HAYNES BOONE

FALSE CLAIMS ACT
2024 Year in Review

haynesboone.com

Clients and friends,

The False Claims Act continues to be one of the most commonly used weapons in the government's enforcement arsenal to address various forms of fraud. This review highlights key developments from 2024 related to the FCA, including:

- The recovery by the government of over $2.9 billion in settlements and judgments in FCA cases in fiscal year 2024—$133 million more than the previous fiscal year's recovery—and a record-high 979 new *"qui tam"* cases filed by whistleblowers (also known as relators).

- The government maintaining its traditional focus on targeting fraudulent billing and kickback schemes as well as fraud involving the pharmaceutical industry and defense contractors and holding the individuals behind corporate fraud accountable.

- The government continuing to prioritize the detection, investigation, and prosecution of fraud related to cybersecurity requirements for government contractors and COVID-19 relief programs like the Paycheck Protection Program.

- Continued judicial efforts to interpret the substantive elements of an FCA claim, including what it means for a claim to be "material" and what it takes to plead a claim with particularity under Rule 9(b)'s heightened pleading standard.

- Significant judicial decisions regarding the standard the government must meet to dismiss an FCA case, what it means for a defendant to act "knowingly," and when an FCA claim "results from" a kickback violation among many other issues.

In 2024, Haynes Boone represented healthcare providers, defense contractors, and individuals in FCA investigations and lawsuits. We successfully resolved matters before lawsuits were filed, negotiated favorable settlements at all stages, and defended our clients in active litigation and appeals. We also advised many healthcare providers and contractors regarding FCA compliance and other related issues.

If you have any questions about the issues covered in this review, please let us know. We look forward to working with our friends and clients in 2025 and beyond.

Stacy Brainin, Bill Morrison, Taryn McDonald, and Neil Issar

This publication is for informational purposes only. *It is not intended to be legal advice. Transmission is not intended to create and receipt does not establish an attorney-client relationship. Legal advice of any nature should be sought from legal counsel.*

TABLE OF CONTENTS

I. INTRODUCTION 10

II. NOTABLE SETTLEMENTS 12

a. The Anti-Kickback Statute and the Stark Law 12

b. Pharmaceutical Manufacturers and Pharmacies 12

c. Procurement and Federal Grant Funding 14

d. Cybersecurity Requirements 14

e. COVID-19 Program Fraud 16

III. UPDATE ON LEGISLATION AND ENFORCEMENT TRENDS AND POLICIES 16

a. Continued Prioritization of PPP and Other COVID-19 Pandemic Fraud Prosecution 16

b. The Government's Focus on Cyber-Fraud Enforcement and FCA Scrutiny of Artificial Intelligence Usage 17

c. Annual Inflation Adjustment to the Civil Monetary Penalty Amounts 18

IV. SIGNIFICANT JUDICIAL DECISIONS 18

A. Agency Deference 18

1. The U.S. Supreme Court Overturned the Longstanding Chevron Doctrine in *Loper Bright* 18

2. *Loper Bright* May Increase Uncertainty in FCA Litigation and Benefit Defendants. 19

B. Seal Requirement 20

1. Amended Complaints Do Not Need to be Filed Under Seal. 20

2. Documents Supporting the Government's Requests for Extension May Remain Under Seal 20

C. Initial Hurdles for an FCA Plaintiff 21

1. *Pro Se* Plaintiff Status 21

2. First-To-File Bars 21

a. The Ninth Circuit Overruled its Precedent that the First-to-File Bar is Jurisdictional 21

b. The District Courts in the Fourth and Fifth Circuits Continued to Adhere to Circuit Precedent Holding the First-to-File Bar is Jurisdictional. 22

3. Public Disclosure Bar & Original Source Exception 23

a. The Eleventh Circuit Held That Blogs Constitute News Media Under the Public Disclosure Bar 23

b. The Ninth Circuit Held That Inter Partes Reviews Do Not Satisfy Public Disclosure Bar Requirements. 25

c. The Eighth Circuit Held That Public Letters Revealing Merely the Possibility of Inaccurate Billing Did Not Trigger the Public Disclosure Bar. 25

d. The Tenth Circuit Held That a Relator Could Not Avoid the Public Disclosure Bar by Combining Information From Various Public Sources. 26

4. Government Dismissal 26

a. The Fourth Circuit Held a Live Hearing is Not Required if the Government Moves for Dismissal Before an Answer is Filed 27

b. Even After Polansky, the Government Still Has a Burden to Meet When Moving to Dismiss a *Qui Tam* Action 27

c. Relators Cannot Avoid Dismissal by Arguing the Government Will Not Incur Significant Costs in Continuing to Monitor the Case 28

D. Substantive Elements of an FCA Claim 28

1. Rule 9(b) Particularity 28

a. Courts Generally Agree That Rule 9(b) Requires a Relator To Plead the "Who, What, When, Where and How" of the Alleged Fraud 29

b. Recent Fifth Circuit Precedent Clarified That the Rule 9(b) Standard is Context-Specific and Flexible 29

c. The Second Circuit Continues to Recognize an Exception When Billing Information is Peculiarly Within the Opposing Party's Knowledge 29

2. Scienter 30

a. The Ninth Circuit Emphasized That Post-SuperValu Relators Must Offer Evidence of Subjective Knowledge of Falsity. 31

b. Seventh Circuit Decision Highlighted How SuperValu's Subjective Knowledge Standard May Require Litigation of Fact Disputes. 31

c. The Second Circuit Held a Relator Alleging AKS-Premised FCA Claims Must Satisfy the AKS's "Willful" Scienter Standard. 32

3. Causation 33

a. A Circuit Split on the Causation Standard for AKS-Premised FCA Claims Continues 33

b. A Fifth Circuit District Court Applied a Flexible Causation Standard. 35

c. The Ninth Circuit Held That the "But For" Causation Standard Applied to FCA Retaliation Claims 35

4. Falsity 35

a. The Ninth Circuit Found Falsity Could Be Met Through Allegations of Falling Below the Minimum Standard of Care 36

b. A Fifth Circuit District Court Held Off-Label Prescriptions Are Not Inherently Factually False or Misleading 36

5. Materiality 36

a. The First Circuit Found Noncompliance With Speed Limit Sign Regulations Not Material to an Agency's Decision to Pay Municipal Claims 37

b. The Eighth Circuit Held Various Alleged Regulatory Violations by Medicare Advantage Participant Insurance Companies and Brokers Were Not Material. 37

c. The Third Circuit Emphasized the Government's Knowledge of the Purported False Statements in Finding Vaccine Misrepresentations Not Material. 38

d. The Ninth Circuit Reversed a Grant of Summary Judgment That a Radiology Center's Use of Non-Medical Grade Monitors Was Not Material. 38

6. Submission of a "Claim" 39

E. Reverse False Claims 39

1. The Second Circuit Determined That Violations of Consent Decrees Do Not Create an Obligation Until the Government has Determined a Fine Must Be Paid. 39

2. The Ninth Circuit Affirmed Pre-2009 Precedent as Consistent with the FCA's Definition of "Obligation." 40

F. Retaliation 40

1. The Fifth Circuit Held It Lacks Jurisdiction Over FCA Retaliation Claims If It Involved a Federal Security Clearance Decision 41

2. The Eleventh Circuit Held It Lacks Jurisdiction Over FCA Retaliation Claims Against Arms of the State. 41

3. The Ninth Circuit Held Protected Activity May Be Shown by Good-Faith Belief That One's Employer is Possibly Committing Fraud Against the Government. 41

4. Courts Are Split Over Whether Employees with Compliance Duties Must Meet a Higher Standard to Establish That Their Employer Was on Notice of Protected Activity. 42

5. The Fifth Circuit Held That Retaliatory Conduct Requires a Showing That the Action Would Have Dissuaded a Reasonable Worker from Engaging in Protected Conduct. 42

6. Courts are Split on Whether Temporal Proximity Is Sufficient to Show That an Employer's Nonretaliation Reasons For Adverse Employment Action was Pretextual. 42

7. The Eighth Circuit Held That a Trial Court Does Not Abuse its Discretion by Declining to Award Punitive Damages for Retaliation. 43

G. Recovery, Damages, and Fees 43

1. The Seventh Circuit Held That FCA Penalties Would Not Be Unconstitutionally Excessive. 43

2. The Seventh Circuit Remanded FCA Damages Award for Recalculation Where it May Have Been Based in Part on Lawful Claims. 44

3. The Ninth Circuit Sanctioned Several Attorneys for Recklessly Allowing a Meritless Motion for Reconsideration to Unreasonably Multiply Proceedings. 44

4. The Fifth Circuit Held A Relator is Not Entitled to a Share of Settlement Proceeds from Related Claims Added by the Government 45

H. Constitutionality of the *Qui Tam* Provision 45

1. A Florida District Court Held the *Qui Tam* Provision Unconstitutional 45

2. Multiple District Courts Rejected the Assertion That the *Qui Tam* Provision is Unconstitutional 46

I. Claims by FCA Defendants 49

1. Georgia District Court Permitted Counterclaims for Breach of Fiduciary Duty and Breach of Contract to Proceed. 49

2. Maryland District Court Allowed Third-Party Claims to Survive Pending Resolution of the Underlying FCA Lawsuit. 49

Table of Authorities 52-57

KEY CONTACTS

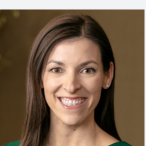
STACY BRAININ has extensive experience in white collar criminal defense and government investigations, including representation of companies and individuals in both criminal and civil matters. Her practice also includes complex business litigation with an emphasis in healthcare and professional liability matters. She has defended cases alleging civil and criminal business fraud in state and federal courts throughout the country. Stacy represents and advises healthcare providers in civil and criminal disputes with state and federal government agencies. She is experienced in handling internal investigations and routinely advises clients regarding difficult compliance and disclosure issues. Stacy has served as adjunct professor at the University of Texas School of Law from 2009-2019.

BILL MORRISON is a partner and co-chair of the firm's Healthcare and Life Sciences Practice Group. Prior to Haynes and Boone, he served as Vice President and Assistant General Counsel of Tenet Healthcare, where he oversaw civil and criminal investigations involving FCA matters, class actions, and other high-level disputes. As a private practice lawyer, he has represented national healthcare providers in connection with federal grand jury subpoenas and with Civil Investigative Demands regarding potential FCA violations.

