether or not the New York Attorney General's comments to the FCC—or any other disclosure—constituted a "public disclosure" for FCA purposes, the court turned to the issue of whether or not the relator was an "original source" of the information on which his *qui tam* claims were based. The court held that he was not, finding that he did not have firsthand knowledge of the alleged fraud, but instead based his allegations on the defendants' fee schedules, invoices for wiretaps and other similar information, as well as his perception that the costs for wiretaps should have decreased (not increased) over time, due to technological improvements. Even if the relator's examination of the defendants' bills and the technical information about wiretaps that he gleaned during his employment with the attorney general's office constituted firsthand knowledge, the court still concluded that his claims of overcharging were not valid, as they were based on speculation and conjecture. "Observing increased pricing over a twenty-year period does not equate to knowledge of fraud," the court reasoned. In addition, the court determined that the relator did not voluntarily disclose information about the fraud to the government before filing his *qui tam* complaint. In reaching that conclusion, the court rejected the relator's argument that he reported his concerns about overcharging to the FCC out of a sense of moral obligation—not due to obligation imposed as part of his employment or in response to the FCC's request for comments. Instead, the court held that the relator's disclosure to the FCC was involuntary, since it was prompted by the FCC solicitation of public comments and since it was submitted in the relator's capacity as a member of the state attorney general's office and at the direction of the state attorney general. Finally, the court recognized that in the Ninth Circuit, the federal FCA's public disclosure bar provision requires original sources to have a hand in the public disclosure. While the relator may have had a hand in the comment letter his office submitted to the FCC, he did not play a part in the original submission the Department of Justice made to the FCC, in which DOJ devoted an entire section to its concerns about the defendants' implementation costs. Consequently, the court held that since the relator was not an original source of his fraud allegations, the court lacked subject matter jurisdiction over his federal *qui tam* claims. Those claims were dismissed with prejudice. The court then dismissed the relator's state FCA claims on the same basis.

- Opinion

***U.S. ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 2013 WL 5492645 (W.D.N.C. Oct. 1, 2013)**

A *qui tam* relator filed suit against two county soil and water conservation districts and several local and federal officials, alleging that the defendants violated the False Claims Act. The relator, who had been employed by one of the conservation districts as a secretary, claimed that the counties were contracted by the U.S. Department of Agriculture (USDA) to perform cleanup and repair work in areas that had been damaged by extensive flooding. She further alleged that the defendants submitted false claims to the federal government for payment under the contracts—tainted by conflicts of interest and failures to seek competitive bidding, as well as billing for work never performed—and/or participated in a cover-up of the fraudulent billing scheme. She voiced her concerns about fraud to local officials and also contacted the USDA. Her county commenced an investigation and hired an accounting firm to perform an audit, which revealed several potential irregularities in the county's administration of the USDA contracts. Shortly thereafter, the state issued a report following its own investigation, which identified similar problems. The USDA's Office of Inspector General then issued its own report, with similar findings. The U.S. District Court for the Western District of North Carolina dismissed the relator's fraud claims, finding that, pursuant to the False Claims Act's public disclosure provision, the claims were precluded by the publicly available reports issued by the county and the state. The U.S. Court of Appeals for the Fourth Circuit reversed the district court's ruling, finding that the two reports did not trigger the FCA's public disclosure provision, since only federal reports qualify as public disclosures under the FCA. The U.S. Supreme Court granted *certiorari* to resolve the dispute, and reversed and remanded to the Fourth Circuit for further proceedings, holding that the public disclosure rule also encompasses disclosures made in state and local government reports. The circuit court then instructed the district court to make the necessary factual findings regarding the applicability of the public disclosure bar to the relator's *qui tam* claims.

The Western District of North Carolina dismissed the relator's complaint for lack of subject matter jurisdiction, finding that the action was barred by the FCA's public disclosure provision.

The court determined that the state and local reports were made publicly available through a variety of outlets—and that the relator herself received copies of the reports. Thus, the court held that the reports were "public," for purposes of the public disclosure bar. The court also found that the USDA report had been publicly disclosed. The court further held that the relator's allegations were actually derived from the public disclosures, stating that "[t]he similarity between the information in the [reports] and Relator's allegations is strong evidence of Relator having derived her claims from the [reports]," and noting that the relator had repeatedly acknowledged that she obtained information from the reports. Moreover, the court observed that one of the individual defendants had been criminally indicted by the United States, and that the indictment—which was a public record—disclosed some of the relator's fraud allegations. While the court noted that the relator provided additional information regarding the defendants' alleged misconduct, including check numbers, dates, and amounts of payments, it ultimately held that "she add[ed] nothing regarding liability, basis of liability or potential liability of any defendant." Consequently, the court held that the public disclosure rule precluded the relator's claims.

Finally, the court evaluated whether or not the relator qualified for the "original source" exception to the public disclosure rule. The court held that she did not, again finding that her claims were actually derived from information she obtained from public disclosures, as evidenced by the relator's own affidavit, and other evidence presented during the proceedings which showed that the relator based her allegations on information she received from the auditors and their respective reports. Thus, the court held, the relator could not establish that her knowledge of the alleged fraud was "direct" or "independent" of the public disclosures. The court dismissed the relator's action for lack of subject matter jurisdiction.

- Opinion (on Remand)

See *U.S. ex rel. May v. Purdue Pharma L.P.*, 2013 WL 6501327 (4th Cir. Dec. 12, 2013).

See *U.S. ex rel. Galmines v. Novartis Pharms. Corp.*, 2013 WL 5924962 (E.D. Pa. Nov. 5, 2013).

See *U.S. ex rel. Fryberger v. Kiewit Pac. Co.*, 2013 WL 5770514 (N.D. Cal. Oct. 24, 2013).

See *U.S. ex rel. Antoon v. Cleveland Clinic Found.*, 2013 WL 5657597 (S.D. Ohio Oct. 16, 2013).

See *U.S. ex rel. Sheet Metal Workers Int'l Ass'n, Local Union No. 20 v. Horning Inv. LLC*, 2013 WL 5503327 (S.D. Ind. Oct. 1, 2013).

C. Primary Jurisdiction / Supplemental Jurisdiction

***U.S. ex rel. Galmines v. Novartis Pharms. Corp.*, 2013 WL 5924962 (E.D. Pa. Nov. 5, 2013)**

A relator moved for reconsideration of the U.S. District Court for the Eastern District of Pennsylvania's dismissal of his state False Claims Act claims. The relator originally brought claims under the federal FCA and the false claims act laws of California, the District of Columbia, Louisiana, and Massachusetts, alleging that a pharmaceuticals company caused the submission of false claims to government healthcare programs. The district court dismissed the relator's state FCA claims, holding that those claims had to be filed in the respective state courts. The relator sought reconsideration of that ruling, arguing that the district court had supplemental jurisdiction over the state law claims. The district court granted the relator's motion and ultimately agreed with the relator that it erred when it dismissed the state FCA claims. The court reasoned that "[t]wo federal statutes provide for supplemental jurisdiction over these state law claims," citing 28 U.S.C.§ 1367(a) (the general provision governing federal district courts' supplemental jurisdiction over state law claims) and 31 U.S.C. §3732(b) (the FCA's supplemental jurisdiction provision that vests jurisdiction over state FCA claims in the federal district courts). The court declined to address the question of whether or not the state FCA statutes were intended to deprive the federal courts of jurisdiction, finding instead that "state statutes cannot restrict federal court jurisdiction by specifying state venue." Thus, the court held that it had supplemental jurisdiction over the relator's state law claims.

The court then determined whether or not it also had subject matter jurisdiction over those claims. The court had previously dismissed the relator's claims under the Nevada FCA, finding that the fraud allegations had been previously publicly disclosed, and the relator was not an "original source" of the information on which his fraud allegations were based. After examining the remaining state statutes, the court concluded that it did not have subject matter jurisdiction over the claims brought under California and District of Columbia laws either, because the versions of those statutes in effect at the time the relator filed suit defined an "original source" as someone who provided information regarding the fraud to the government before the public disclosure occurred. Since the defendant did not assert that he satisfied this definition of "original source," the court dismissed the California and D.C. claims, while allowing the Louisiana and Massachusetts claims to proceed.

- Relator Motion for Reconsideration of Dismissal of State FCA Claims
- Defendant's Opposition to Motion for Reconsideration
- Opinion (Motion for Reconsideration)

See *U.S. ex rel. Sheet Metal Workers Int'l Ass'n, Local Union No. 20 v. Horning Inv. LLC*, 2013 WL 5503327 (S.D. Ind. Oct. 1, 2013).

D. Tax Fraud Exemption

***U.S. ex rel. Sears v. Livingston Mgmt., Inc.*, 2013 WL 5816690 (M.D. La. Oct. 29, 2013)**

Three relators filed a *qui tam* suit alleging that a group of real estate companies violated the False Claims Act by falsifying tenant files and tenant certifications in order to obtain low-interest government loans and low income housing tax credits. The defendants moved to dismiss the relators' claims, arguing that they were not covered by the FCA, which excludes claims based on tax fraud. The relators countered that their complaint stated a claim under the FCA, since their fraud claims did not depend entirely on the Tax Code—notably, since the government loan program at issue was not part of the Tax Code.

The U.S. District Court for the Middle District of Louisiana granted the defendants' motion to dismiss, to the extent that the relators' claims arose from the low-income housing tax credits. However, the court preserved the claims that arose from the government-backed loans.

- Opinion

III. FALSE CLAIMS ACT RETALIATION CLAIMS

Jonassen v. Port of Seattle, 2013 WL 6653683 (9th Cir. Dec. 18, 2013)

A plaintiff filed suit in the U.S. District Court for the Western District of Washington, alleging that his employer violated the anti-retaliation provision of the False Claims Act. The district court granted the defendant's motion for summary judgment on the retaliation claim, finding that the plaintiff did not engage in "protected activity" under the False Claims Act. The plaintiff appealed the district court ruling to the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit affirmed the district court's ruling, agreeing that the plaintiff was not protected by the FCA's anti-retaliation provision, since he did not allege that he investigated his employer's submission of claims to the government. While the plaintiff did file a *qui tam* suit against the defendant, the circuit court stated that the suit was "meritless." The court further found that the adverse employment action the defendant took against the plaintiff—namely, reassigning him to a boiler room—predated the *qui tam* suit. Thus, the court held, the *qui tam* suit was not the cause of the retaliation alleged by the plaintiff.

- Opinion (9th Cir.)

Vander Boegh v. EnergySolutions, Inc., 2013 WL 6633963 (W.D. Ky. Dec. 17, 2013)

A plaintiff alleged various employment claims—including a claim under the False Claims Act's anti-retaliation provision—against a company that operated a landfill under a contract with the federal government. The plaintiff had previously been employed for six years as the landfill manager at the property by the company that had managed the landfill before the defendant company. When the former company ceased its activities at the landfill, the plaintiff's employment was terminated. The defendant company then took over operations at the landfill. The plaintiff alleged that the defendant refused to hire him to continue managing the landfill, because he had reported several environmental law violations to his former employer. He contended that his prior reports of misconduct constituted "protected activity" under the False Claims Act, and that the defendant's refusal to hire him constituted retaliation under the statute. The defendant moved for summary judgment on the plaintiff's FCA claim, arguing that plaintiff—who had never been employed or contracted by the defendant—lacked standing to bring the claim. The U.S. District Court for the Western District of Kentucky granted the defendant's motion, finding that that the plaintiff failed to establish a *prima facie* case of retaliation. The court, though, did not reach the question of the plaintiff's standing. The plaintiff appealed the district court's ruling to the U.S. Court of Appeals for the Sixth Circuit, which reversed the district court's ruling, finding that summary judgment was not appropriate due to the factual issue of whether the defendant had knowledge of the plaintiff's alleged protected activity. The circuit court did not address the standing question. The matter was remanded to the district court with instructions to address the plaintiff's statutory standing to bring the FCA retaliation claim.

The defendant argued that the plaintiff did not have standing to bring his retaliation claim, because the FCA's anti-retaliation provision requires an employment relationship between plaintiffs and defendants. The plaintiff conceded that he did not have an employment relationship with the defendant, but argued that the FCA's protections against retaliation covered both actual employees and prospective employees. The district court noted its prior holding in another suit, in which it determined that only employers can be held liable under the FCA's anti-retaliation provision; the court also recognized the similar holdings of several other circuit and district courts. But the opinions cited by the court were issued before the FCA's anti-retaliation provision was amended in 2009, to expand its whistleblower protections to "contractors," and "agents," as well as employees. After reviewing the amended provision—and the legislative history regarding the amendment—the court concluded that the plaintiff was not covered by the amended provision either. The court stated that "Congress nonetheless intended to limit standing under [the FCA's anti-retaliation] provision to individuals having some type of employment relationship with the retaliating employer. . . .[T]he court sees no reason to extend the FCA's protection to an applicant for employment in the absence of explicit statutory language to that effect." Since there was no genuine issue of material fact regarding whether or not the plaintiff ever had an employment, contractual or agency relationship with the defendant, the court held that the plaintiff lacked standing to assert a retaliation claim under the False Claims Act, and that the defendant was entitled to summary judgment on that claim.

- Opinion

See *U.S. ex rel. Surdovel v. Digirad Imaging Solutions*, 2013 WL 6178987 (E.D. Pa. Nov. 25, 2013).

See *U.S. ex rel. Sharp v. Eastern Okla. Orthopedic Ctr.*, 2013 WL 5816419 (N.D. Okla. Oct. 29, 2013).

IV. COMMON DEFENSES TO FCA ALLEGATIONS

A. Breach of Contract/Duty

U.S. ex rel. Fair Lab. Practices Assocs. V. Quest Diagnostics, Inc., 2013 WL 5763181 (2d Cir. Oct. 25, 2013)

A *qui tam* relator filed suit against a medical testing company and the clinical laboratory company it purchased, alleging that the defendants submitted false Medicare and Medicaid claims tainted by their violations of Anti-Kickback Statute. The relator was actually a general partnership, comprised of three former executives—including the former general counsel—of the clinical laboratory company. The U.S. District Court for the Southern District of New York dismissed the relator's suit, finding that by participating in the *qui tam* suit the former general counsel for the company violated two provisions of the New York Rules of Professional Conduct: (1) he "switched sides" by representing another party (the government) in a matter related to his former representation of one of the defendants; and (2) he used his former client's confidential information improperly. The district court dismissed the *qui tam* suit with prejudice to the relator and each of the individuals involved in the partnership, but without prejudice to the government. The district court also prohibited the relator's outside counsel from pursuing the fraud claims against the defendant. The relator appealed the district court's rulings to the U.S. Court of Appeals for the Second Circuit.

The Second Circuit affirmed the district court's rulings.

The circuit court first noted that although the FCA does not preempt state statutes or rules governing attorneys' conduct, when those rules are inconsistent with the FCA's purpose of encouraging private individuals to expose fraud, then the courts must balance the competing interests involved. With respect to the confidentiality issue, the relator argued that its attorney member's disclosures were protected under a New York Rule of Professional Conduct that permits attorneys to disclose confidential information when they believe that doing so will prevent a client from committing a crime. The appellate court considered two factors when evaluating the relator's arguments, namely whether the defendants intended to commit a crime at the time the relator filed its *qui tam* suit, and whether the relator's disclosures of the defendant's confidential information were necessary to prevent the commission of a crime. The circuit court held that although the relator could have reasonably believed that the defendants intended to commit a crime at the time the *qui tam* suit was filed, the relator's actions went beyond what was necessary to prevent that crime. Notably, the Second Circuit found that, by its own admission, the relator did not need the attorney's participation in the suit, since the other members of the relator's partnership could have exposed the alleged fraud. Moreover, the circuit court held that if the relator desired to participate in the *qui tam* action, then he could have made limited disclosures and not violated his duty to keep his former client's confidences. As a result, the circuit court affirmed the district court's ruling that the attorney—and therefore, the relator—violated confidentiality provision of the professional conduct rule. Having determined that the relator violated the confidentiality rule, the court declined to reach the "side-switching" rule issue.

Next, the Second Circuit reviewed the district court's dismissal of the *qui tam* suit with prejudice to the relator and its ruling that none of the individual members of the relator or the relator's outside counsel could re-file the *qui tam* allegations. The appeals court again affirmed the district court's ruling, noting that the non-attorney members of the relator, as well as the relator's outside counsel, received confidential information from the former in-house lawyer; the court held that those individuals were "tainted" by their knowledge of the confidential information. The circuit court also rejected the relator's argument that it should be allowed to proceed against the medical testing company that purchased their former employer's laboratory company, since the attorney did not owe any duty of confidentiality to the testing company. Instead, the court observed that "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well." Thus, the circuit court held that the attorney's obligations to his former client extended to both defendants and consequently neither the relator nor its outside counsel could proceed against either defendant.

- Opinion (2nd Cir.)

***U.S. ex rel. Siebert v. Gene Sec. Network, Inc.*, 2013 WL 5645309 (N.D. Cal. Oct. 16, 2013)**

A relator filed a *qui tam* suit alleging that a biotechnology company violated the False Claims Act by making false statements in its applications for federal research grant funds. The defendant alleged six counterclaims against the relator, who previously served as the defendant's CEO: breach of fiduciary duty, fraud in the inducement, breach of a confidentiality agreement, breach of a separation agreement, violation of the Computer Fraud and Abuse Act, and violation of the California Computer Crimes Act. The relator moved to dismiss each of the defendant's counterclaims for lack of subject matter jurisdiction. The relator also argued that the counterclaims should be dismissed for failure to state a claim.

The U.S. District Court for the Northern District of California granted the relator's motion in part and denied it in part.

<u>Compulsory Counterclaims</u>

Finding that the relator was a party in the *qui tam* suit and that the defendant's counterclaims arose from the same transaction or occurrence that was the subject of the *qui tam* suit, the court held that the counterclaims were compulsory, pursuant to Federal Rule of Civil Procedure 13, and could not be dismissed for lack of subject matter jurisdiction. The court noted that some of the counterclaims "[were] prohibited as a matter of public policy to avoid weakening the FCA," but held that no jurisdictional bar existed. As a result, the court denied the relator's motion to dismiss the counterclaims for lack of subject matter jurisdiction.

<u>Failure to State a Claim</u>

The court then evaluated whether each of the counterclaims stated a claim for relief. First, the court considered the breach of fiduciary duty counterclaim, in which the defendant contended that the relator breached his duty of loyalty by failing to prevent, remedy or report suspected FCA violations. The court observed that "[g]enerally speaking, a breach of fiduciary duty claim arising out of a Plaintiff-relator's failure to disclose a False Claims Act violation that subsequently becomes the basis of a *qui tam* claims is barred by the FCA." Furthermore, the court agreed with the relator, who argued that the counterclaims were not ripe since they had the effect of indemnifying or contributing to the defendant's damages, and therefore could not be adjudicated unless and until the defendant prevailed in the underlying *qui tam* action. The court noted that the defendant could only prevail on its breach of fiduciary duty counterclaim if it was found liable under the FCA. As a result, that counterclaim was not independent of the FCA claim and therefore was subject to dismissal until the *qui tam* claims were adjudicated. But the court further held that allowing the defendant to pursue the breach of fiduciary duty counterclaim at all would "directly conflict with the goals of the FCA," by "creat[ing] the perverse result of making a truthful relator pay to offset the liability of a wrongdoing FCA defendant." Consequently, the court dismissed the breach of fiduciary duty counterclaim with prejudice.

The court then turned to the fraud in the inducement, breach of the confidentiality agreement and breach of separation agreement counterclaims. The defendant claimed that these counterclaims arose from the relator's unlawful retention—and subsequent disclosure—of its confidential documents and information. According to the defendant, the relator agreed to keep the defendant's information and documents confidential, and later induced the defendant to enter into a separation agreement based on his representations that he had not retained any of the defendant's documents or files, he would continue to comply with his confidentiality agreement, he would not disparage the defendant, and he would release all claims against the defendant. The relator countered that the counterclaims violated public policy, since they would seek to prevent relators from exposing fraud against the government. The court agreed with the relator, but only to the extent that the information he allegedly retained from the defendant was relevant to his *qui tam* claims. The court also agreed that the counterclaims could not go forward, to the extent that they sought to enforce the relator's agreement to release his *qui tam* claims against the defendant; enforcing such contractual provisions violates public policy. Thus, the court refused to dismiss the counterclaims in their entirety, granting the relator's motion in part and denying it in part.

