FALSE CLAIMS ACT UPDATE

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Margaret L. Hutchinson, Esquire
Assistant United States Attorney
Eastern District of Pennsylvania
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106
Phone: (215) 861-8282
Fax: (215) 861-8609
E-Mail: margaret.hutchinson@usdoj.gov

David M. Laigaie, Esquire
ECKERT SEAMANS CHERIN & MELLOTT, LLC
Two Liberty Place
50 South 16th Street, 22nd Floor
Philadelphia, PA 19102
Phone: (215) 851-8386
Fax: (215) 851-8383
E-Mail: dlaigaie@eckertseamans.com

Eric W. Sitarchuk, Esquire
MORGAN, LEWIS & BOCKIUS
1701 Market Street
Philadelphia, PA 19103-2921
Phone: (215) 963-5840
Fax: (877) 432-9652
E-Mail: esitarchuk@morganlewis.com

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<u>United States ex rel. Raggio v. Jacintoport Int'l, LLC,</u>
No. 10-1908 (D.D.C. Dec. 7, 2015)

The Government intervened in this *qui tam* and filed a complaint claiming that Defendant Jacintoport International, LLC ("Jacintoport") and its affiliate, Defendant Seaboard Marine, LTD, knowingly submitted false claims for payment to the United States Agency for International Development ("USAID"). The Government alleged that Defendants' charges for stevedoring services exceeded the maximum rate permitted by a contract between Jacintoport and USAID.

In prior rulings in this case, the Court held that the Government had been overcharged and that the Defendant may be entitled to the benefit of the False Claims Act's (FCA) reduced damages provision.

The parties' opposing motions for summary judgment presented the following issues: the requisite scienter needed to be in violation of the FCA; the possibility of a Government waiver of its pricing rules; the sufficiency of the Government's calculation of damages; and whether the Defendants can be held liable for civil penalties, breach of contract and/or unjust enrichment. This decision addresses these issues.

As to scienter, the FCA imposes liability on one who has actual knowledge that their claims were false, acted in deliberate ignorance of the truth or falsity of the information, or acted in reckless disregard of the truth or falsity of the information. 31 U.S.C. § 3729 (b)(1)(A). The Court recognized that scienter is a fact-intensive inquiry and that the FCA is not designed to punish honest mistakes but is triggered when the Defendant deliberately avoids learning the truth or engages in aggravated gross negligence. In this case, it was undisputed that the contract set maximum rates and that, for a period of time under the contract, the Defendant charged less than the maximum rates. It is also undisputed that during one specific period of time, the

Defendants overcharged the Government by in excess of $500,000. Defendants argued that due to the departure of a key employee who was solely responsible for the compliance with the rate rules, the company mistakenly applied a wrong rate and submitted the overcharges. In response, the Government argued that the Defendant had numerous opportunities to consult the contract and their failure to do so imposes liability. The Court held that "it is clear that Defendants should have familiarized themselves with the contents of the Contract following the departure [of the key employee], and that such familiarity would have revealed the existence of [the maximum rates] contained therein. However, given the disputed facts presented by the Government and by Defendants, the Court cannot conclude as a matter of law that Defendants acted with reckless disregard or deliberate ignorance of the truth of their false claims." This question must go to a jury.

The Defendants next argued that their disclosure to the Government that they intended to increase their rates essentially constituted a modification to the contract. While it is clear that sufficient disclosure to the Government that Defendant is operating in a manner that modifies or transgresses the contract terms may be evidence that the Defendant lacked scienter to submit a false claim, in this case the Defendants failed to create a genuine issue of material fact as to their asserted disclosure. The Defendants also argued that the Government had an affirmative duty to monitor the contract, which the Court rejected, finding that "Quite to the contrary, the government is entitled to assume contractors will comply with their duty to bill the government in conformity with contractual rates and that contractors will not exceed said rates."

The Defendants next argued that the Government had waived its right to enforce the contract rate. The Court held that "Waiver of the government's right to sue under the FCA requires clear and intentional relinquishment or abandonment by the Attorney General of the right to sue." The information provided to the Government by the Defendant was not sufficient to invoke the government knowledge defense. Therefore, there was no evidence of a "clear and intentional relinquishment" by the Government of its right to sue.

