False Claims Act & Qui Tam

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

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

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

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FROM THE EDITOR

"Ten people who speak make more noise than
ten thousand who are silent." –Napoleon Bonaparte

A few weeks ago, Taxpayers Against Fraud Education Fund held its Ninth Annual Conference and Awards Dinner. A varied audience attended the three-day event, including attorneys for whistleblowers, whistleblowers themselves, lawyers for the federal government and various state governments, experts in the healthcare and financial arenas, and even a United States Senator. While greeting familiar faces and meeting new ones throughout the course of the conference, I was often reminded of the striking fact that the nationwide community of dedicated False Claims Act practitioners almost certainly totals fewer than 1000 people. Yet, those people make a thunderous noise, touching virtually every area in which the federal and state governments do business.

This year, the False Claims Act community has been speaking very loudly. Back in May, several necessary amendments to the False Claims Act were enacted. And just last month, we witnessed the largest health care fraud settlement in history, which resolved allegations that healthcare company Pfizer and its subsidiary, Pharmacia & Upjohn Company, illegally promoted several of their pharmaceuticals, resulting in the submission of numerous false claims to the federal and state healthcare programs. Such massive fraud could not have occurred without the knowledge and participation of countless people. Yet, a group of about ten whistleblowers and their attorneys were able to expose the fraud scheme, resulting in the recovery of $2.3 billion settlement to the United States and several state governments. Unlike virtually any other law throughout the United States, False Claims Act statutes truly provide a framework within which David—armed with the truth—can consistently defeat Goliath.

Each year, the TAF Education Fund conference provides those who protect and defend the False Claims Act an opportunity to come together in fellowship and learn from one another as we all continue to outshine those who would rather remain silent, than to affect positive change. I encourage anyone who shares these sentiments to contact us to learn more about this wonderful event. Moreover, should you have any feedback regarding this publication or should you wish to submit an article for publication, please contact me at:

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Recent False Claims Act & *Qui Tam* Decisions

JULY 1–SEPTEMBER 30, 2009

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

U.S. ex rel. Jamison v. McKesson Corp., 2009 WL 3176168 (N.D. Miss. Sept. 29, 2009)

A relator filed a *qui tam* action against numerous defendants, including an equipment supplier ("McKesson"), its subsidiary ("MediNet"), a nursing home chain ("Beverly"), a company that later acquired Beverly ("GGNSC"), a related company involved in strategy ("Ceres"), a medical services LLC ("CSMS"), an ancillary LLC ("Golden Gate"), and several unnamed defendants. The complaint alleged Medicare fraud, Anti-Kickback Statute violations, and other common law claims. The government intervened in the case and alleged that McKesson used MediNet as a conduit between Beverly and McKesson in order to sell its products to the nursing home chain. As a result of this arrangement, the Government contended that the nursing home chain retained a substantial percentage of money paid by Medicare for durable medical equipment ("DME") services, and in return, McKesson was allowed to exclusively provide DME supplies. The government alleged that this arrangement violated the Anti-Kickback Statute. The defendants moved to dismiss for lack of particularity and failure to state a claim.

The United States District Court for the Northern District of Mississippi granted the motion in part. The court denied the motions to dismiss for lack of particularity because it found that the government alleged enough facts about the fraudulent scheme to put the defendants on notice. Specifically, the court noted that the complaint's description of the kickback scheme between McKesson, Beverly, and MediNet met the requisite "who, what, when, where, and how" of fraud. Furthermore, the complaint alleged that McKesson organized CSMS as a sham supplier to induce Beverly to refer its patient bases to MediNet and McKesson. As proof, the court also noted that the government pled several internal documents that referenced the allegedly fraudulent scheme. The court also held that since the government alleged GGNSC assumed Beverly's liabilities, the government pled fraud with particularity against the GGNSC.

The court also denied the motions to dismiss for failure to state a claim because the government alleged enough facts to detail an Anti-Kickback statute violation and false certification, by stating that McKesson, CSMS, and MediNet falsified or caused the falsification of a certification of compliance with the Anti-Kickback Statute and by stating that CSMS knowingly misled state licensing officials to license it despite its noncompliance with the necessary licensing requirements. Finally, the court stated that MediNet submitted claims to Medicare which represented

that CSMS provided certain services, when in fact, those services were actually provided by MediNet. The court also determined that the plaintiffs properly pled presentment by alleging reliable indicia that false claims were actually submitted. Moreover, the court held that the conspiracy claim could be maintained, since the complaint alleged an agreement among McKesson, MediNet, CSMS, and Beverly, which provided that McKesson and MediNet would capture millions of dollars of profit annually from Medicare payments for enteral services for CSMS and Beverly, and in exchange, CSMS and Beverly would refer all enteral orders and non-enteral services for all of Beverly's Medicare residents to McKesson and MediNet. The complaint further alleged that the acts of creating CSMS as a supplier, referring business from Beverly and CSMS to McKesson and MediNet, exchanging discounts for the referral of business to McKesson and MediNet, and submitting claims to Medicare in CSMS's name when it did not provide the services were all joint actions in furtherance of the conspiracy.

However, the court dismissed the FCA claims against Golden Gate and Ceres, leaving only common law claims against those defendants. The court also dismissed all claims against unnamed defendants for lack of particularity, so as to prevent investigation through discovery. Finally, the court dismissed the Section 3729(a)(1) claim against Beverly, as that claim did not include an allegation that the defendant submitted any false certifications.

B. What Constitutes a False Claim

U.S. ex rel. Mason v. State Farm Mut. Auto. Ins. Co., 2009 WL 2486339 (D. Idaho, Aug. 13, 2009)

The relators sued the defendant—an insurance company—for violation of the FCA, alleging that the insurer caused false Medicare claims to be presented to the government, when those claims should have been paid by the insurer. The government declined to intervene. The United States District Court for the District of Idaho granted the defendant's motion to dismiss for failure to state a claim, but granted the relators leave to amend. The relators' withdrew their original claim, but their amended complaint alleged a "reverse false claim," contending that the defendant was the primary insurer, that the defendant made or used a false statement to avoid its duty to pay claims covered by insurance, and that the defendant instead allowed Medicare to pay those claims and failed to reimburse Medicare for those payments. The defendant then moved to dismiss the amended complaint for failure to state a claim. The court again granted the defendant's motion to dismiss, based on its holding that, pursuant to the provisions of the Medicare Secondary Payer Statute, the alleged false statements—hospital bills that were submitted to Medicare—were not actually false, since the relators did not demonstrate that any facts were misrepresented in those claims. The court also found that the hospital had a right to seek contingent payment from Medicare for those bills until the insurer's obligation to pay had been determined, and that the amended complaint did not allege that the defendant knew that Medicare paid the hospital's claims or that the defendant was aware of any existing duty to reimburse Medicare for any such payments. The court also declined to grant the relators leave to further amend their complaint, finding that the relator could not cure the deficiencies in their earlier complaints.

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

U.S. ex rel. Becker v. Tools & Metals, Inc., 2009 WL 2245207 (N.D. Tex. July 27, 2009)

Two relators, Becker and Spencer, brought separate *qui tam* actions against an industrial supplier ("TMI"), an advanced technology company ("Lockheed"), and other individuals, alleging various FCA violations. Becker's action was filed first and named TMI as a defendant and the other defendants were named in Spencer's action, which was filed six months later. After the United StatesDistrict Court for the Northern District of Texas consolidated the two *qui tam* actions, the relators filed a joint amended complaint adding additional claims and defendants. The government partially intervened and filed a complaint-in-intervention against TMI, Lockheed and two individual defendants. The government declined to intervene on various other claims brought by the two relators and declined to intervene against various other defendants named by the two relators. The relators filed another joint amended complaint, which included the non-intervened claims and defendants. The defendants filed separate motions to dismiss, including a motion to dismiss on public disclosure grounds filed by one of the individual defendants. After motions to dismiss were filed, the court dismissed several of the plaintiffs' claims against various defendants and, applying the FCA's first-to-file bar, prohibited relator Becker from participating in or recovering from the claims against Lockheed, since that defendant was not included in Becker's original *qui tam* complaint.

Becker then moved for an interlocutory appeal, contending that before the court applied the first-to-file rule, it should have decided the public disclosure issue and determined whether Spencer's original *qui tam* complaint—which was filed six months after Becker's—was barred by the FCA's public disclosure bar. Becker argued that the court should have determined the question of subject matter jurisdiction before considering the first-to-file question, and that had the court resolved the public disclosure question first, Spencer's original *qui tam* complaint would have been dismissed and the first-to-file bar would not have precluded Becker's action. A group of defendants opposed Becker's motion and the court ultimately denied the motion and held that Becker's motion for certification of an order for appeal was moot; the court found that it was not necessary to decide the public disclosure issue, since the claims against the only defendant who raised that issue were dismissed for failure to state a claim. Hence, the court held that there was no danger of adjudicating claims for which the court did not have subject matter jurisdiction, and the court denied Becker's motion.

See *U.S. ex rel. Leveski v. ITT Educ. Serv., Inc.*, 2009 WL 3079526 (S.D. Ind. Sept. 23, 2009), at page 21.

See *U.S. ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 2009 WL 2450716 (1st Cir. Aug. 12, 2009), at page 13.

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

U.S. ex rel. Dugan v. ADT Sec. Services, Inc., 2009 WL 3232080 (D. Md. Sept. 29, 2009)

A relator brought a *qui tam* action against the defendant, a merchant selling fire protection and security services. In the complaint, the relator alleged fraud in the inducement of a 1996 GSA contract, fraud with respect to sales of parts and labor, false claims for payment, false records submitted for payment of false claims, and failure to pay fees. The United States District Court for the District of Maryland noted that the government did not intervene in the relator's suit, and therefore the FCA's six-year statute of limitations applied to the relator's claims. After applying the statute of limitations, the court held that the relator's first count for fraud in the inducement of the contract was barred, since the contract was executed in 1996, but the relator's complaint was not filed until 2003.

The court dismissed the second count, alleging fraud with respect to sales of parts and labor, as well as counts three and four, which alleged false claims for payment and false records submitted for payment of false claims. The court concluded that the relator failed to state a claim with respect to each of these claims, as she failed to identify a false representation that the defendant made to the government, failed to identify any particular claim for payment that actually included fraudulently inflated labor charges, was unable to provide specific examples of when the defendant overcharged the government, and failed to identify any specific records, dates, or individuals involved in the alleged fraud.

Finally, the court dismissed the fifth count, alleging failure to pay fees owed to the government, pursuant to the FCA's public disclosure bar. The defendant successfully argued that at least some of the relator's allegations had been publicly disclosed in various reports following GSA audits and investigations, and that the relator modified her complaint to include information that was reflected in those reports. The court further found that the relator could not demonstrate that she qualified for the FCA's original source exception to the public disclosure bar. Although the relator had voluntarily disclosed information to the government before she filed her complaint and before the government's reports were publicly disclosed, the court found that the information she provided was broadly-worded and vague. It was only after the public disclosures, the court found, that the relator amended her allegations and offered a more substantial complaint. Thus, the court concluded, the relator was not an original source of the allegations contained in her complaint, since she could not "allege specific facts—as opposed to mere conclusions—showing exactly how and when . . . she obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and support those allegations with competent proof."

***U.S. ex rel. Hixson v. Health Mgmt. Sys. Inc.*, 2009 WL 3003258 (S.D. Iowa Sept. 21, 2009)**

Two attorney–relators brought a *pro se qui tam* action against the State of Iowa's Medicaid Third Party Liability contractor and several of its individual and corporate affiliates, alleging that the defendants violated the FCA by failing to recover from liable third parties certain funds paid by Iowa Medicaid for expenses that were necessitated by medical negligence. The defendants moved to dismiss the action on multiple grounds, each of which is discussed below.

Did the Public Disclosure Bar Apply?

The defendants argued that the court lacked subject matter jurisdiction over the action and that the public disclosure bar applied, as that the relators' action was based on information provided through the state's equivalent to FOIA, information available in the defendants' response to various requests from the Iowa Department of Human Services, and information available in a publicly-filed verdict form in a different case. The United States District Court for the Southern District of Iowa ultimately disagreed, and held that the public disclosure bar did not apply. The court held that the documents were publicly disclosed—the FOIA-like documents constituted an administrative report because they came from a state agency that administered a federal program; the information contained in the defendant's response to the Iowa Department of Human Services was a part of an open bid process that was available for public review and qualified as information disclosed at an administrative hearing; and the publicly-filed verdict form was a form of civil hearing and hence in public domain. However, the court held that the information used to bring the action did not give rise to an inference of fraud. Thus, the relators' allegations could not be "based upon" those disclosures and the public disclosure bar did not apply.

Were the Relators' Claims Pled With Particularity?

The defendants also moved to dismiss on the grounds that the relators failed to identify any claim, false record or statement, or facts to support their allegation of a conspiracy, and thereby failed to state fraud with particularity, as required by Federal Rule of Civil Procedure 9(b). However, the court stated that the defendants' allegedly improper requests for federal dollars to administer Medicaid in the state constituted false claims and/or statements material to false claims under the FCA. However, the court concluded that those claims were not false claims, since, pursuant to state law, the defendants "are not required to seek reimbursement for Medicaid payments for costs necessitated by medical negligence." The court determined that the defendants had followed a reasonable statutory interpretation and had not made any false claim knowingly or recklessly. The court further noted that since relators had failed to identify any false claim, they had also failed to allege a claim of conspiracy to present the false claims. Therefore, the court held that relators failed to state fraud with enough particularity to satisfy Rule 9(b).

Were The Claims Against the Individual Defendants Barred by Sovereign Immunity?

The individual defendants further argued that they were sued in their official capacities and the claims against them were actually claims against the state. Thus, those defendants contended, they did not qualify as "persons" under the FCA and the relators' claims against them could not be maintained. The court responded by noting that even if those defendants had been sued in their individual capacities, as the relators argued, it still did not appear that the individual defendants acted outside their official duties. Therefore, the court found that those defendants did not come within the statutory definition of "person" and hence the Eleventh Amendment barred the relators' claims against them.

Could the Relators Proceed *Pro Se*?

Finally, the defendants argued that the relators lacked standing to bring a *qui tam* action because they brought the suit as *pro se* relators. The United States District Court for the Southern District of Iowa granted the motion to dismiss. However, the court held that as the relators were attorneys licensed to practice law before the court, they could bring the action *pro se*.