Finally, the court analyzed the defendant's allegations of Computer Fraud and Abuse Act and California Comprehensive Computer Data Access and Fraud Act violations. The court dismissed both counterclaims, finding that the statutes were inapplicable because they only applied to unauthorized access to computer networks, and the defendant did not allege that the relator was not authorized to access its computer files at the time he removed the files in preparation for filing his *qui tam* complaint.

- [First Amended Complaint]()
- [Opinion]()

B. Not Knowingly False

***U.S. ex rel. Stephenson v. Archer W. Contractors, LLC*, 2013 WL 6225221 (5th Cir. Dec. 2, 2013)**

A *qui tam* relator filed a complaint against a group of construction and contracting companies, alleging that the defendants violated the False Claims Act by falsely certifying to the U.S. Army Corps of Engineers (USACE) that they had complied with all applicable federal, state, and local laws, codes and regulations while rebuilding and constructing the levees surrounding the city of New Orleans—levees that had previously failed, causing rampant flooding throughout the city in the aftermath of Hurricane Katrina. The relator claimed that the defendants repeatedly hauled loads of clay to the levee projects in excess of applicable weight limits on highways and bridges. Several of the defendants were prime contractors, who allegedly knowingly ignored the violations, while the other defendants were subcontractors, who engaged in the allegedly improper hauling. The United States declined to intervene in the relator's suit. The U.S. District Court for the Eastern District of Louisiana dismissed the relator's complaint, finding that the relator failed to state a claim under the FCA and failed to plead the alleged fraud with the requisite particularity. The district court granted the relator leave to file an amended *qui tam* complaint, but she declined to do so. Instead, she appealed the district court's ruling to the U.S. Court of Appeals for the Fifth Circuit.

In opposition to the relator's appeal, the defendants argued that the government knew that some of the trucks were overweight, and resolved those issues with the defendants satisfactorily. They claimed that the contract with the USACE allowed the government to issue a stop work order, but the government took no such action. Moreover, the defendants argued that the relator's allegations did not amount to a fraud claim, since she did not allege that the defendants hauled less clay or lower quality clay than was required; instead, she argued that the clay was delivered too quickly, using fewer trucks than required.

The Fifth Circuit affirmed the district court's ruling. The circuit court agreed with the district court that the defendants' certifications to the USACE were not prerequisites for payment that would give rise to FCA liability, but rather, amounted to "boilerplate language stating that the [defendants] would follow the law. Absent a more specific certification of compliance, for example with traffic or roadway regulations, the FCA would here become a general enforcement device for traffic infractions." The appeals court observed that <u>both</u> the relator and the defendants acknowledged that the government knew that the trucks were overweight, yet the government never issued a stop work order. The court reasoned, "[h]ow could such 'fraud' be material to payment if the defrauded party knows about it and remains satisfied with the work? It appears beyond doubt that USACE was not defrauded and the focus of the contract was on rapidly providing earthen material to provide one hundred years of flood protections to New Orleans, not on policing roadway weight regulations. Any inaccurate certifications were not material to payment." Since the defendants' allegedly false certifications were not material to the government's payment decisions, the Fifth Circuit held that they could not serve as a basis for liability under the False Claims Act. In addition, the court held that the relator failed to plead the alleged fraud with particularity, finding that she failed to alleged "the identity of the person making the misrepresentation and what that person obtained thereby," since the defendants' pay was not based on the amount of clay delivered in each truck, but was based on the entirety of the clay required for the levees projects. The circuit court further noted that the relator was afforded an opportunity to cure the pleading defects identified by the district court, but she chose not to do so. Consequently, the Fifth Circuit affirmed the district court's dismissal of the *qui tam* complaint.

- Opinion (5th Cir.)

***U.S. ex rel. Thulin v. Shopko Stores Operating Co., LLC*, 2013 WL 5946503 (W.D. Wis. Nov. 5, 2013)**

A relator filed a *qui tam* action on behalf of the United States and eight U.S. States, alleging that an in-store pharmacy violated the False Claims Act by submitting false claims to Medicaid for dual-eligible prescriptions—prescriptions for patients who were covered both by Medicaid and by private, third-party insurers. The relator, who previously worked as a pharmacist at the defendant's store, claimed that since Medicaid is the payer of last resort, the defendant was required to determine the liability of any third-party insurer before submitting claims to Medicaid. He said that the defendant would bill dual-eligible patients' private insurers first—who would usually pay a discounted rate that the insurers negotiated—and then would readjust the claim and immediately bill Medicaid. However, according to the relator, pursuant to the defendant's agreements with the private insurers, it should have accepted the insurers' payments as payments in full, and should only have billed Medicaid for the amount of the patients' co-payment. The relator argued as a result of the defendant's practices, Medicaid was systematically billed for far more than it should have been for dual-eligible patients' prescriptions. He submitted over thirty records from the defendant pharmacy as examples of the alleged fraud, and claimed that the defendant submitted thousands of fraudulent Medicaid claims. The defendant moved to dismiss the relator's claims, arguing that the relator failed to state a claim under the FCA, as he could not show that the defendants' Medicaid claims were "false" and he could not establish that the defendants acted "knowingly."

The U.S District Court for the Western District of Wisconsin agreed with the defendant and dismissed the relator's complaint. According to the defendant, dual-eligible patients are required to assign any rights they have under private insurance plans to the State as a condition of eligibility for Medicaid benefits, but those obligations do not run to medical providers (like the defendants) who have separate relationships with private insurance companies. In addition, the defendant argued that Medicaid does not require States to collect co-pay data and there is no federal obligation for providers to disclose co-pay data to Medicaid, and thus, the defendant was not limited to seeking dual-eligible patients' co-pay amounts from Medicaid. The court agreed, stating that the relator's argument was "fundamentally flawed." At best, the court decided, the relator's allegations demonstrated ambiguity and confusion regarding the relevant Medicaid regulations and their proper interpretations, negating the defendants' scienter. The court ultimately held that the defendant's alleged practices did not appear to violate applicable regulations, saying that "the fact that providers at times were able to obtain a higher reimbursement for dual-eligibles because of their Medicaid coverage than they would if those same individuals only had private insurance does not by itself constitute fraud." Consequently, the court dismissed the relator's federal claim with prejudice. The court declined to exercise supplemental jurisdiction over the relator's state FCA claims, and those claims were dismissed without prejudice.

The court, however, acknowledged "the serious, underlying policy problem the Relator and many others have pointed out: state and federal governments have been reimbursing private parties for the costs of pharmaceuticals over and above the amount paid under more favorable formularies negotiated by private insurers and PBMs." The court continued, "[h]opefully, changes in state and federal formularies have corrected much of this problem."

- Opinion

***United States v. Bollinger Shipyards, Inc.*, 2013 WL 5720340 (E.D. La. Oct. 21, 2013)**

The United States filed suit against a shipyard company, alleging violations of the False Claims Act, as well as common law claims. Specifically, the government alleged that the defendant was contracted to work on a U.S. Coast Guard contract to modify cutter boats, and that the defendant falsified data and falsely certified its compliance with applicable design standards in order to receive payment under the contract. The government claimed that the defendant was liable under the FCA for submitting false claims to the government and making false statements in support of those claims. According to the government, the Coast Guard accepted delivery of four modified cutters, but when one of the boats experienced a design failure due to the defendant's inaccurate numbers, the Coast Guards refused further delivery of the cutters and removed the prior boats from service. The defendant moved to dismiss the FCA allegations for failure to plead the alleged fraud with particularity and for failure to state a claim for relief.

The U.S. District Court for the Eastern District of Louisiana granted the defendant's motion. The court determined that although the government properly alleged that the defendant submitted false claims and made false statements that were material to those claims, it did not sufficiently allege that the defendants did so knowingly, as is required by the FCA. Notwithstanding the FCA's definition of "knowledge"—which includes "reckless disregard" and "deliberate ignorance" of the truth—the court held that the government failed adequately to plead that the defendant knew its claims were false because there was no allegation that the defendant knew the true numbers and concealed them. Instead, the evidence suggested that the defendant simply chose one among four incorrect numbers. Similarly, the court held that the government failed to plead that the defendant knowingly made false statements—the allegedly false certifications of compliance with design standards. The government argued that the defendant was required to consult with an outside entity before it could certify its compliance with the design standards. The court concluded that the government's evidence only showed that the defendant intended to avoid engaging the outside entity, but not that the defendant knew that engaging the other entity was required under the contract and crucial to its certifications to the Coast Guard.

Based on these findings, the court granted the defendant's motion to dismiss the government's FCA claims.

- United States' First Amended Complaint
- Defendants' Motion to Dismiss First Amended Complaint
- United States' Response in Opposition to Motion to Dismiss
- Defendants' Reply in Support of Motion to Dismiss
- Opinion

See *U.S. ex rel. Chilcott v. KBR, Inc.*, 2013 WL 5781660 (C.D. Ill. Oct. 25, 2013).

C. *Pro Se* Relator

U.S. ex rel. Gunn v. Shelton, 2013 WL 5980633 (D. Del. Nov. 12, 2013)

A *pro se* relator filed suit against a financial institution and one of its former employees, alleging that the defendants violated the False Claims Act by falsifying thousands of documents related to federally-backed mortgage loans. The U.S. District Court for the District of Delaware dismissed the relator's complaint. First, the court observed that the relator was proceeding *pro se* and was not a licensed attorney. Consequently, the court held that the relator could not represent the interests of the United States and dismissed the *qui tam* complaint on that basis. Additionally, the court noted that the relator failed to comply with the FCA's service and filing requirements, as he did not file his complaint under seal, did not serve the complaint on the U.S. Attorney General, did not provide the government with "all material evidence and information" in his possession, and served the complaint on the defendants before the government had an opportunity to investigate his allegations. The court dismissed the complaint on the basis of these failures as well. Moreover, the court held that the complaint would have been subject to dismissal for failing to state a claim. The court, however, granted the relator leave to file an amended complaint, in accordance with the FCA's procedural requirements, provided that he could obtain counsel.

- Opinion

***Carter v. G&S Food Shop*, 2013 WL 5874564 (E.D. Mich. Oct. 30, 2013)**

A *pro se* relator filed suit against two food stores, alleging that the defendants violated various provisions of the Federal Insurance Contributions Act (FICA) and the Immigration Reform and Control Act of 1986 (IRCA), by failing to pay and withhold the relator's employment taxes, failing to report the relator's wages to the IRS, and conspiring to hire him without completing an Employment Eligibility Verification. The U.S. District Court for the Eastern District of Michigan referred the *qui tam* suit to a magistrate judge for a report and recommendation. The magistrate recognized that the relator did not comply with the FCA's requirements that he provide the government with a copy of his *qui tam* complaint before filing it under seal in the name of the United States and determined that, because of these defects, the *qui tam* suit should be dismissed with prejudice. The magistrate further concluded that even if the relator had complied with the FCA's procedural requirements, his allegations did not state a claim under the FCA because the FCA explicitly excludes claims based on violations of the Internal Revenue Code, and since the relator's conspiracy claim did not fall within the FCA's liability provisions, since it was not connected to any claim for government money or property. Based on those findings, the magistrate recommended that the *qui tam* suit be dismissed with prejudice.

The district court accepted and adopted the magistrate's report and recommendation, and the *qui tam* suit was dismissed with prejudice.

- Magistrate Report and Recommendation on Motion to Dismiss Complaint
- Order Accepting Magistrate Report and Recommendation

D. Relator Released Defendant from FCA Claims

See *U.S. ex rel. Siebert v. Gene Sec. Network, Inc.*, 2013 WL 5645309 (N.D. Cal. Oct. 16, 2013).

E. *Res Judicata* and Collateral Estoppel

***United States v. Aleff*, 2013 WL 6860405 (D.S.D. Dec. 30, 2013)**

The United States filed suit against two individual defendants, alleging violations of the False Claims Act. Specifically, the government claimed that the defendants conspired to defraud the Commodity Credit Corporation—a U.S. department and agency—and furthered that conspiracy by submitting to the agency over 130 false applications for loan deficiency payments. Prior to the government's suit, the two defendants admitted their guilt and pled guilty to criminal charges of conspiring to defraud the government, in connection with the same scheme. The government moved for summary judgment on its civil claims, arguing that the defendants were estopped from disputing their FCA liability based on their prior guilty pleas. The U.S. District Court for the District of South Dakota granted government's motion. The court found that the doctrine of collateral estoppel applied and that the defendants' guilty pleas barred them from contesting their liability under the FCA. In reaching its holding, the court rejected the argument by one of the defendants that collateral estoppel did not apply because the criminal charges had not actually been litigated, since she pled guilty. This defendant noted that, during sentencing in the criminal proceeding, the court found that she had "diminished capacity." She contended that her diminished capacity created an issue of material fact that precluded summary judgment in the government's favor. But the court held that the defendant had a full opportunity to litigate the criminal case—and could have raised diminished capacity as a defense—but she chose to plead guilty instead, thereby waiving her available defenses. The court also noted that the guilty pleas "embrace[d] all the elements essential to the FCA case," and that the defendants were represented by lawyers and testified under oath in the criminal proceeding. Consequently, the court held that there were no issues of disputed fact, and that granting the government's motion was warranted.

- Opinion

***U.S. ex rel. May v. Purdue Pharma L.P.*, 2013 WL 6501327 (4th Cir. Dec. 12, 2013)**

Two relators filed a *qui tam* suit in the U.S. District Court for the District of West Virginia against two affiliated pharmaceutical companies, alleging that the defendants violated the False Claims Act by falsely marketing the potency of one of their drugs, thereby making the drug appear cheaper per dose than its competitors. The United States declined to intervene in the relators' suit. A nearly identical suit had previously been filed in the same district court, by the husband of one of the two relators in the present suit. However, that original suit was dismissed with prejudice, as the U.S. Court of Appeals for the Fourth Circuit held that the suit was barred by a severance agreement the original relator and the defendants executed before the original *qui tam* suit was filed, in which the relator agreed to a general release of all claims against the defendants. After the circuit court's ruling, the present relators—the original relator's wife and one of his former subordinates from the time when he was employed by the defendants—filed the current *qui tam* suit. The defendants moved to dismiss the action, arguing that pursuant to *res judicata* principles, the present suit was barred by the dismissal of the prior *qui tam* suit. The defendants also claimed that the False Claims Act's public disclosure provision deprived the court of subject matter jurisdiction over the relators' complaint. Furthermore, the defendants argued that the fraud allegations were not pled with particularity, as Federal Rule of Civil Procedure 9 (b) requires. The district court agreed with the defendants and granted the defendants' motion to dismiss, finding that *res judicata* applied, since: (1) the prior suit resulted in a judgment on the merits; (2) the claims brought in both suits were identical; and (3) the parties in both suits were the same, since both suits involved the same defendants and the United States is the real party in interest in all *qui tam* suits. The relators appealed the district court's ruling to the Fourth Circuit, arguing that the first *qui tam* suit was not decided on the merits, for *res judicata* purposes.

Holding: The Fourth Circuit reversed and vacated the district court's ruling and remanded the case for further proceedings.

Res Judicata

The circuit court rejected the relators' contention that the court's ruling dismissing the prior *qui tam* suit was not a "judgment on the merits" because the decision was based on the court's determination that the relator lacked standing to pursue the FCA claims. Rather, the circuit court held that its prior ruling was not based on a lack of standing, but rather a voluntary waiver of the relator's right to sue the defendants. Nonetheless, the Fourth Circuit held that the district court erred by giving the prior suit preclusive effect. The court held that the release executed by the original relator "was personal to him and addressed only his rights and the claims that he might assert against [the defendants]. Neither the [present] relators nor the government were parties to or intended beneficiaries of the Release. . . .[B]ecause the Release does not bar non-signatories from proceeding against [the defendants], the judgment enforcing the Release cannot bar such claims." The appellate court held that the district court erred by dismissing the relators' suit on *res judicata* grounds.

<u>Public Disclosure Bar</u>

The circuit court then turned to the defendants' contention that the relators' suit was barred by the FCA's public disclosure provision, since the allegations in the present *qui tam* complaint were at least partly derived from the prior *qui tam* complaint. First, the appeals court held that the version of the public disclosure rule that applied before the provision was amended in 2010 should apply, since "[t]he retroactivity inquiry looks to when the underlying conduct occurred, not when the complaint was filed," and because "[t]he 2010 amendments deprive [the defendant] of the previously available jurisdictional defense and replace it with a non-jurisdictional defense that is triggered by a substantially narrower range of public disclosures and is, even then, subject to veto by the government." Applying the pre-amendment version of the public disclosure bar, the Fourth Circuit held that the defendants' allegations were insufficient to show that the relators' allegations were "based upon" the prior publicly-disclosed *qui tam* suit. The appellate court noted that "[t]he Relators both submitted affidavits to the district court asserting that their knowledge of [the defendants'] fraud was not derived from the [first *qui tam*] complaint or any other qualifying public disclosure." The court recognized that "[t]he similarity between the allegations in each complaint could provide a basis for disbelieving the Relators' assertions," but concluded that "that is an issue for the district court as fact-finder." The case was remanded to the district court, with instructions to determine whether the relators' knowledge of the alleged fraud was—"even in part"—derived from public disclosures, and if so, to determine whether the relators qualified for the "original source" exception to the public disclosure rule.

In reaching its holding, the circuit court rejected the defendants' arguments that the relators' complaint should be dismissed for lack of particularity and/or for lack of subject matter jurisdiction pursuant to the FCA's first-to-file rule. With respect to the Rule 9(b) argument, the court noted that, in response to the defendants' motion to dismiss, the relators' moved the district court for leave to amend their *qui tam* complaint in the event that the court held that their pleading was deficient. The appellate court held that "it would be improper to rely on Rule 9 deficiencies to affirm the district court's dismissal of the action with prejudice. The district court on remand is free to consider [the defendants'] Rule 9 argument in the first instance." With respect to the first-to-file argument, the Fourth Circuit held that although the present *qui tam* suit was clearly a related action based on the facts underlying the prior *qui tam* suit, the first-to-file bar was not triggered because the original suit was no longer pending when the present suit was filed, as the prior suit had been dismissed by the district court, the dismissal had been affirmed by the circuit court, and the U.S. Supreme Court had denied the corresponding *certiorari* petition.

- Relator-Appellant's Opening Brief
- Defendants-Appellees' Reply Brief
- Relator-Appellant's Reply Supporting Opening Brief
- United States' Statement of Interest (Public Disclosure Bar & *Res Judicata*)
- Opinion (4th Cir.)

Awad v. Chrysler Group LLC, 2013 WL 5816505 (E.D. Mich. Oct. 29, 2013)

A plaintiff filed suit against his former employer—an automobile company—alleging that the defendant violated the False Claims Act's anti-retaliation provision by demoting him and eventually terminating his employment as CFO of one its subsidiaries when he refused to engage in a scheme to defraud the United States government. According to the plaintiff, the defendant was formed as a limited liability company through the use of federal government funds, and gave financial interests to the United States and others in order to facilitate the purchase of another company. The plaintiff claimed that, pursuant to its agreement with the U.S. government, the defendant was required to maintain accurate books and financial records, but instead directed him to manipulate the books and deflate the value of one of the defendant's subsidiaries to be sold. The plaintiff alleged that he refused to cook the defendant's books, and consequently was reassigned, then demoted, and finally terminated from his job.

The plaintiff initially filed a state court action against the defendant, alleging wrongful termination. The sides reached an agreement and the state court action was dismissed. Less than two weeks after he filed the state court action, the plaintiff filed a *qui tam* action against the defendant, alleging fraud claims as well as the present retaliation claim. He later voluntarily dismissed the fraud claims, leaving only the present FCA retaliation claim. The defendant moved to dismiss that claim, arguing that the prior state court action precluded it and that the plaintiff failed to state a claim for relief.