The Court then addressed the sufficiency of the evidence presented by the Government to support the damages claimed. The Court found that "The ascertainment of damages is not an exact science. Hence it is not essential that the amount of damages be ascertained with absolute exactness or mathematical precision." Here the overpayment amount presented by the Government was sufficiently precise to grant the Government summary judgment for breach of contract and the issue of the multiplier under the FCA will go forward.

The Court also ordered that, even if the Defendants are entitled to reduced damages for reporting the overcharging, they still are subject to penalties if liable under the FCA.

<u>Rigsby, et al v. State Farm Fire & Cas. Co.,</u>
794 F.3d 457 (5th Cir., 2015), *cert. granted*, 2016 WL 100332 (U.S., Jan. 11, 2016)

On January 11, 2016, the Supreme Court invited the views of the Solicitor General on the following questions:

1. What standard governs the decision whether to dismiss a relator's claim for violation of the FCA's seal requirement, 31 U.S.C. § 3730(b)(2)?

2. Whether and under what standard a corporation or other organization may be deemed to have "knowingly" presented a false claim, or used or made a false record, in violation of section 3729(a) of the FCA based on the purported collective knowledge or imputed ill intent of employees other than the employee who made the decision to present the claim or record found to be false, where (i) the employee submitting the claim or record independently made the decision to present the claim or record in good faith after reviewing the available information and (ii) there was no causal nexus between the submission of the false claim or record and the purported collective knowledge or imputed ill intent of those other employees?

In the underlying case, the Fifth Circuit ruled that an FCA suit regarding an improper Hurricane Katrina insurance claim was valid despite the whistleblowers' publication of materials that should have been kept under seal, noting that five appeals courts had applied three separate standards to the statute's seal requirement. The Fifth Circuit's decision to allow a jury's verdict to stand was consistent with Ninth Circuit precedent that allows FCA claims to continue even when *qui tam* plaintiffs disregard seal requirements as long as the federal government is not harmed. But other courts of appeals have ruled either that violating the seal requirement mandates dismissal or that a case should be dismissed if a seal violation conflicts with the "congressional goals" of the statute, which can be triggered by prejudice to the government or to the defendant's reputation.

The Supreme Court will address a second issue that is also subject to a circuit split. Specifically, the Fifth Circuit ruled that a claims supervisor submitted a false claim despite the lack of evidence that he knew the claim was false. The Supreme Court will determine whether corporations should be liable only when an individual employee has both knowledge of underlying facts that make a claim false and submits the actual claim.

The whistleblowers alleged that State Farm accepted a false claim for insureds whose home was lost to Katrina. They argued the house was rendered a total loss by wind and not, as the insureds claimed, by Katrina's floodwaters. State Farm was responsible to pay for wind damage, while a federal fund was responsible to pay for flood damage. The whistleblowers knew how the claim was handled because they recommended that State Farm pay out the claim while working for a company that State Farm contracted to provide damage assessments after the August 2005 hurricane.

The jury concluded that the house sustained no compensable flood damage and that the government therefore suffered damages of $250,000 under the FCA as a result of State Farm's submission of false flood claims for payment. The District Court denied State Farm's motions for judgment notwithstanding the verdict and for a new trial. The whistleblowers moved after trial for additional discovery to seek out other instances of false claims that were part of the alleged general scheme, but the court denied that motion, concluding that they had failed to plead sufficient facts about any additional claims. The court, however, awarded the whistleblowers the maximum possible share under the FCA for relators pursuing claims without the government as a party—30 percent of $758,250 (the court trebled damages on the $250,000 false claim and added a civil penalty of $8,250), or $227,475. The court also awarded the whistleblowers $2,913,228.69 in attorney's fees and expenses.

On appeal, State Farm argued to the Fifth Circuit that their opponents had not offered competent evidence to establish that the house was destroyed by wind. The insurer also denied that the adjuster had acted with the requisite “guilty knowledge,” saying he did not have enough information to know the claim was false when State Farm paid it.

The relators filed their initial complaint under seal on April 26, 2006, and served a copy to the government. State Farm alleges that the whistleblower’s prior counsel then disclosed the existence of the lawsuit to several news outlets by emailing copies of the evidentiary disclosures and engineering reports, sometimes including the case caption. State Farm also alleges that the whistleblowers themselves sat for interviews that culminated in the publication of multiple news stories—including one interview that was the subject of a national broadcast on ABC's 20/20 program—and notified a Mississippi congressman of their FCA action. Most of these events occurred before the seal was partially lifted on January 10, 2007. The seal was fully lifted on August 1, 2007.