Consequently, the court granted the defendants' motion and dismissed the case in its entirety for failure to state a fraud claim with sufficient particularity.

U.S. ex rel. Putnam v. E. Idaho Reg'l Med. Center, 2009 WL 2901233 (D. Idaho Sept. 8, 2009)

The relator brought a *qui tam* action against the defendants, a regional medical center and several others, alleging that the defendants fraudulently billed Medicare and Medicaid. The government intervened. One defendant, a recovery center, settled with the plaintiffs. Two of the other defendants, a clinic and its president, moved to dismiss the complaint for lack of subject matter jurisdiction, contending the False Claims Act's public disclosure bar applied. The United States District Court for the District of Idaho denied the motion to dismiss. Relying on Ninth Circuit precedent, the district court held that the relator's faxes, letters, and telephone conversations with the Idaho Department of Health and Welfare (DHW) were not public disclosures under the FCA, and that a public disclosure does not occur when a relator discloses alleged fraud to a government agency. The court also concluded that the report generated by the subsequent DHW audit of the defendants' billing practices did not constitute a public disclosure, since none of DHW's findings were ever actually disclosed to the public. The court also noted that the U.S. Supreme

Court will soon determine whether reports from state government audits, hearings and investigations even qualify as public disclosures at all, or whether that label only applies to reports generated by the federal government.

Although the two defendants conceded that DHW's report was never made available to the public, they argued that the relator's conversations with a DHW investigator constituted a public disclosure. However, the district court determined that the relator initiated those conversations and the subsequent audit and "reported in detail about defendants' alleged fraud." Thus, the court concluded, the "Relator had independent knowledge about defendants'alleged fraud before DHW began its audit and was thus not an 'outsider' to DHW's audit. Accordingly, Relator did not learn about the alleged fraud from DHW, and DHW's communications with Relator could not have resulted in a public disclosure of Relator's *qui tam* allegations." The defendants also argued that public disclosures occurred when DHW discussed its audit with the defendants and their employees and independent contractors. Again, the district court, relying on Ninth Circuit precedent, rejected the defendants' argument, finding that "[w]hen confronted with similar disclosures, the Ninth Circuit has held that 'employees of a corporation later sued under the FCA' are not 'members of the public for purposes of that suit' and "that holding otherwise 'would run contrary to the purpose of the FCA, for it drastically curtails the ability of insiders to bring suit once the government becomes involved in the matter.'" The court noted that this rationale applies to the defendants' independent contractors as well, since, due to the nature of their jobs, those individuals had very real interests in maintaining the confidentiality of information regarding the defendants' billing practices, in order to safeguard their own licenses and reputations, and because they had considerable incentives to ensure that DHW's audit was resolved in favor of the defendants, since their continued work with the defendants was conditioned on the defendants' certification as Medicare providers.

Finally, the district court held that the relator's deposition testimony in a prior state court case did not constitute a public disclosure because the parties did not file the deposition transcript with the state court. The court concluded, "[a]ny disclosures Relator made in that deposition were therefore limited to the parties in the action and only theoretically available to members of the public." Consequently, the court denied the defendants' motion to dismiss.

U.S. ex rel. Rigsby v. State Farm Ins. Co., 2009 WL 2461733 (S.D. Miss. Aug. 10, 2009)

Following Hurricane Katrina, two relators—insurance adjusters of an adjusting firm—sued an insurance company, an engineering firm, and the adjusting firm they'd worked for, alleging FCA violations and FCA retaliation. Specifically, the relators alleged that the defendants conspired not to pay valid insurance claims by

reducing the amount damage attributed to wind, since the government provided reimbursements for flood damage but not for wind damage. The government declined to intervene. The insurance company moved to dismiss the case for lack of subject matter jurisdiction, contending that the relators' claims were barred by the False Claims Act's public disclosure provision. In addition, the company moved to dismiss the relators' claims for lack of particularity and failure to state a claim. The defendant engineering firm moved to join in these motions. Moreover, the defendant insurance company moved for summary judgment on the relators' FCA retaliation claim.

The United States District Court for the Southern District of Mississippi converted the motions to dismiss into motions for summary judgment. The court rejected the public disclosure arguments, finding that one of the relators had direct and independent knowledge of the facts alleged in support of the amended complaint and, therefore, qualified as an original source. The court also rejected the defendants' arguments that the relators' complaint failed to state a claim and lacked particularity, as the court found that the relators' pleadings were sufficient to tell the defendants of the allegations against them and allow them to prepare a defense, and there were issues of material fact regarding the relators' allegations, which made summary judgment improper. However, the court granted the insurance company's motion for summary judgment on the relators' FCA retaliation claim, since the relators were employed by the adjuster and could not have been fired by the insurance company. The court denied the motion to dismiss for lack of subject matter jurisdiction.

U.S. ex rel. Duxbury v. Ortho Biotech Prods., L.P., 2009 WL 2450716 (1st Cir. Aug. 12, 2009)

Two relators, who were both previously employed by the defendant biopharmaceutical company, initiated a *qui tam* action against their former employer. The suit was initially filed by only one of the relators (Duxbury), and alleged a scheme of manipulation of the average wholesale price for the drug, illegal kickbacks and improper inducements to providers, and conspiracy. Duxbury's original complaint was later amended to add the second relator (McClellan)—who was alleged to have knowledge of the alleged fraud after Duxbury's employment with the defendant ended—and to add an allegation for improper off-label promotion of the drug. However, before Duxbury's complaint was filed, a consolidated MDL had already commenced, alleging industry-wide fraudulent reporting of average wholesale price and illegal kickbacks. Moreover, after Duxbury's original complaint was filed, but before McClellan was added as a second relator, yet another relator (Blair) filed a *qui tam* action against the defendant, alleging illegal kickbacks and inducements to providers, as well as improper off-label promotion of the drug. This third relator's complaint was voluntarily dismissed, once it was determined that he was not the first to file. The defendant moved to dismiss the two remaining relators' action, arguing that their average wholesale price and illegal kickback allegations had already been publicly disclosed in the MDL case. The district court agreed that those allegations had been publicly disclosed, but determined that Duxbury qualified for the "original source" exception to the public disclosure bar. However, the district court still ultimately dismissed these allegations, finding that the relators failed to plead the alleged fraud with particularly, as required by Federal Rule of Civil Procedure 9(b). The district court also found that McClellan's allegations were barred, both because there was no evidence that McClellan qualified as an original source of information regarding fraud that occurred after Duxbury left the defendant's company, and since his claims were asserted after the original complaint had been filed and were therefore barred by the first-to-file rule. In addition, the district court found that both relators' allegations of improper off-label promotion were barred under the first-to-file rule, because Blair was the first relator to raise those allegations. Thus, all of Duxbury and McClellan's claims were dismissed. The relators appealed the district court's rulings to the First Circuit.

Application of the Public Disclosure Bar

The First Circuit first discussed the public disclosure bar, and found that the district court's ruling was based on the notion that, in order to qualify as an original source, a relator must voluntarily provide his/her information to the government before filing his/her *qui tam* action. The defendants argued that the district court's ruling was incorrect and that the original source exception only applies when a relator informs the government of his/her allegations before those allegations are publicly disclosed by anyone, regardless of when the relator's *qui tam* suit is filed. They argued that the district court's interpretation is contrary to congressional intent, since it would preserve a relator's *qui tam* action even if that action was based on publicly disclosed information, as long as relator also had direct and independent knowledge of the fraud and alerted the government to his/her knowledge mere moments before filing his/her complaint. The First Circuit, however, agreed with the district court's interpretation of the rule, finding that it comports with the plain, unambiguous language of the statute.

The circuit court then determined that the district court correctly held that McClellan did not qualify as an original source, since the relators did not offer any evidence that McClellan had direct and independent knowledge of the defendant's alleged fraud or that he provided his information to the government prior to the filing of the original *qui tam* complaint. Thus, the First Circuit held that the claims for which only McClellan was alleged to have knowledge were properly dismissed.

The First Circuit, though, reversed the district court's dismissal of Duxbury's claims. The court determined that Duxbury was an original source of the allegations for which he had knowledge, and found that these allegations were also properly pled under Rule 9(b). The court determined that Duxbury was not required to identify particular false claims, but "could satisfy Rule 9(b) by providing 'factual or statistical evidence to strengthen the inference of fraud beyond possibility' without necessarily providing details as to each false claim." The court found that Duxbury's allegations that the defendant caused particular providers—whom he identified—to submit false Medicare and Medicaid claims met Rule 9(b)'s heightened pleading requirement, since Duxbury offered specific information regarding the allegedly false claims, including information regarding the dates and monetary amounts, and number of claims. In addition, the court held that Duxbury's allegations regarding improper inducements supported his allegations that the defendant knowingly caused providers to submit false claims.

Application of the First-to-File Bar

Finally, the First Circuit affirmed the district court's decision that both relators' claims for improper off-label promotion of the drug were barred by the FCA's first-to-file rule, since those allegations had already been raised in Blair's *qui tam* complaint.

U.S. ex rel. Howard v. Urban Inv. Trust, Inc., 2009 WL 2252252 (N.D. Ill. July 29, 2009)

A relator sued her former employer—a real estate investment firm—as well as a related entity, and a group of individuals, alleging FCA violations, retaliation, and constructive discharge from employment. Specifically, the relator alleged that the defendants engaged in an embezzlement scheme involving the unlawful transfer of funds under a government contract. The defendant firm and two of the individual defendants moved to dismiss the complaint for lack of subject matter jurisdiction, pursuant to the FCA's public disclosure bar—these defendants argued that the relator's superiors disclosed the alleged misconduct to the appropriate government official, resulting in a public disclosure.

The relator did not dispute this argument and the court held that the relator's allegations had been previously publicly disclosed. Next, after reviewing the government's investigative report and an affidavit from the president of the defendant firm's subsidiary, the court determined that the information contained in those materials was substantially similar to the relator's allegations, as the report, the affidavit, and the relator's complaint implicated the same people, involved the same time period, and detailed similar activity of improper transfer of funds. Accordingly, the court held the relator's allegations were based on publicly disclosed information. Finally, the court determined that the assessed whether the relator qualified as an original source of the information on which her allegations were based. The defendants did not dispute that the relator had direct and independent knowledge of the alleged fraud, but argued that a relator can only be an original source if he/she had voluntarily notified the government of her allegations before filing her *qui tam* complaint, and that this relator could not be an original source, since her superiors had actually disclosed the pertinent information to the gov-

ernment. The court, however, noted that the relator alleged that she voluntarily initiated meetings with the government and voluntarily provided information and documents to government investigators. Thus, the court concluded that the relator met her burden of asserting subject matter jurisdiction, since her allegations were sufficient to support a conclusion that she qualified as an original source. The court accordingly denied the defendants' motion to dismiss the FCA claims for lack of subject matter jurisdiction.

U.S. ex rel. Little v. ENI Petroleum Co., Inc., 2009 WL 2223652 (W.D. Okla. July 23, 2009)

A relator brought a *qui tam* action against an energy company and its exploration division, alleging failure to pay royalties due to the government under oil production leases. The plaintiff specifically alleged the defendants improperly deducted transportation costs from the royalties they paid. The government declined to intervene. The defendants moved to dismiss for lack of subject matter jurisdiction, pursuant to the FCA's public disclosure bar. The United States District Court for the Western District of Oklahoma converted the defendants' motion to dismiss into a motion for summary judgment. The court noted that none of the disclosures relied on by the defendants involved oil companies improperly deducting transportation costs from the royalties due on oil production that they paid to the government. Instead, many of the disclosures involved royalties on gas production. Also, many of the disclosures related to proposed legislation involving the royalty in kind program. While these disclosures mentioned possible concerns regarding transportation costs, they did not pertain to improper deduction of transportation costs from royalties due to the government. Since the court found no substantial identity between the allegations and transactions in this case and the publicly disclosed allegations and transactions, it held the public disclosure bar did not apply and denied the defendants' motion accordingly.

Glaser v. Wound Care Consultants, Inc., 2009 WL 1885500 (7th Cir. July 2, 2009)

The plaintiff brought a *qui tam* action in the U.S. District Court for the Southern District of Indiana, alleging that a wound care service provider and its owner physicians overbilled Medicare and Medicaid by submitting fraudulent claims for payment. Although the relator in the case was a Medicaid recipient and received treatments from the defendant service provider, she was not familiar with the provider's billing practices, and only learned of the provider's alleged fraud when her attorney described it to her; her *qui tam* action relied solely on information she received from her attorney. The government declined to intervene in the case and the defendant moved to dismiss, pursuant to the FCA's public disclosure bar. The defendants argued that, prior to the relator's complaint being filed, the Centers for

Medicare and Medicaid Services ("CMS") had alredy begin investigating their billing practices and had sent occasional correspondence to the defendant regarding billing and overpayment issues. The relator and her attorney responded that they were unaware of the government's investigation when they filed the *qui tam* complaint. Although they invoked the attorney-client privilege and refused to reveal the source of their information, the attorney stated that she learned about the defendant's billing practices more than a year before the government began its investigation. As a result, the relator argued that her complaint could not have been been precluded by the False Claims Act's public disclosure bar, since the allegations in the complaint could not possibly have been "derived from" the government's information, and thus, could not have been "based upon" that information. The district court disagreed and dismissed the relator's complaint, reasoning that the relator could not demonstrate that her complaint was not based on the government's investigation, since she refused to reveal the source of her information regarding the defendant's billing practices. The relator appealed to the Seventh Circuit.

The circuit court first stated that a three-part inquiry is necessary when determining whether a *qui tam* complaint must be dismissed pursuant to the public disclosure bar. First, the court must decide whether the relator's allegations have been "publicly disclosed." Second it determines whether the relator's suit was "based upon" the public disclosure. And if the relator's allegations are based on publicly disclosed information, then the court takes the third step of determining whether the relator was the "original source" of that information.

Was There a Public Disclosure?

With respect to the first inquiry, the court found that the relator's allegations had been publicly disclosed, notwithstanding the fact that the government's information had been primarily disseminated only to the defendant, and not to the public at large. The plaintiff contended that mere governmental awareness of the defendant's wrongdoing did not constitute public disclosure. Furthermore, she contended the government must take affirmative steps to publicize the investigation if no wide dissemination of the allegations had occurred. The circuit court, however, noted that the text of the False Claims Act does not require that the government to take any affirmative steps to publicize its investigations, and concluded that for FCA purposes, the allegations of the defendant's fraud had been publicly disclosed, first when the government sent a letter to the defendant, demanding a repayment for the defendant's improper billing, and again when the government later directly informed the defendant of its ongoing investigation. The court reasoned that since CMS – the government agency charged with responsibility for overseeing Medicare and Medicaid—was already aware of the defendant's billing practices at the time the relator filed her *qui tam* action, the relator's complaint could not possibly further the FCA's purpose of exposing the fraud to the government. Therefore, the court concluded, the district court properly found that the relator's allegations had been publicly disclosed.