The U.S. District Court for the Eastern District of Michigan granted the defendant's motion, holding that the FCA retaliation claim was barred by the doctrine of *res judicata*. The court held that all the necessary elements for applying *res judicata* had been met. Specifically, the court determined that the dismissal of the prior state court action constituted a final adjudication. Next, the court held that the plaintiff's state court claim could have been resolved in the federal court proceeding. In reaching that conclusion, the court rejected three of the plaintiff's arguments. First, the plaintiff claimed that he could not have brought his FCA retaliation claim in the state court action because his subsequent *qui tam* action would have been subject to dismissal, pursuant to the FCA's public disclosure bar provision. The district court disagreed, finding that the plaintiff would have qualified for the "original source" exception to the public disclosure rule. Next, the court rejected the plaintiff's argument that he could not have brought his retaliation claim in the state court action because only the federal courts have jurisdiction over FCA retaliation claims; the court noted that the legislative history of the FCA retaliation provision doesn't support the plaintiff's argument, that there was no incompatibility between state court-jurisdiction and federal interests, and that the FCA specifies that retaliation claims "may" be brought in federal court—all of which suggests that federal courts don't have exclusive jurisdiction. Finally, the court rejected the plaintiff's argument that the state and federal court claims involve a different subject matter, transaction, and occurrence—with the state court action concerning his employment with one of the defendant's subsidiaries and the federal court action concerning the sale of a different subsidiary. The court held that both actions involved the same underlying issue, namely, the plaintiff's allegedly unlawful termination by the defendant. The court held that both claims should have been brought together.

The court then turned to the final *res judicata* element, and held that both the state court action and the present federal action involved the same parties, since both suits were brought by the plaintiff, and the defendant was named in both actions.

- Opinion

F. Sovereign Immunity

***U.S. ex rel. King v. University of Tex. Health Sci. Ctr.-Houston*, 2013 WL 5881083 (5th Cir. Nov. 4, 2013)**

A professor filed a *qui tam* action against the state university hospital that previously employed her, alleging that her direct supervisor submitted falsified research data and results in connection with federal research grants. She further alleged that the hospital covered up the false information and then retaliated against her for reporting the supervisor's misconduct by hampering her research, relocating her to less favorable positions, and eventually constructively terminating her employment thereby derailing her chances of becoming a tenured faculty member. The relator alleged violations of the False Claims Act's fraud and anti-retaliation provisions. The defendant moved to dismiss the allegations, arguing that as a state agency, it was not subject to FCA liability; that sovereign immunity barred the relator's claims; and that the relator's complaint did not comply with Federal Rule of Civil Procedure 9(b)'s heightened pleading requirements. The U.S. District Court for the Southern District of Texas dismissed the suit, finding that, due to sovereign immunity, the relator's allegations failed to state a claim under the FCA. The relator appealed that ruling to the U.S. Court of Appeals for the Fifth Circuit.

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

Sovereign Immunity/Arm-of-the-State

The relator argued that the district court erred when it concluded that the defendant was an arm of the State of Texas, and as such, was not a "person" subject to FCA liability. The Fifth Circuit agreed with the district court that the six-factor test for determining Eleventh Amendment immunity was appropriate to determine whether the defendant was an arm-of-the-state. The six factors are: "(1) whether the state statutes and caselaw characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide programs; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property." The circuit court concluded that five of the six factors weighed in favor of the defendant.

First, the Texas constitution provides for the establishment of the state university system that operates the defendant hospital, and other Texas statutes make clear that the state's public universities are state agencies under Texas law. In addition, the circuit court observed that Texas courts have treated the hospital as a state agency. Next, the circuit court acknowledged the substantial funding the defendant receives from state sources—while the defendant took in more than $26 million from tuition and fees in 2009, it received nearly $200 million in state funding that year. The appeals court further held that "Texas provides substantial funding to the [defendant] and that allowing for civil recovery would interfere with the state's fiscal autonomy, even if payment is not made directly from the state treasury," and thus, the second factor weighed in favor of the defendant. With respect to the third factor, the court determined that since "[a] board of regents, appointed by the governor with the advice and consent of the senate, governs the University of Texas System;" all of the defendant's "contracts must be in accordance with board rules or specially approved by the board of regents. Fourth, the appellate court concluded that the defendant—which had locations throughout the state—was not only concerned with local issues, noting that "[e]ducation and research are statewide concerns." Turning to the fifth factor, the circuit court noted several cases identified by the relator in which the defendant either sued or was sued in its own name without objection; as a result, this factor weighed in favor of the relator. And finally, the court considered the sixth factor and noted that, by statute, the defendant's acquisition and use property was exclusively managed and controlled by the board of regents, which supported a finding that the defendant was an arm of the state.

Based on these findings, the court affirmed the district court's dismissal of the relator's fraud claims for failure to state a claim. Finding that the relator raised the same arm-of-the-state arguments when challenging the district court's dismissal of her retaliation claim, the Fifth Circuit similarly held that the defendant was an arm of the state and thus, "sovereign immunity bars [the relator]'s claim for monetary relief under the FCA's anti-retaliation provision." The district court's dismissal of the retaliation claim was also affirmed.

- Opinion (5th Cir.)

V. FEDERAL RULES OF CIVIL PROCEDURE

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

***U.S. ex rel. Ge v. Takeda Pharm. Co. Ltd.*, 2013 WL 6399780 (1st Cir. Dec. 6, 2013)**

A *qui tam* relator alleged that a pharmaceutical company—her former employer—and one of its subsidiaries violated the federal False Claims Act and numerous state FCA laws. The relator, who was a physician, claimed that the pharmaceutical company hired her to perform medical reviews of adverse event reports with respect to four of the company's drugs. She alleged that the company refused to promptly notify the U.S. Food and Drug Administration of adverse events associated with the drugs, under-reported the incidence of bladder cancer in its reports, and that the defendant even directed her to misreport bladder cancer and a variety of other serious adverse events to the FDA. She alleged that the defendants' systematic failure to disclose to the FDA the risks associated with their drugs resulted in providers submitting false Medicare and Medicaid reimbursement claims for prescriptions for the drugs. The relator filed two *qui tam* complaints against the defendants, with each suit alleging fraud regarding different drugs. She amended both complaints twice. The United States declined to intervene in either action. The defendants moved to dismiss both complaints and the U.S. District Court for the District of Massachusetts granted the motion, finding that the relator's allegations had not been pled with particularity, as required by federal Rule of Civil Procedure 9(b), and that the relator's allegations failed to state a claim for relief under the FCA.

The relator appealed the district court's ruling to the U.S. Court of Appeals for the First Circuit. First, she argued that her complaints adequately pled "the who, what, where, and when" of the alleged fraud and thus, should not have been dismissed on Rule 9(b) grounds. Next, she argued that the district court erred by rejecting her two requests to amend the complaints. The first request was not made in a separate motion, but rather consisted of two sentences included in the relator's brief opposing the defendants' motion to dismiss; the second request was made in a post-judgment motion filed in conjunction with a motion for reconsideration of the district court's dismissal of her suits. The relator's third argument on appeal was that the district court's Rule 12(b)(6) analysis was too restrictive and that her complaints stated claims under the FCA.

Holding: The First Circuit affirmed the district court's ruling and upheld the dismissal of the relator's *qui tam* complaints, finding that the fraud allegations were not pled with sufficient particularity. The appellate court did not reach the district court's determination that the relator's complaints failed to state a claim. The circuit court also held that the district court acted within its discretion when it denied the relator's motions to amend her complaints.

<u>Failure to Plead Fraud with Particularity</u>

The First Circuit agreed with the district court that while the relator's allegations may have described a "fraud-on-the-FDA," they did not adequately plead that any false Medicare or Medicaid claims were submitted to the government as a result. The circuit court found that the relator failed to "allege facts that would show that some *subset* of claims for government payment for the four subject drugs was rendered false as a result of [the defendants'] alleged misconduct." (emphasis in original) The court further held that the relator's general allegation that <u>all</u> Medicare and Medicaid claims for the four drugs at issue were false was not specific enough to meet Rule 9(b)'s requirements. The court noted that the relator failed to show that the FDA would absolutely have withdrawn approval for the four drugs had it promptly been informed of the adverse events associated with those drugs; the court observed that the FDA had discretion to impose a variety of sanctions against the defendants and that withdrawing the drugs' approval status was the harshest of the FDA's available remedies.

On appeal, the relator offered three theories to support her allegation that all of the Medicare/Medicaid submitted for the defendants' drugs were false—(1) that the drugs were not as safe as the defendants claimed they were and thus, the sales of the drugs to the government violated implied warranties; (2) that uses of the drugs were not "reasonable and necessary" and therefore, the drugs were ineligible for reimbursement; and (3) that the drugs were misbranded and consequently, were ineligible to enter interstate commerce. The Fifth Circuit held that the relator waived these new theories of liability, as she did not properly raise them before the district court. As a result, the circuit court affirmed the dismissal of the relator's *qui tam* complaints.

The Fifth Circuit further held that the district court did not abuse its discretion when it denied the relator's requests to amend her complaint. The appeals court noted that the first request—which was not included in a stand-alone brief—was not properly made. The court further observed that the relator's second request—which was made after the district court entered judgment—was not subject to "the liberal leave to amend language of Rule 15(b)," and could only be granted if the district court's judgment was first set aside. Although the circuit court acknowledged that the relator did move the district court for reconsideration of its ruling against her, it agreed with the district court that the motion should be denied, since the relator had twice before amended both of her *qui tam* complaints and could not show that her motion for reconsideration was based on newly discovered evidence. Thus, there was no basis for permitting the relator again to amend her complaint.

- Defendants-Appellees' Opening Brief
- Relator-Appellant's Reply Brief
- Opinion (1st Cir.)

***U.S. ex rel. Michaels v. Agape Senior Cmty. Inc.*, 2013 WL 6383085 (D.S.C. Dec. 5, 2013)**

Two relators filed a *qui tam* suit alleging that a group of related healthcare companies violated the False Claims Act by certifying patients for hospice care, even though the patients needed no such care. They brought a claim under the FCA alleging that the defendants submitted false healthcare claims to the government, made false statements to the government in support of those claims, and conspired to defraud the government. Both relators had worked for one of the defendants—one relator's employment had been terminated, while the other relator remained with that defendant company. The relator who had been fired also alleged that his employment was terminated in violation of the FCA's anti-retaliation provision. The relators brought various non-FCA claims as well. The defendants moved to dismiss the relators' complaint, arguing that the alleged fraud was not pled with particularity, as required by Federal Rule of Civil Procedure 9(b). The defendants also argued that the relator who was still employed by one of the defendants illegally provided the other relator—whose employment with that defendant had been terminated—with her login credentials, so that the second relator could remotely access confidential medical record information from the defendants' electronic database. According to the defendants, the relators engaged in criminal conduct under federal and state law and violated the Health Insurance and Portability Accountability Act's (HIPAA) provisions that protect private patient information from disclosure. In addition, they alleged that the employee-relator breached her employment agreement by providing her login information to the other relator. Consequently, the defendants moved to stay the *qui tam* proceedings, pending a hearing on their motion for an order directing the relators to surrender the confidential documents to the court for *in camera* review. The relators opposed the defendants' motions and submitted a proposed amended *qui tam* complaint, for which they sought leave to file.

The U.S. District Court for the District of South Carolina denied the defendants' motions. In response to the stay motion and the defendants' allegations of criminal conduct by the relators, the court acknowledged "the difficulty a *qui tam* plaintiff faces when attempting to comply with HIPAA and other regulations, while also attempting to meet the specificity requirements of FRCP 9(b)." The court then recognized that the relators "very well may have violated various computer fraud laws, employment agreements with [the defendant-employer] and HIPAA," and that "some of those violations may amount to criminal activity." The court, though, declined to address the defendants' allegations directly or to "label [the] relators . . . as criminals on a civil motion. . . . [T]he court believes that the best course of action here is for Defendants to file any appropriate counterclaims it may have, or to report the alleged criminal activity to the proper authorities." In addition, the court noted that the relators had already submitted the purportedly confidential documents for *in camera* review, negating the defendants' request for relief. Consequently, the defendants' motion to stay the *qui tam* action was denied.

The court then considered the defendants' motion to dismiss the *qui tam* complaint. For purposes of this motion, the court evaluated the relators' proposed amended *qui tam* complaint, thereby granting the relators' motion for leave to amend. Without elaboration, the court said that the amended complaint appeared to satisfy Rule 9(b)'s heightened pleading requirements. However, since the defendants had not been given an opportunity to address the amended complaint, the court gave the defendants twenty one days to submit a brief discussing why the amended complaint should be dismissed.

- Opinion

***U.S. ex rel. Driscoll v. Todd Spencer M.D. Med. Group, Inc.*, 2013 6243858 (E.D. Cal. Dec. 3, 2013)**

A relator filed suit against a healthcare company, the doctor who owned and operated the company, a hospital, and numerous "John Doe" defendants, alleging violations of the federal False Claims Act and the California False Claims Act. According to the relator—who previously worked for the healthcare company as a radiologist—the defendants defrauded the Medicare and Medi-Cal programs by performing and billing for unnecessary CT scan procedures and diagnostic testing; and by breaking up single procedures into multiple component parts, resulting in inflated reimbursement claims. The U.S. District Court for the Eastern District of California dismissed the relator's claims, finding that the relator failed to plead the alleged fraud with particularity as required by Federal Rule of Civil Procedure 9(b). The relator was granted leave to file an amended *qui tam* complaint, with the court admonishing the relator that he would have "one, and only one" opportunity to amend his complaint. The relator filed an amended complaint and the defendants again moved to dismiss, citing Rule 9(b). The district court granted the defendants' motion and dismissed the relator's complaint with prejudice.

The court examined the relator's amended complaint and determined that the relator "fail[ed] to allege sufficiently the details of the alleged scheme to submit false claims and inflated bills." Specifically, the court found that the relator did not identify "who" participated in the fraud, as the amended complaint merely alleged that the "defendants" engaged in the fraud—which the court held was "too broad of an allegation to satisfy Rule 9(b)." Moreover, the court held that when the relator did identify individual defendants, those particular defendants were not linked to specific allegations of fraud. The court further determined that the relator did not adequately describe "when" the alleged fraud occurred, stating that "the timing of the alleged scheme is still equivocal." The court observed that the relator's employment with the healthcare company defendant lasted less than 2.5 years, but he generally alleged fraud going back six years (under the federal FCA) and ten years (under the California FCA). Similarly, the court held that the relator failed to plead "where" the alleged fraud occurred, noting that the defendants provided services at multiple institutions, but the relator "fail[ed] to allege which services were performed at which institutions," and "fail[ed] to allege which billing departments engaged in which fraudulent billing practices." Moreover, the court held that the relator did not sufficiently allege "how" the fraud occurred; the relator alleged the existence of a fraud "protocol" among the defendants, but he did not detail how the protocol led the defendants to perform unnecessary services, why the services were in fact unnecessary, or how inflated billing was a part of the alleged scheme. Finally, the court noted that the relator's complaint did not describe actual allegedly false claims, and did not cure that deficiency by providing "details leading to a strong inference that the claims involving the alleged unnecessary services were actually submitted." Instead of describing the defendants' billing system, the relator confirmed that he did not have access to the defendants' billing or medical records. As a result of those findings, the court dismissed the relator's amended complaint. As the court had previously cautioned the relator that he would only be given one opportunity to amend his complaint, the court dismissed the first amended complaint with prejudice.

- Opinion

***U.S. ex rel. Worsfold v. Pfizer Inc.*, 2013 WL 6195790 (D. Mass. Nov. 22, 2013)**

A *qui tam* relator alleged that the pharmaceuticals company he previously worked for violated the federal False Claims Act and the FCA laws of 26 states by promoting two of its drugs for off-label, non FDA-approved purposes. The relator claimed that the defendant submitted false claims, and caused healthcare providers to submit false claims, to government healthcare programs. In addition, the relator claimed that the defendant made false statements in support of false healthcare claims. The defendant moved to dismiss the relator's allegations, arguing that the relator's claims were barred under the FCA laws' first-to-rule provisions; that the relator failed to state a claim for relief; and that the relator failed to plead the alleged fraud with particularity.

The U.S. District Court for the District of Massachusetts granted the defendant's motion to dismiss, finding that the relator failed to plead the fraud with particularity. The court first noted that "[p]roof of unlawful, off-label promotion alone cannot sustain a successful FCA action." The court then observed that the relator alleged both that the defendant directly submitted false claims to the government and that it caused providers to submit false claims. With respect to the relator's "direct claims" allegations, the court found that "[n]owhere does Relator allege details evidencing how [the defendant] itself, rather than intermediary physicians, submitted false claims to the government." As a result, the relator's direct claims allegations were dismissed. The court then turned to the allegations of indirect claims. Regarding those allegations, the court observed that the relator did not "identify a single false claim for reimbursement actually presented to a federal or state government based upon an identified, purportedly off-label use of [the defendant's drugs at issue]." The court further held that the relator failed to allege sufficient facts to permit a reasonable inference that false claims were actually submitted. Additionally, the statistical evidence of allegedly false claims relied on by the relator was not adequate to demonstrate that the defendant caused providers to submit those claims. Consequently, the court dismissed the relator's claims based on allegations that the defendant submitted false claims and caused providers to do so.

The court then considered the relator's claim that the defendant made false statements material to false claims. The court dismissed those claims as well, finding that the relator did not allege that the defendant made any false statements with the specific intent to defraud the government—in fact, the court determined that the *qui tam* complaint did not allege <u>any</u> statements the defendant's employees made to providers and that the defendant's promotional materials did not contain any explicitly false statements, such as false representations about the drugs' safety or FDA-approved uses.

Finally, the court determined that allowing the relator to file an amended *qui tam* complaint—the fifth amended complaint—was unwarranted, since the relator could not clearly articulate how an amended complaint would cure the pleading deficiencies, especially without obtaining information from public sources in violation of the FCA's public disclosure bar provision.

- Motion to Dismiss Fourth Amended Complaint
- Relator's Response in Opposition to Motion to Dismiss
- Defendant's Reply in Support of Motion to Dismiss
- Opinion

***U.S. ex rel. Nelson v. Career Educ. Corp.*, 2013 WL 6162673 (E.D. Wis. Nov. 22, 2013)**

A relator filed a *qui tam* suit against a trio of related higher education companies, alleging that the defendants violated the False Claims Act. More specifically, the relator claimed that the defendants entered into program participation agreements with the federal government in order to receive federal subsidy funds under the Higher Education Act. As part of these agreements, the defendants certified their future compliance with various eligibility requirements. According to the relator, the defendants knowingly falsely represented that they would adhere to six specific eligibility requirements. The defendants moved to dismiss the relator's complaint, arguing that the relator failed to state a claim for relief under the FCA, or in the alternative, that he failed to plead the alleged fraud scheme with particularity.

The U.S. District Court for the Eastern District of Wisconsin granted the defendants' motion to dismiss in part and denied it in part. The court dismissed all of the claims against one of the defendants, finding that the relator only made "bald assertions" that this defendant was a party to the agreements at issue. The court then analyzed each of the eligibility requirements the relator claimed the defendants violated. The court determined that the relator adequately pled violations of four of six eligibility requirements and allowed him to base FCA claims on those alleged violations.

- Motion to Dismiss
- Relator's Response in Opposition to Motion to Dismiss
- United States' Statement of Interest in Opposition to Motion to Dismiss
- Defendant's Reply in Support of Motion to Dismiss
- Defendant's Reply to United States' Statement of Interest
- Opinion

***U.S. ex rel. McMullen v. Ascension Health*, 2013 WL 6073549 (M.D. Tenn. Nov. 18, 2013)**

A relator filed a *qui tam* action against four hospitals and medical centers, alleging that the defendants violated the False Claims Act by presenting false Medicare reimbursement claims. According to the relator, the defendants' Medicare claims were false because they sought reimbursements for noninvasive vascular diagnostic studies that were not performed by—or performed under the supervision of—accredited or certified technicians. The defendants moved to dismiss the relator's complaint, arguing that the relator failed to state a claim under the False Claims Act and that his fraud allegations were not pled with the requisite particularity.

The U.S. District Court for the Middles District of Tennessee agreed with the defendants and dismissed the *qui tam* complaint. The court held that the relator failed to plead the fraud allegations with particularity. Although the court acknowledged that the relator may have identified conduct that violated Medicare regulations, it held that his claims were deficient because he did not identify any Medicare claims submitted by the defendants—let alone any false statements or certifications of compliance with Medicare regulations that were contained in any of the defendants' Medicare claims. The court stated, "[b]ecause the false claim itself is a requirement of an FCA cause of action, it is not sufficient that the complaint alleged the underlying fraudulent conduct with particularity; the complaint must also allege the presentation of a false claim for payment to the government with the same particularity." Moreover the court noted that the relator did not identify which of the defendants' patients' claims were false, the subset of those patients who were Medicare beneficiaries, the date the allegedly false claims were submitted to the government, or the amounts the defendants received from the government as a result of the claims. The court rejected the relator's argument that the particularity standard should be relaxed, since he could not plead the specifics of the defendants' alleged false claims due to no fault of his own. The court, though, determined that the pleading standard should only be relaxed "when, even though the relator is unable to produce an actual billing or invoice, he has pled facts which support a "strong inference" that a claim was submitted. Such an inference may arise when the relator has personal knowledge that the fraudulent claims were submitted by Defendants for payment." Here, the relator had only previously worked for one of the four defendants—and only for ten months—and the court determined that he did not allege any personal knowledge of any of the defendants' billing and claims submissions processes or any specific false claims that the defendants actually submitted to the government. In addition, while the court recognized that relators who plead "complex and far-reaching fraud scheme[s]" may provide representative examples of defendant's false claims, it held that the relator failed to meet this standard as well. Consequently, the court granted the defendants' motion to dismiss the *qui tam* complaint. The court denied the relator's request for leave to amend his complaint, finding that an amendment would be futile.