<u>United States ex rel. Oberg v. Pa. Higher Education Assistance Agency,</u>
804 F.3d 646 (4th Cir., 2015)

Dr. Jon Oberg brought this action against Pennsylvania Higher Education Assistance Agency (PHEAA) and other private and state-created student loan entities under the False Claims Act (FCA), alleging that from 2002 through 2006 the Defendants fraudulently claimed hundreds of millions of dollars in federal student loan interest subsidies to which they were not entitled. All other Defendants either settled or were dismissed from the action and only PHEAA remained at the time this decision was entered.

The FCA imposes civil liability on "any person" who makes or presents a false claim for payment to the federal Government. 31 U.S.C. § 3729(a)(1). Corporations, including municipal corporations like cities and counties are "persons" under the FCA. Pursuant to the Eleventh Amendment, states and state agencies have been deemed non- persons and, therefore, not subject to FCA liability.

Repeatedly, the District Court held that PHEAA was not a person, dismissing the suit. After repeated appeals, and on repeated remand, discovery was taken to develop the facts surrounding the PHEAA's mission, funding, and business operations. On appeal a third time, the Fourth Circuit, applying "the arm-of-the-state analysis used in the Eleventh Amendment context" concluded that PHEAA, a state-created student loan agency was an independent political subdivision, not an arm-of-the-state, and therefore a "person" subject to FCA liability.

The four non- exclusive factors that the Court considered were:

1. Whether any judgment against the entity as Defendant will be paid by the state;

2. The degree of autonomy exercised by the entity including the selection of its officers and its funding sources;

3. Whether the entity is involved with state concerns as distinct from non- state concerns; and

4. How the entity is treated under state law.

In a prior appeal, the Fourth Circuit held that the Commonwealth of Pennsylvania was not directly liable for judgments against PHEAA. In this decision the Fourth Circuit addressed whether there was a potential for putting state funds at risk from such a judgment. Because PHEAA has accumulated over one billion dollars in net assets and has substantial control over these funds, the Fourth Circuit held that the answer to factor one was that PHEAA was not an arm-of-the-state.

As to factor two, the Fourth Circuit stated that “the record contains substantial evidence showing that PHEAA operates autonomously, largely free from state interference in its substantive decision.” The Fourth Circuit concluded that the autonomy factor weighed heavily against arm-of-the-state status.

As to the third factor, whether PHEAA was involved in state concerns, the Fourth Circuit found it compelling that PHEAA had extensive out of state transactions and loans and that a substantial portion of its business was conducted out of state. Nonetheless, and although it was a “close call,” this factor still pointed to an arm-of-the-state status.

As to how PHEAA is treated under state law, the fourth factor, the Fourth Circuit agreed with the District Court and found that this factor weighed in favor of arm-of-the-state status.

Weighing the strengths and weaknesses in all four factors, the Fourth Circuit ultimately held that PHEAA is an independent subdivision and not an arm-of-the-state. “In our view, any other conclusion would…heighten a mystery of legal evolution by spread[ing] an Eleventh Amendment cover over an agency that consumes no state revenue but contributes to the State’s wealth.” Accordingly, the case was remanded for further proceedings on the merits of the relator’s FCA claims against PHEAA.

<u>Universal Health Services, Inc. v. United States ex rel. Escobar</u>
780 F.3d 504 (1st Cir., 2015), *cert. granted*, 136 S.Ct. 582 (U.S., Dec. 4, 2015).

On December 4, 2015, the Supreme Court granted *certiorari* in this case to address the viability and reach of the "implied certification" theory of FCA liability. The case began in 2009, when the parents of a patient who had died following treatment at a mental health clinic owned and operated by the subsidiary of defendant, brought a lawsuit against defendant in the U.S. District Court for the District of Massachusetts on the theory that the mental health clinic failed to comply with various supervision and licensure requirements, rendering the entity's claims for government reimbursement false under the FCA. Although the District Court dismissed the claims, the U.S. Court of Appeals for the First Circuit reversed, holding that the regulations at issue were conditions of payment by MassHealth, Massachusetts' Medicaid program, and that the provider's noncompliance with those conditions implicated the FCA.