Were the Relator's Claims "Based Upon" the Public Disclosure?

Next, the Seventh Circuit held that the relator's allegations were "based upon" the publicly disclosed information. In 1999, in *U.S. v. Bank of Farmington*, the Seventh Circuit adopted the minority view that a *qui tam* action is "based upon" a public disclosure when it "depends essentially upon publicly disclosed information and is *actually derived from* such information." (emphasis added) The circuit court affirmed this interpretation in 2007, in *U.S. ex rel. Fowler v. Caremark RX, L.L.C.* Based on these rulings, the relator argued that her complaint could not possibly have been "based upon" the public disclosure, since the relator and her attorney were completely unaware of the government's investigation and therefore the *qui tam* complaint could have neither "depended essentially" nor have been "derived from" the public disclosure. However, the Seventh Circuit departed from its prior rulings and adopted the majority view, thereby expanding its interpretation of "based upon" such that *qui tam* allegations are "based upon" publicly disclosed information when the allegations are merely "substantially similar" to the publicly disclosed information. Applying the new standard, the court found that the relator's allegations were indeed substantially similar to information from the government's investigation, as both alleged the same practice of overbilling. Although the circuit court recognized that the relator's complaint included some allegations that were not present in the government's investigation, it still held that the relator's complaint was barred, finding that "'based upon" does not mean "solely based upon." As the circuit court determined that the relator's complaint was sufficiently "substantially similar" to the allegations in the government's investigation, it held that the public disclosure bar applied and deprived the court of subject matter jurisdiction over the relator's claims. Thus, the Seventh Circuit affirmed the district court's ruling.

Was the Relator an "Original Source" of the Allegations in her Complaint?

Finally, the circuit court considered the third inquiry—whether or not the relator qualified for the FCA's "original source" exception to the public disclosure bar. The court held that she did not, finding that the relator did not have direct and independent knowledge of her allegations. The court found that the relator had no direct knowledge of the defendant's billing practices, since her allegations were based solely on information she acquired from her attorney, and since the relator and her attorney invoked the attorney-client privilege and refused to identify the source of the information contained in the *qui tam* complaint. Hence, the Seventh Circuit held the plaintiff failed to prove her independent knowledge of the alleged fraud and thusly did not qualify as an original source of her allegations and affirmed the district court's ruling.

The Seventh Circuit's rejection of the minority view with respect to the meaning of "based upon" leaves the Fourth Circuit as the only circuit to have considered this question and still currently apply the "derived from" standard. The Seventh Circuit stated that it reversed its position because it determined that the "derived from" standard improperly renders the third inquiry of the public disclosure bar – the "original source exception" – superfluous. The court determined that the original source exception is always extraneous whenever the "derived from" standard is applied, because: (1) when a court finds that the *qui tam* allegations *were* based upon a public disclosure, there will almost never be a need to then ask whether or not the relator has direct and independent knowledge of the allegations and qualifies for the original source exception; and (2) when the court finds that the allegations *were not* based upon a public disclosure, the relator's complaint will not be barred, regardless of whether or not the relator was an original source of the allegations. The court stated that it had previously placed too much significance on the plain language interpretation of "based upon," and referenced other instances of "poor drafting" within the FCA. The court also shared its belief that the "substantially similar" standard is more consistent with the FCA's dual objectives of encouraging knowledgeable relators to expose fraud, while discouraging relators without knowledge from bringing parasitic claims. As a result of this shift in interpretation, the Seventh Circuit overruled its prior decisions in *Bank of Farmington* and *Caremark*, to the extent that those decisions conflict with the court's new interpretation of "based upon."

See *U.S., ex rel. Liotine v. CDW Gov't, Inc.*, 2009 WL 3156704 (S.D. Ill., Sept. 29, 2009), at page 44.

See *U.S. ex rel. Becker v. Tools & Metals, Inc.*, 2009 WL 2245207 (N.D. Tex. July 27, 2009), at page 7.

FALSE CLAIMS ACT RETALIATION CLAIMS

Rost v. Pfizer, Inc., 2009 WL 3097231 (S.D.N.Y., Sept. 24, 2009)

The plaintiff sued his former employer and three of its executives, alleging FCA retaliation and violations of state law. The basis of the plaintiff's FCA retaliation claim was that the defendant company decided to terminate his provisional employment after the government declined to intervene in his *qui tam* suit against the defendants. The defendants moved for summary judgment, seeking dismissal of all claims. The plaintiff cross-moved for partial summary judgment regarding the defendants' attempt to reduce the amount of damages a jury could award, due to the plaintiff's alleged misconduct while working for the defendant. The United States District Court for the Southern District of New York granted the defendants' motion in its entirety and denied the plaintiff's motion as moot. The court held that the plaintiff failed to show that his complaints to the defendant regarding regulatory noncompliance involved false claims submitted to the government. Thus, the court held that his complaints to the defendant were not "protected activity" under the FCA. In addition, the court observed that the defendant company terminated the plaintiff's employment nearly two years after it first became aware of the *qui tam* suit and more than a year after he told that defendant of his discussions with federal regulators about the company's possible violations of federal law. Thus, the court held that the plaintiff did not provide facts showing a causal connection between any protected activity and his termination. Therefore, the court granted the defendants' motion and dismissed the plaintiff's FCA retaliation, as well as his state law claims. The court thus denied the plaintiff's cross-motion as moot.

U.S. ex rel. Leveski v. ITT Educ. Serv., Inc., 2009 WL 3079526 (S.D. Ind. Sept. 23, 2009)

The relator brought a *qui tam* action against her employer in the United States District Court for the Southern District of Indiana, alleging that the defendant violated the Higher Education Act's compensation ban, but falsely certified its compliance with the ban, resulting in a False Claims Act violation. The defendant contended that it had already defended against a prior case that raised similar claims, and thus the relator's case was barred by the FCA's first-to-file bar. The court noted that the prior case was not pending when the plaintiff filed his suit and therefore the first-to-file bar did not apply and the court had subject matter jurisdiction over the relator's claim. The defendant then argued that the relator's suit was barred by a settlement the relator entered into with the defendant to settle an employment dispute. The agreement released the defendant from all liability relating at all to her

employment barred the suit. The court held that this provision did not bar the relator's suit because the relator's allegations were not related to her employment—the claims were derivative in nature and based on an obligation owed the government. Further, the defendant contended that the relator's allegations lacked particularity and failed to state a claim. The court determined that the relator's allegations could amount to an FCA violation, and therefore, her complaint did adequately state a claim. The relator argued that she did not need to plead her complaint with particularity. The court took this argument as an admission by the relator that her complaint did not meet Rule 9(b)'s pleading standard. However, the court noted that the relator's affidavit demonstrated that she had more information available to her and that she had offered to replead her allegations. Consequently, the court gave her an opportunity to file an amended complaint. Accordingly, the court granted the defendant's motion to dismiss without prejudice.

Kakeh v. United Planning Org., Inc., 2009 WL 2869995 (D.D.C. Sept. 9, 2009)

The plaintiff alleged several retaliation claims against his former employer, a nonprofit organization that had contracted with the District of Columbia to manage two anti-poverty programs—programs that were largely funded by federal grant money. The plaintiff alleged that the applicable procedures in place required that whenever the grant money allocated to the defendant exceeded the defendant's needs, the defendant was required to notify the District of Columbia that it had a surplus, and either return the surplus funds or use them for allowable expenses. The plaintiff alleged that the defendant failed to satisfy this requirement, by using the grant money for improper expenditures. He stated that once he discovered this practice and reported it to the defendant's management, he was ordered to report the expenditures as legitimate. Instead, he alleged, he changed the designation for those expenditures from "allowable" to "unallowable" and contacted the appropriate D.C. government official who, with the plaintiff's assistance, launched a multiagency investigation into the defendant's billing practices. The plaintiff alleged that soon after, he was informed that his employment with the defendant had been terminated. As a result of his termination, the plaintiff filed suit, alleging that the defendant violated the anti-retaliation provisions of both the federal and the District of Columbia's respective False Claims Act statutes, as well a claim under the District of Columbia Whistleblower Protection Act, a common law claim for wrongful discharge, and a claim for retaliation under the D.C. Human Rights Act.

The D.C. District Court granted the defendant's summary judgment motion with respect to the common law claim and the plaintiff dismissed the claim under the D.C. Human Rights Act. After a jury trial on the remaining claims, the defendant was found liable in the amount of $891,546, plus costs. Post-trial motions by both parties followed, with the defendant filing a motion for judgment as matter of law,

as well as a motion to amend to amend, alter the judgment, or for new trial, or, alternatively for remittitur, and with the plaintiff moving to alter the judgment.

The Defendant's Motion for Judgment as a Matter of Law Was Denied

The district court denied the defendant's motion for judgment as a matter of law, finding that the plaintiff presented sufficient evidence to demonstrate a violation of the Whistleblower Protection Act, which required him to show that: (1) he made a protected disclosure or refused to comply with an illegal order; (2) the defendant took adverse employment action against him; and (3) his protected disclosure or refusal to comply with an illegal order was a contributing factor to the defendant's decision to take adverse employment action against him. The court found that, notwithstanding whether or not the defendant's billing was lawful, the plaintiff's reports of his suspicions of possible fraud to his supervisors constituted a protected disclosure, as the plaintiff was not merely making suggestions to the defendant, but was expressing his actual, reasonable belief that the defendant was engaged in unlawful conduct. The court rejected the defendant's contention that the plaintiff did not use the necessary "magic words" to alert the defendant that he was making a protected disclosure. The court noted that even if the facts upon which the plaintiff's suspicions were based had been publicly disclosed, it was the plaintiff who was responsible for disclosing that information, which resulted in the government's investigation of the defendant's billing practices. The court also held that the defendant's management was at least partially responsible for the decision by the directors of the defendant's board to terminate the plaintiff's employment. As there was no dispute that the defendant took adverse employment action against the plaintiff, the court concluded that a reasonable jury could find that the defendant was liable under the Whistleblower Protection Act.

Similarly, the court found that the plaintiff offered sufficient evidence to support his federal and D.C. False Claims Act allegations, both of which required him to show that: (1) he engaged in a protected activity; (2) the defendant had knowledge of that activity; (3) the defendant terminated his employment; and (4) there was a causal link between his protected activity and his termination. The court determined that the plaintiff engaged in protected activity by expressing his belief that the defendant's billing practices were fraudulent. In addition, the court found that the plaintiff alleged that he believed that the defendant had instructed him to engage in unlawful billing and that he refused to comply. The court rejected the defendant's argument that the plaintiff did not explain why he refused to comply with orders, and left the defendant to believe that he was simply an insubordinate, disgruntled employee. In rejecting this argument, the court noted that the defendant was aware that the plaintiff was assisting the government's investigators, which was sufficient to allow a reasonable jury to conclude that the defendant was aware of the plaintiff's protected activity. The court also rejected the defendant's argument that the plaintiff failed to establish a causal link between his protected activity and his termination, noting that the plaintiff was the only employee in his department whose employment was terminated, and that his termination was announced only one day after the government visited the defendant's office to conduct its investigation. The court found that, based on these facts, a reasonable jury could find that the plaintiff's termination was linked to his protected activity.

As a result of these findings, the district court denied the defendant's motion for judgment as a matter of law and refused to set aside the jury's verdict.

The Defendant's Motion to Amend, for a New Trial, or for Remittitur Was Granted in Part and Denied in Part

The district court calculated the defendant's liability in the amount of $891, 546 by adding the jury's three separate awards for back pay—one award under the Whistleblower Protection Act, one award under the D.C. False Claims Act, and one award under the federal False Claims Act—each of which amounted to $122,132, and adding that amount to the jury's three separate compensatory damages awards, each of which totaled $175, 050. The defendant argued that the jury's award was unclear, as the jury only calculated back pay and compensatory damages under the WPA, and then wrote "same" as the damages under the two FCA statutes. The court found that even though the defendant failed to object to the verdict form given to the jury and failed to request an instruction against duplicative awards, the evidence showed that the jury only intended to award the plaintiff one award for back pay and only one award for compensatory damages, noting that even the plaintiff acknowledged that he was only owed $122,132 in back pay. The court also determined that there was no evidentiary basis for upholding the original compensatory damages award, since the plaintiff had found other employment and had even received a slight increase in pay. Consequently, the court reduced the plaintiff's award to one $122,132 award for back pay and one $175,050 award for compensatory damages, and denied the defendant's requests for a new trial or remittitur as moot.

The Plaintiff's Motion to Alter or Amend the Judgment Is Granted in Part and Denied in Part

The plaintiff argued that, by statute, his back pay award under the two False Claims Act statutes must be doubled. After reviewing both statutes, the court agreed, as it concluded that each provides that the plaintiff's relief "shall" included two times the employee's back pay. The court found that the use of the word "shall" created a mandatory duty and that the plaintiff was owed two times his back pay. The court then considered whether the plaintiff was entitled to two separate payments—one payment for twice his back pay under the federal FCA and a second payment for twice his back pay under the D.C. FCA. The court concluded that "[a]warding Plaintiff separate damages under the federal FCA and DCFCA would result in a duplicative recovery," and thus limited his award for back pay to $244,264.

Boze v. General Elec. Co., 2009 WL 2485394 (W.D. Ky. Aug. 11, 2009)

The plaintiffs, who were employees of the defendant company's military aircraft parts manufacturing plant, filed a lawsuit alleging FCA retaliation and supplemental state law claims of intentional infliction of emotional distress and invasion of privacy. The plaintiffs alleged that the defendant retaliated against them for testifying before a grand jury convened in conjunction with a *qui tam* action that seven of the plaintiffs' co-employees filed. The United States District Court for the Western District of Kentucky granted the defendant's motions for summary judgment. The court held that the evidence did not show that the defendant's employment actions—which amounted to requests for increased production, and staffing of additional supervisors and harassment from co-workers (but not supervisors)—were adverse, and that the plaintiffs failed to show a causal connection between those employment actions and their grand jury testimony.

