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

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

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

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TABLE OF CONTENTS

Halifax Hospital Medical Center and Halifax Staffing Inc.

Teva Pharmaceuticals USA Inc. and IVAX LLC

Sea Star Line LLC and Horizon Lines LLC

Omnicare Inc.

Diagnostic Imaging Group

Dr. Steven Chun

Endo Health Solutions Inc. and Endo Pharmaceuticals Inc.

EndoGastric Solutions Inc

The A.I.M. Center, Inc.

Vector Planning and Services Inc.

MPRI Inc.

Foley Family Property Management, Inc.

SelfRefind & PremierTox LLC

Sanborn Map Company Inc.

JP Morgan Chase & Co.

Saint Joseph Health System

Dowson Farms

Tennessee Orthopaedic Clinics P.C. and Appalachian Orthopaedic Clinics P.C.

General Electric Hitachi Nuclear Energy Americas LLC

City of New York

Michael R. Barr and Norman J. Pfaadt

CareFusion Corp.

BioScrip, Inc.

Dr. Ravi Sharma

Hi-Tech Pharmacal Co., Inc.

St. Mary Medical Center

FROM THE EDITOR

"And Jesus answering said unto them, 'Render to Caesar the things that are Caesar's, and to God the things that are God's.'"
–The Bible (Kings James Version), Mark 12:17

Three of the four gospels recount this story, in which Jesus gave the answer above in response to a question about whether or not the Jews should pay taxes imposed by the oppressive Roman empire. Most biblical scholars agree that this passage reflects Jesus' endorsement of at least some level of respect for secular authority—and of course, for paying taxes. With the publication of each April issue of the Quarterly Review, we are reminded of Tax Day and our annual obligation to settle up with the federal government. Certainly, we are also reminded that the IRS Whistleblower Office offers an outlet for whistleblowers to report tax fraud, in exchange for a monetary reward.

Unfortunately, the IRS whistleblower program has not yet lived up to its awesome potential. In early April, the IRS issued its most recent annual report to the U.S. Senate on its whistleblower program. According to the report, whistleblowers continue to make submissions alleging tax fraud—some 9000 whistleblower submissions were filed this year alone—but the IRS has been very slow to process whistleblower claims and to pay rewards to successful whistleblowers. The IRS reports that it has a current backlog of more than 20,000 open claims—and that it only paid rewards to 122 whistleblowers last year. The Service also acknowledges that the average time between receiving a whistleblower claim to paying a reward is five to seven years.

The report also includes the IRS's commendable recommendation that Congress add an anti-retaliation provision to the IRS whistleblower program regulations, in order to reduce employees' fear of reprisal when they report their employers' tax fraud. This is certainly an important step toward strengthening the IRS whistleblower program. But of course, including such a provision will only result in more IRS whistleblower claims, which will only further highlight the backlog problem. One of the easiest ways the IRS can alleviate some of the burden of its caseload is by utilizing whistleblowers more throughout its investigative processes—a step the Service has been unwilling to embrace thus far, citing taxpayer privacy concerns. Applicable regulations already contemplate that the IRS will rely on whistleblowers, and the IRS has mechanisms at its disposal that allow it to take advantage of whistleblowers' inside knowledge and other resources; these regulations also impose harsh sanctions on whistleblowers who violate the agreements' terms. And it surely seems that the IRS can use the additional help, as recent reports indicate that the IRS has lost 7% in Congressional appropriations and its workforce has decreased by 15% since 2010.

It is encouraging that whistleblowers have not yet lost faith in the IRS program, and instead still continue to alert the Service to tax fraud. However, at this pivotal moment for the IRS whistleblower program, the Service must recognize that the risk that whistleblowers will simply stop showing up is very real. The time is now for the IRS to begin viewing its whistleblower program as a true public-private partnership, and to fully integrate whistleblowers as it recovers America's stolen tax dollars.

Enjoy this April issue, which salutes the achievements of whistleblowers over the past few months. And Happy Tax Day!

All the best,
Cleveland Lawrence III

Recent False Claims Act & *Qui Tam* Decisions

JANUARY 1, 2014–MARCH 31, 2014

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

U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr., 2014 WL 68603 (M.D. Fla. Jan. 8, 2014)

A relator filed suit under the False Claims Act, alleging that two related healthcare organizations—a special taxing district that operated a community hospital and the instrumentality of the district that handled its staffing and payroll issues—defrauded the federal healthcare programs by engaging in a variety of misconduct. The United States intervened in the relator's FCA claims alleging fraud based on violations of the Stark Law, but declined to intervene in several other qui tam claims, including allegations that the defendants: (1) unnecessarily admitted Medicare patients in order to bill the government at the higher, inpatient rate; (2) conspired to commit FCA violations; (3) engaged in additional Stark Law violations and submitted Medicare claims tainted by those violations; and (4) violated the Anti-Kickback Statute, rendering their Medicare claims false. The defendants moved for summary judgment on the relator's non-intervened claims.

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

First, the court considered the relator's allegation that the defendants regularly admitted Medicare patients for short hospital stays, even though the patients did not need to be admitted, thereby inflating the defendants' Medicare reimbursement claims. The defendants argued that the relator's allegations amounted to nothing more than "second-guessing" physicians' decisions to admit their patients and that the relator's expert did not conduct a proper and sufficient examination of patients' records to conclude that systemic fraud occurred. The court held that the expert's report was sufficient to create a genuine issue of material fact regarding the medical necessity of at least some of the patient admissions at issue. Consequently, the court denied the defendants' summary judgment motion with respect to the relator's "short stay" claims.

The court then evaluated the relator's Anti-Kickback Statute (AKS) allegations, wherein the relator alleged that the hospital maintained improper financial relationships with various physicians, all of whom were independent contractors. The defendants argued that they did not violate the AKS, since the physicians at issue were employees of the hospital—not independent contractors—and the financial relationships between the physician and the hospital were covered by the "Bona Fide Employment Exception" to the AKS. After reviewing the pertinent statutory provisions, the court concluded that exception applied, and thus, the defendants did not violate the AKS or correspondingly, the FCA. In reaching its holding, the court rejected the relator's argument that the physicians at issue were only employed by the staffing company defendant, and not by the hospital defendant. Instead, the court noted that the staffing company was merely an instrumentality of the hospital, and had no employees of its own, and that, pursuant to the common law agency test, the physicians were employees of the hospital, as the hospital exercised control over them. The court held that there was no issue of disputed fact regarding whether or not the bona fide employment exception to the AKS applied and consequently, granted the defendants' summary judgment motion with respect to that claim.

Next, the court considered the relator's non-intervened allegations of Stark Law violations, in which the relator claimed that the defendants engaged in improper financial arrangements with two psychiatrists and a medical director who made referrals to the hospital for Medicare patients. The court granted summary judgment in favor of the defendants with respect to the Stark Law allegations involving the medical director, noting that the relator did not identify any allegedly illegal referrals made by the medical director. The defendants then argued that the bona fide employment exception to the Stark Law negated the relator's allegations with respect to the two psychiatrists. In this instance, the court determined that the exception did not apply, and thus denied the defendants' summary judgment motion. Lastly, the court denied the defendants' motion for summary judgment on the relator's conspiracy claim, finding that that claim—which was based in part on the defendants' alleged Stark Law violations—could be maintained, since the relator's Stark Law claim had survived summary judgment.

See *U.S. ex rel. Booker v. Pfizer, Inc.*, 2014 WL 1271766 (D. Mass. Mar. 26, 2014), at page 9.

See *U.S. ex rel. Willis v. Angels of Hope Hospice, Inc.*, 2014 WL 684657 (M.D. Ga. Feb. 21, 2014), at page 53.

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

See *U.S. ex rel. Booker v. Pfizer, Inc.*, 2014 WL 1271766 (D. Mass. Mar. 26, 2014), at page 9.

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

U.S. ex rel. Casady v. American Int'l Group, Inc., 2014 WL 1286552 (S.D. Cal. Mar. 29, 2014)

Two relators alleged that a group of financial institutions violated the False Claims Act by engaging in a scheme to inflate the value of assets in order to induce the United States to issue more than $130 billion in loans made by the Federal Reserve Board of New York during the 2008 financial crisis. The defendants moved to dismiss the *qui tam* suit, arguing that it was barred under the FCA's public disclosure provision and that the relators' allegations were not pled with particularity.

The U.S. District Court for the Southern District of California granted the motion on both grounds. The relators were granted leave to file an amended complaint. The defendants again moved to dismiss on public disclosure grounds, and submitted more than 150 exhibits consisting of congressional hearing transcripts, news articles, public SEC filings, governmental reports and FOIA releases, and press releases, which the defendant claimed were prior public disclosures of the information on which relator's fraud allegations were based. The relators argued that none of the disclosures revealed the defendants' fraud scheme. The court agreed with the defendants, finding that the disclosures revealed both the allegedly mischaracterized state of facts as well as the allegedly true facts, and therefore were sufficient to bar the relator's *qui tam* suit. The court observed that "Relators twice stated that the source of the information [underlying their fraud claims] was an 'enormous amount of hard work pulling together pieces and bits of information' as a result of 'massive amounts of research.'" Applying Ninth Circuit precedent, the court held that since the relators relied on public sources of information to develop their fraud claims, their *qui tam* complaint was barred under the public disclosure provision. Given the relators' concession that they relied on information from public sources and third parties, the court held that the relators did not have "direct and independent knowledge" of the alleged fraud, and thus could not qualify as original sources.

In addition, the court held that the relators failed to plead their fraud allegations with particularity, noting that the *qui tam* complaint did not "identify a false statement made to the government, let alone who made the statement or what made it false," nor did it "provide a link between the alleged misconduct in this case and the submission of a false claim to the government." Additionally, the court found that the relator failed to differentiate the fraud allegations as to each of the defendants and he did not provide sufficient details of a conspiracy among the defendants.

The defendants' motion to dismiss was granted. Since the court had already given the relators an opportunity to cure their pleading deficiencies, the court denied the relators leave to amend their complaint further and dismissed their fraud claims with prejudice.

U.S. ex rel. Nelson v. Sanford-Brown, Ltd., 2014 WL 1272098 (E.D. Wis. Mar. 27, 2014)

A relator filed a *qui tam* suit against two educational institutions, alleging violations of the False Claims Act. The defendants moved to dismiss the fraud allegations, arguing that the FCA's public disclosure provision barred the relator's claims, because the alleged fraud had been previously publicly disclosed in various news reports, lawsuits, and government investigation. The U.S. District Court for the Eastern District of Wisconsin determined that it did not have subject-matter jurisdiction over some of the relator's claims, but that it needed more information to decide whether it had subject-matter jurisdiction over the relator's remaining claims. With respect to those remaining claims, the court noted that the relator conceded that his fraud allegations had been previously publicly disclosed, but he asserted that he was an "original source" of those allegations. The court concluded that the relator satisfied the original source provision's "direct and independent knowledge" requirement, but the court was unable to determine whether the relator satisfied the original source provision's second requirement—namely, that he voluntarily provided the information his fraud claims were based on to the government before filing his *qui tam* suit. The court requested from the relator additional documentation regarding that element of his claim of "original source" argument. In response, the relator submitted several emails and letters that he either sent to or received from two U.S. Congresswomen, a state education approval board, and a United States Attorney. The court examined each email in turn.

With respect to the relator's emails to the two U.S. Congresswomen, the court interpreted Seventh Circuit precedent to indicate that an original source's voluntary disclosure to the government must be made to "an enforcing branch of the Government—one that might be able to *do something* with the information it receives" (emphasis in original). The court suggested that an email to a legislator would not satisfy that requirement. But the court also noted that the legislative history of the

FCA's original source provision defines "government" to include Congress, among other entities. Ultimately, the court did not decide the issue, as it held that neither email actually discussed the relator's fraud allegations; the court stated that the emails "could have touched on issues entirely outside of the allegations in his amended complaint." The court then held that the relator's email to the state education approval board did not qualify as a voluntary disclosure to the government, declaring that "government" for purposes of the federal FCA's original source provision solely refers to the federal government. Finally, the court considered the relator's letter to the U.S. Attorney, which included a draft version of the relator's *qui tam* complaint. While there was no dispute that this letter was a voluntary disclosure to the government for FCA purposes, the defendants argued that since the letter arrived at the U.S. Attorney's Office only three days before the *qui tam* suit was filed, it was insufficient to give the government adequate time to investigate the fraud allegations. The court theorized that the voluntary disclosure provision serves no purpose if a *qui tam* relator can satisfy the requirement by "submitting a draft complaint to the Government mere days or even hours before formally filing their complaint." But the court held that by the FCA's plain language, the relator would comply with the voluntary disclosure requirement "so long as [he] had gotten his letters to the Government even *one minute* before filing his complaint" (emphasis in original). In reaching this conclusion, the court distinguished the relator's letter—which the court held was "purely voluntary"—from relators' statutorily required disclosures to the government pursuant to the FCA's procedural provisions that require relators to file their *qui tam* complaints under seal, but to serve on the government a copy of the complaint and a written disclosure of all relevant information in the relator's possession.

Since the court had already held that the relator had direct and independent knowledge of the information his remaining fraud claims were based on, and since the relator was able to establish that he voluntarily disclosed that information to the government prior to filing his *qui tam* suit, the court held that the relator was an original source who could overcome the FCA's public disclosure provision. The court held that it had subject-matter jurisdiction over the relator's remaining claims.

U.S. ex rel. Solis v. Millennium Pharms., Inc., 2014 WL 1270581 (E.D. Cal. Mar. 26, 2014)

A relator alleged that a group of pharmaceutical companies violated the federal False Claims Act and 24 state FCA statutes by illegally marketing one of their drugs to providers for non FDA-approved, off-label, and unsafe purposes, thereby causing physicians to submit false Medicare, Medicaid and TRICARE reimbursement claims to cover their prescriptions for off-label uses of the drugs. In addition, the relator claimed that the defendants provided illegal kickbacks to doctors to

induce them to prescribe their drugs for off-label purposes, and that these AKS violations tainted the doctors' healthcare reimbursement claims to the government, resulting in FCA liability. None of the government entities intervened in the relator's case. The defendants moved to dismiss the relator's allegations regarding off-label drug promotion for unsafe uses, arguing that the federal FCA's public disclosure bar provision deprived the court of subject-matter jurisdiction over that claim. The defendants also argued that all of the relator's fraud allegations failed to state a claim for relief and that none of those allegations was pled with particularity.

Holding: The U.S. District Court for the Eastern District of California granted the defendants' motion to dismiss the unsafe off-label marketing claim, finding that the public disclosure bar precluded the *qui tam* complaint. Rather than rule on the remaining fraud allegations, the court directed the relator to file an amended complaint that omitted the unsafe off-label marketing allegation.

As an initial matter, before deciding the public disclosure issue, the court considered the question of which version of the federal FCA's public disclosure provision applied—the pre-2010 version or the amended, post-2010 version. The court recognized that this question was determinative, since the purported public disclosure was a state court lawsuit and the post-2010 version of the provision now clarifies that only disclosures made in <u>federal</u> sources trigger the bar. The court held that the pre-2010 version of the rule applied, since the relator filed his *qui tam* complaint before the amendment was enacted. In reaching this conclusion, the court held that fact that the relator amended his complaint after the amendment was of no consequence, stating that "[w]here a relator seeks to amend his qui tam complaint, the applicable version of the public disclosure bar remains the one in effect when the original complaint was filed."

The court then held that the state court case, which discussed the same off-label, unsafe promotion of the drug by the defendants, but in the context of a wrongful death lawsuit, qualified as a public disclosure for FCA purposes. Even though the relator's *qui tam* complaint provided more detail regarding the alleged illegal marketing scheme than did the prior state court case and even though the state court case only alleged negligence and not fraud against the government, the court determined that the disclosures made in the state court case were sufficient to bar the relator's complaint because the state court case "disclosed the same core elements of the claims made in [the *qui tam* complaint]." The court noted that "specific allegations of fraud are not necessary as long as the allegations are substantially similar."

The court then turned to the question of whether or not the relator qualified for the "original source" exception to the public disclosure rule. The court concluded

that he did not, since in the Ninth Circuit, relators must have had a hand in the public disclosure in order to qualify as original sources who can overcome the public disclosure bar. Since the relator made no attempt to argue that he was connected to the public disclosures made in an unrelated state court proceeding, After dismissing the unsafe off-label marketing allegation, the court decided that since the relator's remaining fraud allegations were "substantially intertwined with the extensive factual narrative" contained in the *qui tam* complaint, the prudent course of action was to direct the relator to amend his complaint and re-plead the remaining causes of action. The defendant's motions to dismiss those allegations for failure to state a claim and for failure to plead fraud with particularity were denied.

U.S. ex rel. Booker v. Pfizer, Inc., 2014 WL 1271766 (D. Mass. Mar. 26, 2014)

Two *qui tam* relators alleged that a pharmaceutical company violated the federal False Claims Act and the corresponding laws of 25 states and the District of Columbia by concealing and misrepresenting side effects and certain clinical data regarding two of its drugs, as part of an illegal scheme to promote the drugs for off-label purposes that were not approved by the Food and Drug Administration and not included in the federally-recognized drug compendia. The relators alleged that the defendant also offered illegal kickbacks to providers who prescribed its drugs. The relators contended that the defendant caused providers to submit false reimbursement claims for prescriptions not covered by the federal and state healthcare programs and that the defendants made false statements material to those false claims. Also, the relators claimed that the defendant's fraud scheme violated a prior Corporate Integrity Agreement it executed with the Office of Inspector General for the U.S. Department of Health and Human Services. In addition, one of the relators, who had been employed as a sales representative for the defendant, alleged that he attempted to stop the defendant's fraud scheme, which resulted in his unlawful termination; he filed a claim under the federal FCA's anti-retaliation provision as well. The defendant moved to dismiss the relators' claims, arguing that two prior *qui tam* complaints (which resulted in the Corporate Integrity Agreement) barred the relators' filing pursuant to the FCAs' first-to-file and public disclosure provisions. The defendant further argued that the present *qui tam* complaint failed to state an FCA claim and failed to plead the alleged fraud with particularity. The relators opposed the defendant's motion, but also sought leave to amend their complaint, should the court determine that the operative complaint (the relators' fifth amended complaint) was deficient.

Holding: The U.S. District Court for the District of Massachusetts granted the defendant's motion in part and denied it in part.

First-to-File Bar

The court first considered the defendant's first-to-file argument. The defendant claimed that two prior *qui tam* suits concerned the same alleged fraud scheme and barred the present relators' suit. The court, though, agreed with the relators that the other lawsuits did not trigger the first-to-file provision, since both of those suits had been dismissed pursuant to a settlement and corporate integrity agreement between the defendant and the government executed before the present suit was filed. Since the prior suits were not "pending" when the present suit was filed, the first-to-file provision did not apply. Moreover, the court noted that the prior suits involved off-label marketing during a different time period than alleged by the present relators and disregarded the defendant's first-to-file argument as "a substitute for what would have been a futile argument of res judicata."

Public Disclosure Bar

The court agreed with the defendant that the prior *qui tam* suits constituted "public disclosures" for FCA purposes. However, the court was less sure that the present suit pled "substantially the same allegations" of fraud as the prior suits, noting that the complaints alleged fraud during slightly different time periods because the present relators alleged that the defendant's fraud continued after the settlement agreement that disposed of the prior *qui tam* suits. The court declined to resolve that issue, as it determined that the FCA's "original source" provision provided the necessary answer. The court stated that the relators "alleged fraud post-dating the operative dates for the prior litigation. Those allegations are plainly "additional" to the prior disclosure in some sense," and "[t]he only real question, then, is . . . whether the value added by relators' allegations brings this action under the 'original source' exception." The court concluded that the relators qualified for the FCA's original source exception, since they had independent knowledge of the information underlying their fraud claims that materially added to the public disclosures, and they voluntarily provided that information to the government prior to filing their *qui tam* complaint. Regarding the original source provision's "voluntary disclosure" requirement, the court noted that in their original *qui tam* complaint the relators claimed that, pursuant to the FCA's procedural requirements, they had previously disclosed to the government a statement of all material evidence and information they possessed related to their fraud claims. The court did not discuss the "voluntariness" of the relators' disclosure, but held that the relators' allegation was sufficient to satisfy that element of original source status. The court then determined that the relators possessed independent knowledge that materially added to the public disclosures, noting that one of the relators had worked as a sales representative for the defendant during the time period alleged in the relators' suit and alleged his own first-hand knowledge of the defendant's continuing fraud. While the other relator only worked for the defendant during a time period prior to the alleged fraud, the court held that he could still satisfy the original source requirement if he acquired knowledge of the fraud alleged during the later time period through a means independent of the public disclosure—including from his co-relator.

Failure to State a Claim/Plead Fraud with Particularity

Next, the court considered the defendant's argument that the relators failed to state an FCA claim and failed to plead the alleged fraud with particularity. The court began its analysis by examining the relators' reverse false claim allegation, based on the defendant's alleged violation of its corporate integrity agreement with the government and its alleged subsequent attempt to avoid paying stipulated penalties under the agreement. The court held that the relators failed to state a claim under this FCA provision because the corporate integrity agreement did not impose on the defendant a definite obligation to pay the government, but instead only provided that the stipulated penalty "may" be imposed. The court stated that "[w]ithout an obligation, [the defendant] had nothing to avoid, and relators' [reverse false claim allegation] must fail." Thus, all of the relators' reverse false claim allegations were dismissed.

The court then turned to the relators' allegations that the defendant caused providers to submit false healthcare claims and made false statements material to those claims. The court determined that only a subset of the relators' allegations of off-label drug promotion—allegations concerning only one of the defendant's drugs and only some of the off-label uses alleged by the relators—was pled with particularity, "through the combination of particular alleged claims for reimbursement and allegations of off-label prescriptions by physicians with substantial (as much as 80%) Medicare/Medicaid patient populations." The relators' remaining fraud claims alleging false claims resulting from off-label promotion were dismissed. The court then held that the relator's allegations of false claims resulting from illegal kickbacks had been pled with sufficient particularity, as the relators alleged particulars of the kickback scheme, including the types and amounts of kickbacks provided, the time periods of the kickbacks, and the identities of both employees who directed the kickback scheme on behalf of the defendant as well as physicians whose prescriptions for the defendant's drug increased after receiving kickbacks.