JOHN PACHTER is a seasoned government contract law practitioner with over 50 years of experience, specializing in litigation before the Boards of Contract Appeals, U.S. Court of Federal Claims, and federal courts. He has handled bid protests, agency best value determinations, cost realism analyses, and contract disputes, including prime-subcontractor issues. John has successfully defended clients in debarment cases, fraud investigations, compliance audits, and *qui tam* actions. He was the first recipient of the ABA's Allan J. Joseph Excellence in Leadership Award and has served as an Independent Monitor for corporate compliance agreements. Additionally, he has acted as an expert witness in multiple cases.

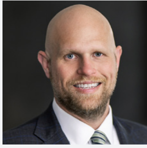
EDMUND AMOROSI is a partner who specializes in government contracts and construction law, handling bid protests, contract disputes, audits, and False Claims Act matters. He has represented clients in federal and state courts, administrative agencies, and alternative dispute resolution. His construction practice covers contract claims, delays, and performance bond disputes. He also advises on commercial litigation and has served as an expert witness in government contract law.

ANDREW GUTHRIE is a partner and an accomplished appellate and trial attorney known for clear, persuasive advocacy in business disputes and government investigations. He specializes in appeals and critical trial court briefing across areas like insurance, bankruptcy, energy, intellectual property, and the False Claims Act. Recognized as "Appellate Lawyer of the Week" by Texas Lawyer, he has also been named to Texas Super Lawyers and received the ABA's Rosner & Rosner Young Lawyer Professionalism Award. His ability to distill complex legal issues into compelling arguments makes him a strong advocate at any stage of a case.



TARYN MCDONALD is a partner that specializes in government investigations and healthcare litigation, defending clients in enforcement actions, False Claims Act cases, and regulatory matters. She has represented individuals and companies in investigations by the DOJ, SEC, and other agencies. Taryn also advises on compliance with healthcare and anti-corruption laws. Actively involved in the legal and local community, she is a member of the Dallas Bar Association and Women in White Collar Defense and serves on the Cattle Baron's Ball Committee for the American Cancer Society.

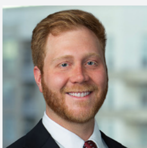
KEY CONTACTS



TODD GARLAND is a partner specializing in contract disputes, bid protests, and litigation involving federal agencies and private contractors. He represents clients before the GAO, U.S. Court of Federal Claims, SBA, and federal appeals courts, handling high-stakes commercial disputes, including major infrastructure and defense projects. Todd also advises on government contract compliance, trade secrets, and white-collar issues such as the False Claims Act and FCPA. Recognized by Super Lawyers and Best Lawyers in America, he brings extensive industry experience, including in contingency contracting.

ZACHARY PRINCE is a partner who advises domestic and international clients on all aspects of government contract law, including compliance, bid protests, contract disputes, cybersecurity, and intellectual property protection. He supports mergers and acquisitions, conducting due diligence on government contracts and national security risks. Zach has litigated cases before federal and state courts, administrative bodies, and international arbitration forums. A former law clerk at the U.S. Court of Federal Claims, he teaches at George Washington University Law School and serves in leadership roles within the ABA's Public Contracts Law Section.

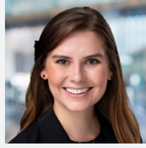
NEIL ISSAR focuses his practice on healthcare litigation, securities enforcement defense, and government investigations, with particular expertise in fraud and abuse laws (including the False Claims Act, the AntiKickback Statute, and the Stark Law), navigation of regulatory and compliance issues involving the healthcare industry, representing securities market participants before the SEC, and defending and pursuing antitrust claims. Neil has been recognized in "Ones to Watch" by Best Lawyers in America.



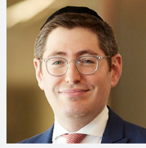
MATT LIPTROT is an associate in the Litigation Practice Group in Haynes Boone's Dallas office. His practice focuses on the defense of government investigations, including securities, healthcare and criminal matters, as well as private securities litigation.

CONTRIBUTORS

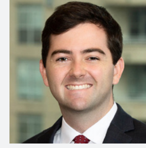
Samuel Mallick
Associate
Dallas



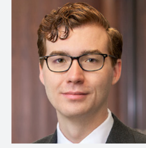
Léa Dickinson
Associate
Northern Virginia



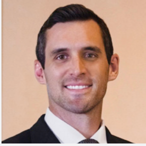
Scott Whitman
Associate
Washington D.C.



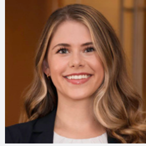
Wilson Miller
Associate
Dallas



Justin Manchester
Associate
Dallas

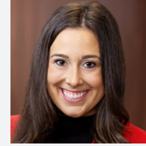


Payton Roberts
Associate
Dallas

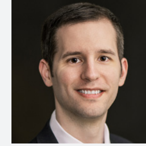


Ashley Koos
Associate
Dallas

John Tanner
Associate
Northern Virginia



Samara Taper
Associate
Dallas

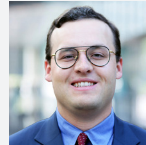


Michael Maroulis
Associate
Northern Virginia

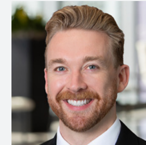
Jonathan Keller
Associate
Northern Virginia

Brenna Scully
Associate
Dallas

Jesse Cardinal
Associate
Northern Virginia

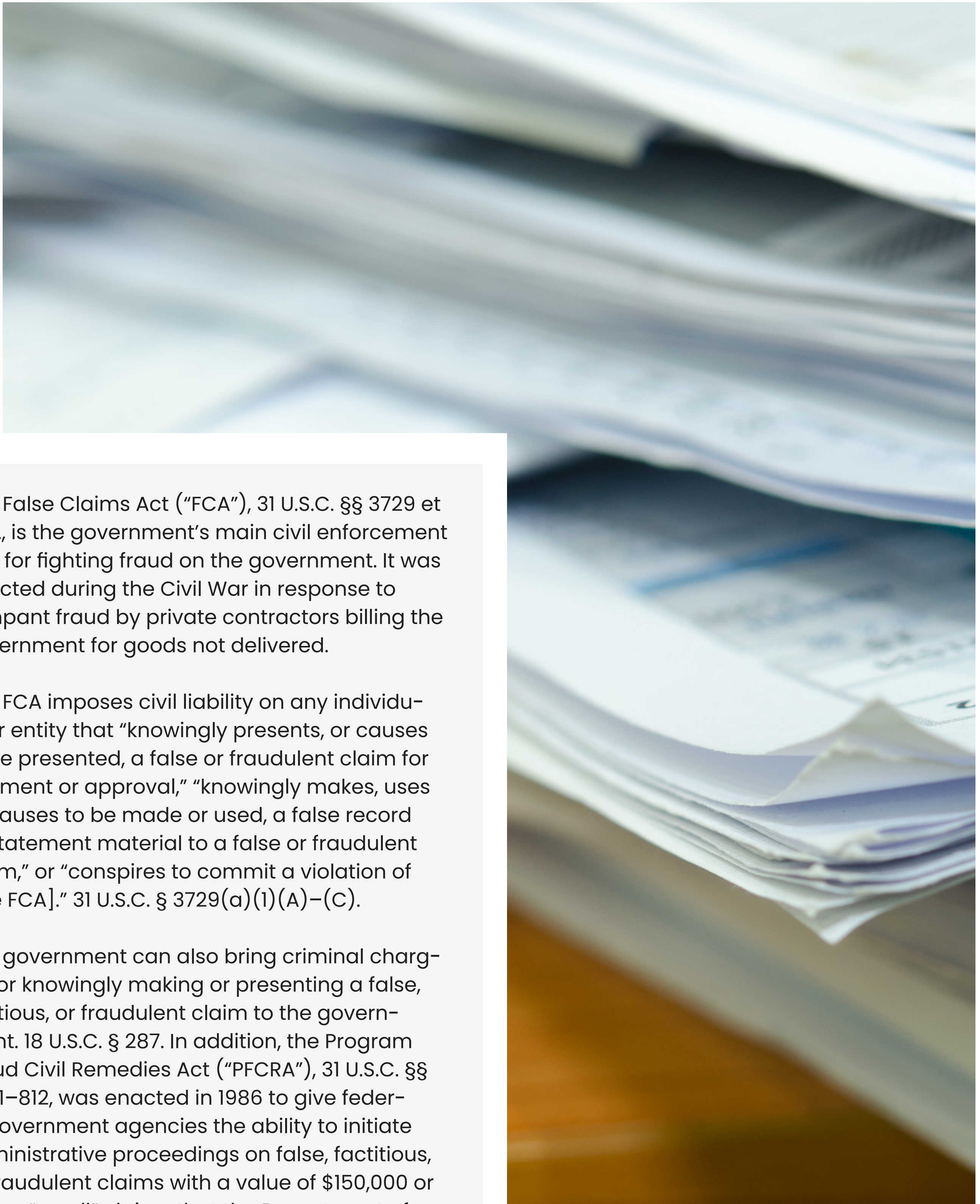


Davis Shugrue
Associate
Dallas



Connor Madden
Associate
Dallas

I. INTRODUCTION



The False Claims Act ("FCA"), 31 U.S.C. §§ 3729 et seq., is the government's main civil enforcement tool for fighting fraud on the government. It was enacted during the Civil War in response to rampant fraud by private contractors billing the government for goods not delivered.

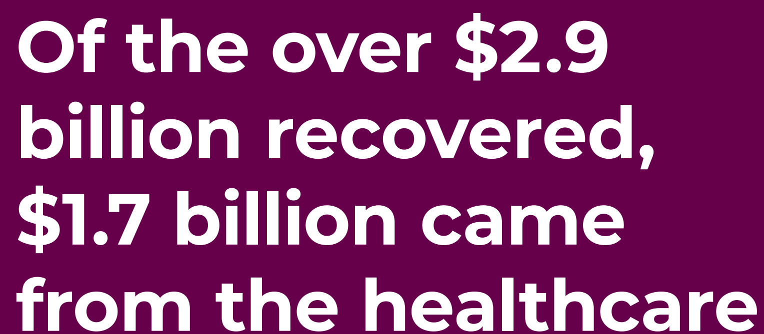
The FCA imposes civil liability on any individual or entity that "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," "knowingly makes, uses or causes to be made or used, a false record or statement material to a false or fraudulent claim," or "conspires to commit a violation of [the FCA]." 31 U.S.C. § 3729(a)(1)(A)–(C).