The Supreme Court granted certiorari and is set to address two questions. First, the Court will address whether the "implied certification" theory is a viable means of establishing legal falsity under the FCA. Resolving this question entails grappling with a circuit split. While the First Circuit could be said to have adopted the "implied certification" approach in *Escobar*, the Seventh Circuit has taken a different approach, rejecting use of the theory in *United States v. Sanford-Brown*, Ltd., 788 F.3d 696 (7th Cir. 2015), petition for cert. filed, No. 15-729 (Dec. 2, 2015). Second, assuming that the "implied certification" theory is a valid grounds for FCA liability, the Court will consider whether a claim for reimbursement can be considered legally "false" if the law or contractual provision the party is alleged to have violated does not expressly state that it is a condition of payment. Resolving this question also requires resolution of a circuit split—this time as between, on the one hand, the Second and Sixth Circuits, which require that the obligation be expressly designated a condition of payment, and on the other, the First, Fourth, and D.C. Circuits, which do not require such a label as a predicate to establishing legal falsity.

<u>United States ex rel. Rille v. PricewaterhouseCoopers LLP</u>,
803 F.3d 368 (8th Cir., 2015) (en banc)

In 2004, relators brought several related *qui tam* actions against certain Government contractors alleging that the contractors committed fraud against the General Services Administration (GSA) by means of kickbacks in violation of the False Claims Act (FCA), the Anti-Kickback Act, and other federal statuses. In 2005, relators submitted over 700,000 pages of documents to the Government to assist in the investigation. According to relators these documents included evidence of kickbacks and defective pricing by Defendants. In 2006, the relators amended their complaint to add defective pricing allegations. The Government partially intervened in the action against one contractor, and settled the action against both the contractor and its distributor, and the action against the contractor was dismissed with prejudice. The covered conduct in the settlement agreement concerned defective pricing rather than kickbacks. The Government argued that the relators were not entitled to a share of settlement with the entity that was not named in relators' complaint. The Government also argued that the relators' defective pricing allegations were insufficient and that it was the Government's own investigation that resulted in this settlement. The District Court awarded the relators shares of all settlements. The Government appealed and the United States Court of Appeals for the Eighth Circuit affirmed. The Government petitioned for rehearing and the Eighth Circuit *en banc* (with two dissents) vacated the District Court decision and remanded for further proceedings.

The question presented was: when the Government proceeds with an action brought by a relator under the FCA, and then settles both the claim brought by the relator and a different claim that does not overlap factually with the claim brought by the relator, is the relator entitled to a share of the proceeds of both claims?

Relying on the text and structure of the FCA, the Eighth Circuit concluded that the better view is that the relator may recover only from the proceeds of the settlement of the claim that he brought. 31 U.S.C. § 3730(d)(1) provides that if the Government proceeds with an action brought by a relator, the relator is entitled to receive a percentage of "the proceeds of the action or settlement of the claim". This case involved a settlement by the Government and the Court held that with respect to a settlement, 3730(d)(1) is clear. A relator's share "is based only on proceeds of the "claim". The use of the definite article refers back to the claim that is brought by the relator in an action that he initiates." The relators' right to recovery is limited to a share of the settlement of the claim that they brought.

The Court also rejected the District Court's holding that a relator is entitled to a share of a settlement where the *qui tam* action was a catalyst to the Government's settlement. The Court stated: "Whatever the merit of this theory as a policy matter, it is not derived from the statute. The statute allows relators to recover a percentage of the proceeds of the settlement of "the claim" brought by the relators, and only that claim. The Act contemplates that the Government, after it elects to intervene, may "clarify or add detail" to the claims brought by the relators, or may "add any additional claims." 31 U.S.C. § 3731(c). Recovery under § 3730(d)(1), however, does not extend to proceeds of the settlement of such "additional claims," whether or not they are causally connected to the claim brought by the relators. The Act does not provide for an award to relators from the proceeds of settlements that "resulted from" the claim or were "caused by" the claim; relators are limited to a percentage of "proceeds of the ... settlement of the claim."

Because the Court of Appeals found that the District Court opinion did not sufficiently address whether there was a factual overlap between the relators' claim and the Government's settlements, it remanded the action for further proceedings.