- Opinion

***U.S. ex rel. Wismer v. Branch Banking & Trust Co.*, 2013 WL 5989312 (N.D. Tex. Nov. 12, 2013)**

A *qui tam* relator filed suit against a bank, alleging that the bank submitted false reimbursement claims to the Federal Deposit Insurance Corporation. According to the relator, during 2009's economic downturn, the FDIC acquired various assets and liabilities from banks and then immediately passed off those holdings to other banks willing to accept them. The defendant agreed to acquire certain assets and liabilities from the FDIC in exchange for the agency's agreement to reimburse the defendant in connection with the sale of certain "shared-loss assets"—the defendant was obligated to use its best efforts to maximize collections with respect to the assets, but in the event that the assets were sold for less than their stated value, then the FDIC would reimburse the defendant for 80% of losses incurred up to $5 million and 95% for losses that exceeded $5 billion. One of the shared-loss assets the defendant looked to sell was a promissory note secured by a property in Texas. The relator, as president of a capital corporation, sought to purchase the promissory note but ultimately learned that the note was sold to a third party bidder. The relator further learned that later that same day, the third party bidder transferred the note back to the original debtor for the same reduced price. The relator alleged that these transactions were part of an elaborate fraud scheme whereby the defendant would sell shared-loss assets to a third party bidder who in turn would transfer the asset back to the original holder in exchange for a kickback. Since the FDIC agreed to reimburse the defendant for the bulk of its losses in connection with the sale of shared-loss assets, the government bore the costs of the defendant's alleged scheme and the defendant's claims to the government for reimbursement were "false" under the False Claims Act. The defendant moved to dismiss the relator's claims, arguing that the relator failed to state a claim and failed to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Northern District of Texas granted the defendant's motion to dismiss. Applying Rule 9(b)'s heightened pleading standard, the court held that the *qui tam* complaint lacked sufficient particularity to pass muster. The complaint did not plead the particulars of any false claims actually submitted to the government nor did it identify anyone who made false statements to the FDIC on behalf of the defendant or when any such statements were made. The relator argued that his claims satisfied the relaxed Rule 9(b) standard announced by the Fifth Circuit: "a relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." The court disagreed, declaring that the relaxed pleading standard "is limited to instances in which the *particular* details of a scheme are alleged, because the precise contents of the false claim are not always significant," (emphasis in original) and finding that the relator's allegations did not include specific factual details of a fraud scheme, and that his claims were based on "information and belief." The court said that the defendant's alleged scheme raised breach of contract questions regarding the defendant's obligation to use its best efforts to maximize the sale of shared-loss; the relator's allegations did not necessarily imply an "FCA fraud." The court further found that the relator failed to plead the "knowledge" element of FCA liability adequately, based on its prior holding that the relator failed properly to plead that false claims had actually been submitted. The relator's complaint was dismissed, but without prejudice.

- Opinion

***Thompson v. Lifepoint Hosps., Inc.*, 2013 WL 5970640 (W.D. La. Nov. 8, 2013)**

A physician filed a *qui tam* action against two healthcare companies and another doctor, alleging that the defendants engaged in violations of the Anti-Kickback Statute (AKS) and then submitted tainted—and thus, "false"—Medicare claims to the government. In addition, the relator claimed that, with the corporate defendants' knowledge, the individual defendant performed and billed the government for unnecessary upper endoscopy procedures, failed to keep accurate notes regarding his patients' conditions, and falsely represented that he performed comprehensive physical exams every time he met with a patient and using equipment not routinely available. Further, the relator claimed that the defendants failed to keep a qualified therapeutic recreation specialist on staff and was therefore not in compliance with applicable "swing-bed" requirements; as a result, the defendants maintained an unqualified facility and all of their Medicare claims were false. The defendants moved to dismiss the *qui tam* claims, arguing that the relator failed to state a clam under the FCA and failed to allege the fraud scheme with particularity. The U.S. District Court for the Western District of Louisiana denied the motions without prejudice and granted the relator leave to file an amended complaint. The relator chose not to file an amended complaint. The defendants then re-filed their motion to dismiss and moved for an award of their attorneys' fees.

Holding: The Louisiana district court granted the defendants' motion to dismiss but denied their motion for attorneys' fees.

Failure to State a Claim/Plead Fraud with Particularity

The court examined the relator's fraud allegations and found that even though the relator claimed to have had firsthand knowledge of the defendants' alleged false claims, he based his fraud allegations on "information and belief." The court further determined that the relator "allege[d] no specific facts in support of his general allegation that defendants submitted false claims." The court continued, "Relator has failed to identify a single claim that was actually submitted pursuant to the allegedly fraudulent schemes identified in the Complaint. Relator has set out the procedure and process by which defendants could have produced false claims, but provides no facts that this process did, in fact, result on the submission of false claims." In addition, the court noted that the relator's allegations based on the defendants' alleged false certifications of compliance with various Medicare regulations were deficient, since the relator failed to allege "what the certification of compliance stated, who submitted the certification, when and where it was submitted to the government, and how the actual certification was false." As a result of these findings, the court dismissed the *qui tam* allegations for failure to state a claim and for failure to pled fraud with particularity.

Attorneys' Fees

After dismissing the relator's complaint, the court addressed the defendants' motion for attorneys' fees, in which they argued that the relator's *qui tam* claims were brought for the purpose of harassing them, after the relator resigned from his employment with them and was required to repay a loan from them. The court denied the defendants' motion, concluding that the defendants' contentions were unsupported.

- First Amended Complaint
- Opinion

***U.S. ex rel. Grenadyor v. Ukranian Vill. Pharmacy, Inc.*, 2013 WL 6009261 (N.D. Ill. Nov. 7, 2013)**

A pharmacist filed a *qui tam* suit on behalf of the United States and the States of Georgia, Illinois, and Massachusetts, alleging that multiple pharmacies and several individuals who owned and operated them provided improper inducements (including expensive food and waived co-payments) to Medicare and Medicaid customers, in violation of the Anti-Kickback Statute (AKS), and then submitted reimbursement claims for those customers' prescriptions that were tainted by the defendants' false certifications of compliance with the AKS. In addition, the relator claimed that the defendants billed the federal healthcare programs for medicine that was never provided to patients; according to the relator, the defendants faxed unnecessary prescription refill requests to physicians without patients' knowledge, never informed patients when the physicians authorized the refills, and then billed the federal government as if the medicines had been provided to the patients. The defendants moved to dismiss the relator's third amended complaint for failing to plead the alleged fraud with particularity—after the second amended complaint was dismissed with leave to amend and the relator was cautioned that further requests to amend might be denied.

The U.S. District Court for the Northern District of Illinois granted the defendants' motion.

First, the court considered the relator's false certification allegations. The court reiterated that the courts within the Seventh Circuit do not recognize the implied false certification theory of FCA liability, and thus, the relator would have to allege some express certification of the defendants' compliance with the AKS in order to maintain his *qui tam* claim. In response to the court's directive, the relator asserted that the defendants' CMS enrollment applications included a pledge to "abide by the Medicare laws" (including the AKS, according to the relator), and specifically conditioned the payment of Medicare claims on compliance with those laws. The court identified two flaws with the relator's allegation. First, the court observed that the assertion was made "upon information and belief," and that he offered no factual support for those beliefs. The court held that the relator's assertion regarding the defendant's CMS enrollment applications did not meet Rule 9(b)'s heightened pleading standard. Moreover, the court noted that the enrollment application constitutes a promise of future conduct, not a certification of past conduct, and consequently, held that the alleged false statements did not create FCA liability under the false certification theory.

The court then turned to the relator's allegation that the defendants billed the federal government for prescription refills that patients never received. Although the relator referenced two examples of the alleged misconduct, the examples did not provided sufficient detail to meet Rule 9(b)'s particularized pleading requirement. The court stated, "Plaintiff provides a specific patient, a specific date, and a specific prescription. But the allegations of actual fraudulent activity, and who actually perpetrated it, are vague." The court further noted that the relator's examples did not establish that the claims were knowingly false when submitted, as the examples only demonstrated that the defendants received a prescription, filled it, and then billed the government. As a result, the court dismissed the claims regarding medicines that were never provided, for lack of particularity.

Since the relator's state FCA claims were construed in a manner consistent with the federal claims, the court dismissed the state law claims as well. All of the claims were dismissed with prejudice, as the court stated that "Relator has had four opportunities to plead his claims. In the process, he has dropped parties, dropped claims, and added allegations in an attempt to describe adequately a fraudulent scheme involving Defendants. It now appears to the Court that he cannot do so, though not for lack of trying."

- Opinion

U.S. ex rel. Lawson v. Aegis Therapies, Inc., 2013 WL 5816501 (S.D. Ga. Oct. 29, 2013)

A *qui tam* relator alleged that a healthcare company violated the False Claims Act by submitting Medicare claims for medically unnecessary services. The United States intervened in the relator's suit, added six additional defendants, and filed its own complaint. The defendants moved to dismiss the plaintiff's claims against the newly named defendants, arguing that the allegations against those defendants were not pled with particularity as required by Federal Rule of Civil Procedure 9(b). The defendants also argued that the plaintiffs failed to state a claim under the FCA, as required by Rule 12(b)(6). In response to the defendant's motion, the government claimed that its theory of the new defendants' FCA liability was based on a veil-piercing or alter-ego theory; the government asked the court either to decline ruling on the defendants' motion until it could develop relevant facts or to dismiss the new defendants from the suit without prejudice and grant the government leave to amend its complaint once it developed sufficient facts to allege its veil-piercing theory.

The U.S. District Court for the Southern District of Georgia agreed that the allegations against the new defendants were not pled with particularity, since the government did not allege "how, when, and where [those] Defendants were involved in the alleged fraudulent activity, who at the companies was involved, and what statements were made." The court held that the government "does not come near meeting Rule 9(b)'s threshold for specificity." The court declined to delay ruling on the defendants' motion so that the government could conduct discovery, and instead, dismissed the claims against the new defendants without prejudice.

The court then turned to the defendants' Rule 12(b)(6) argument, in which they argued that the government's claim that they provided medically unnecessary services was based on subjective standards. The court held that the government "presented facts that plausibly create[d] a claim for relief under the FCA," and determined that questions regarding the medical necessity of the defendants' services "will be decided at a later stage of the litigation." Thus, the defendants' motion to dismiss for failure to state a claim was denied.

- U.S. Complaint-in-Intervention
- Motion to Dismiss Complaint-in-Intervention
- U.S. Response in Opposition to Motion to Dismiss
- Defendants' Reply in Support of Motion to Dismiss
- Opinion

U.S. ex rel. Antoon v. Cleveland Clinic Found., 2013 WL 5657597 (S.D. Ohio Oct. 16, 2013)

Two relators filed a *qui tam* suit against a surgical equipment company, a healthcare company, and a group of individuals affiliated with the healthcare company—including a surgeon. The relators alleged that some of the defendants engaged in an improper kickback scheme whereby the equipment company illegally induced the physician defendant to give inflated positive outcomes to patients to encourage their consent to surgery using the equipment company's device. Due to the alleged improper financial relationship and violations of the Anti-Kickback Statute, the relators claimed that the defendants' reimbursement claims to the federal healthcare programs—including Medicare, Medicaid, and TRICARE—were false. In addition, the relators alleged that the other defendants' claims to the government were false because the defendants failed to meet various conditions of payment under the applicable regulations, including the requirement that attending physicians oversee surgeries performed by residents. The relators made a variety of complaints to various federal and state governmental authorities regarding the defendants' alleged misconduct, and even filed a prior *qui tam* suit, which was dismissed for want of prosecution. The defendants moved to dismiss the relators' fraud claims, arguing that the fraud was not pled with particularity and that the FCA's public disclosure bar provision barred the *qui tam* suit.

Failure to Plead Fraud with Particularity

The U.S. District Court for the Southern District of Ohio granted the defendants' motion. The court held that the *qui tam* claims were not pled with the requisite particularity, since the relators did not provide factual details regarding the services involved, the claims forms the defendants' allegedly submitted, or the dates any such claim forms were submitted. The relators argued that they should not be required to allege the specifics of false claims and that the particularity standard should be relaxed. The court denied the request, finding that relaxing the pleading standard was not appropriate since the relators did not allege any personal knowledge that false claims were submitted and therefore could not plead facts in support of a strong inference that false claims were actually submitted. The court further held that the relators failed to allege any false certifications made by the defendants. Notably, the court observed that the relators did not allege that the medical equipment company submitted any claims, and thus, they did not allege any false certifications by that defendant. With respect to the other defendants, the court found that the relators failed to allege any false certifications of compliance with any law or regulation that created a condition of payment—as opposed to a condition of participation—under the government healthcare programs. The court further determined that the relators did not plead any of the elements of a conspiracy. As a result, the court held that the *qui tam* allegations were not pled with particularity.

Public Disclosure Bar

The court also held that it lacked subject matter jurisdiction over the relators' *qui tam* claims, due to the public disclosure bar. The court determined that facts underlying the relators' claims based on alleged illegal kickbacks had been previously publicly disclosed in multiple malpractice lawsuits filed by the defendants' patients, as well as in publications authored by one of the individual defendants. Moreover, the court determined that the relators did not show that they were original sources of the information on which their fraud claims were based, and therefore held that it lacked subject matter jurisdiction over the kickback claims.

Similarly, the court held that the claims based on the defendants' failure to comply with the attending physician requirements should be dismissed pursuant to the public disclosure bar. The court held that those fraud claims had been previously publicly disclosed in a state court malpractice action filed by the relators. While the court recognized that the relators had direct and independent knowledge of the information disclosed in that prior suit, it ultimately held that the relators did not qualify for the "original source" exception to the public disclosure rule, since they did not claim to have voluntarily disclosed to the government—specifically, the Department of Justice—information regarding their original and amended *qui tam* claims to the government before they filed their *qui tam* suit.

Based on the above findings, the court dismissed the relators' fraud allegations.

- First Amended Complaint
- Defendant Intuitive's Motion to Dismiss
- Cleveland Clinic Defendants' Motion to Dismiss
- Plaintiff's Response in Opposition to Cleveland Clinic Defendants' Motion to Dismiss
- Plaintiff's Response in Opposition to Defendant Intuitive's Motion to Dismiss
- Cleveland Clinic Defendants' Reply in Support of Motion to Dismiss
- Defendant Intuitive's Reply in Support of Motion to Dismiss
- Opinion

***U.S. ex rel. Simpson v. Bayer Healthcare*, 2013 WL 5614268 (8th Cir. Oct. 15, 2013)**

A *qui tam* relator filed suit against a group of affiliated healthcare and pharmaceutical companies, alleging that the defendants violated the False Claims Act with respect to the sales and marketing of one of their drugs. The relator claimed that the defendants made false representations about the drug's effectiveness and efficacy, and withheld information regarding the drug's adverse side effects. The relator alleged two distinct frauds: (1) the defendants fraudulently marketed the drug to physicians and provided illegal kickbacks to induce physicians to prescribe the drug, thereby causing the Medicare and Medicaid programs to pay improper reimbursements for prescriptions of the drug; and (2) the defendants fraudulently induced the U.S. Department of Defense (DoD) to enter into two contracts to purchase the drug for prescriptions to members of the armed services. The U.S. District Court for the District of Minnesota dismissed the relator's claims, finding that the fraud allegations were not pled with the requisite particularity, as required by Federal Rule of Civil Procedure 9(b). The relator appealed the district court's rulings to the U.S. Court of Appeals for the Eighth Circuit.

The Eighth Circuit affirmed the district court's ruling in part and reversed it in part, dismissing the relator's Medicare/Medicaid fraud claims, but allowing her to maintain the claims alleging fraud against the DoD.

With respect to the Medicare/Medicaid claims, the circuit court noted that since the relator alleged that the defendants' misleading marketing scheme caused providers to submit false claims to the government, she was required to support her allegation by identifying specific false claims that were presented to Medicare/Medcaid. She did not. Moreover, the appellate court determined that the relator only pled in conclusory terms that the government would not have paid any healthcare reimbursement claims for the defendants' drug, had it known the truth about the drug's efficacy. Ultimately, the Eighth Circuit held that "because [the relator] did not include at least some representative examples of false claims with respect to [the defendants'] alleged scheme involving federal health insurance reimbursements, or show how any particular reimbursement claim was fraudulent in and of itself," her Medicare/Medicaid claims were deficient. Consequently, the circuit court affirmed the district court's ruling dismissing those claims.

With respect to the relator's allegations of fraud against the DoD, the appeals court rejected the district court's reasoning that the fraud claim failed because the relator did not tie her allegations to specific allegedly false claims submitted to the government. Instead, the circuit court evaluated the claim under a fraud-in-the-inducement theory of FCA liability. Describing that theory, the court stated that "when a relator alleges liability under a theory of fraud-in-the-inducement, claims for payment subsequently submitted under a contract initially induced by fraud do not have to be false or fraudulent in and of themselves in order to state a cause of action under the FCA." Since the relator properly identified "(1) the individuals involved . . .; (2) the alleged misrepresentations . . .; (3) the dates when the alleged misrepresentations were made . . . and the manner in which the alleged misrepresentations were made; and (4) the specific reasons why the representations were alleged to be fraudulent;" combined with the fact that she alleged that the DoD would not have entered the contracts with the defendants had it known about the alleged misrepresentation, the Eighth Circuit held that her allegations satisfied Rule 9(b)'s pleading requirements. The district court's ruling dismissing those claims was reversed and the matter was remanded for further proceedings.

- Opinion (8th Cir.)

***U.S. ex rel. Barker v. Columbus Reg. Healthcare Sys., Inc.*, 2013 WL 5550430 (M.D. Ga. Oct. 9, 2013)**

A relator alleged that a group of healthcare providers violated the False Claims Act by submitting reimbursement claims to Medicare and Medicaid that were tainted with violations of the Anti-Kickback Statute (AKS) and the Stark Law. The relator also alleged that the defendants billed the government for healthcare services that were never provided. One of those defendants—an individual who allegedly sold his cancer treatment center to a regional healthcare system as part of the scheme—moved to dismiss the relator's claims, arguing that the relator failed to state a claim under the False Claims Act and failed to plead the alleged fraud with particularity.

The U.S. District Court for the Middle District of Georgia denied the defendant's motion. The court noted that, at the pleading stage, the relator was only required to "state with particularity the circumstances constituting the basis for the 'false claim.'" The court then held that the relator met that standard, as he described the parties involved (the "who"), the transactions at issue (the "what"), the relevant dates (the "when"), and the pertinent locations (the "where") regarding the individual defendant's alleged AKS and Stark Law violations; detailed why none of the safe harbors or exceptions to those statutory prohibitions applied; and alleged that the individual defendant knowingly submitted claims to the government that falsely certified that the services being billed for were not tainted by violations of the AKS and/or Stark Law. In addition, the relator properly alleged that the defendant's billings for radiation therapy services were false because his equipment was so substandard that he could not actually provide the services within the applicable standard of care. The court stated that the defendant "may quarrel with the truthfulness of these allegations, but this is not the stage where Plaintiff must come forward with proof." The court further rejected the defendant's argument that the relator failed to state a claim because no one could possibly believe his allegations. Such an argument, the court held, "is another example of what [U.S. Supreme Court rulings] *Twombly* and *Iqbal* have wrought—a compulsion to file a motion to dismiss in every case." The court continued, "[f]inding the *Twombly*/*Iqbal* urge irresistible, many lawyers fail to appreciate the distinction between determining whether a claim for relief is 'plausibly stated,' the inquiry required by *Twombly*/*Iqbal*, and divining whether actual proof of that claim is 'improbable,' a feat impossible for a mere mortal, even a federal judge." The individual defendant's motion to dismiss was denied.