The government can also bring criminal charges for knowingly making or presenting a false, fictitious, or fraudulent claim to the government. 18 U.S.C. § 287. In addition, the Program Fraud Civil Remedies Act ("PFCRA"), 31 U.S.C. §§ 3801–812, was enacted in 1986 to give federal government agencies the ability to initiate administrative proceedings on false, factitious, or fraudulent claims with a value of $150,000 or less — "small" claims that the Department of Justice ("DOJ") may elect not to pursue under the FCA.

During fiscal year 2024, the government recovered $2.92 billion in settlements and judgements in FCA cases. This is an increase of $133 million compared to the recovery in 2023 and over $673 million more than 2022. Total recoveries since 1986—when Congress significantly strengthened the FCA—now exceed $78 billion.

DOJ further reported:

- Of the over $2.9 billion recovered, $1.7 billion came from the healthcare industry.
- Private whistleblowers (also known as relators) filed 979 new "*qui tam*" actions in fiscal year 2024—the highest number in a single year.
- Of the over $2.9 billion recovered, over $2.4 billion related to cases filed by relators, with relators receiving nearly $404 million for their share of the rewards (including over $59 million in cases where the government declined to intervene).



Of the over $2.9 billion recovered, $1.7 billion came from the healthcare

II. NOTABLE SETTLEMENTS

A. THE ANTI-KICKBACK STATUTE AND THE STARK LAW

In 2024, DOJ maintained its focus on violations of the Anti-Kickback Statute ("AKS") and the Stark Law (also known as the Physician Self-Referral Law), which can render a claim for government payment "false or fraudulent" and therefore form the basis for an FCA action. *See* 42 U.S.C. § 1320a-7b(g).

For example, one of the year's largest settlements involved two affiliated New Jersey-based generic drug manufacturers jointly agreeing to a $450 million payment to resolve allegations associated with two kickback schemes.[1] Under the first scheme, DOJ alleged the manufacturers indirectly paid Medicare patients' copays for a drug they produced while steadily raising the drug's price. Under the second, one of the manufacturers conspired with other drug manufacturers to fix prices for certain generic drugs, the benefits of which the manufacturer agreed—as part of the settlement—constituted illegal kickbacks.

Similarly, a Florida-based drug manufacturer and its CEO agreed to pay $47 million to settle FCA allegations that they offered kickbacks to healthcare providers to induce prescriptions for a drug.[2] The kickbacks included free breath testing services, which the government alleges were used to induce claims for the manufacturer's drug, despite the test not being a definitive diagnostic tool.

As another example, a Delaware-based healthcare facility provider agreed to pay over $42 million to settle allegations that it provided illegal remuneration to non-employee neonatologists and surgeons in the form of services from ancillary support providers to induce patient referrals.[3]

Likewise, a New York hospital system paid $17.3 million to settle allegations that it provided unlawful kickbacks to physicians tied to referrals at its chemotherapy center.[4] The settlement also included claims under New York state law, illustrating collaboration between federal and state authorities.

B. PHARMACEUTICAL MANUFACTURERS AND PHARMACIES

The largest settlement of the year involved a pharmaceutical manufacturer resolving FCA allegations by granting the government a $475.6 million unsecured claim in its bankruptcy.[5] The manufacturer allegedly marketed opioids for non-medically accepted uses by targeting known "pill mill" prescribers.

---

1 Release available at https://www.justice.gov/opa/pr/drug-maker-teva-pharmaceuticals-agrees-pay-450m-false-claims-act-settlement-resolve-kickback. This settlement was finalized on October 10, 2024 and was therefore not included in the government's fiscal year 2024 recovery figures.

2 Release available at https://www.justice.gov/opa/pr/pharmaceutical-company-qol-medical-and-ceo-agree-pay-47m-allegedly-paying-kickbacks-induce.

3 Release available at https://www.justice.gov/usao-de/pr/christianacare-pays-425-million-resolve-health-care-fraud-allegations-0.

4 Release available at https://www.justice.gov/usao-edny/pr/new-york-presbyterianbrooklyn-methodist-hospital-settles-health-care-fraud-claims-173.

5 Release available at https://www.justice.gov/opa/pr/opioid-manufacturer-endo-health-solutions-inc-agrees-global-resolution-criminal-and-civil.

Similarly, a global management consulting firm agreed to pay over $323 million to resolve FCA allegations that it provided advice to an opioid manufacturer that caused the submission of false and fraudulent claims to federal healthcare programs for medically unnecessary prescriptions of OxyContin. The firm also allegedly failed to disclose conflicts of interest to the U.S. Food and Drug Administration ("FDA") arising from its concurrent work for the manufacturer and the FDA.[6]

DOJ also made significant recoveries involving pharmacies in 2024. For example, an Illinois-based retail pharmacy operator agreed to pay over $106 million to resolve allegations that it billed government healthcare programs for prescriptions that were never dispensed.[7] According to the settlement, for over a decade the company submitted false claims to Medicare, Medicaid, and other healthcare programs for prescriptions that were processed but never picked up by patients.

Similarly, a Pennsylvania-based retail pharmacy operator and three of its subsidiaries agreed to resolve allegations that they submitted false prescription drug event data to Medicare, resulting in overpayments.[8] The parent company and one of its subsidiaries jointly agreed to pay $101 million to resolve the allegations, whereas the two other subsidiaries granted the government a $20 million unsecured claim in the parent corporation's pending bankruptcy.

---

6 Release available at https://www.justice.gov/opa/pr/justice-department-announces-resolution-criminal-and-civil-investigations-mckinsey-companys.

7 Release available at https://www.justice.gov/opa/pr/walgreens-agrees-pay-1068m-resolve-allegations-it-billed-government-prescriptions-never.

8 Release available at https://www.justice.gov/opa/pr/rite-aid-corporation-and-elixir-insurance-company-agree-pay-101m-resolve-allegations-falsely.

C. PROCUREMENT AND FEDERAL GRANT FUNDING

There were also severable notable settlements involving false claims made to the Department of Defense ("DOD") in 2024. For example, a Virginia-based defense contractor agreed to pay $428 million—the second-largest government procurement fraud recovery under the FCA—for violating the Truthful Cost or Pricing Data Act (a.k.a. Truth in Negotiations Act or TINA).[9] DOJ alleged the company provided false or incomplete cost and pricing data during negotiations for government contracts over an 11-year period.

In another case, Connecticut- and Wisconsin-based government contractors, both wholly owned subsidiaries of a common parent company, agreed to pay $70 million to resolve allegations that they overcharged the Navy for spare parts and materials used to maintain aircraft.[10] The subsidiaries allegedly entered into an improper cost-plus-percentage-of-cost subcontract, prohibited by federal statute, and failed to disclose the agreement when submitting cost vouchers to the Navy for reimbursement.

A notable grant funding violation settlement involved a California city that agreed to pay over $38 million to resolve allegations that it failed to meet federal accessibility requirements when using Department of Housing and Urban Development grant funds for multifamily affordable housing.[11] The settlement addressed claims that the city knowingly and falsely certified compliance with these requirements over many years.

D. CYBERSECURITY REQUREMENTS

Since 2021, when DOJ launched its Civil Cyber-Fraud Initiative, we have reported on settlements involving cyber-fraud and failures to safeguard personally identifiable information ("PII"). In 2024, the government resolved a record number of cases under the initiative, confirming these types of cases remain an enforcement priority.

For example, two consulting companies based in Virginia and California agreed to pay $7.6 million and $3.7 million, respectively, to resolve allegations that they failed to meet cybersecurity requirements in administering the application system for the Emergency Rental Assistance Program.[12] Both companies admitted, as part of the settlement, that they failed to complete contractually required cybersecurity testing for the systems, which may have prevented a security breach where PII was compromised.

9 Release available at https://www.justice.gov/opa/pr/raytheon-company-pay-over-950m-connection-defective-pricing-foreign-bribery-and-export.