<u>United States ex rel. Gadbois v. PharMerica Corporation,</u>
2015 WL 9093650 (1st Cir., Dec. 16, 2015)

In this case, the relator formerly worked as a pharmacist for PharMerica. In November, 2010 he filed an action alleging that PharMerica had committed numerous FCA violations related to its distribution of prescription drugs to long-term care facilities. The District Court dismissed the action under the first to file bar, based on the existence of a similar action then pending in Wisconsin. The relator appealed the dismissal. During dependency of the appeal, the Supreme Court decided *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, No. 12-1497, which held that an earlier filed suit ceases to bar subsequent False Claims Act suits under the first to file bar once it is dismissed. Then, after *Carter* was decided, the Wisconsin action was settled and dismissed. The relator thereafter asked the First Circuit to allow him to supplement his Complaint to allege that the Wisconsin action was no longer pending or to remand the suit to the case to the District Court with instructions to permit supplementation.

PharMerica objected to the relator's request arguing that "jurisdiction is determined based on whether it existed at the time the plaintiff filed the original Complaint." According to PharMerica, since the first to file bar is jurisdictional, relator's claim is barred notwithstanding the fact that the Wisconsin suit was dismissed. The First Circuit disagreed. First, Rule 15(d) explicitly states that "the Court may permit supplementation even though the original pleading is defective in stating a claim or defense." Various courts have read Rule 15 to include defects in subject matter jurisdiction among the deficiencies that may be corrected through a supplemented pleading. In this case, developments occurring after the second amended complaint was filed dissolved the jurisdictional bar. Thus, although the order of dismissal was proper at the time it was entered, it clearly was no longer proper.

As to whether the Court would allow supplementation, the Circuit Court determined that discretion should normally be exercised in the first instance by the District Court and remanded the case to the District Court to determine whether plaintiff should be allowed to supplement his second amended complaint to include the additional information concerning the Wisconsin suit. The First Circuit dropped a somewhat cryptic footnote in which it stated that "PharMerica may assert any number of other defenses to the relator's proposed supplementation. For example, PharMerica may argue that such supplementation would be futile in light of the settlement in the Wisconsin action."

This case demonstrates a new set of problems, post *Carter*, that defendants faced with multiple *qui tam* actions must grapple with when attempting to settle some but not all of the cases.

<u>United States ex rel. Kieff v. Wyeth</u>,
2015 WL 8024407 (D.Mass., Dec. 4, 2015)

In anticipation of a trial to take place in March 2016, the Government, joined by Defendant Wyeth, asked the presiding judge to issue an advisory opinion regarding subpoenas issued pursuant to section 3731(a) of the False Claims Act (FCA). 31 U.S.C. § 3731(a). That section provides that "A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States." The question presented to the Judge was whether this language provided that the service **<u>and</u>** enforcement of subpoenas was nationwide or whether, since the language only spoke to service, the enforcement was limited by the language in Federal Rule of Civil Procedure 45, which allows a Court to compel attendance at a trial or hearing only if the person resides or regularly does business in the state or within 100 miles of where the proceeding is to take place. The Government and Wyeth sought to have subpoenas served and enforced nationwide.

Finding no circuit court authority to guide his decision, the District Court judge relied on Federal Rule of Criminal Procedure 17(e) and the legislative history of the FCA and concluded that a subpoena issued pursuant to 3731(a) allows service and enforcement nationwide.

Federal Rule of Criminal procedure 17(e) provides that a "subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States." Although the rule contains no separate allowance for nationwide enforcement, it is well established that this Rule allows for nationwide service and enforcement. Thus, the Court found that 3731(a) should be similarly interpreted.

The FCA's legislative history supports this conclusion. "Section 3731 (a) was added to the False Claims Act in 1978, under the title "An act to provide for nationwide service of subpoenas in all suits involving the False Claims Act"…The House Committee report makes clear that the purpose of the legislation, which came at the recommendation of the Department of Justice, was to facilitate the prosecution of False Claims Act cases by ensuring that witnesses from across the country could be brought into court by subpoena. HR REP. NO.95-1447 (1978)."

Federal Rule of Civil Procedure 45 was amended in 2013 and no longer contains the language authorizing service "at any place… that the court authorizes on motion and for good cause, if a federal statute so provides." Recognizing that this amendment could be interpreted to remove the possible expansion previously provided by citing to other statutes, such as the 3731(a) nationwide service and enforcement, the District Court in this case essentially compromised and required that the parties before the Court must show good cause before a subpoena shall issue under 3731(a) compelling attendance at trial of witnesses out-of state and more than 100 miles away. If that good cause could be demonstrated, the nationwide service and enforcement of the subpoena stands.