After establishing which of the relators' allegations satisfied the heightened pleading standard, the court evaluated whether those allegations stated a claim for relief under the FCA laws. First, the court concluded that the relators adequately alleged that "false" claims for the defendant's drug were submitted to the government. In reaching that conclusion, however, the court held that the relators' assertions of illegal drug promotion were insufficient to establish that false claims were submitted—although those allegations could support the relators' contention that the defendant made false statements. The court further rejected the relators' argument that reimbursement claims for the drug in question were false because the defendant misbranded the drug. The court held that the relators did not allege sufficient facts to establish that the defendant's compliance with branding requirements was a condition of payment for Medicare/Medicaid providers. The court, however, did find one basis on which to hold that claims for the defendant's drug could be "false" for FCA purposes. The defendant had argued that under the federal and state government healthcare programs, the government retains discretion to reimburse providers for prescriptions for off-label, non-compendium uses, and thus the relators' assertion that the reimbursement claims at issue were false could not stand. The court generally agreed with that assessment, but also recognized that at least some states explicitly refuse to provide reimbursements for drugs prescribed for off-label, non-compendium uses. The court held that claims tainted by off-label, non-compendium promotion in those states would be false under the FCA—and that "fraud on any of these federally-funded state health programs constitutes fraud on the federal government" as well. But while the court acknowledged that the relators' allegation of a nationwide scheme of off-label, non-compendium drug promotion undoubtedly gave rise to some viable causes of action under multiple state FCA laws, the court held that the relators failed to plead with particularity that any such false claims were submitted in any of those states. Thus, the state FCA claims alleging off-label promotion were dismissed. The court stated that "[f]or purposes of federal fraud, the treatment of specific claims in states with more flexible reimbursement schemes can be reserved for later stages of the litigation."

The court then addressed the relators' allegations of false claims resulting from the defendant's illegal kickbacks to providers. The court held that the *qui tam* complaint adequately pled that the defendant used illegal kickbacks to induce physicians to prescribe its drug, and that the kickback allegation provided a sufficient basis on which to state a claim under the FCA.

Retaliation

Finally, the court considered the retaliation claim brought by one of the relators, and held that it was adequately pled. The relator alleged that he had been hired as a sales representative for the defendant and had consistently been one of the defendant's top-ranked salesmen. But he claimed that soon after he began objecting to the defendant's off-label promotional activities and mischaracterization of clinical research, he was fired from his job. The court held that the relator's objections—which the court noted did not concern "mere regulatory failures, but also fraudulent conduct directed at physicians to encourage off-label [drug] use"—constituted protected activity under the FCA. Furthermore, the court held that the defendant was on notice of the relator's protected conduct because the relator reported his concerns to the defendant's compliance hotline and sent an email to the company's compliance department. And the court held that the relator adequately pled that his firing was linked to his protected activity, given the temporal proximity between the two events—the relator called the defendant's hotline three months before being fired, and he emailed the defendant's compliance department only one day before being fired. The defendant's motion to dismiss the retaliation claim was denied.

U.S. ex rel. Saunders v. Unisys Corp., 2014 WL 1165869 (E.D. Va. Mar. 21, 2014)

A *qui tam* relator sued his former employer—an information technology company—alleging violations under the False Claims Act. According to the relator, the defendant fraudulently billed the U.S. Army for time spent implementing and maintaining a global radio-frequency identification network. In addition, the relator claimed that when he criticized the defendant for concealing the overbilling, he was terminated from his job; the relator added a claim under the FCA's anti-retaliation provision. The defendant moved to dismiss the relator's claims, arguing that the fraud claim was barred under the FCA's public disclosure provision and that the relator failed to state a claim for retaliation under the FCA.

The U.S. District Court for the Eastern District of Virginia denied the defendant's motion to dismiss.

Public Disclosure Bar

First, the court recognized that the FCA's public disclosure bar provision was amended in 2010 and analyzed which version of the provision applied to the relator's *qui tam* claims. The court concluded that the amended version applied, since the purported public disclosures at issue—the defendant's reports to the Office of the Inspector General for the U.S. Department of Defense (DOD-OIG), submitted after the defendant conducted an internal investigation of the alleged fraudulent billing—were made after the amendment became effective. Since the amended version of the public disclosure provision does not create a jurisdictional bar, the court converted the defendant's motion to dismiss for lack of jurisdiction to a motion to dismiss for failure to state a claim. Ultimately, though, the court held that the public disclosure bar provision was not triggered, since the DOD-OIG reports were never made "public" within the meaning of the FCA and since the reports did not disclose the relator's fraud allegations—while the defendant's reports to the government discussed the defendant's "unacceptable" billing practices, not surprisingly, the reports explicitly denied that the defendant had engaged in false overbilling. As a result, the court denied the defendant's motion to dismiss the relator's fraud claims pursuant to the public disclosure bar.

Retaliation

The court then considered the relator's retaliation claim. The court rejected the defendant's argument that the relator failed to state a claim for retaliation, and instead found that the relator satisfied all the necessary elements for pleading an FCA retaliation claim, as he alleged that: (1) he conducted his own investigation into the defendant's alleged fraudulent overbilling—which constituted protected conduct under the FCA—(2) he revealed his desire to expose the alleged fraud to the defendant's managing partner and associate general counsel—thereby putting the defendant on notice of his protected conduct—and (3) the defendant terminated his employment and accused him of not cooperating with its internal investigation. The court denied the defendant's motion to dismiss the retaliation claim.

Little v. Shell Exploration & Prod. Co., 2014 WL 869326 (S.D. Tex. Mar. 5, 2014)

Two *qui tam* relators alleged that a group of affiliated oil and gas exploration companies violated the False Claims Act by engaging in a scheme to defraud the government by underpaying royalties. The relators both worked as auditors for the Minerals Management Service, which was formerly a branch of the U.S. Department of the Interior. The relators audited twelve of the defendants' mineral leases, as part of their task of finding accounting irregularities. According to the relators, the defendants improperly deducted from their royalties payments the costs for "gathering" oil and for upgrading their storage platforms. The relators reported the deductions to their supervisors, but the government decided that the deductions were permitted. The relators subsequently filed their *qui tam* suit. The U.S. District Court for the Southern District of Texas dismissed the action, holding that, as government auditors, the relators could not sue as "private persons" under the False Claims Act. The relators appealed the district court's ruling to the U.S. Court of Appeals for the Fifth Circuit, which reversed the district court. The circuit court remanded the matter to the district court with instructions to determine whether the relators' suit was barred by the FCA's public disclosure provision.

On remand, the district court dismissed the relators' suit, finding that it was based on publicly-disclosed information. Although the district court did not specifically determine that the relators based their fraud allegations on public disclosures, it concluded that the relators "could have produced the substance of their complaint by synthesizing public disclosures," since the defendants had previously publicly commented about the deductions at issue, past administrative and court decisions disclosed the deductions, and the government was auditing the defendants' royalties payments before the *qui tam* suit was filed. The court did not discuss whether or not the relators qualified for the "original source" exception to the public disclosure rule.

U.S. ex rel. Harman v. Trinity Indus., Inc., 2014 WL 47258 (E.D. Tex. Jan. 6, 2014)

A relator alleged that two related manufacturing companies violated the False Claims Act by defrauding the Federal Highway Administration (FHWA). The relator claimed that the defendants manufactured and sold a traffic safety product used on highways to absorb and dissipate the impact of collisions and to reduce

the impact forces felt inside vehicles. The federal government reimburses states for their purchases of equipment used on the National Highway System (NHS), as long as the equipment was first approved by the FHWA. The relator alleged that after the defendants' product had received FHWA approval, the defendants made significant modifications that rendered the product ineffective. In addition, the relator claimed that the defendants did not inform the FHWA of the modifications or test the new product in accordance with FHWA protocols. The relator asserted that it was only after he began a campaign to expose the deficiencies of the new product that the defendants disclosed some of the modifications to the government; he claimed, however, that at that time the defendants falsely represented to the government that the new product had been properly crash tested. The defendants moved to dismiss the relator's *qui tam* suit, arguing that the court lacked subject-matter jurisdiction due to the FCA's public disclosure bar. They further argued that dismissal was warranted because the relator failed to state a claim and failed to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Eastern District of Texas granted the defendants' motion in part and denied it in part. The court rejected the defendants' subject-matter jurisdiction arguments and held that the relator's complaint properly stated a claim for relief under the FCA and alleged fraud against the defendants with particularity. However, the court held that a subset of the relator's fraud claims were time-barred, as they fell outside the FCA's general six-year statute of limitations.

Public Disclosure Bar

When considering the defendants' subject-matter jurisdiction argument, the court first noted that the FCA's public disclosure bar provision was amended in 2010, during the time period in which the allegedly false claims for the defendant's product were submitted for reimbursement. As a result, the court held that both the older and amended versions of the provision applied—the older version applied to claims submitted prior to the amendment and the current, amended version applied to claims submitted after the amendment. The court observed that the new public disclosure bar provision "recharacterizes the public disclosure bar as a ground for dismissal—effectively, an affirmative defense—rather than a jurisdictional bar. Second, the new statute replaces the old statute's 'based upon' public disclosures test with a new test that asks whether the allegations in the complaint are 'substantially the same' as allegations which have been publicly disclosed. . . Third, the 2010 amendment eliminated the pre-2010 'direct and independent knowledge' requirement for qualifying as an 'original source. . .'"

Applying the older version of the provision—which the court determined was jurisdictional in nature—to reimbursement claims submitted before 2010, the court held that, before the 2010 amendments, the essential elements of the relator's fraud allegations had already been made publicly available: (1) in presentations the relator made to state highway officials, (2) on a website the relator created as part of his campaign to expose the alleged deficiencies in the defendants' modified product, and (3) in related lawsuits regarding the patent on the defendants' product and other issues. The relator, though, argued that the public disclosures did not reveal the essential elements of the fraud scheme. He contended that he learned of the substantial modifications to the defendants' product through his own investigation of the defendants' product on highways of approximately 100 crash sites in several states. He further argued that even though he obtained one of the defendants' submissions to the FHWA through a FOIA request, the FOIA document did not disclosure the fraud, since it did not reveal the modifications to the defendants' product. The court agreed and held that "no public disclosure or set of disclosures, in the absence of [the relator]'s investigation, would have fully brought to light the basis of [the relator]'s claims before [he] filed this suit." Therefore, the court concluded that the relator's *qui tam* suit was not jurisdictionally barred, as the pre-2010 version of the public disclosure provision had not been triggered.

The court then turned to the post-2010 version of the public disclosure bar, noting that after the amendments, the relator made a presentation to an FHWA official—which the court determined was "the first complete public disclosure of the basis of [his *qui tam*] complaint." Having found that the relator's fraud allegations had been publicly disclosed prior to the filing of his *qui tam* suit, the court examined the relator's status as an original source of the information contained in the disclosure—namely, whether he had independent and direct knowledge of that information. First, the court held that, although the relator's investigation partially relied on some publicly-available documents, his knowledge of the alleged fraud was still "independent," comparing the public documents to single bricks whereas the fraud allegations consisted of an entire wall; the court noted that the alleged "falseness" of claims for the defendants' product was only revealed through the relator's efforts. The court further held that the relator's knowledge was "'direct' in the sense that a significant portion of his claim stems form personally-gathered information; this knowledge was gained through his own efforts, rather than by securing the benefits of efforts expended by others." The court held that the relator qualified as an original source under either version of the public disclosure provision. Consequently, the defendants' motion to dismiss for lack of subject-matter jurisdiction was denied.

Failure to State a Claim/Plead Fraud with Particularity

The court then turned to the defendants' remaining arguments—that the relator's complaint suffered from pleading deficiencies. The defendants' first argued that the relator could not maintain his fraud claim because he failed to allege any false claim the defendants submitted or caused to be submitted to the government; according to the defendants, the relator merely alleged that they failed to comply with certain federal regulations, conduct not punishable under the FCA. The court disagreed, finding that the relator alleged that thousands of reimbursement claims had been submitted for reimbursement and that every claim submitted after the modifications were made was false because it included the defendants' false certification that the product had been approved by the FHWA. The court further rejected the defendants' argument that the relator's complaint was deficient because he alleged "on information and belief" that the defendants made false certifications regarding their product. The court, though, held that the relator had a reasonable basis to make the allegation, as he offered a letter from FHWA to the defendants that made clear that the defendants were expected to provide the certification at issue to all potential users of its product. The court noted that the question of whether or not the defendants actually made the certification was an issue of fact that would have to be proved at a later stage of the litigation, but that such a factual question would not preclude the relator from proceeding to the discovery phase of the case. The court also noted that the relator alleged that the defendant made direct false representations to the FHWA in order to maintain the approval status of its product, an allegation the court held provided an additional basis for establishing the falsity of the claims associated with the defendants' product. The court made clear that the alleged false representations were material to the federal government, since the relator alleged that state authorities that purchased the defendants' product required the certification because the federal government would not reimburse them for their purchases without it. Finally, the court held that the relator's allegations were sufficient to satisfy the heightened pleading requirements that govern fraud allegations, since he identified the "who," "what," "when," "where," and "how" of the fraud. The defendants' motion to dismiss for failure to state a claim and/or to plead fraud with particularity was denied.

Statute of Limitations

The court observed that the relator's fraud allegations spanned a period of about seven years. In addition, the court determined that the FCA includes a six-year statute of limitations. As a result, the court held that the relator could only maintain fraud allegations regarding FCA violations that occurred less than six years before he filed his *qui tam* suit. All allegations of fraud occurring more than six years before the suit was filed were dismissed.

U.S. ex rel. v. Conner v. Veluchamy, 2014 WL 51398 (N.D. Ill. Jan. 3, 2014)

A relator filed a *qui tam* suit alleging that a group of fourteen individual bank employees, managers, board members, outside directors, as well as an appraisal company, violated the False Claims Act by engaging in a scheme in which the appraisal company overvalued commercial real estate property used to secure loans, and then the individual defendants misrepresented the quality of their bank's real estate loan collateral to the Federal Deposit Insurance Corporation (FDIC) and in call reports, so as to pay lower loan assessments. The defendants moved to dismiss the relator's complaint, arguing that the court lacked subject-matter jurisdic-

tion, and that the relator failed to state a claim under the FCA and failed to plead the alleged fraud with particularity.

The U.S. District Court for the Northern District of Illinois granted the defendants' motion in part and denied it in part. The court rejected the defendants' subject-matter jurisdiction argument, finding that the fraud allegations had not been previously publicly disclosed. In addition, the court held that the *qui tam* complaint stated a claim under the FCA, although the claims against three of the individual defendants were not pled with sufficient detail to survive a motion to dismiss. The claims against those three defendants were dismissed without prejudice, but all the remaining claims were allowed to proceed.

Public Disclosure Bar

The defendants argued that, pursuant to the FCA's public disclosure bar provision, the court lacked subject-matter jurisdiction over the *qui tam* complaint. According to the defendants, before the relator filed his complaint, the information on which his allegations were based had already been publicly disclosed in a "material loss review" issued by the FDIC's Office of Inspector General, as the FDIC was appointed as receiver for the bank involved in the alleged fraud. In addition, the defendants claimed that the fraud allegations had previously been disclosed in a 2008 state court case in which the relator alleged retaliatory discharge claims against the bank. The court determined that neither disclosure revealed the fraud scheme alleged in the *qui tam* complaint, as the material loss review discussed the bank's failure to provide necessary oversights and its poor underwriting and credit administration. While the review referenced the bank examiners' concerns about the appraisal company, the court held that at best, the review revealed that the "[b]ank was perhaps negligent in its operations or that the Bank engaged in unsafe or inefficient practices"—which are not actionable under the FCA. Similarly, the court found that the state court case—which was filed by the relator—did not disclose the *qui tam* allegations; although the case referenced the relator's attempts to inform the bank's managers of overvalued appraisals, it did not include allegations of fraud against FDIC. Ultimately, the court determined that the relator's allegations were based on his personal knowledge and were not precluded under the public disclosure bar. The defendants' motion to dismiss for lack of subject-matter jurisdiction was denied.

Failure to State a Claim/Plead Fraud with Particularity

The court noted that the relator provided specific examples of alleged overvalued real estate appraisals and alleged specific occasions on which he informed various defendants of overvalued properties. The court held that these allegations were sufficient to state a claim against most of the defendants. The court, though, determined that the relator's complaint did not adequately assert how three of the individual defendants—

both of whom served as outside directors of the bank and were not involved in day-to-day operations—participated in the fraud. The relator's claims against those three defendants were dismissed without prejudice. The allegations against the remaining defendants were allowed to proceed.

See *U.S. ex rel. D'Alessio v. Vanderbilt Univ.*, 2014 WL 1094452 (M.D. Tenn. Mar. 19, 2014), at page 38.

See *U.S. ex rel. Rostholder v. Omnicare, Inc.*, 2014 WL 661351 (4th Cir. Feb. 21, 2014), at page 51.

FALSE CLAIMS ACT RETALIATION CLAIMS

Dutcher v. Mid Iowa Reg'l Housing Auth., 2014 WL 1165856 (N.D. Iowa Mar. 21, 2014)

A plaintiff alleged that his former employer, a public housing agency partially funded by the U.S. Department of Housing and Urban Development, violated the False Claims Act's anti-retaliation provision when it terminated his employment in response to his complaints about the defendant's violations of HUD regulations, rules, and other requirements. The plaintiff had been hired by the defendant to complete inspections of various properties and to ensure that the agency was in compliance with HUD requirements. When the plaintiff became concerned that the defendant was not complying with HUD's rules, he complained to his superiors—including the president of the defendant's board of directors—which rectified some of the problems. But the plaintiff's complaints and the close attention he paid to the issues he identified caused tensions within the agency, resulting in the plaintiff's termination; the defendant did not dispute that the plaintiff was terminated because of his complaints, but argued that the termination did not violate the FCA. The defendant moved for summary judgment on the plaintiff's claim, contending that the plaintiff did not engage in protected activity in furtherance of an FCA action.

Holding: The U.S. District Court for the Northern District of Iowa denied the defendant's summary judgment motion.

The defendant contended that the plaintiff's complaints did not constitute protected activity under the FCA, arguing that none of the eight regulatory issues about which he complained could have led to a viable FCA claim, since the issues did not impact the defendant's federal funding. The court stated that "[t]he law only requires that [the plaintiff] have made a claim (blown the whistle) that he believed [the defendant] had engaged in fraud against the government." The court concluded that the plaintiff's complaints satisfied that requirement. The court held that, regardless of whether the complaints ultimately proved to be valid under the FCA, the relator's concerns about possible fraud against the government were legitimate—especially considering the fact that even the defendant recognized that at least some of the complaint were founded and warranted corrective measures. The court determined that the plaintiff was not required to report his concerns to the defendant's auditor—or to any other specific individual or entity—and that his complaints to his superiors and to the defendant's board were sufficient to constitute protected conduct. The court determined that the defendant's arguments regarding whether or not any regulatory violations were committed and whether

any such violations were material to the government's funding decisions presented issues of fact that could not be decided on summary judgment. Similarly, the court rejected the defendant's argument that the plaintiff did not put the defendant on notice of his protected activity because the plaintiff's complaints were encompassed in his job duties. Instead, the court held that the plaintiff was not required to utter any "magic word" to put the defendant on notice of his protected activity, and held that his repeatedly complaints made it clear to his superiors that he believed the defendant was misusing federal funds. The court held that the question of whether or not the plaintiff's complaints were part of his job was a question of disputed fact that could not be decided on a summary judgment motion. As a result, the court denied the defendant's motion.

Frett v. Howard Univ., 2014 WL 939499 (D.D.C. Mar. 10. 2014)

A plaintiff alleged that her former employer, a private university, as well as several of its current and former officers, violated the False Claims Act's anti-retaliation provision, among other laws, by terminating her employment. According to the plaintiff, the university hired her as a consultant and later transferred her to a permanent position as a senior officer in its human resources office. The plaintiff claimed that during her time working for the university, she began investigating what she believed was a pattern of immigration law and ERISA violations, as well as fraud resulting from a purported conflict of interest that arose because the university's former chief human resources officer also served as a senior manager for one of the university's contractors. The plaintiff filed a whistleblower complaint with the university's internal auditor. About a month later, the plaintiff learned that the university's internal investigation did not uncover sufficient support for her complaints. Within days, the plaintiff was fired from her job, purportedly as part of the university's reduction in workforce. The plaintiff then complained to the university's board of trustees, asserting that the university retaliated against her for her previous whistleblowing activity. The board initiated an investigation of the plaintiff's claim, but had not notified the plaintiff of its decision when she filed the instant complaint several months later. The defendants moved to dismiss the plaintiff's FCA claim, arguing that she did not state a retaliation claim under the FCA.

The U.S. District Court for the District of Columbia granted the defendants' motion. The court first observed that although the FCA anti-retaliation provision was amended in 2009, the amended version of the statute still limits liability for retaliation to "employers" and does not provide for individual liability. Thus, the court held, the university "[was] the only proper FCA defendant." The court then dismissed the plaintiff's FCA retaliation claim against the university as well, finding that the plaintiff's allegations failed to state a claim. The court held that neither the plaintiff's investigation and reports of possible regulatory violations nor her complaints that university allowed a hostile work environment to develop that left employees afraid to speak about mismanagement and waste constituted "protected activity" under the FCA. In addition, the court held that even if the plaintiff had engaged in protected activity under the FCA, she did not allege that she took sufficient action to put the university on notice of that activity. The court noted that there was no dispute that the university hired the plaintiff to assess its employment/recruitment department and to address risks and deficiencies. The court held that "there was no way that the University could have known that plaintiff's report to the auditor constituted a step towards an FCA claim, rather than simply a report detailing inefficiencies that she had discovered in the performance of her job." Notably, the court stated that the plaintiff's reports and complaints to university officials "did not describe any 'false or fraudulent claims' or even hint that [any of the defendants] had 'submitted false records or demands for payment' that could lead to FCA liability."