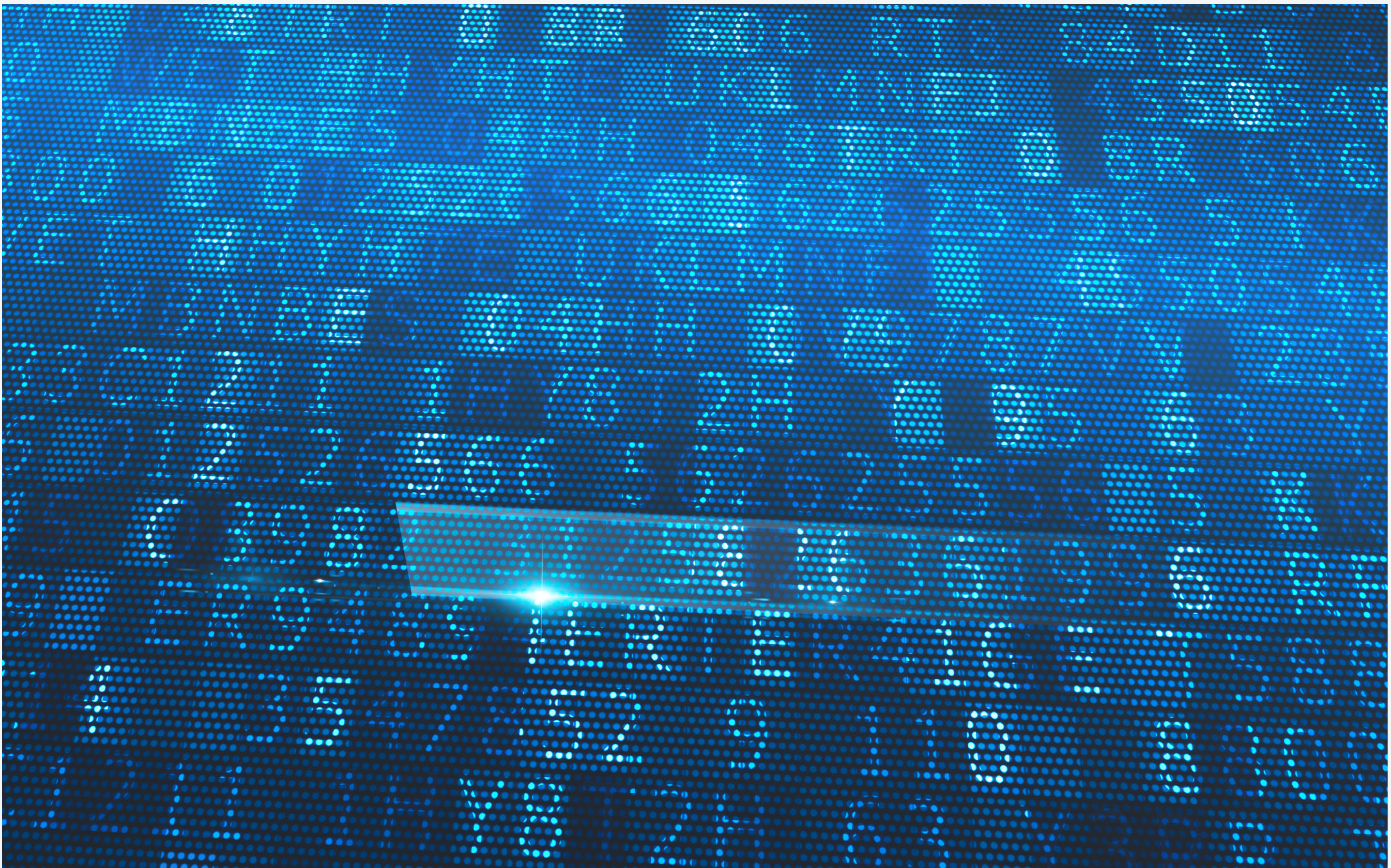
10 Release available at https://www.justice.gov/opa/pr/sikorsky-support-services-inc-and-derco-aerospace-inc-agree-pay-70m-settle-false-claims-act.

11 Release available at https://www.justice.gov/opa/pr/city-los-angeles-agrees-pay-382m-resolve-false-claims-act-suit-alleged-misuse-department.

12 Release available at https://www.justice.gov/opa/pr/consulting-companies-pay-113m-failing-comply-cybersecurity-requirements-federally-funded.

As another example, a Georgia-based staffing company agreed to pay $2.7 million to resolve allegations that it failed to implement proper cybersecurity measures to safeguard health information obtained through a contract with a state agency to provide staffing for COVID-19 contact tracing.[13] DOJ alleged that the company transmitted PII in unencrypted emails, stored and transmitted sensitive data through unprotected Google files, and allowed staff to access this information using shared passwords.

Finally, a Pennsylvania-based university agreed to pay $1.25 million to resolve allegations that it failed to comply with cybersecurity requirements for more than a dozen DOD and National Aeronautics and Space Administration contracts and subcontracts.[14] Unlike in other cases, there were no allegations that a third party breached secured data within the university's custody. Instead, DOJ alleged the university misrepresented the dates by which it would implement certain controls and did not pursue plans to do so.



13 Release available at https://www.justice.gov/opa/pr/staffing-company-pay-27m-alleged-failure-provide-adequate-cybersecurity-covid-19-contact.

14 Release available at https://www.justice.gov/opa/pr/pennsylvania-state-university-agrees-pay-125m-resolve-false-claims-act-allegations-relating.

E. COVID-19 PROGRAM FRAUD

Continuing scrutiny of COVID-19-era programs, DOJ resolved multiple cases involving misuse of Paycheck Protection Program ("PPP") funds, highlighting how pandemic-related fraud is still a priority.

One notable example involved a now-bankrupt lender that agreed to resolve two separate settlements by providing the government with an unsubordinated general unsecured claim for recovery of up to $120 million.[15] DOJ alleged the lender submitted thousands of false claims for loan forgiveness, loan guarantees, and processing fees to the Small Business Administration ("SBA") as part of the PPP in violation of the FCA. Specifically, the lender allegedly inflated thousands of PPP loans, causing the SBA to guarantee and forgive loans in amounts that exceeded what borrowers were eligible to receive, and failed to implement appropriate fraud controls, including removing underwriting steps from its pre-PPP procedures so it could process a greater number of PPP loan applications and maximize processing fees.

Another example involved a Maryland-based urgent care provider that agreed to pay over $12 million to resolve allegations that it submitted false claims for COVID-19 testing to a Health Resources and Services Administration program for uninsured patients.[16] The provider allegedly failed to confirm whether the tested individuals had health insurance coverage and caused outside laboratories to submit false claims by issuing requisition forms that erroneously stated the individuals were uninsured.

III. UPDATE ON LEGISLATION AND ENFORCEMENT TRENDS AND POLICIES

A. CONTINUED PRIORITIZATION OF PPP AND OTHER COVID-19 PANDEMIC FRAUD PROSECUTION

As stated above, the government continues to aggressively investigate and prosecute fraudulent schemes under the PPP and other pandemic-related fraud in the healthcare industry and beyond.

In February 2024, Principal Deputy Assistant Attorney General Brian M. Boynton emphasized that pandemic fraud is still a priority for DOJ.[17] DOJ's COVID-19 Fraud Enforcement Task Force released its 2024 report highlighting its enforcement successes, including criminal charges against more than 3,500 defendants, civil enforcement actions resulting in more than 400 civil settlements and judgments, and more than $1.4 billion in seizures and forfeitures.[18]

15 Release available at https://www.justice.gov/usao-ma/pr/kabbage-agrees-pay-120-million-resolve-allegations-it-defrauded-paycheck-protection.

16 Release available at https://www.justice.gov/opa/pr/citymd-agrees-pay-over-12-million-alleged-false-claims-covid-19-uninsured-program.

17 Release available at https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-brian-m-boynton-delivers-remarks-2024.

18 Release available at https://www.justice.gov/opa/pr/covid-19-fraud-enforcement-task-force-releases-2024-report.

The government also targeted various notable fraudulent schemes in the healthcare sector, including clinics offering unnecessary services to patients, unnecessary laboratory testing, and making false representations about COVID-19 treatment. These efforts particularly focused on defendants exploiting nursing home residents and other vulnerable populations.[19]

Given DOJ's statements regarding pandemic fraud and the volume of enforcement activity for this category of FCA violations in 2024, prosecution of pandemic-related fraudulent schemes in healthcare and other sectors will almost certainly remain an enforcement focus in 2025.

B. THE GOVERNMENT'S FOCUS ON CYBER-FRAUD ENFORCEMENT AND FCA SCRUTINY OF ARTIFICIAL INTELLIGENCE USAGE

DOJ also continued to focus on FCA violations related to failure to meet federal cybersecurity requirements and prioritized enforcement of FCA matters involving the use of artificial intelligence ("AI").[20] In September, DOJ updated its Evaluation of Corporate Compliance Programs ("ECCP"), which provides guidance to prosecutors investigating the effectiveness of a company's compliance programs at the time of an offense.[21] The update specifically addressed the use of AI at the direction of Deputy U.S. Attorney General Lisa Monaco, who noted the potential threats to cybersecurity posed by AI and DOJ's intention to prosecute FCA violations involving AI—as "[f]raud using AI is still fraud." [22]

Under the updated ECCP, prosecutors are instructed to consider, among other factors, what controls exist around AI usage to ensure its reliability and compliance with legal requirements, whether the management of risks related to AI usage and other technologies are integrated into broader enterprise risk management strategies, and what baseline of human decision-making is used to assess AI.

The government has already begun prosecuting FCA actions against healthcare providers in connection with the use of AI to suggest diagnosis codes or treatments. In one case, the government alleged scienter on the novel theory that defendants submitted false diagnoses based on a faulty data-mining algorithm despite an audit that revealed the algorithm's high error rate and unreliability.[23] This case may be a preview of how the government will be poised to bring FCA enforcement actions against those who misuse AI as healthcare providers continue to experiment with how AI can change the healthcare landscape. [24]

19 Release available at https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-brian-m-boynton-delivers-remarks-2024.

20 Release available at https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-brian-m-boynton-delivers-remarks-2024.

21 Release available at https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl.

22 Release available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations.

23 Release available at https://www.justice.gov/usao-ndca/pr/government-intervenes-false-claims-act-lawsuits-against-kaiser-permanente-affiliates; https://www.justice.gov/opa/press-release/file/1444936/dl.

24 Release available at https://www.justice.gov/opa/pr/update-deputy-attorney-general-lisa-monacos-justice-ai-convenings.

C. ANNUAL INFLATION ADJUSTMENT TO THE CIVIL MONETARY PENALTY AMOUNTS

The FCA states that a person who violates the statute is liable "for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990." 31 U.S.C. § 3729(a).

Effective June 28, 2024, the civil monetary penalty for violations of the FCA increased from a minimum of $13,508 to $13,946 per false claim and from a maximum of $27,018 to $27,894 per false claim. *See* 89 Fed. Reg. 9,764, 9,766 (Feb. 12, 2024).

For 2025, these amounts will increase to a minimum of $14,308 per false claim and a maximum of $28,619 per false claim. *See* 89 Fed. Reg. 106,308, 106,310 (Dec. 30, 2024).

IV. SIGNIFICANT JUDICIAL DECISIONS

A. AGENCY DEFERENCE

1. THE U.S. SUPREME COURT OVERTURNED THE LONGSTANDING CHEVRON DOCTRINE IN *LOPER BRIGHT.*

For four decades, federal agencies enjoyed significant deference from courts regarding their interpretation of ambiguous laws and regulations applicable to the programs they administer—a principle known as the Chevron Doctrine, after the U.S. Supreme Court's 1984 decision in *Chevron v. National Resources Defense Council.*

The Chevron Doctrine required courts to use a two-step process to determine if an agency's interpretation of a federal statute is correct:

1) At Step 1, the court asks "whether Congress has directly spoken to the precise question at issue." If the meaning of the statute is "unambiguously expressed," then "that is the end of the matter" because the agency and court must adhere to that.

2) But "if the statute is silent or ambiguous with respect to the specific issue," then a court moves to Step 2 and asks "whether the agency's answer is based on a permissible construction of the statute."