United States ex rel. King v. Solvay SA,
2015 WL 8732010 (S.D. Tx., Dec. 14, 2015)

The relators alleged that Solvay SA caused the submission of false claims for various prescription medications by misleading or colluding with the company that publishes a compendium of research concerning accepted uses for prescription medications. Medicare requires states to pay for drugs that are prescribed for a "medically accepted indication." A "medically accepted indication" is defined as "use for a covered drug which is approved under the Federal Food, Drug and Cosmetic Act **or the use of which is supported by one or more citations included or approved for inclusion in any of the compendia** described" by the Medicaid statute. One such compendia is called Drugdex. The relators alleged that Solvay either mislead or colluded with Drugdex to list supportive information concerning additional uses of various Solvay products.

At the close of discovery, Solvay moved for summary judgment, arguing that the relators had no evidence that they had mislead or colluded with Drugdex. The relators argued that they did not need direct evidence of contact between Solvay and Drugdex, but that circumstantial evidence was sufficient to prove that the Drugdex publishers were deceived into including the challenged information. The relators argued that several circumstances supported their claims.

First, the relators argued that Solvay suppressed certain negative studies. The Court determined, however, that the evidence proffered to support this allegation, "taken in light most favorable to relators, indicates that [Solvay's] research and development department did not actively seek to publish studies with negative outcomes for off-label uses of [the product]. However, the evidence does not show that [Solvay] actively *suppressed* the studies or in any way discouraged investigators who desired to seek publication of their studies from doing so." Since there was no duty on Solvay to disclose these negative studies, the Court dismissed this evidence.

The relators next claimed that Solvay manipulated published results. The Court found the evidence supporting this claim lacking. For example, while Drugdex published results concerning a study before the study was complete and did not publish results as to a portion of the study, there was no evidence that Solvay had any influence in Drugdex's decisions to do so. The Court further held that evidence that Solvay was "keeping track of" and "directing the study" would not support a reasonable finder of fact in concluding that Solvay was directing the outcome of the study. Similarly, that a study investigator received funds from Solvay for speaking two years before the study was published is not probative of whether Solvay defrauded Drugdex into listing the study.

The relators also argued that Solvay's use of studies published in non-peer reviewed supplements to journals that were paid for by Solvay "subverted the literature" and caused the inclusion of subpar studies in the Drugdex. The Court held that "the mere facts that Solvay paid for supplements at some point and that Drugdex would at times rely on the supplements has no bearing on this case without any evidence that Drugdex relied on Solvay funded supplements to support uses of drugs at issue during the relevant timeframe." Finally, the Court shot down the claim that Solvay paid "ghostwriters" to write articles to which physicians "lent their name" in return for payment. The Court "understood" this theory and how it could result in false claims; it noted however that "innuendo related to small articles that may have been partially ghostwritten but did not even end up in Drugdex is not sufficient." The Court granted summary judgment as to the relators Drugdex's theories.

<u>United States ex rel. Purcell v. MWI Corp.,</u>
807 F.3d 281 (D.C. Cir., 2015)

In 1992, MWI Corp. entered into a contract to sell $82.2 million in irrigation pumps and related equipment to Nigeria. To facilitate the sale, the parties sought financing through the Export-Import Bank, an institution that finances exports of U.S. goods and services by providing loans to foreign purchasers. The Bank agreed to lend Nigeria $74.3 million with the requirement that MWI submit a "Letter of Credit Supplier's Certification" that MWI had not paid any discount, allowance, rebate, commission, fee or other payment in connection with the sale except *regular* commissions or fees paid in the ordinary course of business to its regular sales agents. In 1998, a former employee of MWI Corp., Robert Purcell, filed this *qui tam* law suit alleging that MWI violated that certification when it paid "non-regular" commissions, specifically $28 million in commissions, to one long term Nigerian sales agent.

In 2002, the Government intervened and asserted that a commission of $28 million on an $82 million sale was not a regular commission. A jury found the certifications were false and awarded the Government $7.5 million in damages. The damages were trebled to $22.5 million pursuant to the False Claims Act. However, because a False Claims Act Defendant is entitled to an offset from the trebled damages by any amount paid to compensate the Government for the harm caused by the false claims, the District Court considered Nigeria's repayment of $108 million (the full loan amount with interest and fees) to be compensatory and reduced the damages from $22.5 million to 0. The District Court held MWI liable for civil penalties and imposed the highest level of $10,000 for each of the 58 false certifications.