U.S. ex rel. Marlar v. BWXT Y-12, L.L.C., 2009 WL 2195424 (E.D. Tenn. July 23, 2009)

The plaintiff brought a civil action against her former employer, the manager of a national security complex, alleging FCA retaliation. The defendant moved for summary judgment. The United States District Court for the Eastern District of Tennessee ruled that the plaintiff demonstrated sufficient evidence to establish a causal connection between her termination and her written complaints to the defendant's officials alleging illegal activity regarding the defendant's alleged improper recording of prescriptions, dispensing of controlled substances to patients without keeping any record on the patient's chart, and allowing prescription to be written by inappropriate persons. The court also found that the plaintiff presented sufficient evidence to create a dispute of material fact regarding the issue of whether or not her termination was based on a pretext. Lastly, the court held the plaintiff provided sufficient evidence to allow a fact finder to conclude she engaged in protected activity. Accordingly, it denied the defendant's motion for summary judgment.

See *U.S. ex rel. Suter v. National Rehab Partners Inc.*, 2009 WL 3151099 (D. Idaho Sept. 24, 2009), at page 27.

See *U.S. ex rel. Lockyer v. Haw. Pac. Health Group Plan for Employees, et al.*, 2009 WL 2700321 (9th Cir. Aug. 27, 2009) (unpublished), at page 33.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Not a Condition of Payment

See *U.S. v. Science Applications Int'l. Corp.*, 2009 WL 2929250 (D.D.C. Sept. 14, 2009), at page 29.

B. Not Knowingly False

U.S. ex rel. Suter v. National Rehab Partners Inc., 2009 WL 3151099 (D. Idaho Sept. 24, 2009)

Former employees of the defendant, Magic Valley Regional Medical Center, brought a *qui tam* suit alleging that Magic Valley and one of its service providers, National Rehab Partners, Inc., submitted false claims for reimbursement of therapy services and violated state statutory law and common law. The relators also brought an FCA retaliation claim against Magic Valley. Magic Valley moved for summary judgment or summary adjudication regarding the claims alleging substantive FCA violations, arguing that the relators' claims were based upon alleged non-compliance with certain Medicare group therapy guidance manuals (as opposed to statutes and regulations), that the relators could not demonstrate that the defendants did not knowingly present false claims, that any alleged falsity was not material to the government's decision to pay, and that the public disclosure bar foreclosed subject matter jurisdiction over the relators' claims. The National Rehab Partners, Inc. moved to join in Magic Valley's motions. In addition, Magic Valley individually moved for summary judgment, asserting that the FCA's statute of limitations foreclosed the FCA retaliation claim.

The United States District Court for the District of Idaho noted that the relators alleged that employees of Magic Valley understood the group therapy rules, knew that Magic Valley's practices were non-compliance, and submitted false claims anyway. The defendants responded by asserting that they did not knowingly submit false claims to the government and that the Medicare guidance manuals were nonbinding and thus could not impose FCA liability. The court, however, concluded that Medicare guidance "constitutes an interpretive rule which may bind Medicare providers and form the basis for FCA liability." Thus, the relators were allowed to maintain their claims and the defendants' summary judgment motion was denied. The court further held that disputes of material fact existed regarding whether Magic Valley's interpretation of the applicable group therapy regulation was reasonable and regarding whether Magic Valley had certified compliance with regulations while knowing that the agency's interpretation of that regulation suggested non-compliance.

With respect to the issue of whether the defendants submitted false claims, the court held that the relators' allegations were sufficient, as they presented evidence of an individual patient and demonstrated that, despite evidence showing that the patient engaged only in group therapy, Magic Valley used the patient's therapy to qualify her for Medicare payments at a higher individual rate, even when such payments were non-compliant with applicable regulations. The court also determined that this evidence was sufficient to show materiality and accordingly denied the defendants' motion.

The court further held that the FCA's public disclosure bar did not prohibit the relators' claims, since the disclosure the defendants relied upon was a disclosure of the alleged fraud, by one of the relators, to an Idaho Medicaid Fraud Unit. The court held that such disclosures to government employees are not deemed "public" disclosures under the FCA.

With respect to the relators' claim against Magic Valley for retaliation, the district court first observed that the FCA's statute of limitations does not apply to retaliation claims, and that the limitations period of the most analogous state statute would apply. The court concluded that the Idaho Protection of Public Employees Act ("IPPEA")'s 180-day statute of limitation applied, and granted Magic Valley's motion to dismiss the relators' retaliation claims, since those claims were brought more than two years after the accrual of the relators' cause of action for retaliation.

U.S. ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp., 2009 WL 3161828 (D. Colo. Sept. 30, 2009)

The relator, a government auditor, filed a *qui tam* action against the defendant, an oil and natural gas producer, alleging the use of false statements to underpay oil royalties. The government declined to intervene. The jury reached a verdict in the relator's favor and awarded $7,555,886.26 in damages. The defendant renewed its motion for judgment as a matter of law or alternatively for a new trial and for remittitur, arguing that no evidence existed to show that any of the defendant's employees had sufficient knowledge to make a knowingly false statement to the government. The United States District Court for the District of Colorado concluded that the evidence showed that the employees responsible for filling out the defendant's monthly reports for royalties did comprehend the leases and the regulations and knew that a customer provided services. However, these employees failed to change the oil valuation or royalty pricing to reflect the services provided. Thus, the court concluded that sufficient evidence existed for a jury to conclude that the defendant employees made knowingly false statements.

The court also rejected the defendant's argument that the government was aware of its failure to properly pay royalties. The court concluded that the government's knowledge was not so comprehensive as to vitiate the defendant's scienter, because the defendant did not produce any evidence showing the existence of an ongoing dialogue between the defendant and the government that was characterized by complete cooperation and exchange of information. Therefore, the court denied the defendant's motion for judgment as a matter of law or for a new trial. The court also denied the defendant's motion for remittitur and held that the jury award of damages of approximately $7.5 million on leases involving payment of approximately $110 million neither shocked the court's conscience nor offended its sense of justice.

U.S. v. Science Applications Int'l. Corp., 2009 WL 2929250 (D.D.C. Sept. 14, 2009)

The government sued a technical consultant for nuclear waste management, alleging that the defendant violated both the False Claims Act and District of Columbia law by failing to make required disclosures regarding its organizational conflicts of interest (OCIs), as was required by two government contracts the defendant entered into with Nuclear Regulatory Commission (NRC)—since the defendant's neutrality was critical to both government contracts, the defendant agreed not to enter into any contract with any organization that was "regulated by the NRC," as that might create a conflict of interest with its government contracts. The government alleged that the defendant disregarded this provision by repeatedly requesting payments under the contracts and by repeatedly certifying to the NRC that it had no OCIs, when, in fact, it did. A jury found that the defendant had knowingly violated the FCA by presenting false claims and making false statements to the government. The jury also found the defendant liable for breach of contract. The defendant moved for judgment as a matter of law or, alternatively, for a new trial, arguing that: (1) there was insufficient evidence to establish that the defendant knowingly violated the FCA; (2) that the defendant's claims were not objectively false; (3) that the government failed to prove its implied certification theory and could not establish that the payments to the defendant were conditioned on its OCI representations to NRC; (4) that the government failed to show that the defendant's alleged false statements were made with the intent and for the purpose of getting false claims made; (5) that the government suffered no damages as a result of the defendant's false claims; (6) that the government was improperly allowed to argue that the defendant was obligated to disclose even the "appearance" of a conflict to NRC; and (7) that certain jury instructions regarding the defendant's disclosure obligations were erroneous. The district court rejected all of the defendant's arguments and allowed the jury's verdict to stand. The court's analysis of each of the defendant's arguments will be discussed in turn.

Scienter

The defendant argued that its motion should be granted because the evidence presented to the jury could not have reasonably established that the defendant had the requisite scienter to violate the FCA. This argument was based on three grounds: (1) that based on the defendant's interpretation of the contracts—which it argued were reasonable and in good faith—it did not knowingly present false claims or make false statements to the government; (2) that the government improperly relied on a "collective knowledge" theory of liability; and (3) that the government did not show that the defendant acted recklessly or with deliberate ignorance of the truth. The U.S. District Court for the District of Columbia rejected the defendant's arguments, denied their motion, and allowed the jury's verdict to stand.

The defendant first argued that based on its interpretation of is OCI obligations, it did not enter into any agreement with an organization that was "regulated by the NRC." The court agreed with the government that although certain work performed by DoE and its contractors is excluded from NRC regulation, "it does not follow that an entity which performs work outside the scope of the DOE exclusion can avoid NRC regulation for all purposes." The court noted that "[a] defendant's reasonable interpretation of an ambiguous regulation may well be a successful defense to an alleged FCA violation in appropriate cases," but determined that in this case, the government presented testimony and other evidence showing that the defendant knew that some of its business relationships created OCIs, even if the entities with whom the defendant worked also performed some work for DoE that was not subject to NRC regulation. The court held that this evidence was sufficient to allow the jury to reach its verdict. The court also noted that the defendant failed to show any error in the instructions provided to the jury, noting that the jury was instructed that the FCA does not require specific intent to defraud, but does require more than an honest mistake or mere negligence.

The court also rejected the defendant's second argument—that the jury should not have been allowed to consider the defendant's "collective knowledge" when determining scienter and that "general, factual information that is known within a company does not establish that the company 'knew' of a falsehood under the FCA." The defendant, relying on a footnote in a First Circuit opinion, had argued that intent could only be established by focusing on the knowledge of specific decision-makers, and not on collective knowledge. The district court, relying on its own precedent, responded and reiterated that "it is both appropriate and equitable to conclude that a company's fraudulent intent may be inferred from all of the circumstantial evidence including the company's collective knowledge." Thus, the court found no error in allowing the jury to consider the defendant's collective knowledge when determining whether the defendant's scienter.

Finally, the defendant argued that the jury's verdict court not be upheld because the evidence could not show that the defendant acted with reckless disregard or deliberate ignorance of the truth, since the defendant made diligent inquiry to ensure compliance with its OCI obligations" and designed and implemented an OCI compliance system In rejecting this argument, the district court relied on testimony showing that the defendant's OCI compliance system did not integrate some of the defendant's business relationships, had incomplete descriptions of the defendant's services and did not associate important words with descriptions. Consequently, the court held that there was sufficient evidence for the jury to find that the defendant acted with reckless disregard or deliberate ignorance of the truth.

Falsity

As noted above, the government presented evidence showing that the defendant was aware that it had entered into agreements with entities that were at least in part regulated by NRC, and even contracted with one company that had an NRC license. The government also produced evidence showing that the defendant's work on the government contracts at issue could have been biased by its relationships with these other NRC-regulated entities. The court concluded that this evidence was sufficient for the jury to find that the defendant had a conflict of interest that should have been disclosed to NRC.

Implied Certification

The defendant argued that its motion should be granted and that the government's implied certification theory failed, because the government could not show that payments under the contracts at issue were expressly conditioned on the defendant's OCI compliance. As a result, the defendant argued, its OCI representations could not impliedly certify compliance with that condition. In any event, the defendant argued that the jury was not properly instructed with respect to the implied certification theory. The district court first noted that the D.C. Circuit Court has never stated that an express condition is necessary before the implied certification theory can be asserted. Instead, the circuit court has only required that the misrepresentation or omission at issue be material to the government's decision to pay. The court held that the government's evidence was sufficient to show that by withholding key OCI information from NRC, the defendant impliedly certified its compliance with material contractual terms, giving rise to an FCA violation. As the jury was instructed on this materiality standard, the court held that the jury instructions regarding the implied certification theory were proper.

False Statements Made "To Get" False Claims Made

The defendant argued that, pursuant to the U.S. Supreme Court's ruling in *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, the government had to show that the defendant's false claims were made with the specific intent and for the specific purpose of getting false claims paid by the government. The court observed that the recently-enacted Fraud Enforcement and Recovery Act of 2009 (FERA) "legislatively overrules the holding of *Allison Engine* by amending the language of [the FCA], replacing the words 'to get' with the word 'material.'" The court also recognized that FERA provides that this amendment is retroactive and applies to "claims" pending on or before June 7, 2008—just before the Supreme Court's opinion was published. However, the district court agreed with the defendant that none of the defendant's "claims" to the government for payment were pending on June 7, 2008, and thus, FERA's retroactivity provision did not apply to those claims. In response the government argued that Congress' use of the word "claims" in FERA's retroactivity provision did not mean claims to the government for payment, but rather legal claims and causes of action upon which a complaint is based. The district court disagreed, noting that in a separate retroactivity provision of FERA Congress used the word "cases" to describe such actions.

The defendant's success was short-lived, however, as the court distinguished the facts in *Allison Engine* from the facts of this case, noting that in *Allison Engine*, the false statements were made to a third party, whereas in this case, the false statements were made directly to the government. The court also noted that the government presented evidence upon which the jury could have reasonably concluded that the defendant did in fact make those false statements for the purpose of getting the government to pay false claims. The court also determined that the jury instructions on this issue were proper, since even though the jury was instructed on the materiality standard, that instruction applied generally to FCA violations and not specifically to violations resulting from making false statements to get false claims paid. Thus, the court was ultimately unswayed by the defendant's argument.

Damages

The defendant argued that the value of its work on NRC's behalf was ignored, that its failure to disclose OCIs did not result in any actual damages to NRC, and that the instructions to the jury and the jury's subsequent verdict awarding damages were erroneous. The court rejected these arguments, noting that the jury was properly instructed to calculate as damages the amount that NRC paid to the defendant above and beyond what it would have paid, had it known about the defendant's conflicts of interest and that the jury's verdict reflected those instructions, as the jury believed the government's argument that the value of the defendant's work was irrelevant, since the defendant would have never been awarded the contracts with NRC and would have never received any payments under those contracts, had NRC known about the defendant's conflicts.

Defendant's Obligation to Disclose the "Appearance" of a Conflict

The defendant argued that, pursuant to its contracts with NRC, it was only required to disclose "actual" or "potential" conflicts of interest, but that the court erroneously allowed the government to argue that it was required to disclose "apparent" conflicts as well. The court noted that the D.C. Circuit court has previously used "potential" conflicts and "apparent" conflicts interchangeably, implying that it was reasonable for the government and the jury to do the same. The court also noted that the jury was properly instructed on this issue, as the jury instructions discuss "potential" conflicts. Moreover, the jury instructions specifically state that in the event that the jury observed a discrepancy between the law as described by counsel and the instructions they received from the judge, the instructions from the judge would take precedence. Thus, the court rejected this argument as well.