The second step became known as "Chevron deference," as it called for courts to resist "simply impos[ing] their own construction of the statute" and instead to defer to an agency's reasonable construction of a statute when the statute failed to clearly express Congress's intent.

In 2024, the U.S. Supreme Court overturned the Chevron Doctrine with its decision in *Loper Bright Enterprises v. Raimondo*, ending the requirement that courts defer to agency interpretations of ambiguous statutes. 603 U.S. 369, 396–401 (2024).

In other words, "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Id*. at 413.

The Court also noted, however, that though an agency's interpretation is not binding on a court, "it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise'" and that "[c]areful attention to the judgement of the Executive Branch [Agency] may help inform [a court's] inquiry." *Id*. at 402, 412–13 (quoting *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98 n.8 (1983)). So, a court can still decide to agree with an agency's interpretation.

The Court further clarified that when a statute specifically "delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it." *Id*. at 413.

2. *LOPER BRIGHT* MAY INCREASE UNCERTAINTY IN FCA LITIGATION AND BENEFIT DEFENDANTS.

The *Loper Bright* decision is expected to have broad implications for all fields impacted by administrative law, including healthcare, such as increasing the number of legal challenges brought against agency regulations, causing slower and more cautious rulemaking, and pressuring Congress to legislate with greater specificity.

The demise of *Chevron* also has implications for FCA matters. The lack of deference to agency guidance may provide FCA defendants with potential arguments that a regulation underlying an FCA claim is inconsistent with the statute at issue. For example, two requisite elements of any FCA claim are falsity and scienter. Where the government and relators' counsel historically have been able to rely on guidance issued by relevant administrative agencies to establish that these elements are met, the fact that courts no longer need to defer to agency interpretations means FCA defendants may have greater success with interpretive arguments.

In *United States ex rel. Kyer v. Thomas Health System, Inc.*, a nurse filed an FCA lawsuit against the hospital where she worked for allegedly compensating physicians based on referrals and in a manner that exceeded fair market value. No. 2:20-cv-00732 (S.D. W.Va.). At issue was whether certain compensation relationships constituted indirect compensation arrangements in violation of the Stark law, and if so, whether those arrangements satisfied an exception. Both questions relied on regulations that have been promulgated through various rules issued by the Center for Medicare and Medicaid Services ("CMS"), since the Stark Law statute itself says very little.

The case remained under seal for nearly three years before the federal government decided not to intervene. Eventually, the defendants moved to dismiss the case. But before the court could rule, the *Loper Bright* decision was issued. As a result, the court said it needed supplemental briefing on the impact of *Loper Bright* since the relator's Stark-based claims were built on agency regulations and the court could no longer "simply defer to an agency's interpretation of a statute without too much handwringing over the province of the court versus the expertise of an agency." 2024 WL 4165082, at *1 (S.D.W. Va. Sept. 12, 2024).

Ultimately, the court dismissed the case on pleading particularity grounds. But the court's requirement for additional briefing to analyze *Loper Bright* evidences the uncertainty and greater latitude for defendant-favorable arguments created by the decision.

B. SEAL REQUIREMENT

The FCA requires that a complaint "be filed in camera," "remain under seal for at least 60 days," and "not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2).

During that 60-day period, the government must decide whether it wishes to "intervene and proceed with the action." *Id.* If it needs more time to investigate the allegations, the government can ask a court to extend that period and keep the complaint under seal. *Id.* § 3730(b)(3). Any such motions for extension "may be supported by affidavits or other submissions in camera." *Id.*

The FCA's seal requirement Seeks to strike a balance between encouraging private parties to initiate false claims litigation and the needs of the government to properly evaluate the claims for itself and weigh the government's interests in the case. *See, e.g., United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995).

1. AMENDED COMPLAINTS DO NOT NEED TO BE FILED UNDER SEAL.

After an original complaint has been unsealed, most courts do not require subsequent amended complaints to be filed under seal. *See Kyer*, 2024 WL 4707811, at *4. After the original unsealing, "Defendants are aware of the Relator's claims, as well as the Government's knowledge of Relator's allegations and investigation into those allegations . . . [and] [t]here is, therefore, little risk of alerting Defendants to a pending federal criminal investigation by way of the allegations made in the Amended Complaint." *Id.*

2. DOCUMENTS SUPPORTING THE GOVERNMENT'S REQUESTS FOR EXTENSION MAY REMAIN UNDER SEAL.

Whether other documents, such as the government's motions for extension and memoranda supporting such motions, should be unsealed along with the original complaint requires a fact-specific analysis. For example, in *United States ex rel. Jacobs v. Lincare, Inc.*, a district court denied the government's request to keep sealed its motions for extensions of its intervention deadline despite the government's insistence that those motions "discuss[ed] the content and extent of the United States' investigation." No. 2:21-cv-01629, 2024 WL 4063386, at *2 (D. Nev. Sept. 5, 2024). The court found that was an insufficient reason to keep the documents under seal, particularly since they did not disclose "any confidential investigative technique or method" and did not "implicate specific people or provide any substantive investigative procedures or details." *Id.*

In contrast, in *United States ex rel. Devarapally v. Ferncreek Cardiology, P.A.*, a district court ruled that memoranda supporting the government's motions for extension should remain sealed because the defendants failed to establish a need for them and the government would suffer harm from their disclosure. No. 5:17-cv-00616, 2024 WL 2981184, at *2 (E.D.N.C. June 13, 2024).

In particular, the court deemed any information in the memoranda about the quality of the government's investigation to be irrelevant to the defendants' defense. *Id.* And the court found that the memoranda "contain[ed] particularized information that goes beyond the rudimentary details of a fraud investigation," such as "discussions of the types of documents and information the Governments were interested in obtaining before deciding whether to intervene, the witnesses they wished to speak with, and particular types of information that were the focus of their investigation." *Id.* According to the court, such information warranted continued confidentiality to avoid government harm.

C. INITIAL HURDLES FOR AN FCA PLAINTIFF

1. *PRO SE* PLAINTIFF STATUS

The FCA allows private parties to bring FCA actions *on behalf of the federal government*. 31 U.S.C. § 3730(b)(1). This means *qui tam* plaintiffs cannot proceed *pro se*, as the Third and Ninth Circuits reaffirmed in 2024. *See Rothman v. Cabana Series IV Tr.*, No. 23-2455, 2024 WL 1405393, at *2 (3d Cir. Apr. 2, 2024); *Tlatoani-Teotl Tenamaxtle, Tr. ETO v. Polk*, No. 23-55477, 2024 WL 2828806, at *1 (9th Cir. June 4, 2024). As the Ninth Circuit explained in a prior opinion, this is because *"qui tam"* relators are not prosecuting only their 'own case' but also representing the United States and binding it to any adverse judgment the relators may obtain." *Stoner v. Santa Clara Cty. Off ce of Educ.*, 502 F.3d 1116, 1126–27 (9th Cir. 2007).

2. FIRST-TO-FILE BAR

The FCA's first-to-file bar provides that "no person other than the government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5).

This statutory bar prohibits an individual from bringing a *qui tam* action if there is already another pending action based on the same essential facts. The objective of the first-to-file bar is "to discourage opportunistic plaintiffs from bringing parasitic lawsuits whereby would-be relators merely feed off a previous disclosure of fraud." *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005).

a. The Ninth Circuit Overruled its Precedent that the First-to-File Bar is Jurisdictional.

More than two decades ago, the Ninth Circuit deemed the first-to-file bar to be "jurisdictional." *See United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1186–87 (9th Cir. 2001); *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121 (9th Cir. 2015) (en banc). Whether the first-to-file bar is jurisdictional affects the timing of a first-to-file challenge, which party carries the burden on such a challenge, and the type of evidence that can be submitted during the challenge.

In 2024, the Ninth Circuit reversed this precedent and aligned with the First, Second, Third, Sixth, and D.C. Circuits in holding the first-to-file bar is not jurisdictional. *See Stein v. Kaiser Found. Health Plan, Inc.*, 115 F.4th 1244, 1245 (9th Cir. 2024) (en banc).

In *Stein*, the relator alleged related healthcare entities had committed Medicare fraud. The district court dismissed the lawsuit under the first-to-file bar, finding that the action "related" to earlier-filed, pending FCA actions against the same defendants. Applying long-standing Ninth Circuit precedent, a three-judge panel of the Court affirmed the lower decision.

Sitting *en banc*, the Ninth Circuit recognized that its prior decisions proffered no analysis to support the conclusion that the first-to-file bar was jurisdictional. The court recognized the Supreme Court's instruction that a statutory bar is jurisdictional "only if Congress 'clearly states' that it is." *Id.* (citing *Santos-Zacaria v. Garland*, 598 U.S. 411, 416 (2023)). In applying this "clear statement" guidance, the Ninth Circuit recognized that the term "jurisdiction" appears nowhere in the text of the first-to-file bar while other provisions of the FCA explicitly use jurisdictional language and thus overruled its prior decisions on the issue.

b. District Courts in the Fourth and Fifth Circuits Continued to Adhere to Circuit Precedent Holding the First-to-File Bar is Jurisdictional.

Other courts, however, have a different view. In July 2024, the Northern District of Texas granted an aerospace manufacturer's motion to dismiss for lack of jurisdiction, finding that the relator's complaint was barred by the FCA's first-to-file bar. *See United States ex rel. Ferguson v. Lockheed Martin Corp.*, No. 4:24-cv-00025, 2024 WL 3434573, at *1 (N.D. Tex. July 16, 2024), *appeal docketed*, No. 24-10713 (5th Cir. Aug. 7, 2024). The relator, a former auditor of the manufacturer, alleged the defendant violated the FCA by failing to comply with mandatory cost disclosure requirements in connection with multiple defense procurement contracts. The defendant moved to dismiss on jurisdictional grounds, arguing the first-to-file bar was triggered because the relator's lawsuit shared "obvious . . . similarities" with a previously filed case by another relator. *Id.* at *7.

Under Fifth Circuit precedent, the district court was required to apply an "essential facts" or "material elements" standard to determine whether the relator's complaint was indeed related to the previous case. *Id.* at *4 (citing *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009)). Under that standard, a later-filed *qui tam* complaint must allege (1) a different type of wrongdoing, based on different material facts than those alleged in the earlier suit and (2) give rise to a separate and distinct recovery by the government, to avoid dismissal. *See id.* at *6.