The Government, having recovered no damages, appealed, arguing that the offset applies against the amount of damages before trebling, not against trebled damages and so it was entitled to the $15 million in damages. MWI cross-appealed, arguing that it paid its long-term sales agent what it ordinarily did and that the Government failed as a matter of law to establish that when it paid these commissions it knowingly violated the FCA.

On appeal, the D.C. Circuit reversed and held that the District Court should have granted summary judgment to the Defendant because the Government did not have evidence of knowledge. At the time MWI made the certifications, the Government had yet to inform exporters that, contrary to MWI's understanding of "regular commissions," the term refers to what is normally paid in the industry, and not what an exporter has historically paid to an individual sales agent. Absent evidence that the Bank, or other Government entity, had officially warned MWI away from its otherwise facially reasonable interpretation of that undefined and ambiguous term, the FCA's objective knowledge standard, as the Supreme Court clarified while this litigation was pending in *Safeco Insurance Co. of America v. Burr,* 551 U.S. 47, 69-70 &n.20,127 S.Ct.2201,167 L.Ed. 2d 045 (2007), did not permit a jury to find that MWI "'knowingly' made a false claim." The Court held that the Defendant's interpretation of the ambiguous term "regular commission" was not objectively unreasonable and the Government did not have sufficient evidence that it had defined the term. The Court stated that, under the FCA's knowledge element, "the Court's focus is on the objective reasonableness of the Defendant's interpretation of an ambiguous term and whether there is any evidence that the agency warned the Defendant away from that interpretation." The Court also rejected the Government's argument that the Defendant acted recklessly by failing to seek an opinion from the Bank on the term. “[F]ailure to obtain a legal opinion or prior [agency] approval cannot support a finding of recklessness without evidence of anything that might have given it reason to do so.” The Court then overturned the jury verdict and remanded with instructions to enter judgment for MWI. The Court therefore did not address the damages question presented by the Government.

<u>United States ex rel. Saldivar v. Fresenius Medical Care Holdings, Inc.</u>,
No. 1:10-cv-1614 (N.D. Ga. Oct. 30, 2015)

The District Court for the Northern District of Georgia in this declined *qui tam* action granted summary judgment to the Defendant because it found that the FCA's knowledge component had not been met. In a lengthy opinion (over 100 pages), the Court looked at the Defendant's conduct, the conduct of CMS (which was aware how the Defendant and other providers were using and billing for overfills) and the HHS-IG, other *qui tam* actions making similar allegations and DOJ's responses to those *qui tams*, and the Government rules - which tended to be silent rather than ambiguous - and concluded that the relator had produced no evidence of knowledge even using the reckless disregard standard.

The Court stated that the overwhelming evidence showed that Fresenius reasonably interpreted ambiguous Medicare rules, relied on the advice of its counsel, reasonably believed that at all times the Government knew it was billing for overfill and condoned such billing, and acted in conformity with others in the industry. Fresenius may have been negligently unaware that overfill was considered "free" and could not be billed, and negligently failed to inquire when it learned that at least some in the industry believed billing for overfill actually administered was impermissible. But to hold Fresenius liable under the FCA, Fresenius must be more than simply negligent. This record does not support such a finding.

<u>Dalitz v. Amsurg Corp.,</u>
2015 WL 8717398 (E.D. Ca., Dec. 15, 2015)

This case involves the scope of discovery for FCA cases. The Court applied the new Federal Rule of Civil Procedure 26, which came into effect December 1, 2015, and held that a whistleblower whose allegations focused on one ambulatory surgical center ("ASC") in California was not entitled to discovery concerning 246 ambulatory surgical centers in 34 different states.

The whistleblower alleged that a specific ASC failed to perform medical assessments or obtain comprehensive histories and physicals which are required under Medicare reimbursement standards. Although the relator focused its allegations on a single endoscopy center, he also alleged that a policy imposed by the corporate parents to increase patient volume in order to drive revenues applied to all ASCs affiliated with the defendant. He argued that this allegation was sufficient to open the scope of discovery nationwide. The Court held that, "while it is conceivable that such a policy could have incentivized fraudulent behavior at Amsurg Corp.'s other ASC's similar to that alleged against defendants with regard to [the California facility], the existence of such a policy, without more, does not create a plausible inference that the similar misconduct has occurred at those other centers." In addition, Amsurg submitted a declaration indicating that it does not engage in clinical management or billing operations for its affiliated ASCs. The Court believed that this evidence "strongly suggested that the fraud alleged against [the California facility] was only local to that center."