Jury Instructions Regarding the Defendant's Disclosure Obligations

Finally, the court held that the jury was properly instructed regarding the defendant's disclosure obligations to NRC. The defendant had argued that the instructions regarding the applicable NRC regulations were unclear and that the jury had not been properly instructed regarding the applicable contractual language that governed the defendant's obligations to NRC. The court concluded that no special instructions regarding the terms used in the NRC regulations were necessary, as the testimony showed that a "common sense" definition of those terms was applied throughout the trial. Furthermore, the court held that neither party was restricted from discussing the applicable contractual language throughout the trial and that the defendant could have reiterated the actual contractual language during its closing argument, but chose not to do so. The court held that any failure to include a specific instruction regarding the contractual language was, at most, harmless error.

U.S. ex rel. Lockyer v. Haw. Pac. Health Group Plan for Employees, et al., 2009 WL 2700321 (9th Cir. Aug. 27, 2009) (unpublished)

The relator sued his former employer and related parties—all health care entities—alleging that the defendants violated the False Claims Act by defrauding Medicare. The relator also sued for retaliation under the False Claims Act. The United States District Court for the District of Hawaii granted summary judgment in favor of the defendants on the relator's claims and the relator appealed the district court's decision to the Ninth Circuit. The circuit court noted that the evidence presented by the relator raised genuine issues of fact regarding whether the defendants violated Medicare's "incident to" rules. However, the court found that the relator's *qui tam* action could not survive summary judgment since the relator did not produce sufficient evidence to demonstrate that the defendants committed a *knowing* fraud. Instead, the Ninth Circuit found that the relator's evidence only suggested that the defendants' noncompliance with the Medicare regulations stemmed from a good faith interpretation of the regulations or at worst, from negligence. With respect to the relator's retaliation claim, the circuit court also held that even if the relator acted under the belief that the defendants had committed fraud against the government, he did not present any evidence showing that the defendants were aware that he was investigating the defendants for fraud on

the government or was otherwise engaged in protected conduct under the False Claims Act. Thus, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the defendants.

U.S. v. Khan, 2009 WL 2461031 (E.D. Mich. Aug. 5, 2009)

The government sued two individuals and their wives, alleging that the defendants violated the FCA by improperly filing for and receiving Medicare reimbursements on behalf of a pain management clinic. The lawsuit also included claims for unjust enrichment and payment by mistake. The two husbands had each earlier pled guilty to one count of health care fraud and the United States District Court for the Eastern District of Michigan entered a final judgment against each of them and awarded the government treble damages and statutory penalties. The government then settled its remaining claims with one of the wives. The government then moved for partial summary judgment against the remaining defendant wife. During his plea agreement hearing, this remaining wife's husband testified that she never performed any executive duties for the clinic and merely attended the clinic's board meetings. However, the government produced four exhibits showing this defendant's annual hours worked, her duties as the clinic's executive director, and a certification she signed for at least two of the clinic's cost reports, stating that those reports were correct to the best of her knowledge and belief. Based on this information, the court held that the each cost report was a false claim, that the remaining defendant knew that the cost reports were false, and that she assisted in causing these false claims to be presented to the government. Consequently, the court granted the government's motion for partial summary judgment on the FCA violations. The court again awarded treble damages and statutory penalties. Alternatively, the district court ruled that in the event that these amounts were later deemed legally unsustainable, then the government's motion for partial summary judgment for unjust enrichment and payment by mistake would be granted as well, with an award equaling the amount of the payroll checks the defendant wife endorsed and deposited.

U.S. ex rel. Longhi v Lithium Power Techs. Inc., 2009 WL 1959259 (5th Cir. July 9, 2009)

A relator brought a *qui tam* action against his former employer, a manufacturer of lithium-based batteries, and the company's president, alleging that the defendants violated the False Claims Act by making false statements to the government in order to receive federal grant money intended for small businesses. The United States intervened in the case and the plaintiffs moved for summary judgment. The United States District Court for the Southern District of Texas granted the motion and calculated nearly $5 million in damages and penalties. The defendants

moved for reconsideration of the judgment, which the district court denied, and the relator moved for statutory attorney's fees, which the district court granted. The defendants appealed these rulings to the Fifth Circuit.

On appeal, the defendants argued that the district court should not have granted the plaintiffs' summary judgment motion, because the allegedly false statements on which the plaintiffs' case was based were not false, not knowingly false, or not material to the government's decision to award the grants. In addition, the defendants asserted that the relator agreed to sell his stock in the defendants' company, in anticipation of being laid off, and that, as part of the stock sale agreement, the relator agreed not to sue the defendant company "for any other matter prior to the execution of" the sale, although his *qui tam* suit had been filed eleven days prior to the sale. The defendants also argued on appeal that the district court erred when it determined that they were liable for three times the full amount of the grant awards they received, even though the grant money was used to design and manufacture equipment that the government deemed satisfactory. Finally, the defendants argued that the district court's award of attorney's fees was in error, claiming that the relator's motion for fees failed to segregate non-compensable work performed by his attorneys in connection with claims that were eventually dismissed. The Fifth Circuit considered each of the defendants' arguments in turn, and affirmed all of the district court's rulings

FCA Liability

The circuit court first distinguished this set of facts from the more traditional theories of False Claims Act liability—which involve false claims to the government for payment. Here, the court observed, the plaintiffs were asserting a fraudulent inducement theory of liability, arguing that the contract under which the government was to make payments (in the form of grant awards) was procured by fraud. The plaintiffs argued that, in their grant proposals, the defendants made numerous false statements regarding their qualifications, and those statements affected the government's grant selection process. In addition, the plaintiffs argued that even if the defendants did not have actual knowledge of the falsity of their statements, they were liable under the Act because they certainly had reckless disregard for the truth of those statements. The appeals court agreed with the plaintiffs and held that the plaintiffs demonstrated False Claims Act liability by showing: (1) that the defendants' statements were false; (2) that the defendants had the requisite knowledge of the falsity of those statements (either through actual knowledge, through deliberate ignorance of the truth or falsity of the statements, or through reckless disregard for the truth or falsity of the statements); (3) that, pursuant to the recently-amended False Claims Act (which applies the natural tendency test and only requires a showing that the allegedly false statement "had the potential to influence the government's decision, not that the false statements actually did so"), the defendants' false statements were material to the government's decision to award grants to the defendants; and (4) that, because of the defendants' false statements, the government awarded them about $1.6 million in grant funds. Thus, the Fifth Circuit affirmed the district court's ruling that the defendants violated the False Claims Act.

Damages Calculation

The defendants argued that the damages should not have been awarded to the government since it did not suffer an injury. However, the circuit court affirmed the district court's award of treble damages, finding that, by awarding the grant funds, the government sought to receive the intangible benefit of fulfillment of the government's purpose to assist "eligible deserving small business," and that the defendants frustrated that purpose by "siphon[ing] off" funds that "should have gone to a better-qualified candidate." The appeals court ruled that "[i]n a case such as this, where there is no tangible benefit to the government and the intangible benefit is impossible to calculate, it is appropriate to value damages in the amount the government actually paid to the Defendants." Thus, the Fifth Circuit affirmed the district court's damages award.

The Relator's Release and Indemnification Violated Public Policy

The circuit court also affirmed the district court's refusal to enforce the relator's agreement to release the defendant company from all claims that arose prior to the execution of the stock sale agreement, finding that such agreements violate the public policy considerations underlying the False Claims Act—namely, the government's ability to receive information from relators that it otherwise would not obtain. The defendants contended the FCA did not bar the release and indemnification agreement because the relator's release did not prohibit the government from pursuing any of the claims in the action. The circuit court, though, noted that at the time the release was signed, the relator's *qui tam* action had already been filed, and that, by statute, the relator could not dismiss the action without the Attorney General's consent. Consequently, the Fifth Circuit affirmed the district court's ruling.

Award of Attorney's Fees

The defendants sought reversal of the district court's award of the relator's attorney's fees, arguing that the relator's attorney did not segregate the hours that were spent working on claims for which the relator was not the prevailing party. The Fifth Circuit, however, rejected the defendants' arguments and affirmed the district court's award of the relator's attorney's fees. The circuit court found that the district court did not abuse its discretion in that regard, and properly concluded that the relator's attorney did not include bills for duplicative efforts or unnecessary hours, and that all of the work done on the relator's behalf "arose from the same set of contracts, same actors, and the same illegal intent to defraud the government of money in violation of the FCA."

C. Relator Released Defendant from FCA Claims

See *U.S. ex rel. Longhi v Lithium Power Techs. Inc.*, 2009 WL 1959259 (5th Cir. July 9, 2009), at page 34.

D. Sovereign Immunity

See *U.S. ex rel. Hixson v. Health Mgmt. Sys. Inc.*, 2009 WL 3003258 (S.D. Iowa Sept. 21, 2009), at page 10.

E. Statute of Limitations

See *U.S. ex rel. Dugan v. ADT Sec. Services, Inc.*, 2009 WL 3232080 (D. Md. Sept. 29, 2009), at page 9.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Walner v. NorthShore Univ. Healthsystem, 2009 WL 3055357 (N.D. Ill. Sept. 18, 2009)

The relator, a Medicare recipient, sued the defendants, a health system that operates three hospitals, and others, alleging that the defendants submitted false records to Medicare for payment. The relator, who was a patient of the health system, alleged FCA violations and other claims. In support of his allegations, the relator alleged that the health system misrepresented the severity of his medical condition so that his surgery would be covered by Medicare. The government declined to intervene. The defendants moved for dismissal of the FCA claims for lack of particularity. The United States District Court for the Northern District of Illinois granted the motion. The relator's claims under the FCA and for injunctive relief were dismissed without prejudice, as the district court held that the relator failed to plead each defendant's role in the alleged fraud, by omitting such facts as which defendant submitted allegedly false claims and the contents of those allegedly false claims. The relator contended that he could not give the court this information because he lacked access to the defendant's claims. However, the court observed that the relator had received enough information to be able to plead these facts with particularity, yet failed to even plead the specifics of his own surgery, including the date or the hospital. In addition, although the relator also alleged a conspiracy among the defendants, he failed to plead any of the specifics of that conspiracy, including "who agreed with whom, how they agreed, how they decided to file a false claim, who made the alleged misrepresentation, who filed the allegedly false claim, the method by which it was filed, and how much the payment was for." Thus, the court refused to relax the particularity requirement and dismissed the relator's FCA claims for failure to plead fraud with particularity.

U.S. ex rel. Carter v. Halliburton Co., 2009 WL 2240331 (E.D. Va. July 23, 2009)

A relator brought a *qui tam* action against a logistics support provider, its companies, and a union, alleging FCA violations in connection with the defendants' work on a contract to provide support services to government camps during humanitarian assistance missions in various countries, including Iraq. These services included treatment and testing of water at government base camps throughout Iraq.

The contract required the defendants to submit certain documentation in order to receive reimbursements for costs and payments of fees. According to the *qui tam* complaint, the relator, who was employed by one of the defendants, discovered that the defendants were submitting false claims to the government by making false certifications, omitting required information and making false statements to support their false claims. The relator allegedly made several complaints within the defendants' companies, but the defendants refused to take any action or to inform the government of their failures.

The United States District Court for the Central District of California granted the defendants' motion for transfer of venue to the United States District Court for the Eastern District of Virginia. The defendants then moved to dismiss the relator's complaint for failure to state a claim and for failure to plead fraud with particularity. The district court held that the relator successfully alleged that the defendants presented false claims for payment regarding their personnel in two Iraqi camps, since the complaint alleged the defendants knowingly presented false time cards to the government, the relator pled the time and place of the alleged misrepresentations, the persons who made the misrepresentations, and the contents of the misrepresentations, and the relator alleged that the time cards were material to the government's decision to pay the defendants. However, the court determined that the relator's similar allegations regarding other locations were not pled with particularity, since the defendant only extrapolated from his experiences with the two Iraqi camps in order to obtain discovery of the defendants' other sites—the court determined that the relator's actions were a fishing expedition. The court also dismissed the relator's allegation regarding the defendants' alleged omission of required information from their claims, finding that the form the defendants submitted to the government did not create any obligation for the defendants to disclose the information about which the relator complained. The relator's claims regarding false certification were also dismissed, as the court found that the relator failed to demonstrate that any express certification was required and the relator failed to allege that the contract conditioned the government's payment upon a certification of compliance. The court also held the relator's viable claims could be maintained against all defendants, even though three of the defendants were not parties to the contract with the government, since the relator pled fraud with particularity among all three defendants and the complaint contained allegations that listed the defendants individually. Accordingly, the court granted the defendants' motion in part. The court also denied the relator's motion to file a sur-reply because the defendants' reply did not introduce any new arguments.

U.S. ex rel. Elms v. Accenture LLP, 2009 WL 2189795 (4th Cir. July 22, 2009) (unpublished)

The plaintiff brought a *qui tam* action against his former employer, a consulting firm, alleging that the defendant submitted false claims under a cost-plus-fixed fee government contract by billing the government for full rates paid to a subcontractor even though the defendant received a 50% rebate or more from the subcontractor. The relator also alleged a claim for FCA retaliation and a claim under the Age Discrimination in Employment Act ("ADEA"). The government declined to intervene. The United States District Court for the District of Maryland granted the defendant's motion to dismiss for failure to state a claim, holding that the plaintiff failed to allege fraud with particularity and failed to allege sufficient facts to state an FCA retaliation claim. The court also dismissed the plaintiff's ADEA claim as time barred. The plaintiff appealed the dismissal of his FCA claims to the Fourth Circuit.

The circuit court held that the plaintiff failed to plead specifics of the defendant's allegedly fraudulent rebate scheme or billing practices that resulted in the submission of allegedly false claims. The appeals court found that the plaintiff failed to allege details of the alleged rebate and provided no detail regarding his conclusory allegations of fraudulent billing practices. The court also held that the plaintiff failed to identify any of the defendant's employees who made the allegedly affirmative misrepresentations concerning its billing practice or receipt of rebates. Thus, the court held the plaintiff failed to plead fraud with particularity. While the plaintiff contended that the government and the defendant had possession of the evidence, the court held that this did not excuse the lack of particularity as the rule exists to prevent situations where the plaintiff learns all the facts through discovery. Thus the circuit court affirmed the district court's dismissal of the relator's substantive FCA claims. However, the court reversed the district court's ruling on the plaintiff's FCA retaliation claim, finding that the relator satisfied the notice pleading requirements with respect to this claim, because he alleged that he acted in furtherance of a *qui tam* suit, that the defendant knew of his actions, and that he was fired as a result of those actions. Accordingly, the court affirmed the district court's dismissal of the plaintiff's FCA claim for lack of particularity but reversed the dismissal of the FCA retaliation claim and remanded it to the district court.