Perez-Garcia v. Dominick, 2014 WL 903114 (N.D. Ill. Mar. 7, 2014)

A plaintiff sued a local park district and several individuals, alleging various employment law claims, including a claim under the Illinois False Claims Act's (IFCA) anti-retaliation provision. According to the plaintiff, the park district hired her to serve as the administrative assistant to its executive director, and that during the course of her job, she discovered that two high-ranking officials (both named as defendants) routinely used the district's credit card account—apparently for charges that included personal expenses—without submitting receipts for their charges. She claimed that she sent internal memoranda to all department heads—including the two purported offenders—reminding them of the district's receipt policy, but that the practice continued. The plaintiff further claimed that she reported the violations to the president of the district's board of commissioners (also named as a defendant), but that he took no action. Eventually, one of the alleged offenders expressed his concerns to the plaintiff that there was a "leak" in the department and told the plaintiff not to allow anyone to enter her office outside her presence. Soon after, the plaintiff attended a meeting in which the two alleged offenders and certain other municipal officials discussed the credit card receipts issue. Following the meeting, the plaintiff's job duties were curtailed without explanation. The plaintiff continued to document the ongoing credit card violations she witnessed, and she even reported her concerns to the district's outside legal counsel. Soon after, the plaintiff's daughter was accused of damaging equipment in the plaintiff's office; the plaintiff was placed on administrative leave and was later terminated from her job. While the termination letter stated that the plaintiff was being fired "for cause," no specific reason for the firing was given. The plaintiff then filed suit against the defendants. The individual defendants moved to dismiss the IFCA claims against them, arguing that the statute's anti-retaliation provision did not apply to them, since none of them was the plaintiff's "employer."

The U.S. District Court for the Northern District of Illinois granted the defendants' motions to dismiss. First, the plaintiff did not oppose the motion to dismiss filed by one of the individual defendants, and instead sought leave to file an amended complaint to add further allegations regarding that defendant. The court granted the plaintiff's request. The court then turned to the remaining individual defendants' motion to dismiss. The court acknowledged that some other courts—interpreting the federal False Claims Act—have held that the recent elimination of the word "employer" from that law's anti-retaliation provision opened the door to individual liability. But the court ultimately followed the line of cases holding that the FCA's anti-retaliation provision does not provide a right of action against defendants in their individual capacities. As the court held that the IFCA's anti-retaliation provision—which is identical to the federal version—should be read in accordance with the federal law, it held that the plaintiff did not have a right of action against the individual defendants in their individual capacities. Consequently, the court dismissed the plaintiff's IFCA claims against the individual defendants, to the extent that the plaintiff sued those defendants in their individual capacities.

Bland-Collings v. Howard Univ., 2014 WL 521092 (D.D.C. Feb. 10, 2014)

A plaintiff filed suit against a university, alleging various employment law claims, including a claim under the False Claims Act's anti-retaliation provision. The plaintiff had been hired as a research associate for one of the university's professors and was assisting on a grant project funded by the National Science Foundation (NSF). The project included a study on engineering students' career paths, and the professor was responsible for ensuring the university's compliance with NSF's regulations regarding research misconduct. The plaintiff's position—which involved analyzing student interview data and developing a research paper—was funded by the grant. According to the plaintiff, after she repeatedly complained to the professor about research misconduct in connection with the study—specifically, thousands of data entry errors—she was mistreated by the professor and eventually forced to resign. The defendant denied the plaintiff's allegations and contended that she resigned voluntarily after failing to meet a deadline for the research paper. But the plaintiff claimed that the paper was delayed because she could not rely on the erroneous data. The defendant moved for summary judgment on the plaintiff's FCA retaliation claim.

Holding: The U.S. District Court for the District of Columbia denied the university's summary judgment motion. The court held that summary judgment was not warranted, as issues of fact existed regarding all three of the elements of the FCA retaliation claim—namely, whether the plaintiff engaged in protected conduct; whether the defendant was on notice of any such protected conduct; and whether

there was a causal connection between any protected conduct and the plaintiff's termination.

McCurdy v. Cowley County Dev. Svcs., Inc., 2014 WL 298680 (D. Kan. Jan. 28, 2014)

A plaintiff filed suit against her former employer—a community developmental disability organization—alleging that the defendant violated the federal False Claims Act's anti-retaliation provision, the Kansas False Claims Act's equivalent, and other claims. Specifically, the plaintiff claimed that the defendant was responsible for determining eligibility for services and funding for people with developmental disabilities, but failed to live up to that responsibility. She alleged that she raised questions and concerns with the defendant regarding its practices and procedures and eventually began recording conversations and meetings while she was at the office. A dispute arose between the plaintiff and defendant regarding whether or not she was required to turn over her recordings to the defendant, and the plaintiff was terminated from her job. The defendant moved for summary judgment on the plaintiff's FCA claims.

The U.S. District Court for the District of Kansas denied the defendant's motion. In a short opinion, the court held that it could not determine—as a matter of law—whether or not the plaintiff engaged in protected conduct under the federal or Kansas FCA laws, whether the defendant had notice of any alleged protected activity, and whether the alleged protected activity caused the defendant to retaliate against the plaintiff. As a result, the court held that there were genuine issues of material fact that precluded summary judgment.

Wichansky v. Zowne, 2014 WL 289924 (D. Ariz. Jan. 24, 2014)

A plaintiff filed suit against a corporation and multiple individuals, alleging that the defendants violated the False Claims Act's anti-retaliation provision, among various other federal and state laws. According to the plaintiff, he and one of the individual defendants co-founded and had a 50% stake in the corporate defendant—an employee placement services company that eventually maintained offices in five states and had hundreds of employees. The plaintiff claimed that the defendants engaged in a scheme to intimidate and harass him and later created and operated a secret office and improperly removed servers and computers that were vital to the company's continued operation. The plaintiff took steps to terminate his partner's employment with the company, which eventually resulted in the two sides agreeing to a dissolution of the company in which the defendant partner elected to buy out the plaintiff's stake in the company to prevent a wind down of the company's operations. The plaintiff claimed that while he and his experts were preparing for a valuation hearing, they discovered that one of the company's subsidiaries had engaged in a fraudulent billing scheme in which the defendant partner had been intimately involved. The plaintiff concluded that the defendants' behavior toward him was designed to drive him from the company and to dupe him into petitioning for dissolution so that his partner could drive him out and conceal the fraud. Based on these suspicions, the plaintiff sought to withdraw his dissolution petition, but was denied by the state court, which then ordered that the partner defendant be allowed to purchase the plaintiff's share of the company at a price the plaintiff believed was materially below fair market value. He alleged that the defendants' conduct violated the False Claims Act's anti-retaliation provision. The defendants moved to dismiss the FCA claim, arguing that the plaintiff was not an "employee" of the company and therefore was not protected by the FCA; the defendants also argued that the plaintiff failed to establish that he engaged in any protected activity.

Holding: The U.S. District Court for the District of Arizona granted the defendants' motion. The court agreed with the defendants that the plaintiff did not allege that he was in an employer-type relationship with the defendant, and instead asserted that he was the president, chairman and a 50% owner of the company; moreover, he did not claim that any of the individual defendants' alleged actions were taken on behalf of the company. Since the plaintiff did not have an employment relationship with the defendants, the court held that he could not assert an FCA retaliation claim against them. In addition, the court noted that the plaintiff did not allege that he engaged in any protected conduct—investigating the defendants' alleged fraudulent billing—until <u>after</u> the alleged retaliation occurred. As a result, the court held that the plaintiff could not establish that the alleged retaliation was motivated by his protected conduct. Although the court dismissed the plaintiff's FCA retaliation claim, it granted the plaintiff's request for leave to file an amended complaint.

Marbury v. Talladega Coll., 2014 WL 234667 (N.D. Ala. Jan. 22, 2014)

A plaintiff alleged that the college that previously employed her violated the False Claims Act's anti-retaliation provision by terminating her employment after she engaged in protected whistleblower conduct. She claimed that the defendant—a historically black private college—received special federal funding under Title III of the Higher Education Act, and that her job as Directory of Faculty Development was funded by Title III money. She also claimed that whenever a faculty development program required funding, she would seek approval of the expenditure from her supervisors. She further alleged that the defendant's vice president of academic affairs supervised programs under a new continuing education unit at the school, and that, on multiple occasions, she cautioned the vice president against using Title III funds for improper uses, including certain advertising and

travel expenses. According to the relator, the vice president repeatedly directed her to falsify funding requests by changing the descriptions of ineligible costs. The relator stated that the vice president told her to "do what I tell you to do," and reminded her that she could be furloughed and lose her job; however, on most—but not all—of these occasions, Title III funds were ultimately not used. Eventually, the vice president recommended to the college's president that the plaintiff be furloughed. The president accepted the vice president's recommended and decided not to renew the plaintiff's contract. The parties disagree about the reason for the termination, with the plaintiff claiming that it was due to her refusal to participate in the defendant's routine efforts to misuse federal funds, and with the defendant arguing that it was due to the plaintiff's lack of progress on assignments and her demeanor in the workplace. The defendant moved for summary judgment on the plaintiff's FCA retaliation claim, contending that the plaintiff could neither demonstrate that she engaged in protected activity under the FCA nor that there was a causal connection between her alleged protected conduct and her termination.

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

First, the defendant argued that, since the plaintiff conceded that she never took steps actually to file a *qui tam* suit, never informed the defendant that she was contemplating an FCA action, and never filed a complaint under the defendant's grievance policy, she did not engage in protected activity under the FCA. But the court held that "such formal actions are not necessarily required," since "the FCA whistleblower provision protects the making of internal complaint[s]"—noting that the FCA was amended in 2009 to make clear that internal reporting could qualify as protected activity. The court then determined that the plaintiff's refusals to prepare falsified requisition forms accompanied by her protestations about the defendant's alleged misuse of Title III funds could amount to protected activity, since those actions were sufficient to demonstrate the plaintiff's efforts to stop FCA violations and support a reasonable conclusion that the defendant feared being reported to the government for fraud. The court considered the defendant's argument that the retaliation claim should be dismissed because the plaintiff did not establish that Title III funds were ever misused. But the court noted that the FCA's anti-retaliation provision does not require that false claims actually be presented or that federal funds actually be expended; the statute is also designed "to prevent the filing of false claims and to discourage fraud."

Next, the defendant argued that the plaintiff failed to establish a causal connection between her protected conduct and her termination, since the defendant's ultimate decision-makers were not on notice of her activities and thus, could not have had retaliatory motives. The court, though, accepted the plaintiff's "cat's theory," which argued that since the vice president initiated the recommenda-

tion to terminate the plaintiff's employment and since the president simply accepted that recommendation without conducting an independent investigation, the defendant's decision was rooted in a retaliatory motive and not for business reasons. The court further noted the temporal proximity between the plaintiff's protestations and her firing and the generally positive performance reviews she received from the defendant—including an assessment of "outstanding" less than two months before she was fired—and decided that when viewed in a light most favorable to the plaintiff, there were genuine issues of fact regarding the reason for the plaintiff's termination. Consequently, the court held that summary judgment was not proper and denied the defendant's motion.

McCollum v. Jacobs Eng'g Group, Inc., 2014 WL 218441 (S.D. Mass. Jan. 21, 2014)

A plaintiff filed a suit under the False Claims Act's anti-retaliation provision against two affiliated companies that were subcontractors on a construction contract with the Federal Bureau of Prisons (BOP). One of the defendants hired the plaintiff as a resident field engineer on the construction contract; the plaintiff's employment was to conclude at the end of the project. The plaintiff's job duties included preparing independent government estimates (IGEs)—which substantiated the defendants' potential costs to be charged to the government and which the BOP used to negotiate pricing on change orders. The plaintiff's supervisor from BOP began complaining about the timeliness and accuracy of the plaintiff's IGEs. The plaintiff refuted the supervisor's claims, and stated that the IGEs were delayed because he did not always have the necessary information. The supervisor also complained that the plaintiff had a habit of arriving to work late and taking long lunches. The plaintiff began complaining about the IGE process on the project. The situation did not improve and the supervisor eventually notified the defendants that BOP wanted to replace the plaintiff. The defendants complied with the BOP's directive, citing a provision in their contract with the government that allowed the BOP to change or replace their personnel. Pursuant to the defendants' policy, the plaintiff was placed on unpaid leave for sixty days, while he and the defendants attempted to find other work for him. When the plaintiff was unable to find another open position with the defendants within the sixty days, he was laid off. About six months after being laid off, the plaintiff filed a *qui tam* complaint alleging that the defendants and others had conspired to submit falsified change orders for payment to the U.S. Government, in violation of the False Claims Act. He also alleged that the defendants violated the FCA's anti-retaliation provision. The government declined to intervene in the fraud claims and the plaintiff chose to dismiss those claims voluntarily, leaving only the retaliation claim. The defendants moved for summary judgment on that claim.

Holding: The U.S. District Court for the Southern District of Mississippi granted the defendants' motion. The court observed that one of the defendants was a wholly-owned subsidiary of the other, and that the plaintiff was only employed by the parent company. As a result, the court granted the subsidiary's summary judgment motion. The court then determined that the claim against the parent company would be dismissed as well, since the plaintiff failed to demonstrate that he was engaged in protected activity under the FCA. The court noted that the plaintiff's job duties included substantiating the defendants' charges to the government and "contract compliance," and recognized that such employees are held to a heightened burden to prove that they placed their employers on notice of protected whistleblower activity—and were not simply doing their jobs. But the court declined to opine on whether or not the plaintiff met his burden, as the court held that, even if he did engage in protected activity, he did could not have put his employer on notice of the activity because he did not make any complaints about the IGE process until after the BOP ordered his removal. In addition, the court found that the employer submitted sufficient evidence of a non-retaliatory reason for the plaintiff's termination—namely, the fact that the defendant was required to comply with the BOP's directive. Based on these findings, the court granted the parent company's summary judgment motion.

Pitts v. Howard Univ., 2014 WL 69032 (D.D.C. Jan. 9, 2014)

A plaintiff filed suit against his former employer—and university—alleging various employment law claims, including a claim under the anti-retaliation provision of the False Claims Act. According to the plaintiff, who had been employed in a variety of finance-related roles at the university, after he expressed concerns about various tax issues and a possible fraud on the university, he was demoted. The university moved to dismiss the FCA retaliation claim, arguing that the complaint failed to state a claim, since he did not establish that he engaged in protected activity. The U.S. District Court for the District of Columbia denied the defendant's motion. The court held that even though the plaintiff did not actually file a *qui tam* suit, he was still protected by the FCA's anti-retaliation provision, since the FCA protects employees who are merely investigating possible FCA violations—even if the employee does not yet realize the potential for an FCA suit. While the court recognized that the plaintiff's allegations were "fairly cursory," it held that they were sufficient to state a claim. The court did not address the fact that tax fraud allegations are specifically exempted from the FCA. The defendant argued that the plaintiff did not allege that the university submitted any false or fraudulent claim to the government. But the court held that the plaintiff's allegations were sufficient to state a claim, since his alleged protected activity may have uncovered a possible fraud on <u>the university</u>—a federal grantee. The court noted that "retaliation could be taken against someone involved in the *investigation* of an FCA claim,

even if such claim turned out to be unsuccessful." Consequently, the court denied the university's motion to dismiss.

See *U.S. ex rel. Portilla v. Riverview Post Acute Care Ctr.*, 2014 WL 1293882 (D.N.J. Mar. 31, 2014), at page 45.

See *U.S. ex rel. Booker v. Pfizer, Inc.*, 2014 WL 1271766 (D. Mass. Mar. 26, 2014), at page 9.

See *U.S. ex rel. Saunders v. Unisys Corp.*, 2014 WL 1165869 (E.D. Va. Mar. 21, 2014), at page 13.

See *U.S. ex rel. D'Alessio v. Vanderbilt Univ.*, 2014 WL 1094452 (M.D. Tenn. Mar. 19, 2014), at page 38.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Primary Jurisdiction

See *United States v. Kellogg Brown & Root Services, Inc.*, 2014 WL 1282275 (C.D. Ill. Mar. 31, 2014), at page 47.

B. *Pro Se* Relator

Knudsen v. Belt Valley Bank, 2014 WL 824864 (D. Mont. Mar. 3, 2014)

A *pro se* relator filed a *qui tam* action alleging that a bank violated the False Claims Act by failing to apply profits to a loan guaranteed by the U.S. Department of Agriculture Farm Services Agency, resulting in improper payments from the government. A U.S. magistrate judge submitted findings and recommendations to the U.S. District Court for the District of Montana, recommending that the relator's complaint be dismissed without prejudice, since the relator was not represented by a licensed attorney. The court adopted the magistrate's recommendation and dismissed the *qui tam* complaint without prejudice, stating that "a pro se litigant cannot prosecute a false claim on behalf of the United States."

C. Sovereign Immunity

U.S. ex rel. Oberg v. Pennsylvania Higher Ed. Assistance Agency, 2014 WL 961560 (4th Cir. Mar. 13, 2014)

A relator alleged that three state-created student loan corporations—from Pennsylvania, Vermont, and Arkansas—defrauded the U.S. Department of Education and violated the False Claims Act by submitting false claims for a student loan interest subsidy. The defendants moved to dismiss the relator's complaint, arguing that they were "arms" of their respective states, and as such, were not "persons" subject to *qui tam* suits under the False Claims Act. The U.S. District Court for the Eastern District of Virginia granted the defendants' motions to dismiss. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit. The circuit court held that the district court did not properly employ the "arm-of-the-state" analysis in reaching its conclusion. The district court's judgment was vacated and the matter was remanded. After applying the arm-of-the-state test, the district court again dismissed the *qui tam* suit. The relator again appealed the ruling to the Fourth Circuit.

The Fourth Circuit affirmed the district court's ruling in part and reversed it in part. As an initial matter, the circuit court made clear that unlike in the Eleventh Amendment context, in FCA cases, the arm-of-the-state analysis is not an affirmative defense; instead, establishing that the defendant is a "person" is an element of FCA claims that must be proved by the relator. The circuit court then announced the four nonexclusive factors considered when applying the arm-of-the-state test: (1) "whether any judgment against the entity as defendant will be paid by the State;" (2) "the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity's directors or officers, who funds the entity, and whether the State retains a veto over the entity's actions;" (3) "whether the entity is involved with state concerns as distinct from non-state concerns;" and (4) "how the entity is treated under state law, such as whether the entity's relationship with the State is sufficiently close to make the entity an arm of the State."

After applying the test, the appellate court held that the Pennsylvania and Vermont defendants were not arms of their respective states. The court concluded that with respect to these two defendants, two of the four factors weighed in favor of the relator, and two factors weighed against him. Since the court construed all facts in the light most favorable to the relator, it held that the relator's allegations against the Pennsylvania and Vermont defendants could withstand the motions to dismiss. The court, though, granted the Arkansas defendant's motion to dismiss, finding that "all four factors weigh in favor of holding that [the Arkansas defendant] is an arm of the state."

U.S. ex rel. Lesinski v. S. Fla. Water Mgmt. Dist., 2014 WL 23737 (11th Cir. Jan. 2, 2014)

A *qui tam* relator alleged that, in 2004 and 2005, a Florida water management district—his former employer—violated the False Claims Act by submitting false claims to the Federal Emergency Management Agency for funds to cover repair costs to the area's canals and levees after multiple hurricanes struck the region. The district moved to dismiss the suit, arguing that, as an arm of the State of Florida, it was not a "person" subject to suit under the FCA. The U.S. District Court for the Southern District of Florida granted the defendant's motion and dismissed the relator's suit with prejudice. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Eleventh Circuit.

Holding: The Eleventh Circuit affirmed the district court's dismissal of the qui tam complaint.

Sovereign Immunity

The circuit court first noted that although the False Claims Act does not define "person," the U.S. Supreme Court has already held that the term—at least in the context of *qui tam* suits—does not include states or state agencies. The circuit court further observed that, consistent with the Supreme Court's ruling, other circuit courts (including the Fourth, Fifth, Ninth, and Tenth) have reasoned that the Eleventh Amendment "arm-of-the-state" test should be used for determining whether a state entity is a "person" under the FCA. The Eleventh Circuit agreed, and held that the district court correctly applied the four-factor test, which considers: "(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." (internal citation omitted) Upon review of the district court's analysis, the circuit court determined that the water district was an arm of the state of Florida. Regarding the first factor, the circuit court found that the Florida Constitution requires the state legislature to protect and conserve the state's waters, and that the water district was one of five such entities created by state statute to serve that purpose. The circuit court concluded that "there is little dispute that Florida law defines the District as an arm of the State." Next, the appeals court held that the State ultimately controls the water district, as the district's power to manage waterways throughout the state "stems solely from, and is limited by, the State; the District is not autonomous, and no county, municipality, or other local government delegates to it any authority." The appellate court further noted that the district is governed by a board and executive director who are appointed by the Florida governor and approved by the state senate, and that the district's budget must be submitted to various state officials and is subject to the governor's approval. Notwithstanding the fact that the water district maintains some autonomy and is authorized to solicit public grants—including FEMA grants—the court of appeals held that the district is still ultimately controlled by the state, as it "derives both the authority and obligation to exercise [its] powers directly from the State."