In *Ferguson*, the court found that both complaints alleged violations of the same statutes and, despite some differences in factual details, concluded that the essential elements of the alleged wrongdoing were the same. *See id.* at *10. Moreover, the court noted that the government, in investigating the first claim, would have uncovered the essential facts of the fraudulent scheme alleged in the second complaint. *Id.* Because the Fifth Circuit views the first-to-file bar as jurisdictional, the court could dismiss the action without addressing any arguments about the merits of the case.

Similarly, in April 2024, the Eastern District of North Carolina granted a Rule 12(b)(1) motion to dismiss a complaint for lack of jurisdiction based on the first-to-file bar. *See United States ex rel. Rosales v. Amedisys, Inc.*, No. 7:20-cv-00090, 2024 WL 1559284, at *1 (E.D.N.C. Apr. 10, 2024). In *Amedisys*, the relator filed a *qui tam* complaint against a hospice care center operator, alleging the operator sought and received government reimbursements by submitting claims for patients it fraudulently certified as hospice patients, in violation of the FCA and the AKS.

In granting the defendant's motion to dismiss, the court applied the Fourth Circuit's "same material elements" test to determine that the relator's complaint was based upon the same material elements of fraud as an earlier-filed *qui tam* action. *Id.* at *3 (citing *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181–82 (4th Cir. 2013)). The court also ruled that relator could not amend her complaint and add new defendants to defeat the first-to-file bar because the additional defendants did not "amount[] to allegations of a 'different' or 'more far-reaching scheme' than was alleged in the earlier-filed action." *Id.* at *5 (*quoting Cho on behalf of States v. Surgery Partners, Inc.*, 30 F.4th 1035, 1043 (11th Cir. 2022)).

3. Public Disclosure Bar & Original Source Exception

The FCA's public disclosure bar prohibits *qui tam* suits if "substantially the same allegations or transactions" of fraud as alleged in the suit were previously disclosed in (i) a federal criminal, civil, or administrative hearing in which the government or its agent was a party; (ii) a congressional, Government Accountability Office, or other federal report, hearing, audit, or investigation; or (iii) the news media. 31 U.S.C. § 3730(e)(4)(A).

The public disclosure bar aims to "strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 295 (2010).

For a relator's case to survive the public disclosure bar, the relator must show that (i) the public disclosure bar does not apply; or (ii) if it does apply, the relator is an "original source." An "original source" is an individual who either (i) prior to a public disclosure has voluntarily disclosed to the government the information on which allegations or transactions in a claim are based, or (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the government before filing an FCA action. 31 U.S.C. § 3730(e)(4)(B).

a. The Eleventh Circuit Held That Blogs Constitute News Media Under the Public Disclosure Bar.

In 2024, the Eleventh Circuit affirmed the district court's public-disclosure dismissal of a relator's *qui tam* action alleging that a national bank forged mortgage loan promissory notes and submitted false reimbursement claims to the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) for loan servicing costs. *See United States ex rel. Jacobs v. JP Morgan Chase Bank, N.A.*, 113 F.4th 1294, 1304 (11th Cir. 2024).

Double-stranded DNA

G.S.T. ---->
BALANCE --->
IS DUE WITHIN 14 DAYS
0.00
172.20
ACCOUNT TOTAL
$ 172.20

The Eleventh Circuit agreed with the district court that online blog articles posted before the lawsuit was filed, which contained information significantly overlapping with the allegations in the relator's complaint, constituted "news media" for purposes of the public disclosure bar because they were publicly available websites intended to disseminate information to the public. *See id.* at 1301.

The court also concluded that the relator did not meet the requirements to be an original source because the relator's additional allegations did not materially add to the publicly disclosed information, but rather merely supplemented and contextualized the "core fraud hypothesis" in the blog articles. Thus, the court held that the public disclosure bar applied.

b. The Ninth Circuit Held That *Inter Partes* Reviews Do Not Satisfy Public Disclosure Bar Requirements.

In 2024, the Ninth Circuit held that an *inter partes* review ("IPR") of certain patents before the Patent Trial and Appeal Board ("PTAB") did not trigger the FCA's public disclosure bar. *Silbersher v. Valeant Pharm. Int'l, Inc.*, 89 F.4th 1154, 1169 (9th Cir. 2024), *cert. denied*, No. 23-1093, 2024 WL 4426551 (U.S. Oct. 7, 2024).

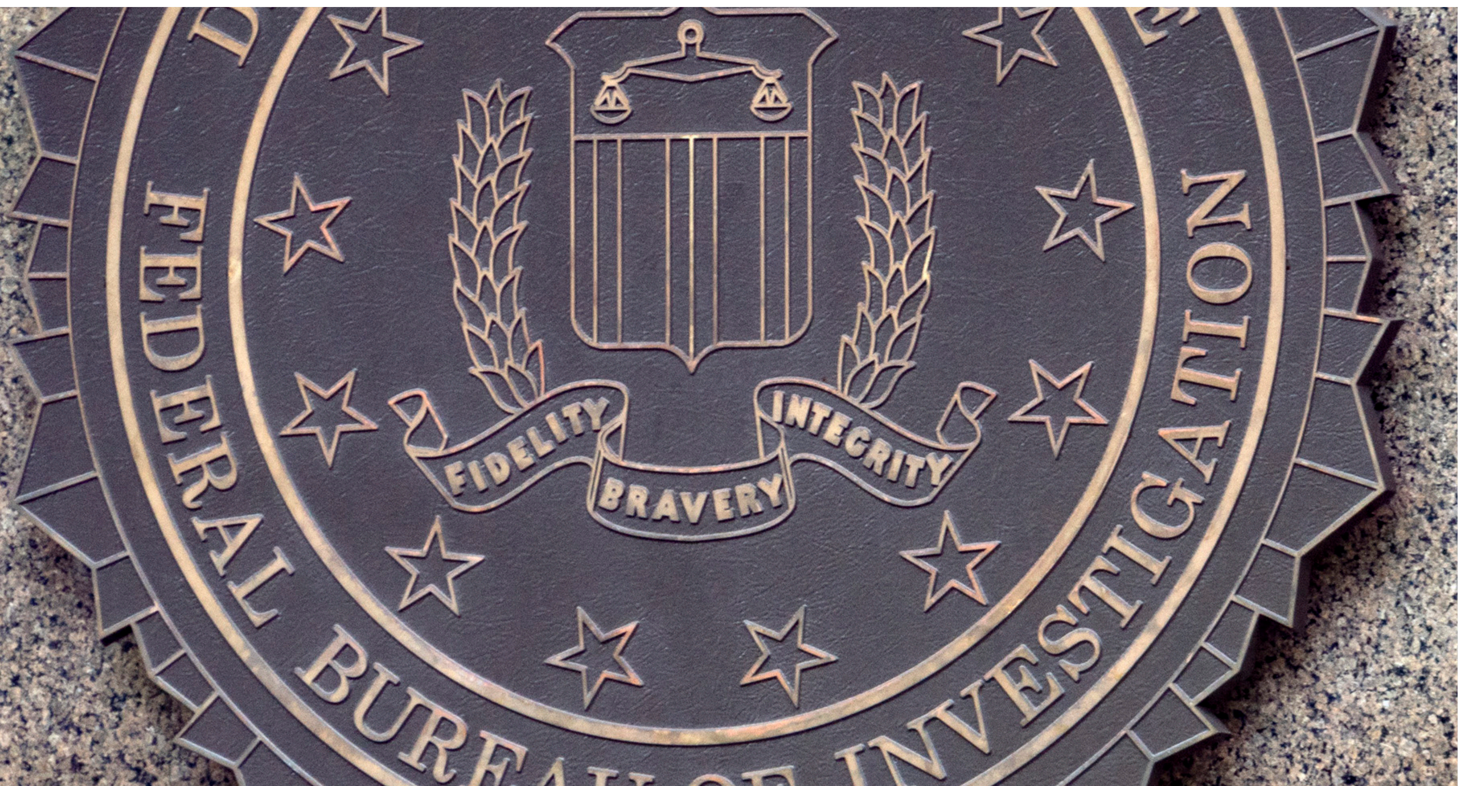
In *Silbersher*, the relator alleged that pharmaceutical companies violated the FCA by fraudulently obtaining patents to extend their monopoly on the market and overcharging the government by falsely certifying that the price of the drug was fair and reasonable. *Id.* at 1158. The underlying district court dismissed the case under the public disclosure bar, concluding that the allegations had been publicly disclosed in an IPR proceeding brought by a generic drug manufacturer to challenge the pharmaceutical companies' patents. *Id.* at 1163.

On appeal, the Ninth Circuit reversed, finding that the IPR was neither "a federal criminal, civil, or administrative hearing in which the government or its agent is a party," nor a "federal report, hearing, audit, or investigation" because the government was not a party to IPRs notwithstanding that an IPR is a "trial-like, adversarial hearing" with many hallmarks of a federal administrative hearing. *Id.* at 1165. The court also noted that the relator's complaint contained material elements of the allegedly fraudulent scheme that were not disclosed at the IPR. *See id.* at 1168.

c. The Eighth Circuit Held That Public Letters Revealing Merely the Possibility of Inaccurate Billing Did Not Trigger the Public Disclosure Bar.

The Eight Circuit affirmed that dismissal of a relator's claims was not warranted under the public disclosure bar where letters that raised the possibility of inaccurate billing did not give rise to a reasonable inference of fraud. *See United States ex rel. Grant v. Zorn*, 107 F.4th 782, 792 (8th Cir. 2024). There, the defendants asserted that the relator's *qui tam* action alleging violations of state and federal FCAs due to overbilling for patient visits was barred because letters from a third-party healthcare administration service publicly disclosed deficiencies in the defendants' billing practices prior to the relator bringing suit.

The Eighth Circuit found that the public disclosure bar was inapplicable, however, as the relator's complaint did not allege "substantially the same allegations" contained in the letters. *See id.* The relator's complaint alleged that the defendants knowingly submitted false claims to the government whereas the letters merely gave rise to the inference that the defendants had made errors and therefore lacked the requisite scienter.



d. The Tenth Circuit Held That a Relator Could Not Avoid the Public Disclosure Bar by Combining Information From Various Public Sources.