U.S. ex rel. Wood v. Applied Research Assocs., Inc., 2009 WL 2143829 (2nd Cir. July 16, 2009) (unpublished)

The relator brought a *qui tam* action against various entities that were hired as consultants to assist the National Institute of Standards and Technology ("NIST") in its investigation into the collapse of the World Trade Center. The relator alleged that the defendants defrauded the government by presenting false claims for payment, by making false statements in support of those claims, and by avoiding their financial obligations to pay money to the Government. The relator's claims arose from her assertion that the defendants misled NIST and concealed the true cause of the destruction of the towers—namely, the use of directed energy weapons. The United States District Court for the Southern District of New York dismissed the complaint with prejudice pursuant to the False Claims Act's public disclosure bar and for failure to meet Federal Rule of Civil Procedure 9(b)'s heightened pleading requirements. The district court also denied the relator leave to further amend her complaint. The relator appealed the district court's rulings to the Second Circuit. The Second Circuit held that the relator's complaint failed to allege fraud with particularity and accordingly affirmed the district court's dismissal of the complaint. It also held the district court did not abuse its discretion in dismissing the complaint with prejudice, because the plaintiff failed to specify the additional particulars that she would provide. The court also denied two of the defendants' requests for attorney's fees.

Particularity Requirement

The Second Circuit addressed the Rule 9(b) issue first, noting the Supreme Court's recent decision in *Ashcroft v. Iqbal*, in which the Court held that legal conclusions—as opposed to facts – pled in a complaint are not to be accepted as true, and that a complaint that merely pleads the *possibility* of misconduct is insufficient to defeat a motion to dismiss. The court also determined that the relator was not entitled to a relaxed pleading standard, since she did not demonstrate that any of her allegations were based on information peculiarly within the defendants' knowledge. Applying these principles, the Second Circuit held that the district court properly dismissed the relator's claims. The circuit court held that the relator's reverse false claims allegation was properly dismissed because the relator failed to identify any financial obligation the defendants owed to the government and failed to specify any false statement or record used by the defendants to decrease any such obligation. The Second Circuit further held that relator's remaining allegations were properly dismissed because she failed to identify any allegedly false statement, false billing submission or example of an allegedly false claim by a particular defendant at a particular time. The court determined that the relator's allegations were only pled in general and conclusory terms, and alleged a scheme of fraud without alleging specific conduct and without attributing alleged conduct to specific defendants. Moreover, the court concluded that the relator's allegations that the defendants provided factually incorrect information regarding the collapse of the Twin Towers were insufficient to support an inference that the defendants knowingly violated the False Claims Act. Ultimately, the court held that the relator's allegations "are plainly insufficient under Rule 9(b)," and that her claims were properly dismissed. Since the Second Circuit was able to affirm the district court's dismissal of the relator's claims on Rule 9(b) grounds, it did not consider the public disclosure bar issue.

The Second Circuit also affirmed the district court's denial of the relator's motion to amend her complaint, finding that the district court properly acted within its discretion, since the relator only asserted that a second amended complaint would provide more detail and satisfy Rule 9(b), but still did not explain what additional information she would actually plead in an amended complaint.

Attorney's Fees

Following the dismissal of the relator's complaint, with prejudice, two of the defendants requested attorney's fees under the False Claims Act, and the district court denied their motion. The Second Circuit affirmed the district court's denial of those defendants' motions, finding that the district court did not abuse its discretion when it decided to warn, rather than sanction, the relator and her counsel.

See *U.S. ex rel. Hixson v. Health Mgmt. Sys. Inc.*, 2009 WL 3003258 (S.D. Iowa Sept. 21, 2009), at page 10.

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

U.S., ex rel. Liotine v. CDW Gov't, Inc., 2009 WL 3156704 (S.D. Ill., Sept. 29, 2009)

The relator sued his ex-employer, alleging FCA violations and retaliation. The case was unsealed, although the government stated that it had not finished its investigation of the relator's claims and had not determined whether it would undertake any future action against the defendant. The defendant moved to dismiss the claim regarding FCA violations for lack of particularity and lack of subject matter jurisdiction, contending that the public disclosure bar applied. The United States District Court for the Southern District of Illinois denied the defendant's motion to dismiss. The court held that the relator's claim was pled with particularity, as the complaint alleged that the defendant's sales representatives and sales managers took part in the fraud and named specific representatives and managers. The court also observed that the relator identified specific items by brand for which the defendant allegedly submitted false claims. The relator also provided examples of specific false claims and included details such as the specific items shipped, the recipient of the items, the time frame for shipment, and the issues of fraud associated with the claims. The court also observed that the relator had alleged that the defendant sent invoices that over-billed the government, had the wrong shipping rate, were for non-trade compliant products, and for products the defendant was not authorized to sell. The relator's allegations were based on personal knowledge as a witness to actual false claims. Thus, the court held the plaintiff pled fraud with particularity.

The defendant argued that a university publication had previously publicly disclosed the relator's allegations. The court held that since the document at issue was an internal publication of the university, it did not qualify as "news media" under the FCA. The court further concluded that the publication contained nothing that revealed the fraudulent scheme in the manner outlined in the relator's complaint. Thus, the court held that the university publication did not constitute a public disclosure that could deprive the court of subject matter jurisdiction over the relator's claims. The defendant also argued that a public disclosure resulted from its voluntary disclosure of inadvertent mistakes to the government. However, the court concluded that those disclosures did not occur during an administrative investigation or even during an informal inquiry. Thus, the court held that no public disclosure flowed from the defendant's voluntary disclosure to the government.

The court accordingly denied the defendant's motion.

U.S. ex rel. Yannacopoulos v. General Dynamics, 2009 WL 2147844 (N.D. Ill. July 16, 2009)

The relator brought a *qui tam* action against a defense industry contractor and an advanced technology company, alleging that the defendants submitted false claims in connection with a contract with the Defense Security Assistance Agency ("DSAA") to sell F-16 fighter aircraft to Greece. The United States District Court for the Northern District of Illinois first granted the defendant contractor's motion for summary judgment on all claims that alleged liability based on an implied certification theory and granted summary judgment on the claim that the defendants deleted a contract clause without telling the DSAA, in violation of the express certification that it would notify the DSAA of any changes in the contract when they took effect. The relator moved the court to reconsider, and the court agreed to reconsider the ruling on the express certification issue. The defendant contractor then moved to renew its motion for summary judgment on the express certification claim, which the court construed as a motion to reconsider. The defendants separately moved for summary judgment on all remaining claims against them and the court ultimately granted the motions for summary judgment and the defendant contractor's motion to reconsider. The court determined that the relator's allegations could not support an FCA violation because the defendants' contract was a fixed-price contract, and the defendants' alleged misconduct would not have affected the amount of funds the defendants received under the contract. In addition, the court determined that the defendants generally complied with the terms of the contract and that since the contract was executed by sophisticated parties, after years of negotiation, there was no need to re-write the terms of the agreement.

LITIGATION DEVELOPMENTS

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

See *U.S. v. Science Applications Int'l. Corp.*, 2009 WL 2929250 (D.D.C. Sept. 14, 2009), at page 29.

B. Calculating Damages and Civil Penalties

U.S. ex rel. Bahrani v. Conagra, Inc., et al., 2009 WL 2766805 (D. Colo. Aug. 28, 2009)

A relator filed a *qui tam* action against a packaged foods company and its subsidiaries, alleging that these defendants violated the "reverse false claims" provision of the False Claims Act by altering more than 10,000 meat and hide export certificates without obtaining necessary replacement certificates from the government, thereby depriving the government of replacement certificate fees. The United States District Court for the District of Colorado granted the defendants' motion for summary judgment, and the Tenth Circuit reversed that decision and the case was remanded, and bifurcated into two jury trials—one trial regarding meat export certificates and a second trial regarding hide export certificates. In the meat export certificate case, the jury found that the relator was not an original source of his allegations, and his claims were dismissed for lack of subject matter jurisdiction, pursuant to the False Claims Act's public disclosure bar. In the trial on hide export certificates, the relator alleged over 1,000 false claims, but the jury only found the defendants liable for knowingly making significant alterations to hide certificates on five occasions, amounting to $107.50 in actual damages to the government. After the district court trebled those damages and added civil penalties, the total award amounted to $27,822.50. Pursuant to the False Claims Act's fee-shifting provision, the relator moved for attorney's fees or costs—which amounted to approximately $3.5 million. The defendants opposed this motion, arguing that the relator was not the prevailing party and should not recover these costs since he could only prove $107.50 of actual damages to the government—far less than the approximately $50 million to $115 million in damages that his complaint asserted. The defendants also filed a cross-motion seeking recovery of their attorneys' fees and costs related to the claims regarding meat export certificates—costs that totaled $1.2 million. The defendants argued that those claims were frivolous, and thus qualified for fee-shifting in the defendants' favor under the False Claims Act.

The district court referred the motions to a magistrate judge for report and recommendation. The magistrate judge noted that although the relator achieved only a minimal amount of success, the False Claims Act's fee-shifting provision applies. However, the magistrate also noted that the language of the statute's fee-shifting provision only requires that the relator recover "reasonable" and "necessarily incurred" expenses. The magistrate then looked to the application of various other fee-shifting provisions and observed that one of the factors for determining the "reasonableness" of expenses is "the amount involved and the result obtained," and that, when a plaintiff's victory is small or *de minimis*, he/she may only be eligible to receive minimal fees, or, in some cases, no fees at all. While the relator prevailed on a legal issue of some significance by proving five occasions of significant knowing alteration of hide certificates, the magistrate found that the litigation spanned almost a decade and did not serve a significant public purpose, as it did not vindicate any civil rights or punish any pervasive illegal conduct. Thus, the magistrate judge concluded that "the only reasonable award to Relator is one-third of the amount he ultimately recovered [$27,822.50], or $9,274.16," and recommended an award in that amount to the district court.

The magistrate further recommended that the defendants' cross-motion for costs related to the meat export certificates be denied, since the jury's determination that the relator was not an original source of those allegations did not mean that the claims themselves were clearly frivolous, unreasonable, or groundless.

The district court adopted the magistrate's recommendation in its entirety.

See *U.S. ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, 2009 WL 3161828 (D. Colo. Sept. 30, 2009), at page 28

See *Kakeh v. United Planning Org., Inc.*, 2009 WL 2869995 (D.D.C. Sept. 9, 2009), at page 22.

See *U.S. ex rel. Lamberts v. Stokes*, 2009 WL 2147017 (W.D. Mich. July 15, 2009), at page 51.

See *U.S. ex rel. Longhi v Lithium Power Techs. Inc.*, 2009 WL 1959259 (5th Cir. July 9, 2009), at page 34.

C. Costs and Attorney's Fees

See *U.S. ex rel. Wood v. Applied Research Assocs.*, Inc., 2009 WL 2143829 (2nd Cir. July 16, 2009) (unpublished), at page 42.

See *U.S. ex rel. Longhi v Lithium Power Techs. Inc.*, 2009 WL 1959259 (5th Cir. July 9, 2009), at page 34.

D. FCA Seal

American Civil Liberties Union v. Holder, 2009 WL 2596641 (E.D. Va. Aug. 21, 2009)

The plaintiffs—three non-profit organizations—filed a lawsuit challenging the constitutionality of the False Claims Act's seal provisions, which require all relators to file their *qui tam* actions under seal and to only provide a copy of their sealed complaints to the Government, so that the Government can investigate the relator's allegations in secret. By statute, the government is given an initial 60-day period in which to investigate relators' allegations, but that period can be extended by court order. The plaintiffs asserted that the FCA's seal provisions are unconstitutional, arguing among other things that the provisions: (1) unconstitutionally "deny access to information of paramount public interest," and thus violate the public's First Amendment right of access to information; (2) are "content-based" restrictions that gag relators from speaking about the cases they've filed, in violation of those relators' First Amendment rights; and (3) "infringe[] on a court's inherent authority to decide on a case-by-case basis whether a particular FCA action should be hidden from public scrutiny and thus violate[] the separation of powers." The defendants, the United States Attorney General and the Clerk of Court for the Eastern District of Virginia, each sued in their official capacities, moved to dismiss the plaintiffs' complaint for lack of subject-matter jurisdiction and for failure to state a claim. Taxpayers Against Fraud Education Fund filed an *amicus curiae* brief in support of the defendants.

The United States District Court for the Eastern District of Virginia allowed the plaintiffs to bring a facial challenge to the FCA's seal provision, since the plaintiffs argued that the seal provisions are unconstitutional in every application, because the 60-day mandatory seal is imposed in every FCA case, without exception. However, the court held that the FCA is not an access statute because its seal provisions do not regulate access to information law enforcement possesses. Instead, the seal provisions temporarily limit public access to a complaint, which is simply a court pleading. The court noted that sealed *qui tam* complaints merely set forth the relator's allegations and relief sought, inform the court of the grounds for jurisdiction, notify the government of the fraud allegations, and initiate the government's inquiry into those allegations. Although these are important procedural steps under the FCA, they do not adjudicate substantive rights. The court also observed sealed *qui tam* complaints do not serve as substitutes for trial, since the adversarial litigation process commences only after the unsealing of the complaint and service on the defendant. In addition, the court further found that public access to such complaints could tip off targets of government investigations and lead to the loss of evidence. As a result of these findings, the court rejected the plaintiffs' right of access argument and held that no First Amendment right of access to sealed *qui tam* complaints exists. The court also held that the common law presumption of access does not warrant the unsealing of *qui tam* complaints because the FCA's seal provisions are narrowly tailored to the compelling governmental interest of protecting ongoing law enforcement operations.