Turning to the third factor—the source of the district's funding—the appeals court noted that although the district can "levy ad valorem taxes, issue bonds, buy land, and borrow money," it also received a significant but fluctuating portion of its funds from the state. The court held that the district's funding mechanism did not create sufficient autonomy to render it a "person" for FCA purposes. Finally, the circuit court considered the final factor—whether the state bears responsibility for adverse judgments against the district. Although the relator argued that he would only seek to recover from the district (which created a self-insurance fund) and not from the state, the Eleventh Circuit held that since the state could potentially bear liability for an adverse judgment against the district—or would have to increase appropriations to the district in the event that such judgments depleted the district's funds—the fourth factor weighed in favor of the defendant. Thus, the Eleventh Circuit affirmed the district court's ruling that the water district was an arm of the State of Florida and not subject to *qui tam* liability. The relator's complaint was dismissed.

D. Statute Of Limitations

See *U.S. ex rel. Portilla v. Riverview Post Acute Care Ctr.*, 2014 WL 1293882 (D.N.J. Mar. 31, 2014), at page 45.

See *U.S. ex rel. Davis v. District of Columbia*, 2014 WL 1273608 (D.D.C. Mar. 31, 2014), at page 61.

See *U.S. ex rel. Bergman v. Abbot Labs.*, 2014 WL 348583 (E.D. Pa. Jan. 30, 2014), at page 41.

See *U.S. ex rel. Harman v. Trinity Indus., Inc.*, 2014 WL 47258 (E.D. Tex. Jan. 6, 2014), at page 14.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Potra v. Jacobson Cos., Inc., 2014 WL 1275501 (N.D. Ga. Mar. 27, 2014)

Two relators alleged that a group of specialty chemical blending companies violated the False Claims Act's "reverse" false claims provision. Specifically, the relators claimed that the defendants failed to comply with federal and state environmental statutes and regulations regarding reporting and permitting when they transported, stored, and disposed of hazardous waste. The relators argued that the government may have imposed fines and penalties against the defendants for their alleged environmental violation, and that the defendants' failure to pay those potential fines constituted "reverse false claims." In addition, the relators alleged that the defendants violated the FCA by re-labeling expired antibiotics and selling them to the government. Moreover, the relators claimed that the defendants conspired to defraud the government. The United States declined to intervene in the *qui tam* suit. The defendants moved to dismiss the relators' complaint, arguing that it failed to state a claim and failed to plead the defendants' false claims with particularity.

Holding: The U.S. District Court for the Northern District of Georgia granted the defendants' motion and dismissed the *qui tam* complaint.

First, the court dismissed the relators' reverse false claim allegation. The court noted that potential fines that may be imposed or other contingent liabilities owed to the government do not create reverse false claims under the FCA. The court then observed that the relators also alleged that the defendants submitted false information to the government in order to avoid paying for necessary permits and certifications, and that these permitting and certification obligations subjected the defendants to reverse false claims liability. But the court rejected this argument as well, finding that the relators could only maintain a cause of action for reverse false claims by alleging with particularity "that the Government was owed 'specific, legal obligations at the time that the alleged false record or statement was made, used or caused to be made or used.'" The court held that the relators failed to meet that standard, since their complaint did not "specify the amount of the costs or fees that the Government was owed or otherwise explain the nature of any existing debt owed to the Government, and it [did] not identify the source of any statutory or regulatory scheme that required the Defendants to pay such costs and fees to the Government *before* the alleged false records were submitted." As a result, the reverse false claim allegation was dismissed.

The court then dismissed the relators' allegation that the defendants sold expired antibiotics to the government, finding that relators failed to respond to the defendants' motion and therefore abandoned that theory of FCA liability. Finally, the court dismissed the conspiracy allegation, holding that since the relators failed to state a fraud claim, their conspiracy claim necessarily failed as well.

U.S. ex rel. Hericks v. Lincare Inc., 2014 WL 1225660 (E.D. Pa. Mar. 25, 2014)

A *qui tam* relator alleged that two related durable medical equipment companies violated the False Claims Act by providing kickbacks—both money and free services—to doctors in exchange for referrals for the defendant's equipment. The relator had been employed by the defendants and claimed that a month after her employment started, she began attended training sessions during which the defendants' kickback scheme—which focused on Medicare patients—was openly discussed and encouraged. The relator also claimed that she supervised employees making sales visits to doctors and witnessed the employees discussing the kickbacks for referrals scheme with doctors. The relator contended that the defendants' illegal kickbacks tainted physicians' Medicare claims for the defendants' devices, resulting in the submission of false healthcare reimbursement claims under the False Claims Act. The defendants moved to dismiss the relator's fraud claims, arguing that they were not pled with particularity, as required by federal Rule of Civil Procedure 9(b).

The U.S. District court for the Eastern District of Pennsylvania granted the defendants' motion.

The court found the relator's fraud allegations to be lacking. The relator alleged a nationwide fraud scheme even though she only worked at a single training center in Michigan and did not allege any actual knowledge of practices occurring at other locations. In addition, the relator alleged a fraud scheme that pre-dated and post-dated her employment with the defendant—which only lasted a year. Moreover, the court determined that the relator's allegations were largely based on materials and information she received during her training sessions; she did not allege particular facts linking specific kickbacks to referrals and Medicare claims. Additionally, the court questioned whether or not the relator adequately established that some of the defendant's alleged misconduct constituted illegal kickbacks under the Anti-Kickback Statute. The court said that the relator's "claims of kickbacks are rooted in conjecture, speculation or supposition; she asks the Court to assume that some claims at some point from some center must have resulted from illegal practices."

Further, the court held that some of the relator's fraud claims accrued more than six years before she filed her *qui tam* complaint, and were barred by the FCA's statute of limitations.

U.S. ex rel. Palmieri v. Alpharma, Inc., 2014 WL 1168953 (D. Md. Mar. 21, 2014)

A *qui tam* relator alleged that his employers—two affiliated pharmaceutical companies—violated the federal False Claims Act and 23 state FCA laws by illegally marketing and promoting their topical pain medication patch for non FDA-approved uses and doses, thereby causing providers to submit false claims to the federal and state healthcare programs. The relator contended that the defendants' marketing practices included a scheme of providing kickbacks to providers who prescribed their patch, in violation of the Anti-Kickback Act (AKS), and that the AKS violations made those providers' Medicare and Medicaid claims false for FCA purposes. The defendants moved to dismiss the *qui tam* complaint, arguing that the relator's suit was barred by the FCA's first-to-file provision. The U.S. District Court for the District of Maryland denied the defendant's motion. But the court still dismissed the *qui tam* complaint, as it found that the fraud allegations were not pled with the requisite particularity, since the relator failed to identify (1) any particular instance of a false claim for the patch being submitted or (2) any particular instance of doctors prescribing the defendants' drug to Medicare/Medicaid patients after receiving an illegal kickback from the defendants. The court granted the relator leave to amend his complaint. The relator filed an amended complaint that included new, more detailed allegations regarding prescriptions two doctors wrote for nine patients. The defendants again moved to dismiss the complaint, arguing that: (1) the first-to-file bar precluded the relator's fraud claims; (2) the alleged fraud was not pled with particularity; and (3) the FCA's public disclosure bar provision barred the *qui tam* suit.

Holding: The Maryland District Court granted the defendants' motion to dismiss, finding that the relator's amended complaint did not plead the alleged fraud scheme with particularity. The court determined that the relator's new allegations did not meet the heightened pleading standard because he did not plead facts showing that any claims for reimbursement were ever submitted to the government. Specifically, the court stated that "the relator offered certain details concerning individual patients, but failed to provide any 'copies of a single actual bill or claim or payment'; any 'amounts of any charges'; any 'actual dates of claims' submitted to the government; or any completed claim forms." The court recognized that the relator likely could not obtain such detailed information since the information was protected from disclosure pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Based on the court's findings, the *qui tam* complaint was dismissed. The court noted that the relator did not seek leave to amend his complaint, but only requested that his state FCA claims not be dismissed with prejudice. The court reasoned that the relator's state law claims might prove to be viable under another court's more lenient particularity standard, and consequently, the district court dismissed

the relator's state FCA claims without prejudice. The relator's federal FCA claims were dismissed with prejudice.

U.S. ex rel. D'Alessio v. Vanderbilt Univ., 2014 WL 1094452 (M.D. Tenn. Mar. 19, 2014)

Three relators filed a *qui tam* suit against a private university and the university's medical center and medical group and clinic, alleging that the defendants violated the federal False Claims Act and several state FCA statutes by submitting Medicare reimbursement claims for services that were not properly supervised by attending physicians. One of the relators also alleged a claim under the FCA's anti-retaliation provision. The defendants moved to dismiss the relators' claims, arguing that the *qui tam* complaint failed to allege a claim for fraud and failed to plead fraud with particularity. The defendants also argued that the relators' fraud claims were precluded by the FCAs' public disclosure bar provisions.

The U.S. District Court for the Middle District of Tennessee denied the defendants' motion.

Public Disclosure Bar

The defendants argued that the relators' fraud claims were substantially similar to information previously disclosed in federal government audits. The relators countered that their *qui tam* suit was not based upon the prior audits, since they alleged fraud that began after the time period discussed in the audits. In addition, the relators—all of whom had worked for the defendant university as physicians—argued that they had first-hand knowledge of the defendants' fraud. The court concluded that the relators' fraud claims were "not subject to dismissal on a Motion to Dismiss by the 'public disclosure bar' or 'original source' requirement."

Failure to State a Claim/Plead Fraud With Particularity

The court held that the relators' fraud claims were properly pled. In reaching its holding, the court rejected the defendants' argument that the fraud claims were deficient because the relators failed to describe specific false claims. The court reasoned that the "lack of a 'specific false claim' is a very important factor to consider but it is not per se fatal to a FCA complaint where the [relator] has pled facts that create a 'strong inference' of false billing practices based on personal knowledge." Without explanation, the court held that "[t]he Complaint in this case is sufficient to raise a 'strong inference' of purported fraud," and, as a result, denied the defendants' motion to dismiss the fraud claims.

Retaliation

One of the relators alleged a claim for retaliation under the FCA, arguing that he expressed concerns to the defendants about the alleged fraud and, consequently, the defendants refused to renew his employment contract. The court held that these allegations were sufficient to state a claim under the FCA and to overcome the defendants' motion to dismiss.

U.S. ex rel. Conteh v. IKON Office Solutions, Inc., 2014 WL 1022861 (D.D.C. Mar. 18, 2014)

A relator filed a *qui tam* suit against copying and document services company, alleging that the defendant violated the False Claims Act. Specifically, the relator, who had been employed by the defendant for three years as a mail clerk, claimed that the defendant entered into a contract with the Federal Deposit Insurance Company (FDIC) to provide various document services, and that the contract required the defendant to pay certain wages and to provide certain benefits to employees under the Service Contract Act. According to the relator, the defendant falsely reported to the FDIC that it was providing its employees with required fringe benefits, in violation of the False Claims Act. The relator claimed that prior to working for the defendant, he had held similar jobs with four other FDIC contractors, and that each of his previous employers had properly provided the required fringe benefits. The relator further claimed that he had discussions with several of his co-workers and discovered that the defendant had failed to provide required benefits to approximately 22 of its employees. And on "information and belief," the relator alleged that the defendant submitted bi-weekly invoices to the FDIC that falsely certified its compliance with the terms of its contract. The defendant moved to dismiss the relator's fraud claims, arguing that the relator failed to state a claim under the FCA and failed to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the District of Columbia granted the defendant's motion and dismissed the *qui tam* complaint without prejudice.

The court noted that the relator's contention was largely based on his past experiences with previous employers—each of whom provided him with fringe benefits—but that he did not allege any facts regarding the content (or even existence) of the defendant's invoices to the FDIC, or any information regarding who participated in the fraudulent activity alleged. Moreover, the court held that the relator's pleading on "information and belief" was insufficient to overcome Rule 9(b)'s particularity standard. The court held that the relator could only plead upon information and belief if he could demonstrate that the defendant controlled the relevant documents or information and that he could not access it. But the court found that the relator failed to meet that standard, since his complaint "fail[ed] to allege anything about lack of access." Although the court granted the defendant's

motion and dismissed the relator's fraud allegations, the court granted the relator leave to file an amended complaint, noting that the relator had not yet amended his complaint and reasoning that allowing a first amended complaint would not necessarily be futile.

U.S. ex rel. Miller v. SSM Health Care Corp., 2014 WL 631635 (W.D. Wis. Feb. 18, 2014)

A *qui tam* relator alleged that three healthcare companies violated the False Claims Act by submitting false Medicare claims. The defendants moved to dismiss the relator's complaint, arguing that the fraud claims were not pled with particularity, as required by Federal Rule of Civil Procedure 9(b). The U.S. District Court for the Western District of Wisconsin granted the defendants' motions, finding that the relator failed to allege that one of the defendants made any false statements or that the defendant "knowingly" submitted false claims. With respect to the other two defendants—which were related entities—the court held that the relator failed to differentiate between the two companies and failed to respond to their argument that her allegations improperly asked the court to infer that the allegedly false claims at issue were submitted to the government and not to private insurers. While the court granted the defendants' motions to dismiss, it dismissed the *qui tam* complaint without prejudice and granted the relator leave to file an amended complaint.

U.S. v. Associates In Eye Care, P.S.C., 2014 WL 414231 (E.D. Ky. Feb. 4, 2014)

The United States filed a civil action against an optometrist and the eye care center that employed him, alleging violations of the False Claims Act, among other claims. According to the government, the defendants defrauded Medicare and Medicaid by submitting reimbursement claims for unnecessary and/or worthless eye examinations and other services, and by billing for services that were never provided—and in some cases, could not possibly have been provided. The defendants moved to dismiss the government's FCA claims, arguing that the fraud allegations did not state a claim under the FCA because they did properly allege the knowledge element; and that the allegations did not satisfy Federal Rule of Civil Procedure 9(b)'s heightened pleading requirement.

Holding: The U.S. District Court for the Eastern District of Kentucky denied the defendants' motion to dismiss. The court held that the United States met Rule 9(b)'s particularity standard, as the government alleged the general time frame during which the ongoing fraudulent scheme allegedly occurred, and included detailed information regarding several representative examples of claims submitted on days when the doctor claimed to see more than fifty patients; in some instances,

the doctor claimed to have treated more than 100 patients in one day. The court stated that "[t]he government in this case has clearly alleged the 'who, what, when, and where' necessary to satisfy Rule 9(b)." Moreover, the court held that under Rule 9(b), defendants' state of mind may be pled generally, rather than with particularity. The court further noted that the FCA's definition of knowledge includes "deliberate ignorance of the truth" and "reckless disregard to the truth," and held that the government's allegation that the defendants "knew or should have known" that their Medicare and Medicaid billings were implausible was sufficient to state a claim under the FCA. The defendants' motion to dismiss the government's FCA claim was denied.

U.S. ex rel. Bergman v. Abbot Labs., 2014 WL 348583 (E.D. Pa. Jan. 30, 2014)

A relator filed suit against a pharmaceuticals company—her former employer—alleging that the defendant violated the federal False Claims Act and the false claims act laws of 23 states and the District of Columbia. Specifically, the relator, who was a sales representative for the defendant, claimed that, despite clinical studies to the contrary, the defendant knowingly trained its sales staff to market one of its prescription drugs for off-label—and therefore medically unnecessary—uses, and paid illegal kickbacks to physicians who prescribed the drug. The relator alleged that the defendant instructed its employees not to record discussions of off-label uses of the drug, in order to conceal its misleading marketing practices. The relator asserted that as a result of the alleged misconduct, the defendant caused providers to submit false claims to Medicare, Medicaid, TRICARE, and the Federal Employee Health Benefits Program—claims that included implied false certifications of the defendant's compliance with applicable healthcare regulations, including the Anti-Kickback Statute. The government plaintiffs declined to intervene in the *qui tam* suit.

The defendant moved to dismiss the relator's fraud allegations, arguing that the *qui tam* complaint failed to state a claim for relief under the FCA because even if its drug was prescribed for off-label uses, those uses were still deemed medically necessary therefore were reimbursable under the government healthcare programs. The defendant also argued that the relator failed to plead the alleged fraud with particularity, stating that the complaint did not provide sufficient details of the alleged illegal kickbacks scheme. In addition, the defendant contended that the relator's lawsuit was an attempt at imposing FCA liability on speech protected by the First Amendment and that the claims were barred by the statute of limitations.

Holding: The U.S. District Court for the Eastern District of Pennsylvania granted the defendant's motion in part and denied it in part. The relator voluntarily dismissed some of her federal and state claims that were untimely; she was allowed to proceed on all of her remaining claims.

Failure to State a Claim/Plead Fraud with Particularity

The court determined that the relator's fraud allegations were based on an implied false certification theory, whereby the relator argued that the defendant's false statements about the uses and efficacy of its drug, coupled with the illegal kickbacks the defendant paid, caused providers to submit false claims to the government. The court held that the relator's allegations stated a claim for relief under the FCA, since the relator asserted that the defendant promoted the drug for medically unnecessary uses, thereby violating a condition of payment under the government healthcare programs. The court observed that the defendant promoted the drug for non-approved uses even though clinical studies failed to support the defendant's statements about the drug. The court held that these allegations would withstand the defendant's motion to dismiss for failure to state a claim. In reaching its holding, the court rejected the defendant's argument that its commercial speech was protected by the First Amendment. The court noted that untruthful or misleading commercial speech is not protected by the First Amendment, and held that the relator's allegations—which must be accepted as true on a motion to dismiss—that the defendant's statements were false and misleading were sufficient to overcome the defendant's First Amendment argument at this stage of the litigation.

The court then determined that the relator's fraud allegations were pled with the requisite particularity as well. Since the relator alleged that the defendant caused providers to submit false claims to the government (and did not allege that the defendant submitted false claims itself), the court held that she was not required to plead the particulars of a specific false claim submitted to the government. The court noted that in the Third Circuit, relators are not necessarily required to plead details such as the "the date, place or time of the fraud, so long as they use an alternative means of injecting precision and some measure of substantiation into their allegations." The district court held that the relator met that standard, noting that she "provide[d] myriad details of [the defendant]'s marketing statements that contradict its FDA-approved label," and alleged that the defendant's off-label were linked to illegal kickbacks. The court determined that the relator's allegations were "specific and particular enough to inform [the defendant] of the 'precise misconduct charged.'" In addition, the court rejected the defendant's argument that the relator's complaint did not allege illegal kickbacks with particularity. Instead, the court held that the relator described how the defendant provided its sales reps with funds to pay honoraria and to provide meals as rewards for physicians who prescribed the defendant's drug or encouraged other physicians to do so. The relator also alleged that the illegal kickbacks violated a condition of payment under the government healthcare programs, and therefore, claims tainted by the illegal kickbacks were false for FCA purposes. Consequently, the court denied the defendant's motion to dismiss for failure to plead fraud with particularity.

Statute of Limitations

The court then turned to the defendant's statute of limitations argument. The defendant claimed that the relator's allegations—which alleged fraud over an eight-year period—were limited by the FCA's six-year statute of limitations. The relator initially agreed to dismiss any claims based on fraud that occurred more than six years before she filed her *qui tam* complaint, but later changed her position after the Fourth Circuit held that, as a result of the United States' war in Iraq, the statute of limitations for FCA claims has been tolled under the Wartime Suspension of Limitations Act (WSLA). The district court though, not bound by the Fourth Circuit's ruling, determined that the WSLA does not apply to non-intervened *qui tam* suits—especially those not involving allegations of fraud on military or war-related contracts. As a result, the court dismissed all of the relator's claims based on fraud that was alleged to have occurred more than six years before the *qui tam* suit was filed.

State FCA Claims

Finally, the court addressed the defendant's motion to dismiss the relator's state FCA claims. The court applied the same reasoning in response to the defendant's motions to dismiss for failure to state a claim and for failure to plead fraud with particularity, and denied those motions. The relator agreed voluntarily to dismiss several of her state FCA claims, because either: (1) the state FCA law only allowed intervened *qui tam* suits to proceed and the state declined to intervene; (2) the state law was not in effect at the time of the alleged misconduct and the law did not apply retroactively; or (3) the state law's statute of limitations barred a subset of the state law claims. The court then evaluated the relator's remaining state FCA claims and determined that some of the claims would be dismissed because they alleged fraud that occurred before the respective state laws' effective dates.

U.S. ex rel. Dunn v. N. Mem'l Health Care, 2014 WL 67765 (8th Cir. Jan. 9, 2014)

A relator filed a *qui tam* suit against a group of related healthcare companies, alleging that the defendants violated the False Claims Act by submitting false Medicare reimbursement claims. According to the relator, the defendants operated outpatient cardiac and pulmonary rehabilitation programs without providing physician supervision as required by the applicable regulations; the relator further claimed that the defendants falsely listed four doctors as the supervising physicians, although none of those doctors ever supervised the programs. The defendants moved to dismiss the qui tam complaint on the grounds that the relator failed to state a claim and failed to plead the alleged fraud with particularity. The U.S. District Court for the District of Minnesota granted the defendants' motion, find-

ing that the relator failed to state a claim under the FCA. The relator appealed the ruling to the U.S. Court of Appeals for the Eighth Circuit.

The Eighth Circuit affirmed the district court's dismissal of the *qui tam* suit, on the alternative ground that the relator did not plead the alleged fraud with particularity. The appellate court determined that the relator only made generalized allegations that all of the defendants' Medicare claims were false because of the defendants' alleged regulatory noncompliance. Instead, the court declared, the relator "must provide some representative examples of [the defendants'] fraudulent conduct, specifying the time, place, and content of their acts and the identity of the actors." Since the relator did not identify "even one example of an actual false claim submitted to CMS for reimbursement," the Eighth Circuit held that the fraud allegations in the *qui tam* complaint were deficient. The district court's ruling was affirmed.

See *U.S. ex rel. Casady v. American Int'l Group, Inc.*, 2014 WL 1286552 (S.D. Cal. Mar. 29, 2014), at page 5.

See *U.S. ex rel. v. Conner v. Veluchamy,* 2014 WL 51398 (N.D. Ill. Jan. 3, 2014), at page 17.