- Amended Complaint
- Defendant's Motion to Dismiss Amended Complaint
- Relator's Response in Opposition to Motion to Dismiss
- Defendant's Reply in Support of Motion to Dismiss
- Opinion

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

***U.S. ex rel. McLain v. Fluor Enters., Inc.* 2013 WL 6002828 (E.D. La. Nov. 12, 2013); *U.S. ex rel. McLain v. Fluor Enters., Inc.* 2013 WL 6002835 (E.D. La. Nov. 12, 2013)**

Two *qui tam* relators filed suit against three construction and engineering companies, alleging that the defendants violated the False Claims Act in connection with FEMA contracts to install, maintain, deactivate, and remove temporary housing units (THUs) in the aftermath of Hurricanes Katrina and Rita. More specifically, the relators claimed that the defendants billed FEMA multiple times for the same work, for THUs that did not comply with applicable state and local regulations; and for work that served no purpose, was outside the scope of the contracts, or that was never actually performed. The relators alleged that the defendants submitted false claims to FEMA, made false certifications to FEMA in support of those claims, and made false statements in order to avoid or reduce their obligation to repay overpayments received from FEMA. In two separate motions, the defendants moved to dismiss the relators' claims, arguing that the claims related to alleged regulatory violations neither constituted a breach of contract nor included a claim that the defendants falsely certified compliance with those underlying regulations as a condition of being paid. In addition, the defendants claimed that the *qui tam* allegations could not establish that their claims to FEMA were "false," and that the relators' "reverse" false claims cause of action was not permitted under the pre-amendment version of that provision that applied when the allegedly fraudulent conduct occurred.

The U.S. District Court for the Eastern District of Louisiana granted the defendants' motions in part and denied them in part.

First, the court held that the relators adequately pled that the defendants' claims to FEMA were false because they failed to comply with applicable state and local regulations when installing and maintaining THUs. In reaching that conclusion, the court rejected the defendants' argument that the Supremacy Clause preempted the local and state regulations. The court first noted that the relators alleged that the FEMA contracts did not conflict with the local and state regulations. In addition, the court observed that "FEMA could have bargained for defendants to perform installations in a manner that did not comply with state and local regulations," and accepted as true the relators' allegation that the contracts incorporated those state and local provisions instead. Consequently, the court held that the Supremacy Clause did not provide a basis for dismissal. Furthermore, the court acknowledged that the relators cited multiple contract provisions that purportedly conditioned the defendants' payment on their compliance with applicable state and local regulatory requirements. The court denied the defendants' motion to dismiss the *qui tam* claims alleging that the defendants presented false claims for work that did not satisfy local and state regulations as required by the contracts.

The court, though, granted the defendants' motion to dismiss the relators' claims alleging that the defendants made false statements in support of the allegedly false claims—in particular, the defendants' allegedly false certifications of compliance with the local and state regulations. With respect to this claim, the court held that "[since] the relators only allege that defendants billed for nonconforming work, as opposed to work that was not completed at all, they must plead that certification of compliance was a precondition of payment to maintain a false certification claim." The court determined that the relators did not meet this requirement. While the court determined that compliance with the regulations was material to FEMA's payment decisions, it concluded that the relators failed to establish that payments were based on certifications of compliance, since the relators did not cite to any regulation that tied payments under the FEMA contracts to compliance with the local and state regulations—and the contract itself authorized a reduction, but not a complete withholding, of compensation for nonconforming work. The relators' allegations based on alleged false certifications of compliance were dismissed, but without prejudice to the government.

The court also dismissed the relators' claims alleging that the defendants wrongfully retained overpayments from FEMA and made false statements, for failure to state a claim. Specifically, the court held that the FCA's overpayment provision "only imposes liability where a person 'delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt.'" Since no receipt or certificate was ever issued for the amounts the defendants retained—the relators asserted that the defendants' fraud scheme prevented the government from issuing them—the court held that overpayment provision did not apply. The relators' overpayments claim was dismissed, but without prejudice to the government. Finally, the court dismissed the "reverse" false claim allegation. The court held that the relators did not state a claim for relief because the provision was amended in 2009—before the relators' claims arose—and the amended provision could not be applied retroactively. The court did not explain why the prior version of the reverse false claims provision did not apply. That claim was dismissed, but without prejudice to the government.

- Opinion (Fluor and CH2M Defendants)
- Opinion (Shaw and CH2M Defendants)

***United States v. Reunion Mortgage, Inc.*, 2013 WL 5944252 (N.D. Cal. Nov. 5, 2013)**

The United States filed suit against a mortgage company and the company's president and vice president, alleging that the defendants fraudulently certified that twelve residential mortgage loans qualified for Federal Housing Administration (FHA) mortgage insurance, in violation of the False Claims Act and other federal and common law. The government asserted that the loans went into default, which caused the FHA to pay out $1.6 million in insurance claims. The company president moved to dismiss the FCA claims asserted against him, arguing that he could not be held vicariously liable for the acts of other company employees.

The U.S. District Court for the Northern District of California granted the defendant's motion to dismiss the government's FCA claims. The court noted that the residential mortgage industry is regulated by state law, which provides that only licensed brokers or agents can engage in residential mortgage solicitations and that the company president served as the designated broker for the mortgage company defendant. The court further noted that the vicarious liability issue raised by the president had previously been addressed by the Ninth Circuit, which determined that when a designated broker delegates authority to act on behalf of the company to other employees, then the broker can be held vicariously liable for the other employees' actions. However, since the government merely alleged that the president was the designated broker for the company, but not that he delegated authority to other employees to serve in that capacity, the district court held that the government failed to establish a principal-agent relationship between the president and the company's other employees, and therefore imposing vicarious liability was inappropriate. In addition, the court rejected the government's argument that the president was liable under the FCA for submitting annual—allegedly false—certifications to the government that the company was in compliance with FHA lending and underwriting requirements. First, the court noted that the government's complaint did not include that allegation, and based the FCA claims on allegedly false certifications included with each of the twelve loans at issue—certifications that the company president did not make. But even if the government had alleged that the president's annual certifications constituted false claims for FCA purposes, the court held that the allegation would not have stated a claim since the annual certifications were not used to obtain FHA mortgage insurance on the loans, but rather were prospective statements regarding the company's continued eligibility to participate in the FHA program. Consequently, the court granted the president's motion to dismiss the FCA claims asserted against him. The government was granted leave to amend its claims against the individual defendant.

- Opinion

***U.S. ex rel. Sharp v. Eastern Okla. Orthopedic Ctr.*, 2013 WL 5816419 (N.D. Okla. Oct. 29, 2013)**

A *qui tam* relator alleged that her former employer—an orthopedic medical practice—violated the False Claims Act by upcoding preoperative exams and miscoding non-medically necessary follow-up visits on Medicare reimbursement claims; by improperly waiving Medicare co-insurance and deductibles for some patients; and by billing Medicare for worker's compensation and liability claims, rather than to primary insurance. In addition, the relator alleged that the defendant violated the FCA's anti-retaliation provision by terminating her employment in response to her protected whistleblowing activity. After years of discovery, the defendant moved for summary judgment on all the relators' claims. The relator moved for partial summary judgment on her fraud claims.

The U.S. District Court for the Northern District of Oklahoma granted the defendant's motion in part and denied it in part. The relator's motion was denied.

With respect to the relator's allegation that the defendant presented false claims that included upcodes for preoperative examinations, the court held that since the relator offered four specific examples of upcoding—one of which included specific allegations of corresponding false claims—the relator created a genuine issue of material fact regarding whether or not the defendant presented at least one false claim in violation of the FCA. The court held that the relator also offered sufficient evidence of the defendant's knowledge that it was engaged in upcoding, as the relator presented evidence from several of the defendant's employees to corroborate her allegations. As a result, the defendant's summary judgment motion was denied. The relator also moved for summary judgment with respect to the upcoding claim, but given the aforementioned genuine issues of fact, the court denied the relator's motion as well.

The court then turned to the relator's miscoding allegation—another claim on which both parties moved for summary judgment. The court determined that the evidence presented did not indicate that the defendant miscoded for follow-up visits, but instead used the proper code for the service provided. Thus, the court granted the defendant's summary judgment motion with respect to that claim, and denied the relator's motion.

Next, the court addressed the relator's allegation that the defendant improperly waived co-insurance and deductibles payments for some patients and then misrepresented to the government the charges it incurred for those patients' visits. Again, the relator only offered one example of a specific patient. The court held that the relator's evidence was sufficient to permit a reasonable jury to conclude that the defendant submitted false claims with respect to the single patient. But the court determined that the relator could not establish that the defendant acted knowingly, particularly since the multiple witnesses testified otherwise and explained that the patient's payments may have been waived as a result of an oversight. The defendant's motion for summary judgment with regard to the co-insurance claim was granted.

Next, the court considered the relator's allegation that the defendant improperly billed Medicare first for worker's compensation and liability claims, rather than to any available private insurance, thereby violating the Medicare Second Payer (MSP) provision. The relator's MSP allegations were based on the defendant's alleged failure to complete "Box 11" on its Medicare claims forms, which asks about other available insurance. The court, though, held that a failure to complete Box 11 did not result in false claims, since the relevant MSP regulations were ambiguous and the defendant's employees received guidance from Medicare personnel that supported their billing practices; the defendant did complete Box 10, which asked whether the patient's condition was related to employment or an accident; and the defendant was often unable to determine whether there was a primary payer, since those decisions were often made by insurance companies. For the same reasons, the court held that even if the defendant's claims were false due to the Box 11 issue, the relator still failed to establish that the defendant submitted the false claims knowingly. Consequently, the court granted the defendant's motion for summary judgment on that claim.

The court then focused on the relator's "reverse false claim" allegation, in which she claimed that he defendant retained Medicare payments to which it was not entitled. The court concluded that the defendant was entitled to judgment as a matter of law on that claim, since the relator failed to present sufficient evidence to support her claim—especially since the defendant submitted evidence showing that any alleged overpayments had been returned to the government.

Lastly, the court considered the relator's retaliation claim. The court denied the defendant's motion for summary judgment on that claim, finding that the relator presented evidence showing that: (1) she engaged in protected activity by investigating the defendant's alleged billing improprieties and false claims—a task that was not encompassed by her job duties as the defendant's front desk supervisor; (2) the defendant was on notice of the protected activity because the relator informed her direct supervisor (a member of the defendant's management) of her concerns and her reports of the alleged fraud to Medicare, and the two commenced an investigation that led to a meeting with some of the defendant's doctors wherein the relator warned the doctors of the alleged Medicare violations; (3) the defendant retaliated against her by blocking her computer access and later terminating her employment. Although the defendant argued that the relator's termination was for a non-retaliatory reason—a cost-cutting measure to consolidate two positions—the court determined that the relator provided sufficient evidence of retaliatory intent, since she was still investigating the alleged fraud at the time of her termination; she had received a positive performance review only two months before being fired; the person the defendant claimed would assume the relator's responsibilities was on maternity leave when the relator was terminated and had never discussed filling the purported combined position with the defendant; and the relator was initially offered a different reason for the firing at the time she was terminated. The defendant's motion for summary judgment with regard to the retaliation claim was denied.

- Opinion

***U.S. ex rel. Munoz v. Computer Sys. Inst., Inc.*, 2013 WL 5781810 (N.D. Ill. Oct. 25, 2013)**

Two relators alleged that a post-secondary education provider violated the False Claims Act by falsely representing to the U.S. Department of Education (DOE) that it was in compliance with various provisions of the Higher Education Act (HEA) and other DOE regulations, in order to secure federal student financial aid loans and grant funds. According to the relators—both of whom were previously employed by the defendant—the defendant never intended to comply with the HEA requirements, on which the defendant's eligibility and government funding were conditioned. The U.S. declined to intervene in the relators' suit. The defendant moved to dismiss the action, arguing that the relators failed to state a claim for relief under the FCA.

The U.S. District Court for the Northern District of Illinois granted the defendant's motion in part and denied it in part. The court first held that relators adequately pled the scienter element of their claims, since Federal Rule of Civil Procedure permits general allegations of knowledge and the relators offered multiple examples of the defendant's alleged conduct indicating an intent to deceive. The court then turned to the relators' specific fraud allegations. First, the relators claimed that the defendant violated the HEA's recruiter-incentive compensation ban by basing the salaries of its admissions representatives exclusively on their enrollment numbers; the relators alleged that the defendant disguised its HEA violations by creating a sham point system for salary increases. The court held that the relators' allegations based on the recruiter-incentive compensation ban stated a valid claim under the FCA. Similarly, the court allowed the relators to maintain their claims based on allegations that the defendant provided false job placement rates, in violation of applicable DOE regulations requiring the defendant to advertise the most recent available data. In reaching that conclusion, the court rejected the defendant's argument that the relators failed to state a claim because they did not allege any "advertisements"—only recruitment scripts given to admissions representatives and information posted on the defendant's webpage. The court held that the examples offered by the relators were sufficient to state a claim, since they clearly reflected the defendant's attempts to attract students to enroll. Moreover, the court denied the defendant's motion to dismiss the relators' claims alleging that the defendant routinely made false statements regarding its educational programs and misled students regarding whether or not it offered associates and bachelor's degree programs, whether or not credit for its courses could be transferred to other institutions, and whether the courses would satisfy requirements for obtaining various necessary certifications and licenses to secure employment in related fields. The court held that, as a condition of receiving federal government funds, the defendant was required to provide accurate information regarding its programs, and thus, the relators' allegations were sufficient to withstand the motion to dismiss.

However, the court dismissed the relators' claim that the defendant failed to meet the "70% rule," which required a verified placement rate of at least 70%. The relators conceded that they failed to allege that the rule applied to the defendant, and thus, their claims arising from the 70% rule were dismissed. The court also dismissed the relators' claims based on allegations that the defendant did not meet the requirements of nationally recognized accrediting agencies—a prerequisite to receiving DOE funds. The court noted that the relators failed to identify any false statement the defendant made to any of its accrediting agencies, nor did the relators allege that the defendant failed to satisfy any of its accrediting agencies' requirements. As a result, the court dismissed the accreditation claims as well.

- First Amended Complaint
- Motion to Dismiss First Amended Complaint
- Relators' Response in Opposition to Motion to Dismiss
- Defendant's Reply in Support of Motion to Dismiss
- Opinion

U.S. ex rel. Chilcott v. KBR, Inc., 2013 WL 5781660 (C.D. Ill. Oct. 25, 2013)

A relator alleged that two affiliated government contractors violated the False Claims Act by knowingly making false statements and billing the government for non-approved "Tour of Duty" costs—costs associated with the demobilization of personnel who were in theater for less than 179 days—pursuant to two contracts with the U.S. Army. The relator also alleged that the defendants conspired to defraud the government and made false statements in order to avoid their obligation to repay the government. After the relator filed suit, the Defense Contract Audit Agency audited the defendants with respect to the issues identified by the relator. The audit concluded that the defendants billed the government for unallowable costs, and the government demanded repayment. The United States declined to intervene in the relator's suit. The defendants moved to dismiss the *qui tam* complaint, arguing that the relator failed to state a claim for relief and that the fraud allegations were not pled with particularity. The defendants argued that the "Tour of Duty" provision only applied when employees were "rotated," which the defendants claimed only referred to instances when personnel were transferred to other positions. But the relator argued that the provision applied to all employees who were in theater for less than 179 days, regardless of the reason. The United States filed a statement of interest in opposition to the defendant's motion.

The U.S. District Court for the Central District of California granted the defendants' motion in part and denied it in part. First, the court determined that both parties' interpretations of the Tour of Duty provision were facially reasonable. But the court disagreed with the defendants' contention that it was not subject to FCA liability, since its interpretation of the pertinent provision was reasonable. Instead, drawing all reasonable inferences in favor of the relator at the motion to dismiss stage, and taking into account the relator's "allegations of specific evidence of knowledge" that the defendants' claims were false, the court held that the relator's interpretation was the correct one. The district court further held, in contravention of opinions from multiple circuit courts, that FCA plaintiffs do not need to show that there is no reasonable interpretation of the law that would make defendants' allegedly false statements true, in order to defeat a motion to dismiss. The court agreed with the government, which argued in its statement of interest that adopting the defendants' approach would allow defendants to avoid FCA liability simply by offering post-hoc "reasonable" interpretations of the contracts at issue, without an evaluation of whether, or how, they chose that interpretation. Since the court could not determine whether or not the defendants acted with at least reckless disregard or willful ignorance of whether their interpretation of the provision was correct, it refused to dismiss the relator's claims based on the reasonableness of the defendants' interpretation.

Next, the court considered the defendants' argument that the relators' conspiracy claim should be dismissed pursuant to the intracorporate conspiracy defense, because the defendants were the same corporate entity and thus, could conspire with themselves. Agreeing with the majority opinion, the court held that "general civil conspiracy principles apply to FCA conspiracy claims," and therefore, the intracorporate conspiracy defense applied. Since the relator only alleged that the defendants' employees or wholly-owned subsidiaries conspired to violate the FCA, the court determined that the relators could not allege a conspiracy and dismissed those claims.

The court then evaluated the relator's claims alleging that the defendants made false statements material to false claims. The defendants argued that these allegations failed to state a claim because neither of the contracts at issued required them to certify their compliance with contractual provisions as a condition of payment. The court rejected that argument, agreeing with the government that the text of the FCA does not require certifications of compliance, and declaring that "an invoice . . . is a statement that payment is due. . . If payment would be improper under the terms of the contract, then an invoice requesting that improper payment" gives rise to FCA liability for making false statement material to a false claim. The court, though, ultimately found it unnecessary to decide whether the FCA's provision prohibiting false statements requires false certifications of compliance with express contractual terms, since the relator alleged that the defendants' invoices—or at least the instruction accompanying the invoice forms—included an express certification of compliance that states that "all payments requested are for appropriate purposes and in accordance with the agreements set forth in the contract." Taking the relator's allegations as true for purposes of the defendants' motion to dismiss, the court held that the relator made a plausible allegation and denied the defendants' motion to dismiss the relator's "false statement" allegations.

Finally, the court turned to the defendants' Rule 9(b) argument. The defendant asserted that the relator was required to include the actual claims alleged to be false. The court disagreed, stating "[w]hile it is true that Plaintiff must eventually prove that Defendants billed the government as she alleges, she need not produce the relevant invoices at this time. The court concluded that the relator's allegations that the defendants were required to certify their compliance with the contract in order to be paid, and that the defendants were in fact paid, created a "logical inference that Defendants did certify their compliance as required, for at least some significant proportion of the invoices." The court denied the defendants' motion to dismiss for lack of particularity.

Based on the above findings, the court granted the defendants' motion to dismiss in part and denied it in part.

- Second Amended Complaint
- Motion to Dismiss Second Amended Complaint
- Relator's Response in Opposition to Motion to Dismiss
- Opinion

***U.S. ex rel. Fryberger v. Kiewit Pac. Co.*, 2013 WL 5770514 (N.D. Cal. Oct. 24, 2013)**

A group of corporate and individual relators filed a *qui tam* suit alleging that multiple construction companies and individuals violated the federal False Claims Act and the California False Claims Act by knowingly falsely certifying their compliance with contract specifications and quality control requirements on a road construction project, jointly funded by the federal and California governments. The relators were subcontractors for the defendants and alleged that when they noticed problems with the defendants' materials, they met with one of the defendant's fired superintendents who verified the problems and provided a declaration that the relators provided to the California government. The relators then notified the defendants of the problems, but the defendants opted to terminate the relators' subcontracts. The relators then filed the present suit, alleging fraud and retaliation under the FCA. The defendants moved to dismiss the relators' claims, arguing that the claims were barred by the FCA's public disclosure provision, and that the relators failed to state a claim.

The U.S. District Court for the Northern District of California granted the defendants' motion.

Public Disclosure Bar

The court first observed that the amended, non-jurisdictional public disclosure bar applied to the relators' claims—which arose after the provision was amended. The court then determined that since the provision was not jurisdictional, it could only take judicial notice of alleged prior public disclosures made in media reports—not for the truth of their content, but for the fact that they were made public—and in government investigation reports. The court declined to take judicial notice of other evidence submitted by the defendants, including two presentations prepared by government agencies, which the court concluded did not fall within the definition of "reports," for FCA purposes. The court then determined that the prior public disclosures were substantially similar to the relators' fraud allegations, as the two news media articles described the problems with the construction projects and indicated that the government was investigating the problems and considering options for resolving them. Thus, the court held that the relator's allegations were barred. The court then held that the relators were not "original sources" of their fraud allegations, and therefore could not overcome the public disclosure bar. While the court acknowledged that, prior to filing their *qui tam* complaint, the relators provided the government with a declaration from the defendant's former superintendent that described the alleged fraud, it also determined that the relators did not have direct and independent knowledge of that information—which was why the declaration was necessary. The court dismissed the relators' claims, pursuant to the public disclosure bar, but granted them leave to amend.