Moreover, citing TAFEF's *amicus* brief, the court held that the plaintiffs lacked standing to even raise their arguments that the FCA's seal provisions impermissibly restricted relators' free speech, since none of the plaintiffs could allege a close relationship with relators, none could demonstrate any participation in any specific FCA case, and none could identify any specific relator who contended that the seal provisions violated his/her free speech rights. The plaintiffs claimed derivative standing based upon their alleged inability to communicate with relators who had been allegedly gagged by the FCA's seal provisions. The court rejected this argument, though, finding that the FCA's seal provisions are not a content-based restriction on speech because the seal merely prevents the disclosure of the *existence* of *qui tam* suit, not the facts upon which the allegations are based. In addition, the court held that although a relator who disclosed the existence of a sealed *qui tam* action could face the dismissal of his/her case and the attendant loss of a right to share in the government's recovery, the FCA does not contain a civil or criminal sanction for relators who disclose the *factual allegations* of fraud, and therefore, the FCA's seal provisions are not a prior restraint on speech.

The plaintiffs also argued that the seal provisions violate separation of powers because they deprive the federal courts of the ability to make sealing decisions on a case-by-case basis. The court also rejected that argument, finding that the FCA merely requires that *qui tam* complaints and their corresponding dockets be placed under seal, which is nothing more than a ministerial act; the seal provisions do not require a judge to perform a non-judicial act or to sign any order without deliberating. In addition, the court found that the "good cause" standard for extending the seal period builds case-by-case judicial review into every *qui tam* case. Thus, the court granted the defendants' motion to dismiss.

E. *Pro Se* Relators

See *U.S. ex rel. Hixson v. Health Mgmt. Sys. Inc.*, 2009 WL 3003258 (S.D. Iowa Sept. 21, 2009), at page 10.

F. *Res Judicata* and Collateral Estoppel

U.S. v. Edelstein, 2009 WL 2982884 (E.D. Ky. Sept. 16, 2009)

The government sued the defendants, a pharmacy, its owner, the owner's wife, and an employee, alleging conspiracy to obtain payment for false or fraudulent Medicaid claims and other common law claims. In particular, the government alleged that the defendants knowingly presented false reimbursement claims for sample drugs to Medicaid and the state's Passport health plan, based on certifications of compliance with state and federal laws. The employee defendant moved for summary judgment, arguing that since he was not a Medicaid provider, he was unable to receive reimbursement through Medicaid and was not bound by the provider agreement. The United States District Court for Eastern District of Kentucky denied this motion and held that the FCA broadly prohibited the submission of false claims and associated false statements not only by any person—not merely by Medicaid providers. The government moved for summary judgment against all four of the defendants, arguing that the pharmacy owner and employee were estopped from denying liability under the FCA action because they had pled guilty in an earlier criminal action for violating the Prescription Drug Marketing Act. The court denied the government's motion against the pharmacy, pharmacy owner and employee, since none of the essential elements of the prior criminal action involved fraud or false statements. Thus, those defendants were not estopped from denying the essential elements of the FCA claims against them. The court also denied the government's motion for summary judgment against the owner's wife, as the government did not provide sufficient evidence in support of its assertion that she physically assisted in selling the prescription drug samples.

U.S. ex rel. Lamberts v. Stokes, 2009 WL 2147017 (W.D. Mich. July 15, 2009)

The relator brought a *qui tam* action against a medical practitioner and his professional corporation, alleging submission of false claims to Medicare and common law claims of fraud and unjust enrichment. The government intervened in part and filed an amended complaint-in-intervention. The government then moved for partial summary judgment on all counts of its complaint, arguing that the defendant practitioner's prior conviction for multiple counts of health care fraud estopped the defendants from denying liability under the FCA and on the common

law claims. The government requested statutory penalties and treble damages. The United States District Court for the Western District of Michigan held that the government established all four elements of issue preclusion, since (1) the prior action involved the same fraudulent scheme of up-coding claims and billing for services not performed; (2) the sentencing hearing decided the extent of loss to Medicare due to the scheme and the amount of restitution the defendant practitioner owed the victims; (3) the final judgment included the restitution order; and (4) the defendant practitioner had the opportunity in the prior action to retain a statistician to present expert testimony and to cross-examine the government's expert. Thus, the court held, the defendant practitioner had a full and fair opportunity to litigate the issue of restitution during the sentencing hearing. The defendants argued that estoppel applied only to the fraudulent billings that were part of the counts for which the practitioner was convicted, but the court refused to limit estoppel in this way, since the jury in the prior case had been instructed that the government had to prove the defendant practitioner devised a scheme to commit health care fraud, and the evidence showed an ongoing fraudulent scheme. The court also determined that the imposition of the maximum statutory penalty for each of those fraudulent billings was reasonable, due to the large amount of false claims. Accordingly, the court granted the government's motion for partial summary judgment, awarded treble damages for all the false claims and the maximum statutory penalty for each of the seventeen billings.

Judgments & Settlements

JULY 1–SEPTEMBER 30, 2009

Louisiana State University Health Science Center: (W.D. La. July 1, 2009)

Louisiana State University Health Science Center in Shreveport (LSUHSC-S) agreed to pay $706,678 to settle allegations that it defrauded the federal Medicare program by billing for medical services that were never provided. William Overdyke, a former teaching physician in the LSU orthopedic department, and Susan Belgard Hodnett, a registered nurse, filed a *qui tam* suit under the False Claims Act, alleging that between 1995 and 2005, LSUHSC-S routinely submitted claims for payment to Medicare Part B on behalf of teaching physicians who claimed to have assisted orthopedic residents during surgery when in fact they were not present for the procedures. A subsequent federal investigation found the allegations to be meritorious, and the United States intervened in suit. The settlement included a relators' share of $141,335 (about 20%) to Overdyke and Hodnett. Patrick Jackson represented the relators. Assistant United States Attorney Alec G. Alexander and Investigator Chris Knighton (Western District of Louisiana) and Special Agent Barbara Alleman (HHS OIG) jointly investigated and prosecuted the case.

Yale-New Haven Hospital: (D. Conn. July 1, 2009)

Yale-New Haven Hospital agreed to pay the federal Government $885,953 to resolve allegations that it billed the Medicare program for medically unnecessary inpatient hospital admissions in relation to Gamma Knife stereotatic radiosurgery procedures. The hospital allegedly billed Medicare for inpatient admissions and overnight stays when these procedures could have been performed safely on an outpatient basis. In April of 2006, the hospital received a letter from Qualidigm, the Medicare Quality Improvement Organization, notifying the hospital that there was a lack of medical necessity to support one patient's inpatient admission for a Gamma Knife surgical procedure. The hospital then performed an internal review and voluntarily notified HHS-OIG of the improper billing and offered to refund Medicare for improper inpatient admissions between April 2002 and April 2006. The hospital subsequently refunded $2,356,702 to Medicare. A subsequent government investigation found that the hospital had also improperly charged Medicare for the same procedures between April 1, 1998 and March 31, 2002. The most recent settlement covers those dates. The hospital cooperated with the investigation and did not admit liability in the settlement. HHS OIG investigated the matter. Assistant United States Attorney Richard M. Molot along with Auditor Kevin A. Saunders prosecuted the case.

Beazer Homes USA Inc.: (W.D.N.C. July 1, 2009)

Beazer Homes USA Inc. and with Beazer Mortgage Corp. (collectively Beazer) resolved allegations that they conducted fraudulent mortgage activities in relation to federally insured mortgages. Beazer agreed to pay the United States $5 million and to pay up to $48 million to victimized private homeowners. Beazer Mortgage Corp. made Federal Housing Administration (FHA) insured mortgage loans for the purchase of homes built by Beazer Homes USA Inc. and is alleged to have fraudulently and improperly: 1) required purchasers to pay "interest discount points" at closing, but then kept the cash and failed to reduce interest rates; 2) provided cash "gifts" to home purchasers through certain charities, so purchasers could come up with minimum required down payments, with assurances that the "gifts" would not need to be repaid, and then increased home purchase prices to offset the amount of the gifts; 3) obscured which of its branches made defaulting mortgage loans to avoid FHA detection of excessive default rates; and 4) ignored "stated income" requirements in making loans to unqualified purchasers. Through these means, Beazer induced unqualified home buyers to enter into improperly inflated FHA-insured mortgages, and after some of the resulting mortgages defaulted, the FHA was required to pay the inflated claims, as well as the cost of handling defaulted properties. The settlement was reached in conjunction with a Deferred Prosecution Agreement (DPA) between the companies and the U.S. Attorney's Office for the Western District of North Carolina.

St. John Health System: (E.D. Mich. July 8, 2009)

St. John Health System agreed to pay Michigan and the United States $822,000 to resolve allegations that it defrauded Medicaid. According to the complaint, between 2002 and 2008, St. John submitted claims to the Medicaid program for dental or oral/maxillofacial care on behalf of three health care professionals, when in fact resident dentists were performing those services without the attending professional present during key procedures. Two former employees, Ms. Hoepner and Dr. Pink, filed the *qui tam* suit. They were awarded $135,630 as their relators' share, and their attorneys, Monica P. Navarro, Louis C. Szura and Maro E. Bush of Frank, Haron, Weiner and Navarro (Troy, Michigan), received $54,910 from the defendants for attorneys' fees and costs. Assistant U.S. Attorney Joan E. Hartman, (E.D. Mich.) and Michigan Assistant Attorney General Elizabeth Valentine, Health Fraud Division, represented the Government.

Joby George: (D. Conn. July 10, 2009)

New Jersey pharmacist Joby George agreed to pay the U.S. $344,805 to resolve civil allegations that he knowingly submitted fraudulent claims to Medicaid and Medicare. George is alleged to have submitted claims to Medicaid for prescription drugs that he never dispensed and to have submitted claims for brand name drugs to Medicaid when he actually dispensed cheaper generic drugs. George also allegedly improperly submitted claims to Medicare for certain prescription narcotics that he dispensed to an individual while accepting cash payments from the same individual for additional quantities of those drugs. George also pleaded guilty to criminal charges stemming from the same actions, and faces up to 10 years imprisonment and a fine of up to

$250,000. In addition, he agreed to surrender all of his pharmacist licenses. The FBI, FDA, Drug Enforcement Administration, and HHS jointly investigated the case. Assistant United States Attorneys William M. Brown, Jr. and Richard M. Molot, along with Auditor Kevin A. Saunders prosecuted the case.

Endoscopic Technologies Inc: (S.D. Tex. July 14, 2009)

Medical device manufacturer Endoscopic Technologies Inc. (Estech) agreed to pay $1.4 million to the United States to resolve allegations of improper marketing of its surgical ablation devices. Estech allegedly promoted its devices to treat atrial fibrillation—a use for which the FDA has not given approval. In addition, Estech allegedly promoted expensive heart surgeries using the company's devices when less invasive alternatives were appropriate and available, advised hospitals to up-code surgical procedures using the company's devices to inflate Medicare reimbursements, and paid kickbacks to healthcare providers that used Estech's devices. The settlement included a share of $200,000 for the relator, identified as Jane Doe. The settlement was the result of a coordinated effort by the U.S. Attorney's Office for the Southern District of Texas, DOJ Civil Division, HHS OIG, and the FDA Office of Chief Counsel.

Dr. Gabriel DeCandido: (M.D. Fla. July 17, 2009)

Florida physician Dr. Gabriel DeCandido agreed to pay the federal Government $1.7 million to settle allegations that he defrauded Medicare. Dr. DeCandido also entered into a Corporate Integrity Agreement. The settlement arises from a *qui tam* suit filed by relator Michael Flanery, who was received a relator's share of $306,000 (18%). Dr. DeCandido allegedly billed Medicare for services he did not provide and for higher levels of service than he actually rendered to patients. TAF members Kevin Darken and Barry A. Cohen, of Cohen, Foster & Romine, represented the relator.

The State of New York and New York City (Speech Therapy): July 17, 2009

The State of New York and New York City entered into $540 million settlement to resolve allegations that they knowingly submitted, or caused to be submitted, false claims for reimbursement for school-based health care services, primarily speech therapy and transportation, provided to Medicaid-eligible children. New York State will pay its $440 million share over time, partly in cash and partly by releasing outstanding claims to payment. New York State also entered into a three-year Program Compliance Agreement with CMS to ensure that services are properly delivered and billed in the future. New York City will pay $100 million of the settlement. The settlement resolves allegations that between 1990 and 2001, the state of New York knowingly failed to provide proper guidance to the districts and counties outlining the requirements for a service to be covered by the Medicaid program, failed to monitor the districts and counties for compliance as required by the program, and passed on claims to the federal Government for services it knew were not covered or properly documented. As a result, the United States paid a larger share of New York's Medicaid costs. Most of the fraudulent claims arose from the state's speech therapy program. HHS-OIG found that, contrary to federal Medicaid rules, many speech services were not provided by or under the direction of a speech pathologist who was either certified by the American Speech-Language-Hearing Association (ASHA) or who had equivalent education and work experience. The agency also found that there was insufficient documentation to verify that the transportation services paid for by Medicaid were actually provided by New York's programs. The settlement arises from a *qui tam* suit filed in 1998. The relator, a school-based speech therapist, was awarded a relator's share of $10 million. TAF member David Koeningsberg, of Menz, Bonner & Komar, represented the relator. Judith Rabinowitz, Assistant Director of the U.S. Department of Justice's Civil Division Commercial Litigation Branch (Fraud Section) and Fraud Section Trial Attorneys David T. Cohen and Carol L. Wallack handled the case for the Government. HHS-OIG conducted the investigation.

Baxter Healthcare Corporation: July 27, 2009 (Illinois FCA)

Prescription drug manufacturer Baxter Healthcare Corporation agreed to pay Illinois $6.8 million to resolve allegations that it inflated the Average Wholesale Prices (AWP) in setting the rates for Medicaid reimbursements. As a result of Baxter's alleged fraud, the state of Illinois overpaid for drugs prescribed to Medicaid patients. The settlement covers more than two dozen Baxter drugs.

Boston Clinical: July 27, 2009

Boston Clinical Laboratories, Inc. ("Boston Clinical") agreed to settle Medicare fraud allegations by paying $615,000 to the Massachusetts Medicaid program and $14,000 to the federal Medicaid program, and by agreeing to enter a program to insure compliance with state and federal Medicare regulations. The settlement stems from allegations that the lab received reimbursements for urine drug screens that were improperly ordered. Boston Clinical did not admit or deny the allegations. The case was investigated by Joseph Shea and Timothy Johnson of Massachusetts's Medicaid Fraud Division and was prosecuted by Assistant Attorney General Toby Unger, also of the Medicaid Fraud Division.