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

U.S. ex rel. Portilla v. Riverview Post Acute Care Ctr., 2014 WL 1293882 (D.N.J. Mar. 31, 2014)

A relator filed suit under the federal False Claims Act and the New Jersey FCA, alleging that a group of nursing healthcare providers defrauded the government by failing to provide necessary services and devices to their residents, but billing Medicare and Medicaid as if the services and devices had been provided. She asserted claims under both statutes alleging that the defendants submitted false claims to the government; made false statements to the government in connection with their false claims; and made false statements to the government to avoid their obligation to repay money owed to the government. The relator had been employed as a registered nurse at one of the defendants' facilities for about a year and claimed that during her employment, she witnessed several incidents in which patients' health and safety were put at risk—the relator claimed that one patient went missing for hours and another patient died—due to failures to provide patients with functioning bed alarms (which alerted staff members when patients attempted to get out of their beds unaided) and abdominal binders (which held feeding tubes in place). The relator alleged that she repeatedly complained to her superiors about the problems she discovered, but that no remedial actions were taken. Instead, the relator asserted, her employer allowed her co-workers to falsify daily reports to show that functional equipment had been install when in fact it had not. As a result of the relator's complaints, the Department of Health inspected her employer's facility; the next day, the relator was fired from her job. The relator also alleged claims under both statutes' respective anti-retaliation provisions. The defendants moved to dismiss the relator's fraud claims, arguing that the claims should be dismissed for failure to state a claim, for failure to plead the alleged fraud scheme with particularity and, because the claims were barred by the statute of limitations. The relator's former employer moved to dismiss the retaliation claims, arguing that the relator failed to state a claim.

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

Failure to State a Claim/Plead Fraud with Particularity

The defendants argued that the fraud claims were not pled with particularity, as required by Federal Rule of Civil Procedure 9(b), because the relator did not identify any actual false claims that the defendants submitted to the government. The relator countered that she was not required to plead the specifics of actual false claims, and instead could satisfy Rule 9(b)'s pleading requirements as long as her fraud allegations were sufficient to put the defendants on notice of the locus of the alleged fraud. The court agreed with the defendants, noting that the relator was an "insider" of at least one of the defendants, but still did not specify "the whens, wheres, and to-whoms of [the] alleged actionable submissions." The court held that the fraud allegations contained in the relator's *qui tam* complaint should be dismissed for failing to meet the heightened pleading standard.

In addition, the court held that the relator failed to state a claim under the FCA statutes. The defendants argued that the relator's fraud allegations did not state a claim because their alleged regulatory violations were immaterial to the government's payment decisions. The defendants claimed that they were compensated on a *per diem* basis that would not have been affected by things like missing bed alarms or abdominal binders, and that even if they were required to certify to the government that they provided the services and devices at issue, any such certifications would only have been required as conditions of continued <u>participation</u> in the healthcare programs, but not as conditions of <u>payment</u>. The court agreed, finding that the relator failed to link any of the defendants' alleged regulatory violations to the amounts the defendants would receive in reimbursements from the government. Thus, the court held that the fraud allegations should be dismissed for failing to state a claim.

Statute of Limitations

Although the court dismissed the relator's claims on other grounds, it acknowledged that the FCA statutes include a six-year statute of limitations provision, which presumptively bars any claims the relator brought based on incidents that occurred more than six years before the *qui tam* suit was filed. The court held that any such claims must be dismissed. In reaching this conclusion, the court noted that there is a split of opinion within the circuit courts over whether or not the FCA's tolling provision might apply to the relator's non-intervened *qui tam* suit. But since the relator did not argue that she could take advantage of the tolling provision, the court dismissed the subset of her claims that was more than six years old.

Retaliation

The relator's former employer argued that the relator's retaliation claims should fail because she could not show that she was acting in furtherance of an FCA action or that she put the employer on notice of any such protected conduct. The court agreed, finding that although the relator was "[c]oncerned about the allegedly shoddy care at the facility, regulatory violations, and attempts to falsify records," she did not "discuss how the defendants would have been aware that billing practices or Medicare/Medicaid fraud was on [her] mind." The court observed that the relator was terminated "because of her administrative, regulatory whistleblowing," but held that such conduct did not give rise to an FCA retaliation claim. The relator's retaliation claims were also dismissed.

United States v. Kellogg Brown & Root Services, Inc., 2014 WL 1282275 (C.D. Ill. Mar. 31, 2014)

The United States alleged that one of its prime contractors, as well as a subcontractor used by the prime contractor, violated the False Claims Act by submitting false claims for payment under a LOGCAP III contract to provide living quarters for American troops in Iraq. The government claimed that the defendants inflated their costs, rendering their claims false. According to the government, the prime contractor routinely used subcontractors to complete tasks under the contract, and, when subcontractors were used, the prime contractor paid for their actual costs and then sought reimbursement from the government—plus a 1% base fee and a discretionary award of up to 2%. The government claimed that the subcontractor caused delays in the delivery of housing units at a camp in Iraq, and that the additional expenses it incurred in dealing with the delays were not reimbursable. However, the subcontractor did recover from the prime contractor a variety of disallowed—and unsupportable—expenses related to the delays, and the prime contractor passed those costs on to the government, even though it had reason to know that the claimed expenses were not reliable and it could have easily verified whether the subcontractor's claimed costs were accurate and reimbursable.

With respect to the prime contractor, the government alleged several causes of action under the FCA, including: submitting false claims for payment; making false statements in support of its false claims; making false statements to avoid its obligation to repay money owed to the government; and conspiring with its subsidiaries and with the subcontractor to defraud the government. The prime contractor moved to dismiss the government's claims against it, arguing that the government failed to state a claim under the FCA and failed to plead the alleged fraud with particularity. The defendant also argued that the government's FCA claims violated public policy.

Holding: The U.S. District Court for the Central District of Illinois denied the defendant's motion to dismiss.

Failure to State a Claim/Plead Fraud with Particularity

The prime contractor defendant argued that it could not be held liable under the FCA for failing to verify the subcontractor's claimed costs, because neither the LOGCAP III contract nor applicable federal regulations required such verification. Instead, the prime contractor asserted, the contract allowed it to rely on other sources—including market price comparisons—to determine whether the subcontractor's claimed expenses were reasonable. The defendant did not attach a copy of the contract to its motion, however, so the court was left only with the government's allegations that the prime contractor was required to verify subcontractors' costs but instead recklessly disregarded information that undermined the accuracy of those costs; the government's allegations were accepted as true for purposes of the motion to dismiss. Consequently, the court denied the defendant's motion to dismiss the government's allegation that it submitted false claims for payment. Similarly, the court held that the government's allegation that the defendant made false statements in support of its claims would proceed when it allegedly misrepresented the accuracy and veracity of its reimbursement claims—even though it possessed information that casted doubt on the subcontractor's claimed costs.

The court also held that the government's fraud allegations were pled with particularity, noting that the government "detail[ed] dates, methods of communication, parties involved," etc. Furthermore, the court observed that the defendant failed to develop its particularity argument, and therefore effectively waived that argument.

Public Policy Considerations

The defendant argued that the government's lawsuit merely reflected disputed contractual reimbursement issues and that allowing the government to characterize the dispute as fraud violated public policy. The defendant contended that the proper forum for resolving the dispute was either the Army Services Board of Contract Appeals or the Court of Federal Claims, as opposed to a federal district court addressing FCA allegations. The court rejected that argument, stating that "under [the defendant]'s approach, even the most egregious cases of fraud under the FCA would be dismissed where the contractor merely alleged a 'reasonable interpretation' of a contract term to justify its false demand for payment. Moreover, the Court finds that the FCA's knowledge requirement grants contractors some protection from the proliferation of fraud claims."

U.S. ex rel. Escobar v. Universal Health Svcs., Inc., 2014 WL 1271757 (D. Mass. Mar. 26, 2014)

Two relators, serving as administratrix of their daughter's estate, filed a *qui tam* suit alleging that a healthcare company violated the federal and Massachusetts False Claims Act statutes by submitting Medicaid reimbursement claims that were tainted by systematic regulatory violations regarding patient care, supervision, and staffing. The relators claimed that due to the defendant's misconduct, their daughter was improperly medicated and suffered seizures that resulted in her death. The defendant moved to dismiss the relators' claims, arguing that the alleged regulatory violations did not give rise to FCA liability, since the regulations in question did not create conditions of payment under Medicaid. The relators had previously amended their *qui tam* complaint and when the defendant moved to dismiss that first amended complaint, the relators requested further leave to amend to detail which of the defendant's alleged regulatory violations constituted false claims for FCA purposes. The court granted the relators' request "on the understanding that Plaintiffs must be willing to rise or fall on their new Complaint."

Holding: The U.S. District Court for the District of Massachusetts granted the defendant's motion and dismissed the relators' *qui tam* suit.

The court first examined First Circuit caselaw and concluded that when FCA claims are based on regulatory violations, only conditions of payment under Medicaid—not conditions of participation in the Medicaid program—can give rise to liability. After reviewing each of the regulatory violations alleged by the relators, the court concluded that only one—a regulation concerning training that autonomous satellite programs must provide to their staff—created a condition of payment under Medicaid. But the court observed that the relators did not allege that that regulatory provision applied to the defendant; they certainly did not do so with particularity. As a result, the court held that the relators failed to allege that the defendant violated any regulatory provision that created a condition of payment under Medicaid. The court dismissed the relators' fraud claims for failure to state a claim under the FCA. Moreover the court held that the fraud claims were not pled with particularity, since the relators did not "state the who, when, or particular content of any potential false claims," and "provide[d] no claim numbers, no dates, and no amounts charged to the government." The *qui tam* complaint was dismissed for its lack of particularity as well.

U.S. ex rel. Doe v. Taconic Hills Cent. School Dist., 2014 WL 1243784 (S.D.N.Y. Mar. 25, 2014)

Two unidentified relators alleged that the New York City Department of Education violated the False Claims Act in connection to the Medicaid claims it submitted for the case management services it provided to special education students. According to the relators, the school district already received funding for its services under the Individuals with Disabilities Education Act, which meant that it was ineligible for Medicaid reimbursements for those same services. The relators claimed that the defendant could only bill Medicaid for certain supplemental services, but that the defendant did not provide any of those services, rendering its claims false. The relators further alleged that the defendant violated the FCA by making false statements to the government in support of its false Medicaid claims, and by violating the "reverse false claim" provision—which prohibits making false claims to avoid an obligation to pay money to the government. The defendant moved to dismiss the relators' FCA claim, arguing that the realtors' *qui tam* complaint failed to state a claim for relief.

The U.S. District Court for the Southern District of New York granted the defendant's motion to dismiss. The court determined that the relators "misconstrue[d] the applicable legal framework in place during the time period in question" when they asserted that the defendant was not permitted to bill Medicaid for its services. Instead, the court concluded that New York State's Medicaid program—which

the federal government approved—authorized the defendant to bill Medicaid in the manner it did. The court rejected the relators' argument that the New York law conflicted with federal law that prohibited duplicative billing. Rather, the court held that even if federal law prohibited duplicative billing—a premise the court was not prepared to accept—"any conflict between federal and state Medicaid regulations is the fault of New York State, which set up these billing procedures. It is not the fault of school districts like the [defendant], which acted in accordance with these billing procedures as required by state law. . .[I]t is not appropriate to hold the [defendant] liable for submitting a 'false claim' when it complied with all applicable regulations and therefore did absolutely nothing wrong." Moreover, the court held that since the defendant acted in accord with New York law, "it would have been impossible" for the defendant to knowingly submit false Medicaid claims. The court not only held that the relators failed to properly allege that the defendant's Medicaid claims were factually false; it held that the relators also failed to allege that the defendant's claims were legally false, because none of the underlying regulations the relators contended the defendant violated created conditions of payment under Medicaid. As a result, the court dismissed the relators' claims without prejudice.

U.S. ex rel. Knisely v. Cintas Corp., 2014 WL 983468 (E.D. Pa. Mar. 14, 2014)

A relator alleged that several of his competitors—companies hired to provide shredding services to numerous federal government agencies under contracts with the General Services Administration (GSA)—violated the False Claims Act by submitting false claims to the government and by making false statements to the government in support of those claims. Specifically, the relator claimed that the defendants misrepresented their compliance with contract specifications regarding the size of their machines' respective shredded "residue particles," both in order to receive improper payments under their government contracts and in order to win other shredding business from the government. The United States declined to intervene in the relator's lawsuit. Eventually, all but one of the defendants reached settlements with the relator and the government, and the claims against those defendants were dismissed pursuant to those settlement agreements. The remaining defendant moved to dismiss the relator's claims, arguing that, under Federal Rule of Civil Procedure 12(b)(6), the relator's complaint failed to state a claim under the False Claims Act. According to the defendants, the government contracts at issue did not require "micro shredding" as the relator claimed and instead allowed the defendant to negotiate terms with each government agency individually. In addition, the defendant moved to dismiss the relator's complaint under Federal Rule of Civil Procedure 9(b), claiming that the relator failed to plead the alleged fraud with particularity, because he did not identify any specific false claims, nor did he allege the time, place or individuals involved in the alleged fraud.

The U.S. District Court for the Eastern District of Pennsylvania granted the defendant's motion to dismiss the FCA claims. With respect to the relator's allegation that the defendant submitted false claims to the government for payment, the court noted that, although the relator contended that the shredding size limitation was mandatory, he also claimed that each government agency was required to devise its own document destruction plan. Additionally, the relator only offered one example of an agency shredding size specification—and the defendant's shredding conformed to that agency's specifications. Since the relator was unable to offer facts to substantiate his allegation that the defendant submitted false claims to the government, and since he was unable to allege which specific contractual shredding standards the defendant allegedly violated, the court held that his complaint failed to state a claim. Moreover, the court held that the relator's fraud allegations were not alleged with particularity because the relator did not plead the "who, what, when, where, and how" regarding the alleged fraud scheme. The relator's allegations that the defendant submitted false claims were dismissed.

Similarly, the court dismissed the relator's allegations that the defendant made false statements in support of false claims. The court noted that these allegations were based on the "express false certification" theory of FCA liability, whereby, "on information and belief," the relator contended that the contracts required the defendant to submit a "certificate of destruction," and that the defendant's certifications were knowingly false. The court held that the relator did not plead sufficient facts to establish that his belief was reasonably based, and stated that his allegations were "conclusory." As a result, the court dismissed the relator's "false statements" allegations as well.

U.S. ex rel. Rostholder v. Omnicare, Inc., 2014 WL 661351 (4th Cir. Feb. 21, 2014)

A relator brought a *qui tam* action against his former employer—a pharmaceutical services provider—and one of its affiliated companies, alleging that the defendants violated the federal False Claims Act, 23 state FCA statutes, two city FCA ordinances, and one county FCA law, by submitting healthcare reimbursement claims for contaminated, adulterated drugs that violated U.S. Food and Drug Administration (FDA) safety regulations. The defendants moved to dismiss the relator's claims and the U.S. District Court for the District of Maryland granted the motion and dismissed the *qui tam* complaint with prejudice, finding that the relator's complaint failed to state a claim under the FCA, since he failed to allege that the defendants made a false statement to the government and he failed to assert any details of allegedly false claims the defendants submitted to the government. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit. On appeal, the defendant also argued that the district court also lacked subject matter jurisdiction over the relator's *qui tam* complaint, due to the FCAs' respective public disclosure provisions.

Holding: The Fourth Circuit affirmed the district court's ruling and upheld the dismissal of the *qui tam* complaint.

Public Disclosure Bar

First, the circuit court addressed the defendants' public disclosure argument, in which they contended that the relator's allegations were based on information disclosed in a publicly-available warning letter the FDA sent to the defendants and information from the defendants' own public SEC filings, and that the relator was not an original source of that information. The circuit court rejected the defendants' argument, finding that the relator's claims were not "based upon" the public-disclosed information, but rather were derived from the relator's conversations with other employees and his familiarity and with and independent research into the defendants' drug repackaging operations during the time he was employed by the defendants as a pharmacist who oversaw the defendants' "repackaging, quality assurance, regulatory affairs, and wholesale and distribution." Furthermore, the court recognized that the relator alleged that the defendants supplied drugs to patients in nursing care facilities who were insured by government healthcare programs—information that demonstrated the relator's independent knowledge. As a result, the court concluded that the relator demonstrated that he had direct and independent knowledge of the information on which his allegations were based and that he qualified for the "original source" exception to the public disclosure bar.

Failure to State a Claim/Plead Fraud With Particularity

The court then turned to the relator's argument that the district court erred when it held that his *qui tam* complaint was not adequately pled. The relator contended that he properly pled that the defendant failed to comply with applicable regulations and that their drugs were "adulterated" as a result and ineligible for reimbursement under the government healthcare programs. The appellate court, though, agreed with the district court that "the Medicare and Medicaid statutes do not expressly prohibit reimbursement for drugs that have been adulterated," and do not make compliance with the regulations governing adulteration a condition of payment under the healthcare programs. The appeals court acknowledged that the defendants' drug had already been approved by the FDA, and further noted that the relevant statutes don't discuss the status of already-approved drugs that were subsequently repackaged in violation of FDA safety standards. Consequently, the circuit court held that "the submission of a reimbursement request for [the defendants'] drug cannot constitute a 'false' claim under the FCA on the sole basis that the drug has been adulterated as a result of having been processed in violation of FDA safety regulations." The court then held that, even if compliance with applicable packaging regulations was material to the government's reimbursement decisions, the relator's claims were still deficient because he failed to allege that the defendants made a false statement to the government—particularly since the defendants were never required to certify their compliance with those regulations to the government. These factors also influenced the circuit court's conclusion that the relator could not show that the defendants "knowingly" submitted false claims to the government. Ultimately, the court held that the relator's allegations sought to impose FCA liability for a mere regulatory violation, and that the FDA has a variety of remedies at its disposal for handling such violations.

Finally, the Fourth Circuit held that the district court did not err when it denied the relator's request to file a third amended complaint. The circuit court held that "any amendment would have been futile in light of our holding that adulterated drugs are not barred from reimbursement by Medicare and Medicaid, and, therefore, claims for reimbursement for these drugs cannot be 'false' under the FCA."

U.S. ex rel. Willis v. Angels of Hope Hospice, Inc., 2014 WL 684657 (M.D. Ga. Feb. 21, 2014)

A relator alleged that a Medicare-certified hospice provider violated the False Claims Act by committing Medicare fraud. Specifically, the relator—who had been employed by the defendant as a community relations specialist—claimed that the defendant manipulated Medicare's annual caps on reimbursements by refusing to admit non-Medicaid patients (including indigent patients and those with private insurance); instead the defendant allegedly sought only to admit Medicare patients who had not previously elected hospice care, thereby maximizing the its annual reimbursement cap. The relator alleged that the defendant engaged in "extremely aggressive marketing tactics" to find patients to admit, and even drove around neighborhoods looking for elderly, disabled people. Moreover, the relator claimed that the defendant admitted patients regardless of their eligibility for hospice care, in order to receive Medicare reimbursements; when it was necessary to certify that a patient was terminally ill, the defendant allegedly falsified information and manipulated records. In addition, the relator claimed that the defendant violated the False Claims Act by submitting reimbursement claims tainted with violations of the Anti-Kickback Statute; the relator contended that the defendant paid cash bonuses to a physician and his wife in exchange for patient referrals. Based on these allegations, the relator sued the defendant under the False Claims Act for: (1) submitting false Medicare claims, (2) making false records and statements in support of those claims, and (3) failing to return Medicare overpayments and concealing those funds from the government. The defendant moved to dismiss the relator's claims, arguing that the relator's complaint did not state a claim and that the alleged fraud scheme was not pled with particularity.

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

Failure to State a Claim/Plead Fraud With Particularity

The defendant argued that the relator's claim alleging the submission of false claims was deficient because the relator could not identify any claims the defendant actually submitted to the government. After reviewing decisions from the Sixth and Eleventh Circuits, the district court held that the Rule 9(b) did not require the relator to allege detailed billing information. The court noted that the relator's "allegations in large part are based upon the recorded conversations of [the defendant's] management. If [the relator] is believed, [the defendant's] management has largely admitted that it fraudulently billed the Government. No goal of Rule 9(b) would be served by requiring [the relator] to have recorded a clerk in [the defendant's] billing department confirming that a bill was actually submitted." The defendant's motion to dismiss for failure to plead specific false claims was denied.

The defendant then argued that the relator failed to allege the fraudulent schemes with particularity, since he did not sufficiently demonstrate that the defendant admitted Medicare patients who were ineligible for hospice care. The court disagreed, finding that the relator alleged that one of the defendant's nurses told him that after she reported to management that ineligible patients were being admitted, the defendant directed the nurse to falsify patients' charts and the nurse "just did what [she] was told." The court also noted that the relator alleged the particulars of an illegal kickback scheme for patient referrals. In addition, the court held that the relator's AKS allegation stated a claim under the FCA, noting that the defendant's reliance on the AKS's bona fide employee exception is an affirmative defense about which the defendant bore the burden of proof.

Similarly, the court held that the relator properly alleged his claim against the defendant for using false statements and records in support of its false Medicare claims, observing that the alleged fraud schemes were "directly linked to Medicare's decisions to pay the resulting claims. Accordingly, [the relator] has sufficiently pled false records and statements were made for the purpose of getting false claims approved. Further, . . . [the relator's] allegations have the indicia of reliability to excuse any failure to allege with particularity the details of Medicare payments received by [the defendant], and he has sufficiently pled a claim pursuant to [the FCA]." The court denied the defendant's motion to dismiss the relator's claim alleging the use of false statements and records.