The Tenth Circuit affirmed dismissal of a relator's *qui tam* action, concluding that the relator's allegations were substantially similar to prior public disclosures and that the relator did not qualify as an original source. *See United States ex rel. Heron v. Nationstar Mortg., LLC*, No. 21-1362, 2024 WL 3770843, at *13 (10th Cir. Aug. 13, 2024). In *Heron*, the relator accused a national mortgage servicer of wrongfully obtaining hundreds of millions of dollars in government incentive payments by submitting false claims and certifications of compliance with federal and state laws, including requirements related to foreclosure practices.

The Tenth Circuit affirmed dismissal, finding the public disclosure bar applicable even though the public disclosures at issue—consent orders, a prior federal prosecution, and an FBI mortgage fraud notice—did not name the defendant. The court held these were still public disclosures because they contained enough information to link the defendant to the scheme.

The court also concluded that the relator did not meet the criteria for being an original source, as the relator's knowledge was essentially an amalgamation of secondhand knowledge from public sources and such knowledge was incapable of influencing the government's understanding of the alleged fraud.

4. Government Dismissal

The FCA authorizes the government to dismiss an action over a relator's objection so long as the government notifies the relator of its motion to dismiss and the court provides the relator with an opportunity for a hearing on the matter. 31 U.S.C. § 3730(c)(2)(A).

Over the past year, courts solidified the interpretation that the "opportunity for a hearing" language does not require a live, in-court hearing and may be satisfied by an opportunity to file briefing on the motion in appropriate cases. In addition, courts clarified the requirements for the government's motion to dismiss a *qui tam* action following the Supreme Court's decision in *United States ex rel. Polansky¬ v. Executive Health Resources, Inc.*, 599 U.S. 419 (2023).

a. The Fourth Circuit Held a Live Hearing is Not Required if the Government Moves for Dismissal Before an Answer is Filed.

In 2024, the Fourth Circuit addressed the post-*Polansky* requirements when the government moves to dismiss a *qui tam* action, over the objections of the relator, before an answer has been filed. *See United States ex rel. Doe v. Credit Suisse AG*, 117 F.4th 155 (2024).

In *Doe*, a former employee brought a *qui tam* case against a global investment bank, alleging the bank failed to disclose additional criminal conduct that would have increased the fines and restitution paid to the government in connection with its 2014 guilty plea for enabling tax evasion by thousands of wealthy individuals. *See* 117 F.4th at 158. The government moved to dismiss the action before any answer or summary judgement motion had been filed. *Id.* at 159. The relator opposed the motion and requested an evidentiary hearing, but the court denied the hearing request and granted the government's motion on the papers. *Id.* at 159–60.

On appeal, the Fourth Circuit held that the "opportunity for a hearing" requirement of § 3730(c)(2)(A) is met when the district court considered the parties' written submissions. *Id.* at 161. The Fourth Circuit noted the Supreme Court's statement in *Polansky* that when the government seeks dismissal before an answer is filed "Rule 41 entitles the movant to a dismissal; the district court has no adjudicatory role." *Id*. (quoting *Polansky*, 599 U.S. at 436 n.4). As such, the Fourth Circuit recognized it "would be illogical to require district courts to hold live, in-person evidentiary hearings." *Id*. at 162. However, the court averred that if the relator had raised a colorable constitutional violation, a hearing may have been warranted. *Id.*

b. Even After *Polansky*, the Government Still Has a Burden to Meet When Moving to Dismiss a *Qui Tam* Action.

In *United States ex rel. Day v. Boeing*, the Eastern District of Virginia highlighted the continued need for the government to exercise due care in moving to dismiss *qui tam* actions. No. 3:23-cv-00371, 2024 WL 2978469 (E.D. Va. June 13, 2024). In *Day*, the relator alleged the defendants and the Defense Logistics Agency schemed to supply parts to the government under a fraudulent bidding process that inflated their profit margins far beyond what would be permissible under the appropriate sole source procurement regulatory structure. *Id.* at *1. The government intervened and moved to dismiss the case. The relator failed to respond to the motion and dismissal was granted.

Shortly thereafter, the relator moved for relief from the dismissal order, arguing that he had been unable to consult with counsel regarding the motion to dismiss because he was incarcerated and was being transferred from institution to institution at the time. The district court found the relator's failure to object to be excusable. *Id.* at *3 ("[A] court, in applying Rule 41, should endeavor to ensure that substantial justice is accorded to all parties.") (quoting *Polansky*, 599 U.S. at 437).

The court then found dismissal did not satisfy the requirements of *Polansky* because the government failed to make an adequate showing that the burdens of litigation outweighed its benefits. Rather, the government merely alluded to the burdens of litigation in conclusory fashion, failed to address why it felt the "suit had little chance of success on the merits," and mischaracterized the relator's complaint. *Id.* at 5.

c. Relators Cannot Avoid Dismissal by Arguing the Government Will Not Incur Significant Costs in Continuing to Monitor the Case.

In *United States ex rel. USN4U v. Wolf Creek Federal Services*, the Northern District of Ohio held that a government's motion for dismissal cannot be defeated merely by the relator's objection that the government will not incur significant additional costs. No. 1:17-cv-0558, 2023 WL 8480085, at *3 (N.D. Ohio Dec. 7, 2023), *appeal docketed*, No. 24-3022 (6th Cir. Jan. 8, 2024).

In *Wolf Creek*, the relator alleged the defendants made false claims when securing a government repair contract. The government initially declined to intervene. But after more than seven years of litigation, the court asked the government to intervene due to serious concerns as to whether the relator should continue to act as a representative for the government due to the relator breaching the seal requirement. *Id.* at *1.

The government intervened and moved for dismissal, citing lack of evidence, unlikelihood of success on the merits, and burden on the government of continued litigation. *Id.* at *2. The relator objected, arguing "the Government will not occur significant costs in continuing to 'monitor' his case." *Id*. at *3. The court recognized, however, that post-intervention the government "would be taking the lead role in prosecuting this case." *Id*. Thus, lack of burden was not an appropriate basis to deny dismissal given the unlikelihood of an award in a seven-year-old case.

D. SUBSTANTIVE ELEMENTS OF AN FCA CLAIM

1. Rule 9(b) Particularity

FCA violations require the submission of a false or fraudulent claim to the government. Because the allegations involve fraud, all claims brought under the FCA are subject to the heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure. Rule 9(b) requires a complaint to "state with particularity the circumstances constituting fraud." FED. R. CIV. P. 9(b).

The purpose of the Rule 9(b) particularity requirement is "to alert defendants to the precise misconduct with which they are charged," "protect[] defendants against spurious charges of immoral and fraudulent behavior," and "ensure[] that the relator's strong financial incentive to bring an FCA claim . . . does not precipitate the filing of frivolous suits." *Gose v. Native Am. Servs. Corp.*, 109 F.4th 1297, 1317 (11th Cir. 2024) (citing *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1324 (11th Cir. 2009)).

Circuit courts have been split for years over how Rule 9(b) applies in practice to FCA claims. Some circuits, including the Sixth, Seventh, Eighth, and Eleventh Circuits, appear to favor—and in some cases have required—detailed allegations of a specific false claim that was actually submitted to the government. Most other circuits take a less stringent approach, requiring only particular details of a scheme to submit false claims to the government along with indicia of reliability that false claims were actually submitted.

a. Courts Generally Agree That Rule 9(b) Requires a Relator To Plead the "Who, What, When, Where and How" of the Alleged Fraud.

Although the Supreme Court has yet to address the ongoing circuit split as to what exactly is required to satisfy Rule 9(b), most courts generally agree that a relator must plead the "who, what, when, where, and how" of the alleged fraud to survive dismissal at the pleading stage.

For example, in *Gose*, the Eleventh Circuit held the relator's allegations complied with Rule 9(b) because the relator's complaint sufficiently identified who engaged in the alleged fraud, what the alleged fraudulent activity was, details about where the alleged fraud took place, when the defendants' actions became fraudulent, and how the fraudulent activity occurred. 109 F.4th at 1318. Thus, the court found the defendants had enough notice of the specific claims against them and were positioned to prepare a defense. *Id.* at 1319.

b. Recent Fifth Circuit Precedent Clarified That the Rule 9(b) Standard is Context-Specific and Flexible.

In the Fifth Circuit, under Rule 9(b), a plaintiff is also generally required to plead the "who, what, when, where, and how" of the alleged fraud. *United States ex rel. Carew v. Senseonics Holdings, Inc.*, No. 20-cv-00657, 2023 WL 2354915, at *3 (W.D. Tex. Mar. 3, 2023) (citing *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 179 (5th Cir. 1997)). But the Fifth Circuit has made clear that this requirement "is not a straitjacket for Rule 9(b)," meaning that the Rule 9(b) standard is "context specific and flexible." *Id.* (citing *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 189–90 (5th Cir. 2009)).

In other words, "even if [a relator's complaint] cannot allege the details of an actually submitted false claim," the complaint can still sometimes survive by "alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Id.*

In contrast, allegations that only create mere speculation are not enough. For example, in *Carew*, the district court held that the relator's complaint failed to provide sufficient details of an alleged fraudulent scheme. *Id.* at *4. Even though it was possible that the alleged payments at issue were illegal kickbacks, the relator failed to plead strong or reliable indications that the payments were in fact illegal. *Id.* at *6. The court found that relator's complaint was "too speculative" and failed to allege, as required, "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that false claims were actually submitted." *Id.* The Fifth Circuit affirmed the district court's holding without further analysis. *United States ex rel. Carew v. Senseonics Holdings, Inc.*, No. 23-50307, 2024 WL 837042, at *1 (5th Cir. Feb. 28, 2024) (per curiam).

c. The Second Circuit Continues to Recognize an Exception When Billing Information is Peculiarly Within the Opposing Party's Knowledge.

The Second Circuit has similarly said that Rule 9(b) requires a party alleging fraud to: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *United States ex rel. Askari v. PharMerica Corp.*, No. 23-909, 2024 WL 1132191, at *3 (2d Cir. Mar. 15, 2024) (quoting *United States ex rel. Chorches for Bankr. Estate of Fabula v. Am. Med. Response, Inc.*, 865 F.3d 71, 81 (2d Cir. 2017)).