Tulare Healthcare: (C.D. Cal. July 27, 2009)

Tulare Local Healthcare District, Tulare District Healthcare System and Tulare District Hospital ("Tulare") agreed to pay more than $2.4 million to settle allegations that they violated the Stark Law, the Anti-Kickback Statute, and the FCA. The settlement stems from a *qui tam* suit that Mary Lucy Reimche, Tulare's former CFO, filed in 2006. According to Reimche's complaint, Tulare Healthcare provided prohibited remuneration to physicians who referred Medicare patients to Tulare Healthcare. The doctors who allegedly received prohibited remuneration from 2001 through 2007 were given rental arrangements at below-market rates, were able to purchase commercial real estate lots at below market value, and had debts forgiven. TAF member Michael Hirst represented the relator, who received a $500,000 relator's share. HHS-OIG investigated the case.

Computer Assets Inc.: (D.N.M. July 30, 2009)

Computer Assets, Inc. and its principals, Abraham and Damon Salazar, agreed to pay $350,000 and to surrender up to $35 million in pending E-Rate applications in order to settle allegations that the company violated the False Claims Act in connection with the Federal Communications Commission's E-Rate program. Former employee John Lyons brought a *qui tam* suit alleging that Computer Assets engaged in non-competitive billing practices, billed for installing excess and unnecessary networking cable, and in some instances billed twice for the same work. The settlement awarded Mr. Lyons a relator's share of $77,000 (22%). DOJ's Civil Division, in coordination with the FCC's Office of the Inspector General, investigated the case.

Quest Diagnostics: Aug. 6, 2009

Quest Diagnostics and its former subsidiary Nichols Institute Diagnostics (NID) entered into a $12.4 million settlement with the National Association of Medicaid Fraud Control Units. The settlement is a follow-up to the April 2009 resolution of federal allegations arising from a *qui tam* suit regarding faulty diagnostic tests that NID manufactured, marketed and sold to laboratories during 2000-2006. The test kits, used to determine whether patients suffering from end stage renal disease also had overactive parathyroid glands, frequently resulted in false positive results. This portion of the recovery correlates to the amount that state Medicaid programs paid for all of the allegedly inaccurate NID tests. The National Association of Medicaid Fraud Control Units conducted the settlement negotiations on behalf of the participating states, with representatives of the New York, New Jersey, California, and Oregon Medicaid Fraud Control Units leading the effort.

William and Marie King; King & Associates; SouthernCare, Inc.: (N.D. Ala. Aug. 7, 2009)

William "Bill" King Jr., Marie King, King & Associates, Inc., and SouthernCare, Inc. agreed to pay approximately $1.4 million to resolve allegations that they defrauded Medicare. SouthernCare, d/b/a King & Associates, provided consulting services to skilled nursing facilities in Alabama and in other southeastern states. Medicare guidelines state that only payments made to physicians for their services on utilization review ("UR") committees are allowable as cost claims for a skilled nursing facility. However, according to the complaint, the Kings and their respective companies caused certain of their skilled nursing facility clients to present claims which overstated the amount of work performed by physicians. Those false claims increased the Medicare reimbursement to these clients, resulting in losses of over $740,000 to Medicare. The Kings also face criminal prosecution. A former accountant for a company that prepared cost reports for the skilled nursing facilities that had been clients of SouthernCare filed the *qui tam* suit and was awarded 19% of the recovery. In addition, the Kings and their companies agreed to pay attorney's fees and costs totaling $36,273.50. TAF members at the firm of Hare, Wynn, Newell & Newton, LLP represented the relator. The HHS Office of the Inspector General and the FBI investigated the case. Assistant United States Attorney Lloyd Peeples represented the United States in both the civil and criminal matters.

Dynamics Research Corporation: (D. Mass. Aug. 13, 2009)

Dynamics Research Corporation (DRC), an Andover, MA defense contractor, agreed to pay the United States more than $15 million plus interest to settle allegations that two of its former executives engaged in a fraudulent kickback scheme in connection with two technical services contracts with the Air Force. The contracts required DRC's employees to certify that neither they nor their spouses had financial interests that would interfere with their ability to deliver unbiased advice while performing the contracts. According to the settlement, Paul Arguin and Victor Garber, two former vice presidents in charge of the project, steered Air Force contracts for computer equipment and services to companies owned by themselves, Mr. Arguin's wife and others in exchange for kickbacks and inflated contract prices that produced windfall profits for them between 1997 and 2000. The United States filed a civil suit seeking damages and penalties under the Anti-Kickback Act, the False Claims Act, and for breach of contract. Mr. Arguin and Mr. Garber pleaded guilty to conspiring to defraud the government. Both received prison sentences and were ordered to pay restitution. The DOJ Civil Division, along with the Defense Criminal Investigative Service, the Air Force Office of Special Investigations, the General Services Administration's Office of Inspector General, and the Defense Contract Audit Agency conducted the investigation.

Noel R. Botsch: (Missouri Aug. 13, 2009)

Noel R. Botsch, owner of Special Design Health Care, a pharmacy headquartered in Cape Girardeau, MO, agreed to pay more than $3.9 million to Missouri, Illinois, and the federal Government to resolve allegations of Medicaid fraud. Between 2002 and 2005, Botsch allegedly double-billed Medicaid and submitted false Medicaid claims for payment. The settlement is the result of a joint state and federal investigation involving Missouri's Medicaid Fraud Control Unit and the federal Office of the Inspector General.

Boeing Co.: (W.D. Tex. Aug. 13, 2009)

Boeing agreed to pay the United States $25 million to resolve allegations that the company performed defective work on the entire KC-10 Extender fleet, which is a mainstay of the Air Force's aerial refueling fleet. Boeing agreed to pay $18.4 in cash and to perform $6.6 million worth of repair work. Former Boeing employees Anthony Rico and Fernando de la Garza filed the *qui tam* suit, which alleged that Boeing defectively installed insulation blanket kits in KC-10 aircraft, and that it overcharged the Government for the kits. During the subsequent investigation, government auditors found that Boeing had inflated estimates of the number of hours needed to perform the blanket kit work and had charged an excessive hourly rate for the work. The settlement provided relator's share of $2,625,000 to Rico and de la Garza. Assistant U.S. Attorney Harold Brown Jr. negotiated the settlement for the Government. TAF members Glenn Grossenbacher, Gary Groseenbacher, John Clark, Rosemarie Alvarado, and Leo Alvarado represented the relator.

East Coast Fruit Co.: (S.D. Ga. Aug. 18, 2009)

East Coast Fruit Co., through its successor company R & J 123 Inc. of Georgia, agreed to pay the United States $685,000 to settle allegations that it overcharged the Department of Defense pursuant to its contract to supply fruit and vegetables to DOD facilities in South Carolina. The Government alleged that East Coast Fruit submitted inflated invoices to the DOD between June and December of 2007, in violation of the False Claims Act. Special Agent Clifford E. Currington of the Defense Criminal Investigative Service, Senior Auditor Keith Melville of the Defense Contract Audit Agency investigated the matter. Assistant United States Attorneys Shannon Heath Statkus and Kenneth D. Crowder represented the Government.

Covenant Medical Center: (N.D. Iowa Aug. 25, 2009)

Covenant Medical Center, in Waterloo, Iowa, agreed to pay the United States $4.5 million to resolve allegations that it submitted false claims to Medicare by having financial relationships with five physicians in violation of the Stark Law. Covenant was allegedly giving physicians who referred patients to Covenant compensation far above market value. As a result, those doctors were among the highest paid hospital-employed physicians in the country. The Justice Department's Civil Division and the United States Attorney's Office for the Northern District of Iowa jointly handled this case. The Office of the Inspector General for the Department of Health and Human Services provided investigative assistance.

Advanced Spine and Pain Management Center: (D. Nev. Sept. 2, 2009)

Las Vegas pain management center Advanced Spine and Pain Management Center, along with five of its health care professionals, agreed to pay the United States $167,000 to resolve allegations that they defrauded Medicare. The suit alleged that between 2000 and 2009, Advanced Spine submitted Medicare claims for Vertebral Axial Decompression (VAX-D), even though that procedure is not covered by Medicare and has been characterized by the Department of Health and Human Services as "not medically reasonable and necessary under any circumstances." The defendants allegedly used codes for other services covered by Medicare in order to disguise the fact that they were providing non-covered services. HHS-OIG investigated the case. Assistant United States Attorney Roger Wenthe handled the case on behalf of the U.S. Attorney's Office.

Pfizer: Sept. 2, 2009

Pfizer Inc. and its subsidiary Pharmacia & Upjohn Company Inc. (Pfizer) agreed to pay state and federal governments $2.3 billion—the largest health care fraud settlement in history. Of the total settlement, $1.3 billion was a criminal fine and $1 billion was a civil settlement under the False Claims Act. The FCA settlement provided $668,514,830 for the federal Government and $331,485,170 for the states. Pharmacia & Upjohn Company Inc. pleaded guilty to a felony violation of the Food, Drug and Cosmetic Act for misbranding Bextra, an anti-inflammatory drug, with the intent to defraud or mislead. The settlement arises from a series of whistleblower suits alleging that Pfizer illegally promoted a number of prescription drugs. The company marketed these drugs for "off-label" uses which had not been approved by the FDA. As a result, Pfizer caused false claims to be submitted to government health care programs for uses that were not medically accepted indications and were therefore not covered by those programs. The settlement also resolves allegations that Pfizer paid kickbacks to health care providers to induce them to prescribe the company's drugs.

The U.S. Attorney's offices for the District of Massachusetts, the Eastern District of Pennsylvania, and the Eastern District of Kentucky, and the Civil Division of the Department of Justice handled these cases. The U.S. Attorney's Office for the District of Massachusetts led the criminal investigation regarding Bextra. The investigation was conducted by the Office of Inspector General for the Department of Health and Human Services, the FBI, the Defense Criminal Investigative Service, the Office of Criminal Investigations for the Food and Drug Administration, the Veterans' Administration's Office of Criminal Investigations, the Office of the Inspector General for the Office of Personnel Management, the Office of the Inspector General for the United States Postal Service, the National Association of Medicaid Fraud Control Units, and the offices of various state Attorneys General.

The settlement provided $102 million for the six relators and their attorneys. Relator John Kopchinski brought off-label marketing allegations regarding Bextra (Bextra-related allegations accounted for $1.8 billion of the total); TAF member Erika Kelton (Phillips and Cohen) represented Mr. Kopchinski, and his relator's share was $51.5 million. Relator Dr. Stefan Kruszewski brought allegations regarding the off-label marketing of Geodon; he was represented by TAF members Brian Kenney and Tavy Deming (Kenney, Egan McCafferty & Young) along with W. Scott Simmer and Thomas J. Poulin (Blank Rome), and his relator's share was $29 million. Relator Ronald Rainero brought off-label allegations regarding Zyvox, was represented by Stephen A. Sheller, James J. Pepper, and Brian J. McCormick (Sheller P.C.), and received a relator's share of $9.3 million. Relator Glenn DeMott brought off-label allegations regarding Geodon, Lyrica, Relpax, Celebrex, Bextra, and Depo-provera and got a $7.4 million relator's share. Relator Dana Spencer, who was represented by William Hoyle, received a $2.7 million relator's share. Relator Blair Collins, represented by Boston attorneys Suzanne E. Durrell, Robert M. Thomas, Jr. and Rory Delaney, received a $2.35 million relator's share for bringing kickback allegations regarding Lipitor, Norvasc, Viagra, Zithromax, and Zyrtec. Multiple state FCA cases against Pfizer are still pending.

Dey, L.P.: (Utah Sept. 18, 2009)

Drug manufacturer Dey, L.P. agreed to pay $1 million to resolve allegations that it overcharged Utah's Medicaid program. Dey allegedly manipulated the drug prices that Medicaid uses to determine reimbursement amounts to pharmacies and then marketed the difference in price between the reported prices and the actual prices as a means of convincing pharmacies that its products were more profitable than competing products. Dey did not admit any wrongdoing in the settlement.

Pinkerton Government Services, Inc.: (E.D. La. Sept. 18, 2009)

Pinkerton Government Services, Inc. (PGS) (a subsidiary of Securitas Security Services, USA, Inc.) agreed to pay the United States $1,016,500 to resolve allegations that it improperly billed self-insurance benefits costs under its contract to provide security services at Department of Energy installations. Under its contract, PGS was reimbursed for all costs, including costs of providing health insurance to its employees, by the Department of Energy. The Government alleged that, from April 2002 through the end of its contract, PGS improperly billed for costs of health insurance under its parent company's self-insurance program without first obtaining approval for these costs in accordance with its contract. The Government alleged that as a result of PGS's failure to seek approval for its self-insurance healthcare costs, the United States was overcharged. The two relators who initiated the suit received a relator's share of $172,805.

Kyphoplasty: Sept. 29, 2009

Six hospitals in Indiana and Alabama have agreed to pay the United States more than $8 million to settle allegations that they overcharged Medicare each time they performed kyphoplasty, a minimally-invasive procedure used to treat certain spinal fractures that often are due to osteoporosis. The procedure can be performed safely as an out-patient surgery, but the hospitals performed the procedure on an in-patient basis in order to increase their Medicare billings. The settlements with these Indiana and Alabama facilities follow the government's June 2009 settlement with three Minnesota hospitals for alleged kyphoplasty-related Medicare fraud claims, as well as the government's May 2008 settlement with Medtronic Spine LLC, corporate successor to Kyphon Inc. Medtronic Spine paid $75 million to settle allegations that it defrauded Medicare by counseling hospital providers to perform kyphoplasty procedures as an in-patient procedure. Craig Patrick, a former reimbursement manager for Kyphon, and Charles Bates, a former regional sales manager, filed the original *qui tam* suit in 2008. The settlements awarded them a relator's share of $1.4 million. TAF members, Tim McCormack and Matthew Smith of Phillips and Cohen represented the relators. The Indiana hospitals include St. Francis Hospital in Beech Grove, Deaconess Hospital in Evansville and St. John's Hospital System in Anderson. The hospitals have agreed to pay the United States $3,158,629, $2,110,034 and $826,256, respectively. The Alabama hospitals include St. Vincent's East Hospital and St. Vincent's Birmingham Hospital, both located in Birmingham, and Providence Hospital, located in Mobile. These facilities have agreed to pay the United States $1,459,395, $422,748 and $381,713, respectively. The settlements were a result of a coordinated effort between the Commercial Litigation Branch of the DOJ Civil Division, the U.S. Attorney's Office for the Western District of New York, and the Department of Health and Human Services' Office of Inspector General and Office of Counsel to the Inspector General.