The plaintiff also sought discovery for periods of time that pre- and post-dated employment at the facility. Defendants sought to limit the temporal scope of discovery to the four months during which plaintiff was employed. The Court refused, holding that such temporal limitation would undermine the purpose behind the *qui tam* provisions and place a limit on *qui* *tam* actions that did not exist for Government initiated actions. Because the plaintiff's allegations concerned alleged fraudulent practices that occurred prior to, during and after her employment, she was able to seek discovery before and after such employment. The Court set as a limit for discovery the day that the Complaint was filed because the allegations of the Complaint were written in the past tense.

The Court applied the new rules governing civil discovery. This rule, Federal Rule of Civil Procedure 26(b)(1), became effective on December 1, 2015. It limits discovery to "non-privileged matter that is relevant to the party's claim or defense and proportional to the needs of the case…."

United States v. Bertie Ambulance Service, Inc.,
2015 WL 5916691 (E.D.N.C., Oct. 8, 2015)

The Government sued two individuals and the ambulance company that they owned alleging that they submitted claims for emergency transport services provided to end stage renal dialysis patients who were able to travel without an ambulance. The Government began its investigation in 2004. The investigation drug on for many years. In August 2010, the Government informed the ambulance company that it was under investigation and requested a tolling agreement. The ambulance company, but not the individual defendants, entered into a series of tolling agreements covering the period from September 1, 2010 to August 29, 2014. Each of the tolling agreements provided that the Government "agreed to provide 30 days' notice to the perspective defendants before the United States files any action alleging false claims." On August 28, 2014, the day before the 2013 tolling agreement was set to expire, the Government filed its Complaint. The defendants filed for summary judgment arguing that the claims against the individual defendants and the company prior to August 28, 2008 (i.e., 6 years before the complaint was filed) were time-barred. The Government agreed that the claims prior to August 2008 were time barred as against the individual defendants because the tolling agreements did not address those claims. It argued however that the older claims against the ambulance company were saved by the tolling agreement. The Court disagreed, finding that the Government had breached its obligations under the tolling agreement by not giving defendants prior notice that it intended to file suit. The Government argued that it had given adequate notice, pointing to a phone call and email to defendants' counsel in which the Government indicated it was "now preparing to move forward in this case," that, "it may be helpful to schedule a phone call in the next week to discuss our next steps," and that "[w]e appreciate your cooperation as we pursue or seek to resolve this civil action." During that call, the Government counsel stated that he "had a Complaint prepared for filing." The Government argued that these statements were sufficient to give notice of the Government's intent to file suit. The Court disagreed stating that there was "nothing definitive about any of the Government's statements." Having breached the tolling agreement, the Government was not entitled to benefit under it. Nor was it entitled to equitable estoppel because the Court "declined to imply an equitable doctrine in favor of the breaching party."

The Court also dismissed the remaining claims against the individual defendants finding that the Government had failed to adduce evidence that they had the requisite *mens rea* to impose culpability under the FCA. The individual defendants were not involved in the day-to-day management of the business, delegated decisions to upper level management and only learned of management's decisions after they had already been made. The individual defendants did not think that management's decisions were improper. The Government pointed to various excerpts from the record arguing that they raised a genuine dispute of material fact as to the individual defendants' knowledge of the alleged false claims. However, various employees confirmed that the individual defendants were not involved in the day-to-day operations, while other employee-deponents failed even to mention the individual owners. The Court held that a single former employee's testimony that he "believed" that the owners were aware that ambulatory patients were being transported was insufficient to create a genuine issue of material fact. "The FDA is not a strict liability statute. It does not punish high ranking individuals merely because of their association with the wrongdoing corporation ... . Instead, the Government is charged with proving the requisite *mens rea* for each individual defendant. On the record before the Court a reasonable jury could not conclude that the [individual defendants] had actual knowledge of, deliberate ignorance of, or reckless disregard for the truth or falsity of claims submitted."