Finally, the court held that the relator's reverse false claim allegation was sufficiently pled. In reaching its holding, the court rejected the defendant's argument that the relator only made general and conclusory allegations and failed to allege any specific amounts owed to the government. The court, though, found that after alleging that the defendants use false statements or records, he was only required to show that the statements/records were used to avoid an "obligation" owed to the government. Turning to the plain language of the FCA, the court declared that "obligation" specifically applied to the retention of overpayments. The court then held that the relator adequately pled that the defendants received overpayments from Medicare by fraudulently manipulating the annual reimbursement cap, as he alleged "who knew of the overpayments, how [the defendant] violate its obligation to refund Medicare, when those violations occurred, and what [the defendant] gained as a result. Finally, [the relator] has sufficiently alleged the misrepresentations were material because they were of a nature to influence Medicare's decision making." The defendant's motion to dismiss the reverse false claim allegation was denied.

AEY, Inc. v. United States, 2014 WL 341669 (Fed. Cl. Jan. 30, 2014)

A government contractor that was hired by the U.S. Army to provide ammunition to military and police forces in Afghanistan sued the U.S. government, alleging that the government wrongfully withheld payment on two invoices. The government filed a counterclaim, asserting that, pursuant to the Forfeiture Statute, the plaintiff forfeited its claims for payment because the two invoices at issue pertained to a contract that had earlier been tainted by fraud when the plaintiff delivered ammunition manufactured in China—which violated the contract and federal regulations. Moreover, the government sued the plaintiff for damages under the False Claims Act, arguing that the defendant submitted false invoices under the contract. The government claimed that soon after the non-conforming ammunition was delivered and accepted, the Army became suspicious of the ammunition's origins and executed a search warrant on the plaintiff's place of business in the U.S. The warrant was executed after the government ordered the two deliveries at issue, but before those deliveries arrived. On the same day that the two deliveries were shipped to the Army, the Army temporarily suspended the plaintiff from future government contracting. Days later, the two deliveries arrived and the Army determined that the ammunition conformed to contract specifications, as it was manufactured in Hungary and Bulgaria. Two months later, the Army terminated its contract with the plaintiff, citing the plaintiff's delivery of ammunition from China. The plaintiff challenged the Army's decision in a civil proceeding, but was unsuccessful. Soon after, the plaintiff and its officers were indicted in federal court for crimes associated with the delivery of the Chinese ammunition. Before pleading guilty to multiple conspiracy charges, the plaintiff filed the present suit against the U.S. seeking payment on the two invoices for deliveries of conforming ammunition. The parties filed cross-motions for summary judgment on the government's Forfeiture Statute counterclaim. The defendant also moved to dismiss the government's FCA counterclaim, arguing that the counterclaim should have been brought as a compulsory counterclaim during the parties' prior litigation over the Army's termination of the contract.

Holding: The U.S. Court of Federal Claims denied both parties' summary judgment motions. The court also denied the defendant's motion to dismiss the FCA counterclaim.

With respect to the government's counterclaim under the Forfeiture Statute, the plaintiff argued that since the two deliveries at issue did not involve fraud, the statute did not apply. The plaintiff further claimed that the government waived its forfeiture argument because it accepted and used the two deliveries of conforming ammunition before it decided to withhold payment on the invoices for those deliveries. The court declined to resolve the question of whether or not the Forfeiture Statute applied, finding that issues of fact existed regarding whether or not each delivery constituted a separate contract, for Forfeiture Statute purposes, and that those issues of fact prevented summary judgment in favor of either party. Then, the court denied the plaintiff's motion to dismiss the FCA counterclaim, finding that the compulsory counterclaim rule did not require the government to bring its FCA claim in the prior action, since the government had only filed a motion to dismiss (converted into a motion for summary judgment) in the earlier proceeding, and therefore, had not filed a "pleading" that would trigger the compulsory counterclaim rule. The court further held that the government's FCA counterclaim was not barred by claim preclusion principles, finding that "there is no concern that if the government prevails on its FCA counterclaim that it would have an adverse effect on the court's prior judgment."

U.S. ex rel. Petratos v. Genetech, Inc., 2014 WL 345332 (D.N.J. Jan. 30, 2014)

A relator alleged that her former employer—a pharmaceuticals company—violated the federal False Claims Act and 28 state false claims acts by knowingly underreporting the prevalence and severity of adverse effects caused by one of its drugs, resulting in providers prescribing the drug for non FDA-approved, off-label uses and then submitting false reimbursement claims to government healthcare programs. The day after the relator's *qui tam* complaint was filed, the FDA held a hearing regarding a proposal to withdraw one of the approved uses of the drug; ultimately the FDA withdrew approval. The relator alleged that the defendant violated multiple provisions of the FCA: (1) causing providers to present false Medicare claims to the government; (2) making false statements material to those false claims; (3) making false statements material to obligations to remit improper reimbursements back to the government; and (4) conspiring to violate the FCA. The defendant moved to dismiss the relator's complaint, arguing that the allegations failed to state a claim under the FCA.

The U.S. District Court for the District of New Jersey granted the defendant's motion in part and denied it in part. The court dismissed the relator's allegations of false claims and false statements, finding that the relator failed to establish that claims for the defendant's drug were false; although the drug was prescribed for off-label uses, those prescriptions were not false for FCA purposes, since the off-label uses were supported by listings in the major drug compendia—and the government healthcare programs generally accept reimbursement claims for drug uses listed in the compendia. Additionally, the court determined that providers' reimbursement payments were not conditioned on the defendant's compliance with its reporting requirements, and thus, the defendants' alleged misconduct did not give rise to FCA liability. The court, though denied the defendant's motion to dismiss the "reverse" false claim and conspiracy allegations, noting that the defendant did not make any argument seeking dismissal of the reverse false claim allegation, and that correspondingly, the conspiracy claim—which encompassed the alleged conspiracy to violate the reverse false claim provision—would go forward as well.

Since the relator was allowed to maintain some of the federal FCA claims, the court declined to dismiss the relator's state FCA claims.

U.S. ex rel. Osmose, Inc. v. Chemical Specialties, Inc., 2014 WL 234819 (W.D.N.Y. Jan. 22, 2014)

A corporation filed a *qui tam* complaint alleging that two chemical companies violated the False Claims Act by knowingly selling a defective fire retardant chemical formula to wood treating companies that subsequently sold supposedly fire retardant treated wood and plywood products to the U.S. Department of Defense (DOD). The relator claimed that the Defense Department's standards incorporated certain fire retardant tests and that the testing laboratory issued a stamp that was affixed to products that met those standards—including the defendants' product. The relator alleged that some thirty years ago, the defendants' product passed the required tests and that the defendants successfully applied to have their product included on the DOD's "qualified product list"—a designation that the defendants used as a marketing tool. However, the relator claimed that it subsequently created a "copycat" version of the defendants' formula—based on the defendants' patent and other publicly-available information—and that the copycat version failed the required tests. Soon after, the testing lab commenced an investigation of the defendants' formula. The relator alleged "on information and belief" that the product failed the lab's tests; the lab retracted its certification of the formula. The relator further claimed that, despite the lab's decision, the defendants continued to tell their customers that the formula satisfied the applicable testing standards. The relator asserted its belief that the defendants went as far as affixing a forged stamp on their formula to further mislead customers. The relator claimed that the defendants caused their customers to submit false claims to the government for sales of wood treated with the defendants' formula and made false statements to customers that were material those false claims, thereby violating the FCA. The government filed a notice indicating to the court that it was "not intervening at this time" in the *qui tam* suit, as it could not make a decision before the court's deadline to unseal the *qui tam* complaint. The defendants moved to dismiss the suit for failure to state a claim.

Holding: The U.S. District Court for the Western District of New York granted the defendant's motion, finding that the relator failed to state a claim and failed to plead the alleged fraud with particularity.

The court first noted that the FCA was amended in 2009, in part to correct "what was considered to be an erroneous interpretation of the law," and that one of the amendments clarified that the FCA imposes liability on those who defraud third party contractors and other recipients of federal funds. The court could not determine from the *qui tam* complaint whether any of the alleged fraud occurred after the 2009 amendment and thus held that the relator failed to plead with the requisite particularity that the defendants' caused their customers to submit false claims to the government. The court further noted that the relator did not allege any specific instance of a sale of deficient wood treated with the defendants' product. The court rejected the relator's argument that the pleading standard should be relaxed to allow for its allegations "on information and belief," because more detailed facts regarding the submission of false claims to the government were peculiarly within the defendant's knowledge. Instead, the court held that allegations on information and belief are only appropriate when facts are peculiarly within the defendant's knowledge <u>and</u> when the allegations are accompanied by a statement of facts on which the belief is based. The court determined that the relator failed to establish either element. First, the court found that facts regarding allegedly false claims for the defendants' formula were not in the defendants' possession, since those claims were submitted by third parties and there was no allegation that the defendants had any control over those submissions; the court concluded that information regarding the claims was obtainable from the third parties that sent the claims or from the government recipients. Second, the court noted that the relator did not allege sufficient facts to provide a basis for its belief that false claims were submitted, since the relator did not allege any facts showing that, based on the mistaken belief that products containing the defendants' formula satisfied the testing standards, third parties sold wood treated with the defendants' formula to the government. The court held that "the complaint states only an attenuated possibility that a fraudulent claim might have been submitted." In reaching this conclusion, the court rejected the relator's "market-share" theory that false claims for products containing the defendants' formula must have been submitted to the government, given the significant quantity of treated wood products and the defendants' significant market share.

The court then turned to the relator's allegation that the defendants made false statements that were material to false claims. The court observed that this FCA provision was also amended in 2009 "to eliminate the requirement of proof that the defendant intended for the Government itself to pay the false or fraudulent claim." The court determined that this amended provision applies to all *qui tam* complaints pending on or after June 7, 2008. Since the relator's complaint was filed after June 7, 2008, the court held that the relator was not required to estab-

lish that the defendants intended for the government to pay the allegedly false claims submitted by the defendants' customers. But ultimately, the court held that the defendant did not plead sufficient facts in support of this cause of action either, as the relator did not specify the defendants' allegedly false statements, who made those statements, when the statements were made, why the statements were fraudulent with respect to any claims submitted to the government, or which of the defendants' customers received the false statements, among other things. Thus, the relator's claims based on the defendants' alleged false statements was also dismissed.

Since the *qui tam* complaint had already been amended twice and since the relator did not request leave to file another amended complaint, the court dismissed the complaint with prejudice.

U.S. ex rel. Thomas v. Siemens AG, 2014 WL 114709 (E.D. Pa. Jan. 13, 2014)

A relator alleged that a medical supply company violated the False Claims Act by making false statements and omissions when obtaining contracts with the Veterans Administration (VA). More specifically, the relator argued that the defendant failed to disclose and provide to the government the "best price" it offered to any of its other customers, as required by applicable regulations. Although it declined to intervene in the suit, the United States submitted a statement of interest in which it asserted that the defendant provided all of the necessary information the VA needed and that the government had not been defrauded in the contracting process. The defendant moved for summary judgment on the relator's claim.

After reviewing the relevant regulations, the U.S. District Court for the Eastern District of Pennsylvania concluded that although the defendant was obligated to <u>disclose</u> to the government the highest discounts and best prices it offered to its commercial customers, it was not required to <u>offer</u> the best price to the government. The court noted that the government negotiated the contracts at issue with the defendant, and that the parties negotiated multiple contract terms—not only price. The court recognized that the government may have negotiated more favorable contracts terms regarding delivery time, quality of product, customized product features, etc., in exchange for a less favorable price. The court stated that the very fact that the parties negotiated the terms of the contracts underscored the fact that the defendant was not required to give the government its best price—if that were the case, then there would be no room for negotiations.

The court then addressed the question of whether the defendant properly disclosed its best price to the government; the relator claimed that the defendant fraudulently induced the government to enter the contracts. The court declared

that in order to prevail on his fraudulent inducement theory, the relator would need to "prove not only that the omitted information was material but also that the government was *induced* by, or relied on, the fraudulent statement or omission when it awarded the contract." The relator challenged the court's conclusion that he was required to show reliance as an element of his FCA claim, arguing that the FCA only includes a materiality element and that relators would not be required to prove materiality if they were also required to prove that the government was actually induced to act. But the court decided that unlike the typical FCA case, involving the submission of false claims to the government for payment—and where a mere attempt to obtain funds fraudulently results in liability—FCA claims brought under a fraudulent inducement theory require a showing of actual reliance, since attempted fraudulent inducements cannot serve as a basis for FCA liability. The court held that "materiality and inducement are separate and distinct elements. Proving materiality does not prove inducement or reliance. Even if the false statement is material, there is no violation unless the government relied on it."

Ultimately, the court held that the relator failed to show that the defendant made a false statement or omission to the government, as the evidence showed that the defendant sought to provide necessary information to the VA, and that during the contracting process the VA was aware of the facts that the relator alleged were fraudulently represented with respect to the contracts at issue. As the court determined that there were no genuine issues of material fact regarding whether the defendant's statements were materially false, and since the court found that the relator failed to establish that the government was misled into awarding the contracts at issue, the court granted the defendant's summary judgment motion.

See *U.S. ex rel. Booker v. Pfizer, Inc.*, 2014 WL 1271766 (D. Mass. Mar. 26, 2014), at page 9.

See *U.S. ex rel. Harman v. Trinity Indus., Inc.*, 2014 WL 47258 (E.D. Tex. Jan. 6, 2014), at page 14.

A. Calculating Damages and Civil Penalties

U.S. ex rel. Davis v. District of Columbia, 2014 WL 1273608 (D.D.C. Mar. 31, 2014)

A relator filed a *qui tam* action against the District of Columbia (DC), alleging that the municipality violated the False Claims Act by submitting false claims for reimbursements for special education costs incurred by the DC Public Schools. The relator alleged that the defendant's claims were false because DC failed to maintain required documentation to support its reimbursement claims for tens of millions of dollars. The relator owned an accounting firm that DC used to prepare its year-end Medicaid reimbursement reports for multiple years. One year, DC replaced the relator's firm with another company, even after the relator's firm had already begun preparing the annual report. The relator's firm completed their work anyway, but DC submitted the new firm's year-end reimbursement reports to the federal government. The relator knew that his company possessed the only copy of the required supporting documentation and cautioned high-ranking DC government officials that its annual reports for that year were inaccurate and could not possibly be adequately documented. However, DC made no changes to its submissions to the government and received more than $10 million on its reimbursement claims for that year. Pursuant to federal regulations, DC subsequently hired an independent auditor to review its most recent annual submissions to the government. The auditor found the same deficiencies the relator had previously identified and concluded that DC should not have received nearly $8 million of the $10 million the federal government paid in response to the new firm's reimbursement reports; DC later returned the overpayment to the federal government. The parties filed cross-motions for summary judgment, with DC arguing that the relator's fraud claims were barred by the FCA's six-year statute of limitations and the relator arguing that he was entitled to a civil penalty under the FCA for every interim claim included in the annual reports DC submitted to the government claiming $10 million in reimbursements.

The U.S. District Court for the District of Columbia granted the parties' motions in part and denied them in part.

Statute of Limitations

DC argued that the FCA's six-year statute of limitations barred the relator's fraud claims, contending that the *qui tam* complaint was filed more than six years after the reimbursement reports in question were submitted to the government in January 2000. The court observed that one of DC's reports was filed 6 years and 3 months before the *qui tam* suit was filed. The court granted the defendant's summary judgment motion with respect to the relator's fraud claim based on this report; that claim was dismissed as untimely. But the court determined that the other report in question was filed 5 years and 11 months before the *qui tam* suit was filed. The court held that the fraud claim based on this report was not barred by the FCA's statute of limitations, and denied the defendant's motion to dismiss that claim.

Calculating Damages and Civil Penalties

The court determined that DC did not maintain the necessary documentation to support the reimbursement report underlying the fraud claim the relator was allowed to maintain. The court held that DC's failure was "a clear violation of both the District's Medicaid plan . . . and federal Medicaid regulations." The court rejected DC argument that since the relator's firm had all of the required documentation, DC "constructively" possessed the documents under an implied agency theory and was therefore in compliance with the applicable regulations. The court found no evidence that DC's new firm relied on the documents the relator's firm possessed when preparing the year-end report at issue, particularly since DC had already fired the relator's firm by the time the report was prepared. In addition, the court held that the report was implicitly false, for FCA purposes, since DC's implied certification that the report was based on supporting documentation was material to the federal government's decision to reimburse DC for its claimed costs. The court noted that the regulatory obligation to maintain supporting documentation "would be toothless if the [federal] government would reimburse for unsupported claims." And the court held that the report was a knowingly false submission, since the relator warned DC that the new firm's report lacked the necessary documentation, and at the very least, DC recklessly disregarded whether its report complied with applicable regulations.

Having determined that DC's report was a false claim to the federal government, the court turned to the question of the federal government's damages. It held that there were none, finding that all of the charges for which reimbursement was ultimately provided were legitimate and that DC's failure to maintain supporting documentation for those charges had no independent monetary value. The court then turned to the question of civil penalties under the FCA, for each of DC's false claims. The court concluded that the annual reimbursement report was the sole false claim—notwithstanding the fact that the report sought reimbursements for nearly 400,000 claims throughout the course of the year. The court analogized the situation, saying that "a dastardly diner who tried to pay for a fancy dinner with a forged check would not be liable for three counts of fraud just because he ordered a soup, a salad, and dessert—he committed fraud once when he tried to pay the total bill with a bad check." The court imposed the maximum civil penalty under the FCA—$11,000—for DC's single false claim, and stated that it was "appropriate that [the relator] receive 30% of that recovery, which will partially reward him for the eight years of litigation that was necessary to fully expose the District's carelessness to the public."

U.S. ex rel. Purcell v. MWI Corp., 2014 WL 521524 (D.D.C. Feb. 10, 2014)

A relator alleged False Claims Act violations against his former employer, a company that sold irrigation pumps and other equipment to seven Nigerian states. According to the relator, Nigeria borrowed $74.3 from a federal government agency—the Export-Import Bank of the United States (Ex-Im). After interest and fees, Nigeria would pay Ex-Im $82.2 million back. The relator claimed that, before approving the loan, Ex-Im required the defendant to certify that it would only pay "regular commissions" in connection with sales of the equipment. However, the relator alleged that the defendant actually paid excessive commission to its long-time Nigerian sales agent and failed properly to disclose that information to Ex-Im, resulting in the submission of false claims for Ex-Im loan funds. The United States intervened in the relator's suit. After years of litigation, the FCA claims were tried to a jury. The jury returned a verdict in favor of the relator, finding that the defendant violated the FCA; the jury concluded that the defendant presented 58 false claims for payment to the government, and made 58 materially false statements to the government, and caused the government $7.5 million in damages as a result. The U.S. District Court for the District of Columbia then ordered the parties to submit supplemental briefing on the issue of damages, and the court held a damages hearing. The government conceded that the total amount of damages was $7.5 million, while the relator argued that the jury found $7.5 million in damages as a result of the defendant's false claims, and <u>another</u> $7.5 million in damages as a result of the defendant's false statements in support of those claims.

Following the hearing, the court held that the government suffered a total of $7.5 million in damages, noting that the jury identified the same 58 false certifications when determining the defendant's liability for submitting false claims and for making false statements. The court then trebled the damages amount, as provided for by the FCA, bringing the total damages to $22.5 million. The court then turned to the question of how Nigeria's repayment of the loan (which totaled $108 million—of which nearly $34 million covered interest and fees) affected the government's damages claim. The court ultimately held that Nigeria's repayment of the Ex-Im loan—which dwarfed the government's FCA claim for treble damages, fully compensated the government for its loss. In reaching that holding, the court rejected the government's argument that because of urging from the defendant, Nigeria repaid the Ex-Im loan at issue, at the expense of repaying other Ex-Im loan obligations, which still caused Ex-Im harm. The court found that the government failed to offer evidence of the defendant's influence on Nigeria's decision-making. Similarly, the court rejected the government's argument that the loan repayment was not a "compensatory payment" that should offset the defendant's liability. Here, the court held that the government failed to offer an authority for its position. The court also rejected the government's argument that Nigeria's loan

repayment should be segregated into the "legitimate" amount and the amount paid on the "fraudulent" portion of the loan; the government contended that there were two separate obligations at issue—Nigeria's loan obligation and the defendant's obligation to pay damages. Again, the court held that the government failed to cite any appellate court precedent in support of its position. Ultimately, the court held that "[d]espite the fraudulent actions taken by [the defendant] to persuade the Government to make these loans, they were in fact paid back in full with interest and fees. . . . Thus, the Government has been 'made completely whole' because of Nigeria's repayments."

After determining damages, the court turned to the FCA's civil penalties provision, which imposed a penalty of between $5000 and $11,000 for each of the defendant's false claims. The court held that "[u]nder the totality of the circumstances," and after considering factors such as "the seriousness of the misconduct, the scienter of the defendants, and the amount of damages suffered by the United States as a result of the misconduct," the appropriate civil penalty to be imposed against the defendant was $10,000 per false claim. The court found that the defendant acted knowingly and deliberately and caused the government more harm than solely monetary damages, as the defendant's wrongdoing affected "the integrity and purposes of the Ex-Im's programmatic goals," and required an extensive and costly government investigation. The court held that the penalty would deter future misconduct, while compensating the government for the injuries it suffered due to the defendant's serious, willful misconduct. The defendant was ordered to pay a civil penalty of $580,000, to account for the 58 false claims it submitted.

U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr., 2014 WL 495378 (M.D. Fla. Feb. 6, 2014)

A relator alleged that a hospital medical center and its subsidiary staffing company violated the False Claims Act by overbilling Medicare in various ways. The relator sought to recover treble damages and civil penalties on behalf of the government. The defendant challenged the relator's claim for civil penalties, arguing that *qui tam* relators do not have standing under Article III of the Constitution to seek the government's civil penalties under the FCA. In addition, the defendants claimed that the FCA's delegation of authority to relators to seek civil penalties violates Article II's "Appointments Clause." The defendants sought judgment on the pleading under Rule 12(c), with respect to the civil penalties issue.