Failure to State a Claim

The court evaluated the sufficiency of multiple *qui tam* claims filed under the federal and state FCA laws. First, the court considered the relator's allegations that the defendant submitted false claims and made false statements to the government. The defendant argued that those allegations should be dismissed on the grounds that the relators failed to state a claim under the FCA. The court held that the relators adequately pled that false claims and false statements were presented to the government, as they alleged that a specific contractual provision required the defendants to certify that their work had been performed in accordance with the contract before they could receive payment, and that the defendants' certifications were false. In addition, the relators detailed the defendants' allegedly false claims for materials that were never purchased or installed, as well as the defendants' alleged failures to develop and implement required quality control measures.

Next, the court addressed the relators' reverse false claim allegation. The court held that this allegation was not adequately pled, because the relators only asserted that the defendants made false statements to receive payments from the government—not that they made false statements to avoid paying money owed to the government. The court granted the relators leave to amend their reverse false claim allegation.

The court then dismissed the allegations against the individual defendants and one of the corporate defendants—a company affiliated with another of the corporate defendants. With respect to the individual defendants, the court held that the relators' allegations lacked the necessary particularity to satisfy Rule 9(b)'s heightened pleading requirements. And the court dismissed the claims against one of the corporate defendant because the relators merely alleged that another defendant "acted through" the company, which the court held was insufficient to state a claim. The court also dismissed the relators' conspiracy claim, finding that their *qui tam* complaint "[did] not contain any allegations concerning a conspiracy claim." These claims were all dismissed without prejudice.

Likewise, the court dismissed the relators' retaliation claim—with leave to amend—since the relators did not dispute the defendants' motion to dismiss that claim.

- First Amended Complaint
- Motion to Dismiss or, in Alternative, to Stay
- Relator's Response in Opposition to Motion to Dismiss
- Defendant's Reply in Support of Motion to Dismiss
- Opinion

***U.S. ex rel. Maa v. Ostroff*, 2013 WL 5755043 (N.D. Cal. Oct. 23, 2013)**

A physician filed a *qui tam* suit against several other doctors and officials employed by a university medical center and school of medicine, alleging violations of the False Claims Act. According to the relator, the defendants defrauded federal healthcare programs by allowing unqualified sedation nurses to perform anesthesia services without proper supervision, and by allowing unsupervised residents to perform endoscopic procedures. The U.S. District Court for the Northern District of California determined that the regulations relied on by the relator either did not apply to the services and procedures at issue or did not require the level of physician supervision alleged by the relator. Thus, the district court dismissed the relator's first amended *qui tam* complaint for failure to state a claim. The court granted the relator leave to file a second amended complaint. The defendants again moved to dismiss the fraud allegations for failure to state a claim.

The California district court granted the defendants' motion and dismissed the fraud claims. The court agreed that the relator's re-filed claims based on anesthesia services were identical to the previously-filed allegations. Since the court had previously held that those allegations did not state a claim because the regulations cited by the relator did not apply to the sedation services provided by the defendants—the government even filed a statement of interest making this distinction. Consequently, the court again dismissed the relator's anesthesia claims. In addition, the court dismissed the relator's claims alleging that the defendants allowed unsupervised residents to perform endoscopic procedures, finding that the regulation relied on by the relator clearly indicated that the level of physician supervision alleged by the relator was not required. The court held that there was "no legal support" for the relator's conclusion. In addition, the relator's endoscopic procedures claim did not allege that any of the procedures were provided to Medicare patients. The court noted that the relator argued that "some of these patients were likely Medicare patients," but held that "[t]his is insufficient."

The relator's claims were dismissed with prejudice.

- Second Amended Complaint
- Motion to Dismiss Second Amended Complaint
- Relator's Response in Opposition to Motion to Dismiss

- [Defendants' Reply in Support of Motion to Dismiss]
- [U.S. Statement of Interest]
- [Opinion]

***U.S. ex rel. Ruhe v. Masimo Corp.*, 2013 WL 5630947 (C.D. Cal. Oct. 2, 2013)**

Three relators filed a *qui tam* action against a medical device manufacturer—their former employer—alleging that the defendant violated the False Claims Act by knowingly making false and misleading statements in connection with its devices, which resulted in the submission of false reimbursement claims to Medicare. According to the relators, the defendant made multiple false submissions to the U.S. Food & Drug Administration (FDA), seeking approval to market its devices in the U.S. The relators further alleged that after misleading the FDA to approve the devices, the defendant then submitted an application to the American Medical Association, requesting a new code to reflect billing for using its device. Moreover, the relators claimed that the defendant marketed the devices to providers for non-approved, off-label uses, and sold the devices knowing that they did not meet FDA requirements, and essentially provided a medically worthless service. The relators, all of whom were previously employed as sales representatives for the defendant, alleged that they all resigned from the company amid concerns about performance issues with its devices. Subsequently, the defendant commenced an internal investigation and voluntarily notified the FDA of the relators' concerns. The FDA performed an unannounced audit at the defendant's headquarters, but did not issue any findings or take any enforcement actions. The relators later filed their *qui tam* suit. The United States declined to intervene in the action. The defendant moved for summary judgment on the relators' claims.

The U.S. District Court for the Central District of California granted the defendant's motion. The court noted that the relators' allegations were "not the 'archetypical' False Claims Act case in which the defendant submitted a claim to the government that was false or fraudulent because it overcharged for the services rendered or charged for services that were not actually performed." Instead, the relators' fraud allegations were based on the theory that Medicare reimbursement claims submitted by providers for the defendant's devices were false, because the defendants had previously made false statements in connection with the devices. The court, though, held that the relators failed to demonstrate any false or fraudulent statement made by the defendant, and further held that even if the defendants had made a false statement regarding its devices, the relators failed to show that any such false statements were "knowingly" made, noting that the defendant disclosed its methodologies and data collection processes to the FDA, and followed FDA directives regarding specifications for its devices and the devices' approved uses. The court held that the defendants' alleged false statements "fall far short of the 'intentional, palpable lies' for which the FCA imposes liability, and instead reflected the defendant's good faith belief that its statements were true and accurate. Consequently, the court granted the defendant's motion for summary judgment.

- [Opinion]

***U.S. ex rel. Sheet Metal Workers Int'l Ass'n, Local Union No. 20 v. Horning Inv. LLC*, 2013 WL 5503327 (S.D. Ind. Oct. 1, 2013)**

A union filed a *qui tam* action against a sheet metal company, alleging that the defendant was contracted to replace the roof of a Veterans' Affairs (VA) medical center and, in order to get paid, falsely certified in its weekly payroll registers submitted to the VA that it was paying its roofers proper wages in accordance with the Davis-Bacon Act, as required by the contract. The relator claimed that the defendant hired one of its members as a roofer, but failed to pay him the proper wage during his five weeks of employment. In addition, the relator alleged that the defendant submitted false certifications to the government, as the defendant would not have been paid under the contract had it failed to submit the required certification. The defendant moved to dismiss the relator's claims, arguing two grounds: (1) that he court lacked subject matter jurisdiction over the claims because the union was not a proper FCA relator since its knowledge of the alleged fraud was second-hand, and since the U.S. Department of Labor had primary jurisdiction over Davis-Bacon Act issues; and (2) that the relator failed to state a claim under the FCA, because the fraud allegations were not pled with particularity.

The U.S. District Court for the Southern District of Indiana denied the defendant's motion.

First, the court determined that it did have jurisdiction over the relator's claims. The court held that relators are only required to be original sources of the information on which their *qui tam* claims are based if their fraud allegations had been previously publicly disclosed. Since there had been no prior public disclosure—in fact, the defendant contended that the relator would likely need to obtain its allegedly false certification forms from public disclosures, such as FOIA requests—the court held that the union was not precluded from bringing its *qui tam* claims. Additionally, the court noted that "the statute requires that the 'allegations of wrongdoing' must have been publicly disclosed," and therefore, even if the defendant's alleged false certification forms had been made publicly available, those disclosures would not trigger the FCA's public disclosure bar provision, since the disclosures alone would not constitute allegations of fraud. Next, the court considered the defendant's primary jurisdiction argument. The court concluded that while the Department of Labor has primary jurisdiction over the classification of employees, it does not have primary jurisdiction over the core issues presented in the relator's complaint—the misrepresentation and underpayment of employees. Thus, the court rejected the primary jurisdiction argument as well.

Having established jurisdiction over the relator's claims, the court turned to the defendant's motion to dismiss for failure to state a claim. The court also rejected this argument, finding that the relator properly pled his fraud allegations. The defendant had argued that the relator could not allege fraud with particularity because he could not plead the details of any false claims that were submitted to the government, and instead could only allege that false claims "must have" been submitted. But the court noted that the relator alleged the time frame when the allegedly false claims were submitted, the allegedly false certifications made by the defendants, and that the VA would not have paid the defendant without the certifications. These allegations, the court held, went beyond mere claims that false claims "must have" been submitted by the defendants. Relying on Seventh Circuit precedent, the court held that the relator was not required to provide copies of the defendant's allegedly false certification forms in order to maintain its claims. Ultimately, the court held that the relator's allegations "set[ ] forth the who, what, when, where, and how of the alleged FCA violations," and were sufficient to withstand the defendant's motion to dismiss. Finally, the court rejected the defendant's argument that the relator failed to show any damages to the government resulting from the alleged fraud, since any alleged economic loss was suffered by individual roofing employees. Although the relator argued that it was not required to plead damages in order to maintain its fraud claims, the court did not address that assertion, as it found that on multiple occasions, the relator alleged that the government was damaged by the defendant's misconduct, as the government did not receive the benefit of its bargain with the defendant and would not have paid the defendant under the contract had it known the truth about the defendant's compensation to its roofers. The court held that these allegations were sufficient to plead damages.

The defendant's motion to dismiss was denied.

- Amended Complaint
- Opinion

***U.S. ex rel. Harris v. Dialysis Corp. of Am.,* 2013 WL 5505400 (D. Md. Oct. 1, 2013)**

Two relators filed a *qui tam* action, alleging that a dialysis center violated the False Claims Act by submitting false Medicare claims. According to the relators—both of whom worked in the defendant's billing department—the defendant: (1) altered Social Security numbers on claims; (2) changed patients' body mass index numbers in order to make claims reimbursable; (3) overbilled for a particular drug; and (4) overbilled the District of Columbia and Ohio Medicaid programs. The defendant moved to dismiss those allegations, arguing that the relators failed to state a claim and failed to plead the alleged fraud with particularity. The U.S. District Court for the District of Maryland considered each allegation in turn.

First, the court examined the relators' allegation that due to inadequate billing software, the defendant regularly knowingly submitted claims to the government with altered digits in patients' Social Security numbers—thereby billing for services that were never provided to the individuals whose Social Security numbers were used. The court agreed with the defendants that the Social Security numbers were not material to the government's payment decisions, since Medicare claims are keyed to Medicare identification numbers—not Social Security numbers—and since the relators' own allegations established that the services being billed for were actually provided. Thus, the Social Security allegations were dismissed. The court dismissed this claim with prejudice as to the relators, and dismissed without prejudice as to the allegedly defrauded government entities.

Next, the court considered the relators' allegation that the defendant routinely inflated patients' body mass index numbers and entered diagnoses that had not been documented by a physician, in order to receive Medicare reimbursements for excess dialysis treatments. The court noted that the relators described specific individuals, time periods, and locations relevant to this alleged fraudulent activity, and that they cited specific regulations that established that body mass index was taken into account when payment decisions were made for the defendant's service. These allegations, the court held, were sufficient to state a claim under the FCA and the body mass index allegations were not dismissed.

Third, the court addressed the relators' contention that the defendant overbilled the government for a particular drug; specifically, the relator alleged that the defendant directed its physicians to increase orders for the drug by up to 16% of their usual orders—and in turn, to bill the government for those amounts—even though the additional amounts were not administered to patients, and were never intended to be. Ultimately, the court held that it lacked subject matter jurisdiction over that claim, pursuant to the False Claims Act's first-to-file provision. The court observed that at the time the relators filed their *qui tam* complaint, another *qui tam* action alleging the same fraud scheme against the defendant was already pending, and held that this prior suit precluded the relators' present overbilling allegation. Moreover, the court held that even if the claim was not jurisdictionally barred, the relators failed to state a claim, because the evidence offered in support of the claim "amount[ed] to nothing more than discussions of billing errors and efforts to correct the same." As a result, the overbilling claim was dismissed without prejudice, as the court noted that the previously pending *qui tam* suit had since been dismissed and would not preclude the relators from re-filing the overbilling claim. Finally, the court similarly held that the relators' allegations of fraud against the D.C. and Ohio Medicaid programs were deficient, as the relators did not allege facts demonstrating the defendant's scienter, and did not allege the fraud with particularity. Those claims were dismissed with prejudice to the relators, but not the government.

- Opinion

See *U.S. ex rel. Adams v. Wells Fargo Bank Nat'l Assn*, 2013 WL 6506732 (D. Nev. Dec. 11, 2013).

See *U.S. ex rel. Stephenson v. Archer W. Contractors, LLC*, 2013 WL 6225221 (5th Cir. Dec. 2, 2013).

See *U.S. ex rel. Budike v. PECO Energy*, 2013 WL 5890650 (E.D. Pa. Nov. 4, 2013).

See *U.S. ex rel. Siebert v. Gene Sec. Network, Inc.*, 2013 WL 5645309 (N.D. Cal. Oct. 16, 2013).

See *U.S. ex rel. Qazi v. Bushwick United Dev. Fund Corp.*, 2013 WL 5607181 (E.D.N.Y. Oct. 14, 2013).

VI. LITIGATION DEVELOPMENTS

A. Calculating Damages and Civil Penalties

***U.S. ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 2013 WL 6671270 (4th Cir. Dec. 19, 2013)**

A *qui tam* relator alleged that a company hired by the U.S. Department of Defense, pursuant to multiple contracts, to provide transportation services violated the False Claims Act by engaging in bid-rigging schemes and by submitting more than false claims for its services to the government. The relator did not seek actual to recover the government's damages from the defendant, and instead only sought civil penalties for each the false claims for payment the defendant submitted to the government. After a trial, a jury found the defendant liable under the FCA for submitting more than 9100 false claims. The U.S. District Court for the Eastern District of Virginia noted that imposing even the minimum statutory civil penalty for each of those false claims would result in more than $50 million in penalties—although no actual damages had been established, and the evidence showed that the government only paid the defendant about $3.3 million under the contract at issue. The court agreed with the defendant that such a penalty was grossly disproportionate to the alleged misconduct, and would violate the "Excessive Fines" clause of the Eighth Amendment to the U.S. Constitution. The relator and the government seemingly anticipated this issue and proposed to resolve the defendant's liability for only $24 million. The court, however, held that it could not award less than the FCA's minimum civil penalty, but also held that each of the false claims required a penalty. As a result, rather than impose a reduced total penalty that would pass constitutional muster, the court declined to impose any civil penalty at all.

Both sides appealed the district court's rulings to the U.S. Court of Appeals for the Fourth Circuit. The relator, joined by the government (and supported by an *amicus curiae* brief from Taxpayers Against Fraud Education Fund), appealed the district court's ruling awarding the government $0 in civil penalties on the relator's claims. And the defendant cross-appealed, arguing that the relator did not have standing to seek civil penalties only on behalf of the government without a corresponding claim for actual damages.

Holding: The Fourth Circuit held that the relator had standing to sue for civil penalties in the absence of actual damages, and affirmed the district court's ruling in that regard. The circuit court, though, reversed and remanded the district court's ruling that no civil penalties would be awarded against the defendant and directed the district court to enter the requested civil penalty of $24 million, an amount the circuit court declared was consistent with the Constitution's protections against excessive fines.

Damages and Civil Penalties

First, the court addressed the defendant's cross-appeal, arguing that the relator lacked standing to pursue civil penalties only on behalf of the government. The defendant claimed that standing is based on an injury-in-fact, and that the relator's decision to seek only civil penalties demonstrated that suffered no injury-in-fact. The Fourth Circuit rejected that argument, and noted that the U.S. Supreme Court had already decided the issue. According to the circuit court, the Supreme Court has established that FCA relators' standing is based, not on an injury-in-fact, but instead on the government's partial assignment of its FCA claims to relators. The defendant acknowledged the Supreme Court's ruling, but argued that the government's assignment to *qui tam* relators only applies to the government's injuries-in-fact (which are remedied by damages), and not injuries to the government's sovereignty resulting from violations of its laws (which are remedied by penalties). Thus, the defendant argued that, notwithstanding the Supreme Court's ruling, *qui tam* relators do not have standing to pursue civil penalties on behalf of the government. The Fourth Circuit, however, noted that the Supreme Court's ruling was based on its review of the long history of *qui tam* and "informer" statutes—laws that originated in England hundreds of years before the U.S. Constitution was ratified and were later enacted by the American colonies. These laws, the Supreme Court noted, allowed informers to receive a portion of penalties paid to the government, regardless of whether the informers themselves suffered an injury. The Fourth Circuit reasoned that the Supreme Court would likely not have relied on those antiquated informer statutes as a basis for conferring standing to FCA relators, had it intended for *qui tam* relators to be prohibited from recovering civil penalties for the government—and being rewarded for doing so. Finding that the FCA's damages and civil penalties provisions "were designed to be unitary, or at least complimentary" the circuit court declared: "That [the relator] made a tactical decision during the course of litigation to pursue only civil penalties altered in no material way the fundamental legal relationship among him as plaintiff and assignee, [the defendant company] as defendant and tortfeasor, and the government as victim and assignor." Furthermore, the court noted that its ruling was in line with those of the two other circuit courts that have considered the issue. In reaching its decision, the circuit court withheld ruling on the defendant's argument that allowing *qui tam* relators to pursue the government's civil penalties usurps the President's authority to appoint Executive Branch officials and to penalize those who violate federal law, in contravention of the Appointments and Take Care clauses of Article II of the Constitution. Instead, the Fourth Circuit held that the argument did not introduce jurisdictional issues, and that since it was raised for the time on cross-appeal, the issue was not properly before the appellate court.

Next, the Fourth Circuit addressed the district court's ruling that, due to constitutional concerns, no civil penalties would be awarded, even though the relator and the government agreed to accept less than half of the minimum statutory penalty for the more than 9000 false claims the defendant submitted. The circuit court held that the district court's ruling was erroneous. First, the court noted that a civil plaintiff is the "master of his complaint," and that the relator's request for only $24 million in civil penalties was "an attempt to bring the case to a suitable conclusion following the jury's verdict in his favor." While the court recognized that it is rare for a plaintiff to prevail before a jury and then seek a lesser judgment, it also concluded that "plaintiff [s'] discretion to willingly do so is virtually unbounded," and cautioned the district court to "permit the government or its assignee the freedom to navigate its FCA claims through the uncertain waters of the Eighth Amendment." Second, the court determined that the district court's award of no civil penalty to the government did not further the FCA's purpose of making the government whole. Rather, the Fourth Circuit deduced, the district court's ruling would "provide[] a perverse incentive for dishonest contractors to generate as many false claims as possible, siphoning ever more resources from the government." The court then held that the requested civil penalty of $24 million was not excessive under the Constitution, as it was not in gross disproportion to the injury the defendant caused the government. The court noted that the question of economic harm to the government in connection with the relator's claims was a hotly contested issue in the district court proceedings and the evidence support a finding that the government suffered some amount of actual damages. But the court further noted that "the concept of harm need not be confined strictly to the economic realm," and that a fraud scheme perpetrated against the government "shakes the public's faith in the government's competence and may encourage other similarly situated to act in a like fashion." The Fourth Circuit concluded that the requested $24 million civil penalty "appropriately reflect[ed] the gravity of [the defendant]'s offenses and provides the necessary and appropriate deterrent effect going forward;" the circuit court directed the district court to impose a $24 million civil penalty against the defendant.