Holding: The U.S. District Court for the Middle District of Florida denied the defendants' motion. Relying on U.S. Supreme Court precedent, as well as rulings from two circuit courts that directly addressed the question, the district court held that the "Relator possesses standing to pursue [a] claim for a civil penalty," under Article III. Similarly, the court rejected the defendants' Article II argument, in which

they contended that Article II requires that only "Officers of the United States," appointed by the Executive Branch (not statutorily, by Congress) can vindicate public rights by pursuing civil penalties. However, the district court, again, relying on a Supreme Court ruling as well as four circuit court opinions, held that "the FCA's *qui tam* provisions therefore [do] not run afoul of the Appointment Clause."

B. Costs and Attorneys' Fees

U.S. ex rel. Stephenson v. Archer W. Contractors, LLC, 2014 WL 1093534 (E.D. La. Mar. 17, 2014)

A relator alleged that a group of government contractors violated the False Claims Act by making false statements in connection with their claims for payment from the U.S. Army Corps of Engineers under various levee-building projects in the aftermath of Hurricane Katrina. Specifically, the relator claimed that the defendants were contracted to deliver clay, that they exceeded federal weight limits when loading their trucks, and that they falsely certified to the government that they had complied with all applicable laws in order to receive payment. The government declined to intervene in the relator's *qui tam* action. The U.S. District Court for the Eastern District of Louisiana dismissed the relator's *qui tam* suit, finding that the relator failed to state a claim and failed to plead the alleged fraud with particularity. The court granted the relator leave to amend her complaint, but cautioned that if the relator filed an amended complaint that suffered from the same pleading deficiencies, then the court would be willing to entertain a motion by the defendants to recover their fees and costs. The relator chose not to amend her complaint; instead, she appealed the district court's ruling to the U.S. Court of Appeals for the Fifth Circuit. The circuit court affirmed the district court's dismissal of the *qui tam* suit. The defendants moved the district court to recover their attorneys' fees from the relator, pursuant to two different provisions of the False Claims Act.

The Louisiana district court denied the defendants' motions. First, the court considered the defendants' argument for fees under 31 U.S.C. sec. 3730(g). The court denied the request, noting that this FCA provision only grants prevailing defendants their fees and expenses in FCA actions brought by the United States and in which the United States took a position that was not substantially justified. Since the government declined to intervene in the relator's suit, the court reasoned that the government neither brought the FCA case nor took any position (whether or not substantially justified). Consequently, the court held that section 3730(g) was inapplicable. Second, the court evaluated the defendants' argument for fees under 31 U.S.C. sec. 3730(d)(4), which explicitly applies to non-intervened *qui tam* suits, but which only authorizes courts to award fees to prevailing defendants when the *qui tam* action "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." The court denied the defendants' motion pursuant to this section of the FCA as well, finding that the relator's *qui tam* claims "were not so obviously precluded under existing jurisprudence that she can be said to have had no good faith basis for her arguments."

U.S. ex rel. Todd v. Fidelity Nat'l Fin., Inc., 2014 WL 958950 (D. Colo. Mar. 12, 2014)

A relator alleged that a group of 25 corporate defendants violated the False Claims Act by providing substandard title work and legal services for homes with loans guaranteed by the federal government. The relator voluntarily dismissed the claims brought against 20 of the defendants without prejudice. Two of the dismissed defendants moved for an award of their costs under Federal Rule of Civil Procedure 54(d), and for an award of their attorneys' fees pursuant to the FCA's fee-shifting provision. The U.S. District Court for the District of Colorado granted the motion in part and denied it in part.

The court recognized that in accordance with Rule 54, costs other than attorneys' fees should generally be awarded to "prevailing parties." Applying Tenth Circuit precedent, the district court held that the two defendants satisfied the definition of "prevailing parties," for Rule 54(d) purposes, since the relator dismissed the *qui tam* claims against those defendants, and the dismissal was not pursuant to a settlement; the court noted that whether the dismissal was with prejudice or without was of no significance. Thus, the court granted the defendants' motion for costs. The court, though, noted that the defendants' motion was premature, since no final order had yet been entered in the case. The court held that, as prevailing parties, upon entry of a final order, the defendants would have 14 days to submit a bill of costs. At that time, the court mentioned, the relator would be allowed an opportunity to challenge the defendants' request and appeal to the court's discretion. However, the court denied the defendants' motion for attorneys' fees under the FCA, finding that the defendants were not "prevailing defendants" under that statute. Relying on Supreme Court precedent, the district court declared, "[v]oluntary dismissal of an action ordinarily does not create a prevailing party because in order to create a prevailing party there must be a 'judicially sanctioned change in the legal relationship of the parties.'" The court stated that "the claims against [the defendants] were dismissed by the relator via a notice to dismiss under Rule 41(a)(1)(A)(I). That notice was self-effectuating when filed, and not judicial sanction was required to make the notice effective. The notice did not result in a judicially sanctioned change in the legal relationship of the parties and, therefore, did not cause [the defendants] to become prevailing defendants."

U.S. ex rel. Prather v. AT&T Inc., 2014 WL 555133 (N.D. Cal. Feb. 10, 2014)

A *qui tam* relator filed an action alleging that four telecommunications companies violated the False Claims Act by overcharging federal and state law enforcement agencies for electronic surveillance services. The U.S. District Court for the Northern District of California dismissed the relator's suit, finding that the court

lacked subject-matter jurisdiction due to the FCA's public disclosure bar provision. Subsequently, the defendants moved to recover their attorneys' fees from the relator, pursuant to the FCA's fee-shifting provision, which discourages relators from bringing *qui tam* claims that are "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." The court denied the defendants' motion, noting that in the Ninth Circuit, attorneys' fees for prevailing FCA defendants "are reserved for rare and special circumstances," and may be denied when "the circumstances furnish some basis, albeit somewhat tenuous, for one to theorize a claim, even if evidence to support such a theory failed to materialize, and summary judgment was properly granted in favor of the defendants." (internal citations omitted) Although the relator was ultimately unsuccessful, the court reasoned that his fraud allegations were not "clearly frivolous," noting that the parties litigated the subject-matter jurisdiction issues for months and the court held two hearings before dismissing the *qui tam* suit. The court found no evidence that the relator's motive in bringing the suit was to harass or embarrass the defendants, and thus, the court denied the defendants' motion for fees under the FCA. Similarly, the court denied the defendants' requests for fees pursuant to the court's inherent powers to sanction litigants who act in bad faith and/or under Federal Rule of Civil Procedure 11. Instead, the court found that defendants failed to "provide any explanation as to how Relator or his counsel acted in bad faith. Citing one of its prior rulings, the court stated that "public policy would be entirely undermined if a plaintiff in this situation were forced to pay attorneys' fees to the defense upon a finding that a good faith and not unreasonable claim lacked merit." The defendants' motion for fees was denied.

C. False Certifications of Compliance

U.S. ex rel. Hill v. City of Chicago, 2014 WL 123833 (N.D. Ill. Jan. 14, 2014)

A relator filed a *qui tam* suit against her former employer—the City of Chicago, IL—alleging that the defendant defrauded the federal government by submitting more than twenty false grant applications for federal funds. Most of the grant applications were for funds for the city's police department, while the remaining applications were for the city's department of family support services. The relator claimed that the applications contained false certifications that the city had required equal employment opportunity (EEO) programs, and therefore violated the False Claims Act. The relator's job responsibilities included overseeing EEO issues, and she alleged that she refused to sign the certifications at issue, due to her concerns. The United States declined to intervene in the relator's suit. The defendant moved for summary judgment on the relator's claims, arguing that the relator failed to offer any evidence of fraud.

Holding: The U.S. District Court for the Northern District of Illinois granted the defendant's motion. The relator alleged that in order to receive the federal funds at issue, the city was required to have an "active" EEO plan and was required to implement that plan. The defendant countered that while the regulations governing the grant applications at issue required applicants to submit equal employment opportunity plan certifications and described the characteristics of satisfactory plans, the defendant was not required to maintain an active plan as a precondition of receiving federal grant funds, and instead was only required to certify the existence of an EEO plan, which could be implemented up to 120 days after the grant application was approved. After reviewing the applicable regulations, the district court could not determine whether or not the regulations required an active plan as a precondition of funding. Assuming that the city was required to have an active plan at the time the certifications were made, the court determined that, in order to maintain her claims, the relator would still need to show that the defendant's EEO plan was not implemented and that the city's certifications were "knowingly" false. The relator argued that the city failed to implement a functional plan, due to a lack of necessary knowledgeable personnel. The defendant countered that although certain staffing positions relevant to the EEO plan had not been filled during the time when the allegedly false grant applications were submitted, the relator's allegations put form over substance, since the functions of those positions were handled by other, knowledgeable employees. Moreover, several of the individuals who signed and submitted the allegedly false certifications on behalf of the defendant testified that they believed that certifications were true. The court determined that the only evidence offered by the relator that the city's EEO plan was not actually implemented was her own deposition testimony, in which she recalled conversations with two other city officials. However, that testimony was contradicted by testimony from city officials—including one of the two specifically referenced by the relator—and other evidence presented by the defendant. The court held that the relator's "unsupported testimony is insufficient to defeat a motion for summary judgment." Ultimately, the court concluded that the city's EEO plan was in fact implemented and consequently, the city's certifications were not false. As a result, the court held that summary judgment in favor of the defendant was warranted.

See *U.S. ex rel. Portilla v. Riverview Post Acute Care Ctr.*, 2014 WL 1293882 (D.N.J. Mar. 31, 2014), at page 45.

See *U.S. ex rel. Knisely v. Cintas Corp.*, 2014 WL 983468 (E.D. Pa. Mar. 14, 2014), at page 50.

See *U.S. ex rel. Purcell v. MWI Corp.*, 2014 WL 521524 (D.D.C. Feb. 10, 2014), at page 63.

See *U.S. ex rel. Bergman v. Abbot Labs.*, 2014 WL 348583 (E.D. Pa. Jan. 30, 2014), at page 41.

D. Leave to Amend *Qui Tam* Complaint

Youssef v. Tishman Constr. Corp., 2014 WL 903491 (2d Cir. Mar. 10, 2014)

A structural engineer filed a *qui tam* complaint against two of his former employers, alleging that the defendants violated the federal False Claims Act and its New York State counterpart by fraudulently billing the government on multiple construction projects. The federal and state governments declined to intervene in the relator's suit. Soon after, the relator indicated to the court that because the government chose not to intervene in the *qui tam* action, he "decided not to pursue this matter any further" and wished to dismiss the *qui tam* suit. The relator also acknowledged that, pursuant to the FCA statutes, dismissal required the consent of the court and the government. At this stage of the litigation, the defendants had not been served with the *qui tam* complaint. The government advised the court that it consented to the dismissal of the *qui tam* action, as long as it was without prejudice to the government. In a handwritten order, the district court subsequently dismissed the action with prejudice to the relator but without prejudice to the government. After learning that the government was investigating similar allegations against the defendants, the relator re-filed his *qui tam* complaint. The relator alleged that when he attempted to re-file his complaint, he learned for the first time that the court had dismissed the prior complaint with prejudice to him—the relator claimed that he did not receive a copy of the court's handwritten order for eight months, and noted that the order had never been entered on the court's docket.

The relator requested that the court modify its prior order to reflect a dismissal without prejudice, but the court declined the request. The relator moved the court to reconsider its decision, or to extend the relator's time to file a notice of appeal. The court again denied the relator's requests. Soon after, the court entered the order of dismissal on its docket. The relator then sought leave to appeal the order, which the court granted. The relator then appealed the court's order to the U.S. Court of Appeals for the Second Circuit.

The Second Circuit vacated the district court's ruling and remanded the matter. The circuit court declared that the "appeal turn[ed] on the application of the Federal Rule of Civil Procedure governing voluntary dismissals," Rule 41(a)(1). Applying that rule, the court held that the relator's voluntary dismissal should have been without prejudice to the relator, since it occurred before any defendant filed an answer or moved for summary judgment. The circuit court held that the district court erred when it dismissed the *qui tam* complaint with prejudice to the relator, finding that the relator's statement that he did not want to pursue the matter any further did not amount to a request to dismiss the claim with prejudice; the Second Circuit noted that the relator "may just as well have been indicating an intention simply to stop pressing the complaint that was currently before the dis-

trict court for any number of reasons having nothing to do with the merits of the claim." In reaching its holding, the circuit court rejected the defendants' argument that the dismissal of the *qui tam* suit should be evaluated under Rule 41(a)(2), which affords more discretion to district courts to dismiss with prejudice. Instead, the appellate court held that Rule 41(a)(1) covered dismissals of suits brought under federal statutes—and even when the statute specifically requires a court order before dismissal.

E. Sanctions

See *U.S. ex rel. Prather v. AT&T Inc.*, 2014 WL 555133 (N.D. Cal. Feb. 10, 2014), at page 67.

F. Settlement Issues

U.S. ex rel. Peterson v. Sanborn Map Co., Inc., 2014 WL 414358 (E.D. Mo. Feb. 4, 2014)

A *qui tam* relator alleged that a digital mapping company violated the False Claims Act by using unapproved subcontractors on three contracts awarded by the U.S. Army Corps of Engineers. The relator was a former vice president and general manager of the defendant company. According to the relator, the government paid the defendant more than $6.7 million under the contracts. The United States intervened in the relator's action and sought to settle the *qui tam* allegations with the defendant. The government presented a proposed settlement to the relator that provided for installment payments from the defendant totaling about $2.1 million, and the government sent the relator a letter explaining why the settlement figure was fair, reasonable and adequate, as it eliminated litigation risks and reflected sound public policy by not forcing the defendant into bankruptcy. The relator indicated that he would not object to the settlement.

However, the relator and the government were unable to reach an agreement regarding the relator's share of the settlement amount, and agreed to resolve that issue after the settlement was signed. However, the settlement agreement was never signed, as the relator and the government failed to agree on language regarding the respective retention of rights regarding the relator's share; moreover, after multiple drafts of the settlement agreement were exchanged between and among the parties, a dispute arose regarding the language describing the scope of the relator's release of his claims against the defendant. This resulted in the defendant rejecting the settlement language proposed by the relator. In addition, the defendant and the relator disputed the relator's proposed attorneys' fees. The government argued that the attorneys' fees dispute was not essential to the resolution of the *qui tam* claims and could be resolved post-settlement. Taking the view that the relator had already agreed to the release language—which had remained unchanged through several drafts of the settlement—the government sought to enforce the fifth and final settlement proposal. The relator, however, denied that an agreement had ever been reached, withdrew from settlement negotiations, and announced his intention to proceed with his *qui tam* claims—with or without government intervention. In addition to contending that the final version of the settlement should be enforced because the relator had already agreed to the pertinent settlement language, the government argued that—notwithstanding the relator's objection, the settlement agreement should still be enforced because it satisfies the False Claims Act's "fair, adequate, and reasonableness" standard.

Holding: The U.S. District Court for the Eastern District of Missouri granted the government's motion to enforce the final version of the settlement. The court held that the relator had already agreed to the scope of the release language and that

the parties' discussions regarding attorneys' fees did not nullify language that had previously been agreed to. The court, however, rejected the government's alternative argument—namely, that, pursuant to the FCA, the court should enforce the settlement over the relator's objections, since the agreement was fair, adequate and reasonable. Instead, the court held that while the settlement amount was fair, the agreement included release language from the government and defendant "that affects the rights of Relator with respect to future liability of Defendant to Relator;" the court stated that it would not have approved such a provision, had the relator presented a valid objection and had not already agreed to the provision. In accordance with its order granting the government's motion to enforce the settlement agreement, the court ordered the relator to submit his fees' request for the defendant's consideration.

Judgments & Settlements

JANUARY 1, 2014–MARCH 31, 2014

Stryker Corporation and Alliant Enterprises (C.D. Cal. Mar. 24, 2014)

Two medical product companies, Stryker Corporation and Alliant Enterprises, agreed to pay the federal government $1.05 million to resolve allegations that they failed to disclose accurate pricing information to government contract negotiators, thereby putting the contract negotiators at a disadvantage and leading government agencies to overpay for medical products purchased under a Department of Veterans Affairs contract. Specifically, Alliant allegedly knowingly understated the expected sales for Stryker-manufactured products by failing to provide Stryker's commercial pricing history to the VA. Under the settlement agreement, Stryker will pay $911,219, while Alliant will pay $151,215. The settlement also resolves a whistleblower lawsuit brought by a former Stryker employee, Gary Gustafson, who was represented by TAFEF member Michael Hirst.

Dr. Carlos Mego and Dr. Subbarao Yarra (Mar. 21, 2014)

Drs. Carlos Mego and Subbarao Yarra of Valley Heart Consultants agreed to a $3.9 million settlement to resolve allegations that they violated the False Claims Act. The FCA allegations were brought in a *qui tam* case filed by two former Valley Heart Consultants employees. From January 2004 through September 2010, Mego and Yarra allegedly billed Medicare for unnecessary and substandard nuclear stress tests that were performed by unqualified personnel. Other services billed to Medicare—such as coronary angiographies, echocardiograms, and carotid doppler studies—were also allegedly unnecessary. As part of the settlement, the doctors have entered a three-year integrity agreement.

Okland Construction Company, Inc. (D. Utah Mar. 21, 2014)

Utah-based Okland Construction Co. agreed to pay $928,000 to resolve allegations that the company violated the federal False Claims Act by submitting false claims and making false statements under the Small Business Administration's (SBA) Section 8(a) Program for Small and Disadvantaged Businesses—a mentoring program that allows large businesses to form SBA-approved joint ventures with smaller businesses in order to bid on and perform federal agency contracts set aside for small businesses. The government contended that Okland entered a mentor-protégé agreement with Saiz Construction Co., a participant in the 8(a) Program, but failed to form a qualifying joint venture and was thus ineligible to bid on or perform the primary functions of 8(a) contracts. Okland allegedly prepared bids and performed primary functions on Saiz Construction's contracts, but concealed its involvement from the government. The settlement also resolves a *qui tam* lawsuit filed by Saiz Construction and its owner Abel Saiz, who will receive $148,480 from the government's recovery.

Duke University Health System, Inc. (E.D.N.C. Mar. 21, 2014)

Duke University Health System, Inc., which operates Duke University Hospital, Duke Regional Hospital, and Duke Raleigh Hospital, agreed to pay $1 million to settle allegations under the federal and North Carolina False Claims Acts. The government alleged that Duke violated the FCAs by billing for services provided by physician assistants who improperly acted as surgical assistants, and by increasing billing through improper unbundling of claims. The resultant false claims were allegedly submitted to Medicare, Medicaid, and TRICARE. The fraud allegations were originally brought in a *qui tam* lawsuit filed by Leslie Johnson, who had worked as an in-house auditor for the health system. Johnson was represented by TAFEF member David Parker of Liles Parker LPPC.

West Penn Allegheny Health System, Inc. (Mar. 19, 2014)

West Penn Allegheny Health System, Inc. (WPAHS) agreed to pay the federal government $1,529,281.50 to resolve False Claims Act violations. The company self-disclosed violations of the Anti-Kickback Statute and Stark Law; it leased space to referring physicians at below-market rates in exchange for referrals, resulting in false claims being submitted to federal health care programs.

American Family Care Inc. (N.D. Ala. Mar. 18, 2014)

American Family Care Inc., a network of walk-in medical clinics, agreed to pay the federal government $1.2 million to settle allegations that the company knowingly submitted false claims to Medicare in violation of the False Claims Act. American Family Care clinics allegedly overbilled Medicare by using Evaluation and Management codes that corresponded to a higher level of care than the clinics actually provided. A former American Family Care employee, Anita C. Salters, brought a *qui tam* lawsuit against the company, which was resolved by the settlement.

HEB Grocery Co. (Mar. 14, 2014)

HEB Grocery Company agreed to pay the State of Texas $12 million to resolve allegations that the pharmacy departments in some of the chain's 300 grocery stores submitted false claims to the Texas Medicaid program, in violation of the Texas Medicaid Fraud Prevention Act. Specifically, Texas alleged that HEB knowingly provided inflated "usual and customary" price information—related to the drug price charged to uninsured customers—in order to obtain higher reimbursements. The allegations were brought in a whistleblower lawsuit by three pharmacists, Michael Yarberry, Robert Stamm, and Tracy Schutte. The relators were represented by TAFEF members John Clark and Rand Riklin of Goode Casseb Jones Riklin Choate & Watson PC; Gary Grossenbacher of Gary Grossenbacher Attorney at Law; Glenn Grossenbacher of Law Offices of Glenn Grossenbacher; Timothy Keller of Aschemann Keller LLC; and Jarett Anderson of Austin, TX.

Lantheus Medical Imaging & Bristol-Myers Squibb (Mar. 14, 2014)

Lantheus Medical Imaging Inc., and its former parent company Bristol-Myers Squibb, agreed to pay $6.2 million to resolve allegations that, from 2002 to 2006, they did not pay New York State business franchise taxes, New York City corporation taxes, or MTA surcharges, despite earning revenues in the State of New York. The allegations arose in a *qui tam* complaint filed by a tax services provider. Relator Nicholas Moore, who will receive $1,137,814.80 from the settlement, was represented by TAFEF member David Caputo of Kline & Specter, P.C.

CLP HealthcareServices and Hospice Compassus (N.D. Ala. Mar. 13, 2014)

CLP HealthcareServices, the parent company of Hospice Compassus, agreed to pay the government $3.92 million to resolve False Claims Act allegations against the company. Two *qui tam* actions, filed by former Hospice Compassus employees, alleged that Hospice Compassus submitted false claims to Medicare for patients who were ineligible for hospice care. The relators, who were represented by TAFEF members Cliff Johnson of Pigott & Johnson, P.A. and Patricia Stamler of Hertz Schram P.C., will receive approximately $712,000 as their share of the government's recovery.

Memorial Hospital (Mar. 13, 2014)

Memorial Hospital, a non-profit organization that operates an acute care hospital in Fremont, Ohio, agreed to pay the federal government and the State of Ohio $8.5 million ($600,383 of which went to Ohio) to resolve allegations of improper financial relationships with two physicians—a joint venture with a pain management physician and a purchasing arrangement with an ophthalmologist. Memorial disclosed the two relationships to the government. Since both relationships involved Medicaid patients, they violated the Anti-Kickback Statute and the Stark Law, and consequently, the False Claims Act.

Bizlink Technology, Inc. (N.D. Cal. Mar. 12, 2014)

Fremont, California-based Bizlink Technology, Inc. (BTI) agreed to pay the federal government $1.2 million to resolve allegations that it underpaid customs duties on goods imported from China. From 2006 through 2008, BTI, an importer of computer cable assemblies, allegedly obtained false invoices, which it used to calculate its customs duties, resulting in improperly decreased payments. The allegations arose in a whistleblower lawsuit filed by a former BTI manager. The relator, Zhonghui Tu, had worked as a business manager for Bizlink for more than 10 years. Tu, who was represented by TAFEF member Mark Schlein of Baum, Hedlund, Aristei & Goldman, will receive $252,000 from the government's recovery.

Halifax Hospital Medical Center and Halifax Staffing Inc. (M.D. Fla. Mar. 11, 2014)

A Florida-based hospital system, Halifax Hospital Medical Center and Halifax Staffing Inc. (Halifax), agreed to pay $85 million to settle allegations that they submitted false claims to Medicare that were tainted by Stark Law violations. The government alleged that Halifax had contracts with six oncologists, and that these contracts provided for improper incentive bonuses based on the value of referred services that Halifax billed to Medicare. Halifax also allegedly paid three neurosurgeons more than fair market value for their work, which also allegedly violated the Stark Law. The claims were brought in a *qui tam* complaint filed by a Halifax Hospital employee, Elin Baklid-Kunz, who will receive $20.8 million from the government's recovery. Baklid-Kunz was represented by Marlan Wilbanks, Ty Bridges, and Susan Gouinlock, of the Wilbanks & Bridges firm.

Teva Pharmaceuticals USA Inc. and IVAX LLC (Mar. 11, 2014)

Drug manufacturer Teva Pharmaceuticals USA Inc. and its subsidiary, IVAX LLC, agreed to pay $27.6 million to resolve allegations that the companies made illegal payments to an Illinois physician to induce prescriptions of an anti-psychotic drug for Medicare and Illinois Medicaid patients. Dr. Michael J. Reinstein allegedly agreed to switch his patients to generic clozapine in exchange for a payment of $50,000 under a one-year consulting agreement. Reinstein, his wife, and his employees also allegedly received all-expenses paid trips to Miami that were financed by IVAX. The government contended that the kickback scheme resulted in the submission of thousands of false claims to the federal healthcare programs. A civil action against Reinstein remains pending in the Northern District of Illinois.

Sea Star Line LLC and Horizon Lines LLC (M.D. Fla. Mar. 7, 2014)

Two ocean shipping companies—Sea Star Line LLC and Horizon Lines LLC—have agreed to settlements with the federal government to resolve allegations that they coordinated to fix the price of government cargo transportation contracts, in violation of the False Claims Act. Sea Star Line LLC has agreed to pay $1.9 million, while Horizon Lines will pay $1.5 million. The government contended that executives at the shipping companies exchanged confidential bidding information in order to allocate certain routes at predetermined rates. Both companies pled guilty in related criminal proceedings. A former Sea Star Line executive, William B. Stallings, filed a *qui tam* lawsuit against the companies, and will receive $512,719 from the government's recovery.

Omnicare Inc. (D.S.C. Feb. 27, 2014)

Omnicare Inc. agreed to pay $4.19 million to resolve allegations that the long-term care pharmacy engaged in a kickback scheme with Amgen Inc. Omnicare allegedly solicited kickbacks in exchange for implementation of a "therapeutic interchange" program, which aimed to switch patients from a competitor drug to Aranesp, an Amgen product. The alleged kickbacks included performance-based rebates, grants, speaker fees, consulting services, and dinners. The relator who brought the initial *qui tam* complaint against Omnicare, Frank Kunkirk, will receive a reward of $397,925. Kunkirk was represented by Reuben Guttman, Justin Victor and TAFEF member Traci Buschner, all of Grant & Eisenhofer P.A., as well as Richard Harpootlian.

Diagnostic Imaging Group (D.N.J. and E.D.N.Y. Feb. 25, 2014)

Diagnostic Imaging Group (DIG), which operates a group of diagnostic testing facilities, has agreed to pay $15.5 million to settle allegations that the company violated the False Claims Act by billing government health care programs for services that were not performed or not medically necessary, and by paying kickbacks to physicians. DIG allegedly billed Medicare and the New Jersey and New York Medicaid programs for 3D reconstructions of CT scans that were never performed; DIG also allegedly bundled certain tests on its order form, leading to the performance of medically-unnecessary tests. DIG also allegedly paid inflated rates to physicians as illegal kickbacks for patient referrals. These allegations arose in three whistleblower lawsuits filed against DIG. The relators—Mark Novick, M.D., Rey Solano, and Richard Steinman, M.D.—will receive $1.5 million, $1.07 million, and $209,250, respectively. All three relators were represented by TAFEF members: Novick was represented by Marc Raspanti and Michael Morse at Pietragallo Gordon Alfano Bosick & Raspanti; Solano was represented by Eric Jaso at Seeger Weiss LLP, and David Bocian at Kessler Topaz Meltzer & Check, LLP; and Steinman was represented by Timothy McCormack of Phillips & Cohen LLP.

Dr. Steven Chun (M.D. Fla. Feb. 25, 2014)

Dr. Steven Chun, a Florida physician, has agreed to pay $750,000 for allegedly billing Medicare for physician office visits that never occurred. The government contended that between 2006 and 2011, Dr. Chun billed Medicare for comprehensive examinations at the highest billing levels possible when he was, in reality, performing scheduled procedures for which he was also paid. Dr. Chun has also agreed to a three-year Corporate Integrity Agreement and an independent external review of his coding, billing, and claims submission. The settlement resolves a *qui tam* lawsuit filed by Cathia Gavin and Penelope Thomas, who worked as nurses for Dr. Chun. The realtors were represented by TAFEF members Brian McCormick of Sheller, P.C. and Joseph Trautwein of Trautwein & Associates LLC.

Endo Health Solutions Inc. and Endo Pharmaceuticals Inc. (E.D. Pa. Feb. 21, 2014)

Pharmaceutical company Endo Health Solutions Inc. and its subsidiary Endo Pharmaceuticals Inc. (Endo) agreed to pay $171.9 million to resolve potential civil liability resulting from its marketing of Lidoderm, a drug for the treatment of pain from post-herpetic neuralgia (PHN). From March 1999 through December 2007, Endo allegedly promoted Lidoderm for unapproved uses, causing false claims to be submitted to federal healthcare programs. The federal government will receive $137.7 million from the settlement, while multiple states and the District of Columbia will divide the remaining $34.2 million. The civil settlement resolves three *qui tam* lawsuits brought by Peggy Ryan, a former Lidoderm sales representative (represented by TAFEF member Elaine Stromgren of James, Hoyer, Newcomer & Smiljanich); Max Weathersby, another former sales representative (represented by TAFEF member Scott Simmer of Blank Rome LLP); and Gursheel S. Dhillon, a physician. In a related deferred prosecution agreement awaiting approval by the U.S. District Court for the Northern District of New York, Endo agreed to pay $20.8 million in penalties and forfeitures.

EndoGastric Solutions Inc. (D. Mont. Feb. 19, 2014)

EndoGastric Solutions Inc. agreed to pay up to $5.25 million to settle False Claims Act allegations raised in a *qui tam* lawsuit filed by a former EndoGastric Solutions employee, Glenn Schmasow. The suit alleged that EndoGastric Solutions, which produces and sells EsophyX, a device used to treat gastroesophageal reflux disease, knowingly encouraged health care providers to use billing codes for more invasive procedures to increase reimbursement from federal health care programs. EndoGastric also allegedly paid illegal kickbacks to certain physicians to induce them to use EsophyX. As part of the settlement, EndoGastric Solutions has also agreed to enter a Corporate Integrity Agreement. Schmasow will receive a reward of up to $945,000.

The A.I.M. Center, Inc. (Feb. 18, 2014)

The A.I.M. Center, Inc. (AIM) agreed to pay $800,000 to resolve allegations that it violated the federal False Claims Act and the Tennessee Medicaid False Claims Act. AIM operates a community mental health facility in Chattanooga, Tennessee, and allegedly knowingly upcoded and overbilled TennCare/Medicaid for psychosocial rehabilitation services from 2009 through 2012. AIM also allegedly concealed its obligation to repay additional funds received from TennCare/Medicaid due to double billing. As part of the settlement agreement, AIM has entered into a Corporate Integrity Agreement with HHS-OIG.

Vector Planning and Services Inc. (S.D. Calif. Feb. 18, 2014)

Vector Planning and Services Inc. (VPSI) agreed to pay $6.5 million to the federal government to resolve allegations that the company violated the False Claims Act by inflating reimbursement claims to the U.S. Navy. VPSI, a Virginia-based firm, had several contracts to provide information technology, systems engineering and program management services to the Navy. A *qui tam* lawsuit alleged that, when billing the government for indirect costs, VPSI improperly included direct costs that had already been paid, as well as costs that were never incurred. The corporate relator, Hai Ba Trung, will receive $1.28 million as his share of the government's recovery. He was represented by TAFEF members Michael Hirst of Hirst Law Group, and Mark Kleiman of Law Office of Mark Kleiman.

MPRI Inc. (S.D. Ohio Feb. 12, 2014)

In order to resolve allegations regarding false labor charges under a government contract with the U.S. Army, MPRI Inc. agreed to a $3.2 million settlement with the federal government. MPRI's contract obligated the company to provide support to the Army as it developed a new Afghan Defense Sector; MPRI was supposed to provide support for program and financial management, development and implementation of core systems, logistics and acquisitions training, and other programming. From March 2005 through October 2010, MPRI allegedly falsely billed the government for employees who were actually on leave or outside the country. A former MPRI employee, Byron Scott Lankford, brought a *qui tam* lawsuit against the company; he will receive $576,000 as his share of the settlement proceeds. Lankford was represented by TAFEF members Lee Wallace of the Wallace Law Firm, LLC, and Rick Morgan and Jennifer Verkamp of Morgan Verkamp, LLC.

Foley Family Property Management, Inc. (Feb. 10, 2014)

Foley Family Property Management, Inc. agreed to pay the government $640,000 to settle False Claims Act allegations. Foley, which operates apartment complexes in Kansas City, Kansas, allegedly submitted false claims to the U.S. Department of Housing and Urban Development (HUD)'s Section 8 housing program. The government contended that an assistant property manager at a property operated by Foley falsely reported Section 8 eligibility and accepted false citizenship documents in exchange for bribes. The government further alleged that the company then submitted false claims for ineligible foreign citizens, which were paid by HUD.

SelfRefind & PremierTox LLC (Feb. 10, 2014)

SelfRefind, a group of addiction treatment clinics, and PremierTox LLC, a urine testing laboratory, as well as both companies' owners, Drs. Bryan Wood and Robin Peavler, agreed to pay $15.75 million to settle allegations that they violated the False Claims Act. The government contended that SelfRefind submitted inflated claims to Medicare and Kentucky's Medicaid program, along with claims for medically unnecessary tests performed by PremierTox. According to the government, these charges began after Wood and Peavler purchased 20 percent ownership stakes in PremierTox; consequently, certain tests referred by SelfRefind were in violation of the Stark law, rendering the claims for those tests false. The Commonwealth of Kentucky will receive $2.74 million from the settlement, while the federal government will receive the remaining $13.01 million.

Sanborn Map Company Inc. (E.D. Mo. Feb. 7, 2014)

Sanborn Map Company Inc., which provides photogrammetric mapping and geographic information system services, agreed to pay $2.1 million to resolve allegations that the company submitted false claims in connection with U.S. Army Corps of Engineers contracts between 2005 and 2011. While preparing maps for U.S. convoy routes in Iraq, Marine Corps bases, and other projects, Sanborn allegedly used unapproved foreign and domestic subcontractors, in violation of contractual obligations. The allegations against Sanborn were brought in a *qui tam* suit filed by a former employee, James Peterson.

JPMorgan Chase & Co. (S.D.N.Y. Feb. 4, 2014)

JP Morgan Chase & Co. agreed to pay $614 million to the federal government as part of a settlement agreement related to allegations that the bank defrauded federal agencies by approving insured loans that were not eligible for insurance through the Federal Housing Administration (FHA) and the Department of Veterans Affairs (VA). These loans allegedly created substantial losses for the FHA and the VA as both organizations covered the associated losses when the loans failed. Similar allegations have been leveled at Citigroup Inc. and Deutsche Bank AG—both of which have also reached settlements—and Bank of America Corp. The allegations against JPMorgan arose from a whistleblower lawsuit filed by Keith Edwards, who will receive $63.9 million as his share of the government's recovery. Edwards was represented by TAFEF member David Wasinger of the Wasinger Law Group, PC.

Saint Joseph Health System Inc. (E.D. Ky. Jan. 29, 2014)

Three Kentucky cardiologists—Drs. Michael Jones, Paula Hollingsworth, and Michael Rukavina—filed a *qui tam* complaint against Saint Joseph Health System Inc., which operates several Kentucky hospitals. The suit contended that doctors at Saint Joseph Hospital, which is operated by Saint Joseph Health System, performed unnecessary and invasive cardiac procedures on Medicare and Medicaid patients, and that the health system submitted false claims to Medicare and Kentucky Medicaid programs. Saint Joseph Health System agreed to pay the federal government $16.5 million to settle allegations. For their efforts, the relators—who were represented by Jed Wulfekotte and TAFEF member Andrew Beato, of Stein Mitchell Muse & Cipollone LLP—will receive a $2.46 reward.

In addition, Dr. Sandesh Patil, one of the cardiologists accused of performing medically-unnecessary coronary stents, pled guilty to a federal healthcare fraud offense and will serve 30 months in prison. Moreover, the settlement also resolves allegations that the hospital system violated the Stark Law and Anti-Kickback Statute due to questionable agreements with Cumberland Clinic, a physician group that had an exclusive arrangement with Saint Joseph Hospital. The government has announced its intervention in a separate False Claims Act *qui tam* lawsuit against Satyabrata Chatterjee and Ashwini Anand, owners of the Cumberland Clinic.

Dowson Farms (Jan. 29, 2014)

Dowson Farms agreed to pay the federal government $5.4 million to settle allegations that it evaded limits on federal farm subsidies by creating fake partnerships in the names of employees. As a result, they received additional subsidies to which they were not entitled. Certain farm subsidies have an annual limit for program participants. One such limit is the "Three Entity Rule," which restricts a participant from receiving payments for more than himself and two additional entities in which he has more than a 50 percent interest. The Dowsons allegedly used fake partnerships to circumvent these rules—for instance, on paper, the Dowsons had only a 2% interest in one such partnership, even though they allegedly wholly controlled the business.

Tennessee Orthopaedic Clinics P.C. & Appalachian Orthopaedic Clinics P.C. (E.D. Tenn. Jan. 24, 2014)

Tennessee Orthopaedic Clinics P.C. and Appalachian Orthopaedic Clinics P.C. agreed to pay the government $1.85 million to settle allegations that they knowingly submitted false claims to state and federal health care programs. The orthopedic clinics allegedly improperly billed health programs for reimported viscosupplements, FDA-approved injections for the treatment of osteoarthritis. Douglas Estey, a physician's assistant, who was represented by TAFEF members Mike Bothwell, Julie Bracker, and Jason Marcus of Bothwell Bracker, P.C., filed a *qui tam* suit alleging that the reimported drugs were not reimbursable by Medicare, Medicaid, and other health programs, and thus, the defendants' claims were false. Estey will receive $323,750 from the settlement.

General Electric Hitachi Nuclear Energy Americas LLC (E.D.N.C. Jan. 23, 2014)

General Electric Hitachi Nuclear Energy Americas LLC (GE Hitachi), a subsidiary of General Electric Company (GE) that is partially owned by Hitachi Ltd., agreed to pay $2.7 million to resolve *qui tam* allegations that it violated the False Claims Act by making false statements to the Department of Energy and to the Nuclear Regulatory Commission (NRC) regarding a component of the Economic Simplified Boiling-Water Reactor (ESBWR). The ESBWR, known as the steam dryer, removes water droplets from steam produced by the nuclear reaction that generates electricity in boiling-water type reactors. From 2007 through 2012, GE Hitachi received Energy Department funding for the development and engineering of the steam dryer, but allegedly concealed flaws in its steam dryer analysis and falsely claimed that it had conducted a proper analysis of the device.

City of New York (E.D.N.Y. Jan. 13, 2014)

The City of New York has agreed to pay $1,375,000 to the United States to resolve allegations that its Department of Education (NYC DOE) violated the federal False Claims Act by submitting false claims for psychological counseling services to special education students in public schools between 2001 and 2004. Medicaid pays NYC DOE a flat rate for each student who receives at least two psychological counseling sessions in a calendar month; from 2001-2004, the flat fee was $233 per month per student. NYC DOE allegedly billed Medicaid for counseling services for multiple students who received fewer than two sessions per month. The settlement resolves a *qui tam* lawsuit brought by Dana Ohlmeyer, a social worker who has worked for NYC DOE since 1992. Ohlmeyer will receive $206,250 as her share of the government's recovery. She was represented by TAFEF member Ross Brooks of Sanford Heisler, LLP.

Michael R. Barr and Norman J. Pfaadt (W.D. Ky. Jan. 10, 2014)

Michael R. Barr, the former CEO of HealthEssentials Solutions Inc., agreed to pay the federal government $1 million to settle allegations that he violated the False Claims Act by knowingly causing HealthEssentials to bill Medicare for inflated and medically-unnecessary services from 1999 through 2004. Barr also allegedly pressured employees to conduct special medical assessments on patients in order to increase bills sent to Medicare. Barr agreed to be excluded from participating in federal healthcare programs for three years as part of the settlement. The settlement resolves a *qui tam* action brought by former HealthEssentials employees, Michael and Leigh RoBards, who will receive $153,000 as their share of the recovery.

The company's former CFO, Norman J. Pfaadt, will pay $20,000 to resolve similar allegations. HealthEssentials, which provided primary medical care to nursing and assisted living facilities, shut down and filed for bankruptcy in 2005. Three years later, the company pled guilty to submitting false statements to Medicare.

CareFusion Corp. (D. Kan. Jan. 9, 2014)

CareFusion Corp., a medical technology company, agreed to pay $40.1 million to resolve allegations that it violated the False Claims Act by paying illegal kickbacks and promoting the use of ChloraPrep for non-FDA approved uses. The settlement also resolves allegations that CareFusion paid $11.6 million in kickbacks to Dr. Charles Denham—who was serving as the co-chair of the Safe Practices Committee at the National Quality Forum—in order to induce him to encourage healthcare providers to use ChloraPrep. The allegations against CareFusion arose in a *qui tam* lawsuit filed by Dr. Cynthia Kirk, former vice president of regulatory affairs for the Infection Prevention Business Unit of CareFusion. Kirk will receive $3.26 million as her share of the recovery.

BioScrip, Inc. (Jan. 8, 2014)

BioScrip, Inc. agreed to pay $15 million to settle allegations that it received kickbacks from Novartis Pharmaceuticals Corp. in exchange for promotion of Novartis' iron reduction drug, Exjade. The federal government will receive $11.7 million from the settlement, while $3.3 million will go to several states involved in the *qui tam* lawsuit. According to the relator, David Kester (represented by TAFEF member Shelley Slade of Vogel Slate & Goldstein LLP.), BioScrip was one of three specialty pharmacies allowed to dispense Exjade through Novartis' Exjade Patient Assistance and Support Services Network (EPASS). When prescriptions received by EPASS were not designated for a specific pharmacy, Novartis distributed them among the three pharmacies. In February 2007, Novartis allegedly informed BioScrip that its refill orders were too low and that the pharmacy might lose its undesignated patient referrals, which led BioScrip to launch an intensive effort to increase patient refills of Exjade. In exchange, Novartis allegedly granted the pharmacy higher rebates and more undesignated patients.

Dr. Ravi Sharma (M.D. Fla. Jan. 7, 2014)

Dr. Ravi Sharma agreed to pay $400,000 to settle claims that he knowingly billed Medicare for vein injections and office visits performed by unqualified personnel at his Florida clinics, thus violating the federal False Claims Act. From 2009 through 2010, Sharma allegedly instructed the office manager at his Premier Vein Centers clinic to perform vein injections when he was unavailable. Sharma also allegedly had unqualified personnel meet with patients at his weight loss clinic, Life's New Image, and billed Medicare using his own provider number. The allegations against Sharma arose in a *qui tam* lawsuit filed by Patti Lovell, Sharma's former office manager. Lovell, who was represented by TAFEF member Kevin Darken of the Cohen Law Group, will receive $72,000 as her share of the government's recovery.

Hi-Tech Pharmacal Co., Inc. (Jan. 7, 2014)

A New York-based drug manufacturer, Hi-Tech Pharmacal Co., Inc., agreed to pay $25 million to settle claims that the company fraudulently misreported generic drug prices to the Medicaid program. The State of Texas, which will receive $11.2 million from the settlement, alleges that an investigation revealed that Hi-Tech reported improperly inflated drug prices, leading Medicaid to overpay for certain products.

St. Mary Medical Center (Jan. 6, 2014)

St. Mary Medical Center (SMMC), a Philadelphia hospital, agreed to pay $2,339,224 to settle False Claims Act allegations of improper physician income agreements. Specifically, SMMC had guaranteed income agreements with 15 physicians, and its failure to properly administer the terms of some of those contracts resulted in net overpayments to certain physicians. Because the physicians referred patients to SMMC for treatments billed to federal healthcare programs, the company's healthcare claims were false under the FCA. When SMMC discovered the issue, it took corrective action and disclosed the situation to the government.