- U.S. Opening Brief as Intervenor
- Relators-Appellants' Opening Brief
- Defendants-Appellees' Response and Cross-Appeal
- Amicus Brief in Support of Defendants-Appellees (4th Cir.) (PhRMA)
- Amicus Brief in Support of Defendants-Appellees (4th Cir.) (U.S. Chamber of Commerce)
- U.S. Reply to Cross-Appeal
- Relators-Appellants Reply to Cross-Appeal
- Amicus Brief in Support of Plaintiffs-Appellants (4th Cir.) (TAFEF)
- Defendant-Appellee Reply Supporting Cross-Appeal
- December 19, 2013 Opinion (4th Cir.)
- January 8, 2014 Opinion (4th Cir.)

United States v. Bruce, 2013 WL 5780812 (D.N.J. Oct. 25, 2013)

The United States moved for entry of default judgment against an individual defendant who had been accused of violating the False Claims Act by making false statements in an application for federal railroad retirement unemployment benefits, and in corresponding bi-weekly certifications. The government alleged that the defendant submitted fifteen false claims, and that each claim caused the U.S. Treasury Department to directly deposit a check into the defendant's bank account. After the government discovered that the defendant improperly received more than $9000 in unemployment benefits, a U.S. Attorney's Office made several attempts to contact the defendant by mail, to inform him of the false claims allegations against him and the corresponding civil penalties, and requesting a response. The government also made attempts to call the defendant to resolve the matter, but the defendant never answered the government's calls and did not set up a voicemail. After receiving no response from the defendant, the government filed suit and served the defendant with the complaint. The defendant never answered the government's complaint, and about six months after the complaint was served on the defendant, the U.S. District Court for the District of New Jersey entered default judgment against the defendant. Subsequently, the government moved for entry of the default judgment pursuant to Federal Rule of Civil Procedure 55.

The New Jersey District Court found that the government produced unchallenged evidence that the defendant knowingly submitted fraudulent unemployment benefits claims and received more than $9000 in improper payments as a result. The court further determined that the government would be prejudiced if its motion was denied, since four years had passed since the defendant received the improper payments; the government had spent significant time and resources attempting to resolve the issue with the defendant; and the defendant did not present any facts or arguments suggesting that he had any defense. Consequently, the court held that an entry of default judgment was appropriate. Applying the False Claims Act's damages and civil penalties provisions, the court held that the defendant was liable for treble damages—totaling more than $27,000—plus the minimum statutory civil penalty ($5500) for each of the false benefits claims he submitted—amounting to $82,500. In total, default judgment was entered against the defendant for nearly $110,000.

- Opinion

See _U.S. ex rel. Drakeford v. Tuomey_, 2013 WL 5503695 (D.S.C. Oct. 2, 2013).

B. Costs and Attorneys' Fees

See *Thompson v. Lifepoint Hosps., Inc.*, 2013 WL 5970640 (W.D. La. Nov. 8, 2013).

C. Default Judgment

See *United States v. Bruce*, 2013 WL 5780812 (D.N.J. Oct. 25, 2013).

D. False Certifications of Compliance

***U.S. ex rel. Qazi v. Bushwick United Dev. Fund Corp.*, 2013 WL 5607181 (E.D.N.Y. Oct. 14, 2013)**

A *qui tam* relator filed suit on behalf of the United States and the State of New York, alleging that a housing development corporation and a day care center violated the federal and New York false claims laws. Specifically, the relator claimed that the defendants were contracted by the State and federal governments to provide child care services to New York families pursuant to a program jointly funded by federal and state funds. The relator, who spent 10 years working for the day care center as a teacher, alleged that, in order to receive payment from the government agencies, the defendants falsely certified that they were in compliance with applicable regulations regarding the proper ratio of children to adults. She claimed that she reported her concerns to the center's upper management multiple times, but that the center continued making false certifications. In addition, the relator maintained that after the center stopped its operations, the development corporation took over and continued the fraud. Neither government intervened in the relator's suit. The defendants moved to dismiss the action, arguing that the relator's allegations failed to state a claim under the FCA.

The U.S. District Court for the Eastern District of New York granted the defendants' motion. The court first determined that the relator's claims were based on a "legally false" theory of FCA liability, whereby the defendants' reimbursement claims to the federal and State governments contained explicit, false certifications of compliance with applicable regulations, notwithstanding the fact that the services billed for were actually provided. The court, though, ultimately held that this certification was a condition of the defendants' participation in the government-funded program—not a condition of receiving payment for services rendered. The court based its holding, at least in part, on its observations that the regulatory scheme at issue did not discuss payment or reimbursement, and that, with regard to non-compliance, the underlying administrative scheme only provided for denial or revocation of applicable permits and/or suspension or termination of child care service operations, not denial of payment. Quoting Second Circuit precedent, the district court noted that "not all instances of regulatory noncompliance will cause a claim to become false." Consequently, the court concluded that the FCA does not apply to "any knowing violation of any regulation for which a defendant certified compliance, no matter how technical or attenuated from the government's actual payment decision." Since the relator failed to allege how the defendants' alleged false certifications affected the governments' payment decisions, the court held that the *qui tam* allegations were deficient. And to the extent that the relator's claims were based on allegations of implied—not explicit—false certifications of compliance—the court similarly held that the claims could not proceed, since the certifications at issue were not conditions of payment. Furthermore, the court concluded that, pursuant to applicable regulations, "local administrators would take responsibility for ensuring compliance," and thus, allowing the relator to bring an FCA action based on the defendants' certifications in this instance would undermine the State's administrative scheme. The court stated that "[o]nce the federal courts start addressing the issue of which [regulatory] violations are 'serious enough' to give rise to a false claim and which are not, they will have effectively taken over the administrative function."

The defendants' motion to dismiss was granted.

- Opinion

***U.S. ex rel. Ortolano v. Amin Radiology*, 2013 WL 5526514 (M.D. Fla. Oct. 3, 2013)**

A relator filed a *qui tam* action on behalf of the United States and the State of Florida, alleging that his former employer—a radiology center—violated the federal and Florida False Claims Act laws by violating a variety of Medicare and Medicaid regulations, while falsely certifying with all applicable conditions of participation in the programs. The relator submitted a four-page spreadsheet detailing more than 300 of the defendant's allegedly false claims. In addition, he specifically referenced two procedures for which the defendant allegedly submitted false reimbursement claims. The court considered each of the regulations the defendant allegedly violated and held that some of the relator's allegations were based on actual regulatory violations—which could form the basis for the relator's FCA claims—while other allegations did not establish regulatory violations and therefore could not serve as the basis for FCA liability. With respect to the claims that were based on actual regulatory violations, the court further held that the relator, given the fact that he "was an insider working for [the defendant] during the relevant time period and in a position to personally observe these events" and the spreadsheet of allegedly false claims he provided, could satisfy the "indicia of reliability" standard for pleading that the defendant actually submitted false healthcare claims. Since the relator's allegations were "more than enough to put [the defendant] on notice of the charges against it and to mount a proper defense," the court denied the defendant's motion to dismiss the claims based on actual regulatory violations.

- Amended Complaint
- Motion to Dismiss Amended Complaint
- Relator's Response in Opposition to Motion to Dismiss
- Opinion

See *U.S. ex rel. Stephenson v. Archer W. Contractors, LLC*, 2013 WL 6225221 (5th Cir. Dec. 2, 2013).

See *U.S. ex rel. McLain v. Fluor Enters., Inc.* 2013 WL 6002828 (E.D. La. Nov. 12, 2013); *U.S. ex rel. McLain v. Fluor Enters., Inc.* 2013 WL 6002835 (E.D. La. Nov. 12, 2013).

See *U.S. ex rel. Grenadyor v. Ukranian Vill. Pharmacy, Inc.*, 2013 WL 6009261 (N.D. Ill. Nov. 7, 2013).

See *United States v. Reunion Mortgage, Inc.*, 2013 WL 5944252 (N.D. Cal. Nov. 5, 2013).

See *U.S. ex rel. Chilcott v. KBR, Inc.*, 2013 WL 5781660 (C.D. Ill. Oct. 25, 2013).

E. FCA Seal/Service Issues

***U.S. ex rel. Surdovel v. Digirad Imaging Solutions*, 2013 WL 6178987 (E.D. Pa. Nov. 25, 2013)**

A *qui tam* relator alleged that his former employer, a medical imaging company, made false applications for payment to Medicare, in violation of the False Claims Act. The government moved to dismiss the relator's complaint, arguing that the relator failed to comply with the FCA's requirement to serve the United States with a copy of the complaint and his written disclosure of all material facts. The relator's counsel did file the complaint—which actually did not allege any fraud claims on behalf of the government, and instead only alleged a claim under the FCA's anti-retaliation provision—under seal, but never served the government with a copy. Two years later, the relator's counsel contacted the U.S. Attorney, inquiring about the status of the government's investigation; the attorney was directed to serve the government with the complaint. A year later, the U.S. Attorney again informed the relator's counsel that the *qui tam* complaint had not been served. Two years later—and five years after originally filing the *qui tam* action—the relator's counsel moved to unseal the *qui tam* complaint, which still had never been served on the government. The government then filed its motion.

The U.S. District Court for the Eastern District of Pennsylvania granted the government's motion to dismiss the *qui tam* complaint. The relator's motion to lift the seal was also granted.

The court first noted that three circuit courts have examined the standard to be applied when the government moves to dismiss a *qui tam* complaint. While the D.C. Circuit held that the government has the unfettered right to dismiss *qui tam* suits, the Ninth and Tenth Circuits have held that the government's motion should only be granted if the government can show that the dismissal is rationally-related to accomplishing some valid government purpose, and that the government's motion is neither arbitrary nor irrational. While not opining on how the Third Circuit might rule on the issue, the district court held that the government's motion would be granted under either standard, as the motion "was rationally related to the government's interest in investigating *qui tam* claims." The court concluded that the relator's failure to serve the *qui tam* complaint on the government—for several years—frustrated the government's ability to investigate the fraud allegations, warranting dismissal. Although the relator's complaint did not actually allege any claims on behalf of the government—and could have been filed as a stand-alone retaliation claim—since the relator chose to file the claims under seal as a *qui tam* action, the court held that the FCA's service requirements applied; otherwise, the defendants would be prejudiced by having the relator "spring this claim" on them after it had been under seal for more than five years. As a result, the relator's complaint was dismissed with prejudice.

- Opinion

***U.S. ex rel. Grover v. Related Cos., LP*, 2013 WL 6037213 (D.D.C. Nov. 14, 2013)**

A relator filed a *qui tam* suit alleging that his co-workers—employees of Fannie Mae—conspired to defraud the United States by undervaluing property assets, transferring those assets to private ownership, and personally profiting when the properties were resold. After the United States announced its decision not to intervene in the relator's suit, the relator moved to voluntarily dismiss the suit without prejudice. The relator also moved to keep the action under seal permanently, or alternatively, for leave to file a redacted amended complaint. The United States consented to the voluntary dismissal of the complaint, but opposed the motion to keep the case under seal. The U.S. District Court for the District of Columbia dismissed the suit, but denied the relator's request to maintain the seal.

The court observed that in the D.C. Circuit, there's a strong presumption in favor of public access to judicial proceedings, and a six-factor test is used to determine whether that presumption can be overcome. The six factors are: "(1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents at issue; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings." The court held that the first factor weighed in favor of unsealing the case, notwithstanding the relator's assertion that no litigation had commenced since the *qui tam* complaint had never been served and thus, the presumption of public access to judicial proceedings had not been implicated. Instead, the court determined that there is an "inherent public interest in being able to access records in FCA cases," and that the interest was heightened in the relator's suit, which alleged "improprieties with taxpayer money by one of the largest entities in the mortgage and financial services industry." Next, the court held that since the public never had access to any of the case documents, as the case had always been under seal, the second factor was neutral. Third, the court noted that the relator objected to the unsealing of the case, which weighed in favor of maintaining the seal. The fourth factor—the strength of privacy interests—weighed in favor of unsealing. The relator argued that two privacy interests were implicated—his and the defendant's. But the court held that the relator's interest in maintaining his reputation and/or future career prospects was not the type of interest protected by the FCA seal, noting that, by filing the *qui tam* suit, the relator took the risk that his identity would be revealed. The court also held that the relator had no standing to raise arguments regarding the potential harm to the defendant's reputation should the case be unsealed. The court then held that he fifth factor weighed in favor of unsealing, since the relator could not point to any possible prejudice he might suffer in future litigation as a result of unsealing—particularly since he was no longer employed by the defendant. Finally, the court determined that the sixth factor weighed in favor of unsealing, since the relator's complaint was dismissed without prejudice and thus, could be revived in future litigation. The relator's motion to keep the case under seal was denied.

The court also denied the relator's motion to file a redacted amended complaint that would remove any information identifying himself or the defendant. The court noted that this request was inappropriate for many of the same reasons that maintaining the seal was improper—in fact, the court held that redacting unsealed compliant in this way would "have the practical effect of sealing the entire case," and reiterated that the public has an interest in having access to the relator's allegations of fraud by officers of Fannie Mae. The relator's request to file a redacted amended complaint was denied.

- Opinion

See *U.S. ex rel. Gunn v. Shelton*, 2013 WL 5980633 (D. Del. Nov. 12, 2013).

F. Leave to Amend *Qui Tam* Complaint

U.S. ex rel. Budike v. PECO Energy, 2013 WL 5890650 (E.D. Pa. Nov. 4, 2013)

A relator filed a *qui tam* suit against an electric utility company, a defense contractor, and a city's port authority, alleging violations of the False Claims Act. Specifically, the relator claimed that the port authority was contracted by the U.S. Government to provide auxiliary support services—including electrical power—to naval vessels that were managed by the defense contractor. The port authority contracted with the utility company to provide electricity to the vessels. The port authority also contracted with an engineering and consulting firm, of which the relator was president, to provide on-call engineering services. The port authority also had the relator's firm conduct a comprehensive energy audit amid concerns that the utility company was submitting inflated bills for the electric power supplied to the naval vessels; the port authority authorized the utility company to give the relator's company access to all documentation and information relevant to the audit. The relator alleged that the utility company failed to provide all of the requested information, and that his company continued the audit using the port authority's records and information obtained from meters and monitoring equipment his company installed throughout the vessels. The relator claimed that his company's audit revealed billing irregularities and overcharges—of up to 40%—and that his company discussed those issues with all of the defendants and appropriate government officials. Subsequently, the relator alleged, the defense contractor asked the relator's company to drop its investigation and withheld critical information from the company regarding the payments made to the vessels' electric utility companies—information that, according to the relator, could have stopped the alleged overbilling. The defense contractor defendant moved to dismiss the relator's allegations, arguing that the relator failed to state a claim. The relator also moved for leave to file a third amended complaint to add more specific factual allegations against the defense contractor. The defense contractor opposed the relator's motion, arguing that amending the complaint would be futile.

The U.S. District Court for the Eastern District of Pennsylvania granted the relator's motion for leave to amend the *qui tam* complaint and denied the motion to dismiss. The court observed that the proposed third amended complaint included detailed allegations regarding the defense contractor's interactions with the other defendants, and the defendants' alleged conspiracy to defraud the government. Contrary to the defense contractor's assertion, the court held that the amendment would not unduly prejudice the defendant—particularly since the defendant did not show how it would be prejudiced—and that the motion for leave to amend was neither untimely nor filed in bad faith. Moreover, the court held that the proposed amended complaint would not be futile, since the relator alleged specific facts that "described the general composition of the conspiracy, its broad objective, and defendants' general roles."

- Opinion

G. Vicarious Liability

See *United States v. Reunion Mortgage, Inc.*, 2013 WL 5944252 (N.D. Cal. Nov. 5, 2013).

RECENT JUDGMENTS & SETTLEMENTS

October 1, 2013 – December 31, 2013

St. James Healthcare/Sisters of Charity (Dec. 31, 2013)

Sisters of Charity of Leavenworth Health System, a Colorado-based health care organization, and St. James Healthcare, a Montana hospital, have agreed to a settlement to resolve allegations that they violated the Anti-Kickback Statute, the Stark Law, and the False Claims Act. St. James and Sisters of Charity will pay $3.85 million to settle claims that they were involved in improper financial arrangements with certain referring physicians and physicians groups. The government alleged that Sisters of Charity arranged below-market lease rates for referring physicians on the St. James campus. The organizations disclosed these issues to the government.

Abbott Laboratories (E.D. Tenn. Dec. 27, 2013)

Abbott Laboratories, a global pharmaceuticals company, agreed to pay $5.48 million in order to settle allegations that the company violated the Anti-Kickback Statute and the False Claims Act by paying illegal kickbacks to physicians to encourage the use of the company's carotid, biliary, and peripheral vascular products. According to the government, Abbott paid doctors for speaking engagements and conferences in an effort to induce the doctors to arrange for Abbott products to be used in their hospitals. The allegations arose in a lawsuit filed by former Abbott employees Steven Peters and Douglas Gray; Peters and Gray will receive more than $1 million as their share of the government's recovery.

<u>Rural/Metro</u> (Dec. 26, 2013)

Rural/Metro, which operates multiple Arizona ambulance companies, agreed to pay $2.8 million to resolve allegations of fraudulently billing Medicare for emergency ambulance services. The government contended that, from 2007 through 2011, Rural/Metro reported non-emergency ambulance rides between hospitals as emergency trips, which are reimbursed at a higher rate. Rural/Metro paid $5.4 million in a settlement agreement related to Medicare billing in 2012; Rural/Metro is under a five-year corporate integrity agreement stemming from the 2012 settlement.

<u>Genzyme Corp.</u> (M.D. Fla. Dec. 20, 2013)

Genzyme Corp. will pay the government $22.28 million to settle allegations that it marketed a "slurry" version of its Seprafilm adhesion barrier—a film which forms a bioresorbable barrier between abdominal tissue and organs after surgery. The government alleged that sales representatives for the biotech company trained doctors in creating a Seprafilm and saline mixture known as "slurry," which was then used in laparoscopic surgeries. Seprafilm was not FDA-approved for use in laproscopic surgery, and thus Genzyme was accused of causing false claims to be submitted to federal health care programs for improper uses of Seprafilm. The settlement will resolve two *qui tam* lawsuits. One of the suits was brought by former Genzyme manager Joseph Feuntes and former Genzyme surgery specialist Christoper Russo, both of whom were represented by TAFEF member Kevin Darken of the Cohen Law Group. The other lawsuit was filed by physician and Genzyme expert speaker Scott Kelley.

<u>Dr. Elie H. Korban</u> (W.D. Tenn. Dec. 19, 2013)

A Tennessee-based cardiologist has agreed to pay $1.15 million to resolve allegations that he violated the False Claims Act by billing federal health care programs for medically unnecessary placements of cardiac stents. The government claimed that Dr. Elie H. Korban, who owns Delta Clinic and has privileges at two Jackson, Tenn. hospitals, placed medically unnecessary stents in Medicare and Medicaid patients from 2005 through 2008. Korban also allegedly submitted improper bills to Medicare for work performed by substitute doctors. The settlement resolves a *qui tam* lawsuit filed by Dr. Wood M. Deming, who was represented by TAFEF member Susan Schneider Thomas of Berger & Montague, P.C.

<u>Northrop Grumman Corp.</u> (Fed. Cl. Dec. 9, 2013)

Northrop Grumman Corp. agreed to pay the United States government $11.4 million to resolve allegations that the company failed to honor commitments included in a 2002 settlement agreement with the Defense Contract Management Agency (DCMA). As a condition of its 2002 settlement, Northrop agreed to limit deferred compensation awards to key employees in proposals for subsequent contracts. According to the government, Northrop failed to abide by this provision; consequently, the government assessed a penalty against Northrop. Northrup challenged the government's decision in the U.S. Court of Federal Claims, and the government responded with counterclaims alleging that Northrop also violated the False Claims Act by passing on unallowable costs in its government contracts. This $11.4 million settlement resolves the parties' claims.

<u>AT&T Corp.</u> (W.D. Pa. Dec. 3, 2013)

AT&T Corp. agreed to pay $3.5 million to resolve allegations of improperly collecting Federal Communications Commission funds for its telecommunications relay service, while knowingly allowing international con artists to use the service. The telecommunications relay service is intended to help the hearing-impaired, who use the service to type messages that are then read to call recipients. The lawsuit was brought by a former AT&T employee, Constance Lyttle, who claimed that scam artists were using the service to manipulate targets. Lyttle will receive $525,000 of the government's recovery.

<u>Caremark LLC</u> (W.D. Tex. Dec. 2, 2013)

Caremark LLC has agreed to pay $4.25 million to settle allegations that the pharmacy benefit management company failed to reimburse Medicaid properly. The federal government will receive approximately $2.31 million, while five states—Arkansas, California, Delaware, Louisiana, and Massachusetts—will share the remaining $1.94 million. Caremark LLC allegedly failed to reimburse Medicaid for drug costs associated with "dual eligible" individuals enrolled in both Medicaid and Caremark's private health plan. The government contended that Caremark cancelled Medicaid's legitimate requests for reimbursement, causing Medicaid to incur costs which should have been covered by the private insurer. The settlement also resolves a lawsuit filed by a former quality assurance representative at Caremark, Janaki Ramadoss. Ramadoss will receive approximately $505,680 from the federal government's share of the settlement, as well as additional amounts from the states.

<u>Hallmark Meat Packing & Westland Meat Co.</u> (C.D. Cal. Nov. 27, 2013)

A California slaughterhouse company, Hallmark Meat Packing, and its sister company, Westland Meat Co., have agreed to forfeit $3.1 million to settle claims that they violated the conditions of their contracts with the U.S. Department of Agriculture, which required humane handling of the animals. Undercover operatives for the Humane Society provided videos of slaughterhouse employees abusing cattle as they were moved to slaughter. A court had previously handed down a $497.3 million judgment against Westland, which was then reduced to approximately $155.7 million; but because the company was essentially bankrupt, that judgment was symbolic, according to the Humane Society. This settlement payment represents almost all of Westland's remaining assets.

<u>Lymphedema & Wound Care Institute Inc.</u> (S.D. Tex. Nov. 25, 2013)

Susan Morgan, Erin Hamilton, and Ryan Chuston, who conducted business in four locations in the Houston area as the Lymphedema & Wound Care Institute Inc., paid the government $4.3 million to settle claims that they violated the federal False Claims Act. The government alleged that, from 2006 through 2012, the Institute billed Medicare for manual lymphatic drainage therapy performed by massage therapists—and not physical therapists, as required by Medicare. The allegations arose in a *qui tam* lawsuit filed by a physician who also provides lymphatic drainage treatments; the physician will receive 19% of the government's recovery. The settlement agreement also bars Morgan from participating in federal health benefit programs for 10 years; Hamilton and Chuston will operate the Lymphedema & Wound Care Institute under a corporate integrity agreement through the Inspector General for the Department of Health and Human Services.

<u>Vantage Oncology LLC</u> (S.D. Ohio Nov. 21, 2013)

Vantage Oncology LLC, which owns and operates multiple radiation oncology centers, has agreed to pay approximately $2.08 million to resolve allegations that, from 2007 through mid-2012, its Illinois centers overbilled Medicare for treatments and improperly billed Medicare for undocumented and insufficiently supervised procedures. Suleiman Refaei, a former Vantage employee, brought a *qui tam* lawsuit against the company under the False Claims Act. Refaei will receive a $354,450 reward.

__Twenty-five Drug Manufacturers__ (Nov. 20, 2013)

Twenty-five drug makers (Abbott; Alcon; Apotex; Astellas; Aventis; Bayer; Biovail; Brenn Distribution; Eisai; Eli Lilly; Forest; Gilead; Johnson & Johnson; Lupin; Novartis; Ostuka; Par; Pernix; Perrigo; Ranbaxy; Sandoz; Shire; Takeda/Tap; Taro; and UCB) agreed to pay $88.4 million to resolve allegations that the companies fraudulently inflated drug prices in order to increase Louisiana Medicaid reimbursements. The State of Louisiana alleged that many of the companies' average wholesale drug prices were well above the true cost of medicine—in some cases, the AWP was more than 5,000 percent higher. The settlement stems from a Louisiana lawsuit against 109 drug manufacturers. Including the latest settlement, the lawsuit has resulted in $238.1 million in settlement payments.

__The Ensign Group Inc.__ (C.D. Cal. Nov. 19, 2013)

A California-based skilled nursing provider, The Ensign Group Inc., agreed to pay the federal government $48 million to settle allegations that six of its nursing homes submitted false claims to Medicare. The allegations were raised in *qui tam* lawsuits filed by two former Ensign therapists—Gloria Patterson and Carol Sanchez—who were represented by TAFEF member Larry Zoglin of Phillips & Cohen LLP. The suits contended that, between 1999 and August 2011, Ensign's skilled nursing facilities submitted claims for medically unnecessary rehabilitation therapy in an effort to increase their revenue. Ensign also allegedly encouraged therapists to increase their reimbursement revenue by providing excess therapy regardless of patients' needs. In addition to the monetary settlement, Ensign agreed to enter into a Corporate Integrity Agreement with HHS-OIG, which will impact all of its skilled nursing facilities.

__FreshPoint Inc.__ (S.D. Ga. Nov. 19, 2013)

FreshPoint Inc., a Texas-based food distribution company, has agreed to pay $4.2 million to resolve allegations that it charged the Department of Defense improperly inflated prices for fresh fruits and vegetables. FreshPoint Inc., a wholly owned subsidiary of Sysco Corp., allegedly adjusted its prices in violation of fifteen contracts with the Defense Department, which required the company to charge the government a pre-established markup above cost. The allegations against FreshPoint arose from a *qui tam* lawsuit filed by Charles Hall, who will receive $798,000 of the government's award.

__FILYN Corporation d/b/a Lynch Ambulance__ (C.D. Cal. Nov. 18, 2012)

Anaheim, California-based Lynch Ambulance has agreed to pay $3.05 million to resolve claims that the company submitted false claims to Medicare, TRICARE, and the Federal Employees Health Benefits Program. Between 2001 and 2007, Lynch Ambulance allegedly billed these federal healthcare programs for services provided to patients who did not require ambulance transportation. The settlement resolves a *qui tam* lawsuit brought by two former Lynch Ambulance employees, Jamie Weatherly and Dawn Lucero. In addition to the monetary settlement, Lynch Ambulance entered into a Corporate Integrity Agreement with the Department of Health and Human Services.

__CA Technologies__ (E.D.N.Y. Nov. 16, 2013)

CA Technologies (CA) agreed to pay $11 million to resolve allegations that it fraudulently overbilled government agencies for software maintenance and purchasing plans between 2001 and 2009. According to former employee Ann Marie Shaw, who filed a *qui tam* lawsuit against the company, CA overbilled the State Department, the Department of Justice, the Department of Defense, and other government entities. Under its maintenance renewal plans, CA agreed to provide free upgrades, patches, and technical support for software customers, but when customers renewed their plans, CA allegedly delayed the renewal period, enabling the company to overcharge customers for maintenance services between the end of the previous plan and the renewal. CA also allegedly manipulated the Department of Defense into ordering software from third-party vendors rather than using prepaid software under its existing blanket purchase agreement. Of the $11 million settlement, the federal government will receive $8 million, and the remainder will be divided between the District of Columbia and the eight states represented in the suit: California, Florida, Hawaii, Illinois, Massachusetts, New York, Nevada, and Virginia. Shaw, who was represented by TAFEF members Janet L. Goldstein of Vogel Slade & Goldstein LLP, and Peter W. Chatfield of Phillips & Cohen LLP, will receive approximately $2.2 million as her share of the government's recovery.

<u>The Vision Center</u> (M.D. La. Nov. 15, 2013)

Sabine Optical, d/b/a The Vision Center, and its owners have agreed to pay $1.2 million to resolve allegations that it violated the federal and Louisiana False Claims Acts by submitting fraudulent bills to Medicaid. Of the total settlement, the federal government will receive $819,960,000 and the State of Louisiana will receive the remainder. The Vision Center allegedly billed Medicaid for services never performed, glasses never provided, and inadequate services due to an excessive patient load. The defendants also allegedly falsified prior authorization forms. The allegations arose in a lawsuit filed by William Guess, a former employee. Guess, who was represented by TAFEF member J. Marc Vezina of Vezina Law, PLC, will receive a 20% share of the recovery.

<u>Basco Manufacturing Co.</u> (M.D. Fla. Nov. 14, 2013)

Basco Manufacturing Co. agreed to pay the government $1.1 million as part of a settlement agreement resolving allegations that it submitted false customs declarations to the U.S. Department of Homeland Security Customs and Border Protection. As alleged in a *qui tam* lawsuit brought by James F. Valenti Jr., Basco deliberately misstated the origin of aluminum extrusions imported from China in order to avoid paying duties on the imported goods. By stating that the aluminum extrusions were from Malaysia, Basco could avoid certain antidumping and countervailing duties.

<u>Iraqi Consultants and Construction Bureau</u> (Nov. 7, 2013)

Iraqi Consultants and Construction Bureau (ICCB), a Baghdad-based construction company, agreed to pay a $2.7 million settlement to resolve allegations that it bribed Army Corps of Engineers procurement official John Markus in exchange for information that helped ICCB obtain government contracts. After obtaining the contracts, ICCB allegedly overcharged the U.S. for services, in violation of the False Claims Act. The settlement is connected to a larger criminal investigation into Markus, who pleaded guilty in 2012 to wire fraud, money laundering, and failure to report a foreign bank account.

<u>McKesson Corporation and First DataBank, Inc.</u> (Nov. 5, 2013)

Pharmaceutical wholesaler McKesson Corporation and publisher First DataBank, Inc. reached a settlement agreement with the State of Wisconsin over allegations that the companies defrauded the Wisconsin Medicaid program. The state alleged that the companies violated the Wisconsin Medicaid fraud statute, Wisconsin's Deceptive Trade Practices Act and the Wisconsin false claims act law by deliberately misreporting drug prices to Wisconsin Medicaid, causing pharmacies to be reimbursed at inflated rates. McKesson will pay $13,916,115.60 (including more than $2 million in attorneys' fees) to Wisconsin, while First DataBank will pay the state $276,881.25 in credits for its services.

LG Chem Michigan, Inc. (Nov. 5, 2013)

LG Chem Michigan, Inc. (LGCMI) will pay $1,231,319 to the federal government to settle allegations that the company violated the federal False Claims Act. The government contended that LGCMI used funds from the Department of Energy—which were provided under the American Recovery and Reinvestment Act to finance the construction of a lithium-ion battery manufacturing plant in Michigan—to pay workers engaged in non-work activities, including watching movies and performing volunteer work. Moreover, the government alleged that LGCMI failed to provide accurate information regarding these activities in response to government inquiries about the funding. The $1.2 million amount is in addition to the $842,189 that LGCMI already refunded to the Department of Energy.

Johnson & Johnson (E.D. Pa., D. Mass., and N.D. Cal. Nov. 4, 2013)

Johnson & Johnson (J&J) agreed to pay over $2.2 billion as part of the largest-ever United States health care fraud settlement, which includes criminal fines and forfeiture of $485 million and civil settlements of $1.72 billion. The settlement resolves allegations that J&J and its subsidiaries promoted the drugs Risperdal, Invega, and Natrecor for non-FDA approved uses. In addition to the financial settlement, J&J agreed to a five-year Corporate Integrity Agreement that required major changes for J&J's executive compensation program, research practices, and physician payments.

The government contended that sales representatives Janssen Pharmaceuticals, a subsidiary of J&J, promoted the antipsychotic drug Risperdal to prescribers, encouraging its use for symptoms such as anxiety, depression, hostility and confusion. Specifically, sales representatives allegedly targeted physicians who treated elderly dementia patients, and used sales materials that downplayed Risperdal's FDA-approved use—treating schizophrenia. In a plea agreement, Janssen admitted that it promoted Risperdal for elderly, non-schizophrenic patients, and the company will pay a total of $400 million to resolve liability for those charges. The government also charged that Janssen based sales representatives' bonuses on sales of Risperdal, thus encouraging off-label promotion. One civil complaint alleged that Janssen made false statements about the safety of the medication for elderly dementia patients, despite the fact that the FDA cautioned the company that marketing Risperdal as safe and effective would be "misleading." The complaint also alleged that J&J and Janssen were allegedly aware of an increased risk of stroke in elderly patients taking Risperdal, and downplayed that risk by delaying the publication of data supporting the existence of the risk. The government further contended that, from 1999 through 2005, Janssen marketed Risperdal to child psychiatrists for treating symptoms of oppositional defiant disorder, obsessive-compulsive disorder, autism, and other childhood disorders. Risperdal was not approved for use in children until 2006. Janssen sales representatives also allegedly encouraged doctors to increase their number of Risperdal prescriptions in order to receive speaker fees. The government contended that J&J and Janssen engaged in a kickback scheme with Omnicare Inc., the nation's largest long-term care pharmacy provider, by paying the company kickbacks through market share rebate payments, data-purchase agreements, grants, and educational funding. The payments were intended to encourage Omnicare and its consultant pharmacists to promote Risperdal and other J&J drugs. Of the $2.2 billion settlement, $149 million is intended to resolve allegations that these kickbacks resulted in false claims to federal health care programs.

The settlement also resolves allegations that Janssen improperly marketed Invega, another antipsychotic, for off-label uses from 2006 through 2009. Additionally, the settlement resolves allegations that against another J&J subsidiary, Scios Inc., engaged in an off-label marketing campaign surrounding the heart failure drug, Natrecor, thereby causing false claims to be submitted to federal health care programs.

The allegations were the subject of multiple *qui tam* lawsuits filed in the Eastern District of Pennsylvania, the District of Massachusetts, and the Northern District of California. The whistleblowers in the Eastern District of Pennsylvania, which include five former J&J employees—Judy Doetterl, Lynn Powell, Camille McGowan, Judy Doetterl, and Kurtis J. Barry—will share a $112 million reward. Bernard Lisitza, the relator in the Massachusetts lawsuit regarding Omnicare kickbacks, will receive a reward of $27.2 million. Lisitza was represented by TAFEF members Michael Behn and Linda Wyetzner of Behn & Wyetzner. Relator Joe Strom, who brought the Natrecor allegations in a *qui tam* suit filed in the Northern District of California, will receive $28 million as his share of the government's recovery. Strom was represented by TAFEF member Marcella Auerbach of Nolan, Auerbach & White.

<u>Hospice of the Comforter Inc.</u> (M.D. Fla. Nov. 5, 2013)

Hospice of the Comforter Inc. (HOTCI), a hospice services provider based in Alamonte Springs, Fla., agreed to pay $3 million to settle allegations that it submitted false claims to Medicare for patients who were not terminally ill, and thus not eligible for hospice care. The government alleged that HOTCI admitted patients who were ineligible for hospice benefits through Medicare, and subsequently falsified medical records to cover up the patients' ineligibility; additionally, HOTCI allegedly delayed discharging ineligible patients. The government also contended that HOTCI employed untrained nurses. The settlement resolves a *qui tam* lawsuit filed by Douglas Stone, a former HOTCI employee. The company's former CEO, Robert Wilson, has agreed to a three-year exclusion from federal health programs, and HOTCI has entered a Corporate Integrity Agreement with the Inspector General of the Department of Health and Human Services.

<u>Sutter Health</u> (Nov. 4, 2013)

Sutter Health, which operates over 20 hospitals in California, has agreed to pay the federal government $46 million to resolve a 2011 whistleblower lawsuit against the hospital chain. The lawsuit, which was brought by Rockville Recovery Associates, a billing auditor, alleged that Sutter Health overcharged patients and insurers by including extra medical billing codes during procedures involving anesthesia. In addition to the $46 million payment, the settlement agreement required Sutter Health to change its anesthesia billing procedures.

<u>Axway Inc.</u> (D. Md. Oct. 28, 2013)

Axway, Inc. has agreed to pay the federal government $6.2 million to resolve allegations that it and its predecessor companies—Valicert, Inc. and Tumbleweed Communications Corporation—provided inaccurate pricing information to the General Services Administration (GSA) when negotiating a Multiple Award Schedule (MAS) contract, and failed to update the information throughout the term of the contract. Kenneth Marcus, a former Tumbleweed employee, filed a *qui tam* lawsuit contending that the inaccurate pricing information allowed Axway and its predecessors to sell overpriced software licenses and services to federal agencies under the MAS contract, in violation of the False Claims Act. Marcus, who was represented by TAFEF member Andrew Grosso, will receive $1,178,000 from the settlement.

<u>Omnicare, Inc.</u> (N.D. Ohio Oct. 23, 2013)

Omnicare, Inc., a major provider of pharmacy services to long-term care facilities, agreed to pay the federal government $120 million to settle claims that the company violated the Anti-Kickback Statute and the False Claims Act. The allegations arose in a *qui tam* lawsuit filed by Donald Gale, a pharmacist and former Omnicare employee.

Gale's complaint alleged that Omnicare engaged in a kickback scheme with nursing home owners, trading discounted services to patients covered by Medicare Part A in exchange for referrals of Medicare Part D patients. Gale was represented by TAFEF members Rick Morgan, Jennifer Verkamp, and Sara Vann of Morgan Verkamp.

Robert Shea and Mark Franz, Global Medical Inc. and Global Medical Direct, LLC (Oct. 22, 2013)

Robert Shea and Mark Franz, owners of the mail-order diabetic supply company, Global Medical Inc., as well as its parent company, Global Medical Direct, LLC, have agreed to pay $7 million as part of a settlement agreement regarding allegations that they submitted false claims to Medicare and Tricare programs between April 2008 and January 2012. Additionally, the companies agreed to pay $5 million in proceeds from asset sales. Shea and Franz also agreed to twenty-year exclusions from participating in federal healthcare programs. According to the United States, Shea and Franz entered into marketing contracts with certain companies with a high percentage of diabetic patients and then paid those companies based on the number of subsequent patient referrals—an arrangement that violated the Anti-Kickback Statute.

Kmart Corporation (E.D. Mich. Oct. 21, 2013)

Kmart Corporation will pay $2.55 million to settle allegations that its pharmacy centers overbilled multiple federal health programs—including Medicaid, Tricare, and the Federal Health Employee Benefits Program—by submitting false prescription claims. Specifically, Kmart was alleged to have billed for full prescriptions, despite dispensing only a portion of the prescribed drugs to beneficiaries. According to the plaintiffs, Kmart then returned the undistributed drugs to its stock. The settlement will be shared among the federal government, 30 states, Puerto Rico, and the Virgin Islands. Mark Kirsch, a former Kmart pharmacist, will also receive $309,687 for his role as a relator in a *qui tam* lawsuit against the company.

Dr. Jun Xu and Rehabilitation Medicine and Acupuncture Center M.D., LLC (Oct. 18, 2013)

Connecticut physician Jun Xu and his professional corporation, the Rehabilitation Medicine and Acupuncture Center M.D., LLC, agreed to pay $300,000 to resolve allegations that Xu submitted fraudulent bills to Medicare for physical therapy services from 2007 through 2009, in violation of the False Claims Act. The government contended that Xu billed Medicare for medically unnecessary services, in addition to submitting improper claims. For example, Xu allegedly billed Medicare for one-on-one therapy services when group therapy had occurred; he also allegedly submitted claims for reimbursement services performed by massage therapists in contravention of Medicare's reimbursement rules.

Boston Scientific Corp., Guidant LLC, Guidant Sales LLC, and Cardiac Pacemakers Inc. (D. Minn. Oct. 17, 2013)

Boston Scientific Corp., and its subsidiaries Guidant LLC, Guidant Sales LLC, and Cardiac Pacemakers Inc. (Guidant), will pay $30 million to resolve allegations that Guidant violated the False Claims Act by selling defective heart devices that were implanted into Medicare patients. From 2002 through 2005, Guidant produced two lines of implantable defibrillators known as the Prizm 2 and the Renewal 1 and 2, both of which allegedly had a defect that caused the device to deliver a shock to itself rather than to the heart, causing the device to short circuit; this phenomenon is known as "arcing." James Allen, who received a defibrillator from Guidant, filed a *qui tam* suit that alleged that Guidant learned of the Prizm defect as early as April 2002, and the Renewal defect as early as November 2003, and fixed the defects. However, Guidant allegedly continued to sell defective versions of the devices and allegedly failed to disclose the issue to the FDA and to doctors. Guidant pleaded guilty to criminal charges of misleading the FDA and failing to submit a labeling change to the FDA. For his efforts, Allen will receive a reward of $2.25 million.

Fougera Pharmaceuticals Inc. (Oct. 15, 2013)

Fougera Pharmaceuticals Inc., a subsidiary of Sandoz Inc., agreed to a $22.75 million settlement with the federal government and the State of Texas to settle allegations that the company reported inflated drug pricing information to the Texas Vendor Drug Program (VDP), thereby causing false claims to be submitted to VDP, which resulted in overpayments to Texas pharmacies. Texas will receive over $10 million from the overall settlement payment.