But the Second Circuit also allows a plaintiff to plead "on information and belief" if it can (1) show billing information is "peculiarly within the opposing party's knowledge" and (2) "mak[e] plausible allegations creating a strong inference that specific false claims were submitted to the government." *United States ex rel. Pilat v. Amedisys, Inc.*, No. 23-566, 2024 WL 177990, at *2 (2d Cir. Jan. 17, 2024) (citing Chorches, 865 F.3d at 86).

In *Pilat*, the relators were former employees of a home health and hospice care company. *Id.* at *1. They alleged that the defendant "falsely certified unqualified patients for home health care, provided unnecessary and improper treatment, falsified time records, and manipulated patient records." *Id*. In support, the relators identified multiple specific instances in which clinicians were instructed to either incorrectly document patient information or recommend an unnecessary course of treatment. *Id.* at *3–4.

The court held that the relator's allegations raised a strong inference that false claims were indeed submitted to the government. *Id.* But the court also held that the relators had not established relevant billing information was "peculiarly within" the defendant's knowledge since they admitted to being able to review some of the forms that showed falsified billing information. *See id.* at *4. As such, the Second Circuit affirmed dismissal for failure to satisfy Rule 9(b), but held the relators should be granted leave to amend to address the billing information issue.

2. Scienter

FCA liability requires that a defendant acted "knowingly." *See* 31 U.S.C. § 3729(a)(1). The FCA "is not intended to punish honest mistakes or incorrect claims submitted through mere negligence." *United States ex rel. Skibo v. Greer Labs., Inc.*, 841 F. App'x 527, 531 (4th Cir. 2021) (citation omitted); *see also United States ex rel. Jacobs v. Walgreen Co.*, No. 21-20463, 2022 WL 613160, at *1 (5th Cir. Mar. 2, 2022) (allegations of fraud that do not amount to "anything more than innocent mistake or negligence" are insufficient).

The terms "knowing" and "knowingly" are defined by the FCA to "mean that a person, with respect to information (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A); *see also United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 750 (2023) ("In short, either actual knowledge, deliberate indifference, or recklessness will suffice.").

In its 2023 *SuperValu* decision, the U.S. Supreme Court held that in FCA cases involving ambiguous legal requirements, the scienter element turns on a defendant's subjective beliefs, not what an objectively reasonable person may have believed—rejecting a standard previously followed by many circuit courts. *See* 598 U.S. at 749.

In the aftermath of *SuperValu,* numerous lower courts were forced to reevaluate prior decisions involving scienter. *See e.g., United States ex rel. Sheldon v. Allergan Sales, LLC*, 143 S. Ct. 2686 (2023) (remanding "for further consideration in light of [*SuperValu*]"); *Olhausen v. Arriva Med., LLC*, 143 S. Ct. 2686 (2023) (same); *United States ex rel. Heath v. Wisconsin Bell, Inc.*, 92 F.4th 654, 663 (7th Cir. 2024) (reversing lower court and applying *SuperValu* scienter standard to find genuine issue of material fact existed as to recklessness), *cert. granted*, 144 S. Ct. 2657 (2024); *United States ex rel. Miller v. Reckitt Benckiser Grp. PLC*, No. 1:15-cv-00017, 2023 WL 6849436, at *17 (W.D. Va. Oct. 17, 2023) (staying the case, requiring briefs addressing the impact of *SuperValu*, and thereafter finding the relator had sufficiently alleged scienter).

After *SuperValu*, relators must take care to allege and introduce facts regarding a defendant's subjective knowledge. And some defendants who would have prevailed on dispositive motions under an objectively reasonable person scienter standard now may not meet their burden with respect to the subjective knowledge scienter standard.

a. The Ninth Circuit Emphasized That Post-*SuperValu* Relators Must Offer Evidence of Subjective Knowledge of Falsity.

In *Evans v. Southern California Intergovernmental Training and Development Center*, the Ninth Circuit affirmed summary judgment against a relator who failed to offer facts evidencing the defendant's subjective knowledge that its invoices overstated the cost of its services. No. 22-16715, 2024 WL 1988827, at *1–2 (9th Cir. May 6, 2024).

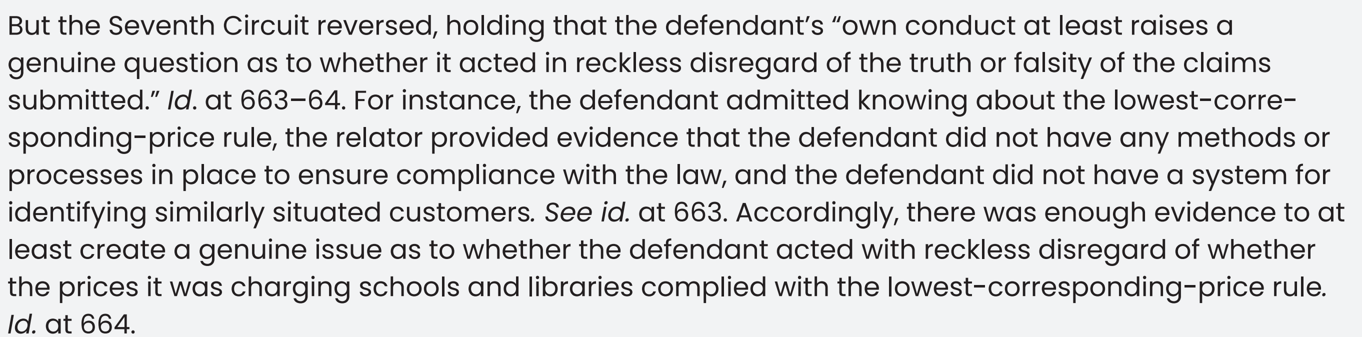
The relator argued that the defendant "was on actual or constructive notice" that its budgeting practices were improper because the defendant's executive director "would have had knowledge of the contents of the contracts . . . because it was her practice to read the contracts in their entirety." Appellant's Opening Brief, *Evans v. S. Cal. Intergovernmental Training & Dev. Ctr.*, No. 22-16715, 2023 WL 1930661, at *40 (9th Cir. Feb. 2, 2023). But the Ninth Circuit held that this was not enough: "[t]hat . . . contracts with [defendant] required actual-cost invoicing does not demonstrate that [defendant] knew actual-cost invoicing was required by the federal government because the inquiry here is focused on what [defendant] *subjectively* thought and believed." *Evans*, 2024 WL 1988827, at *2.

b. A Seventh Circuit Decision Highlighted How *SuperValu's* Subjective Knowledge Standard May Require Litigation of Fact Disputes.

The subjective knowledge standard may require parties to litigate fact disputes that would not have survived summary judgment under the objectively reasonable person standard. The consequence for defendants is exemplified by the Seventh Circuit's decision in *United States ex rel. Heath v. Wisconsin Bell, Inc.*, which applied *SuperValu* to reverse a district court's ruling that the relator had failed to establish scienter. 92 F.4th 654, 662–63 (7th Cir. 2024), *cert. granted*, 144 S. Ct. 2657 (2024).

Heath involved the Schools and Libraries Universal Service Support program (a.k.a. the "E-Rate program"), which provides federal subsidies for internet access and related services for schools and libraries. Per Federal Communications Commission ("FCC") regulations implementing the E-Rate program, telecommunications service providers must follow what is known as the "lowest-corresponding-price" rule and offer schools and libraries the lowest price charged to similarly situated non-residential customers.

The relator alleged that a telecommunications provider submitted overstated bills and false certifications of compliance after failing to implement procedures to evaluate its own compliance with E-Rate program rules for many years. *Id.* at 659, 663. The district court concluded that the defendant's interpretation of the lowest-corresponding-price rule was objectively reasonable and consistent with the rule's language as well as FCC guidance, which in turn, warranted summary judgment against the relator on scienter. *Id.* at 662–63.



But the Seventh Circuit reversed, holding that the defendant's "own conduct at least raises a genuine question as to whether it acted in reckless disregard of the truth or falsity of the claims submitted." *Id*. at 663–64. For instance, the defendant admitted knowing about the lowest-corresponding-price rule, the relator provided evidence that the defendant did not have any methods or processes in place to ensure compliance with the law, and the defendant did not have a system for identifying similarly situated customers. *See id.* at 663. Accordingly, there was enough evidence to at least create a genuine issue as to whether the defendant acted with reckless disregard of whether the prices it was charging schools and libraries complied with the lowest-corresponding-price rule. *Id.* at 664.

Heath is indicative of courts' greater reluctance to grant summary judgment with respect to scienter after *SuperValu* articulated the subjective knowledge standard. If a relator can plead and supply facts sufficient to suggest that a defendant had subjective knowledge of falsity, then defendant's counsel may be required to engage in a fact-specific analysis that would not have been required in many circuits before *SuperValu*.

c. The Second Circuit Held a Relator Alleging AKS-Premised FCA Claims Must Satisfy the AKS's "Willful" Scienter Standard.

The AKS prohibits individuals and entities from *knowingly or willfully* paying another to induce a referral of business that is reimbursable under a federal healthcare program. 42 U.S.C. § 1320a-7b(b). In 2010, Congress amended the AKS to include FCA liability for a claim that includes items and services "*resulting from* a violation of [the AKS]." 42 U.S.C. § 1320a-7b(g) (emphasis added).

In *United States ex rel. Hart v. McKesson Corp.*, the relator sued a pharmaceutical wholesaler alleging that the wholesaler offered its customers business management tools that induced customers to purchase drugs from the wholesaler. 96 F.4th 145, 150 (2d Cir. 2024). The relator argued that this was an illegal kickback in violation of the AKS and the FCA.

The district court dismissed the lawsuit, concluding the relator had failed to allege that the defendant acted with the requisite scienter under the AKS. The Second Circuit affirmed, holding that "[t]o act willfully under the AKS, a defendant must act with a 'bad purpose,'" which means "the defendant must act 'with knowing that his conduct was unlawful,'" even if the defendant is not aware that his conduct is unlawful under the AKS specifically or the defendant did not intend to violate the AKS. *Id.* at 157 (quoting *Bryan v. United States*, 524 U.S. 184, 191–92 (1998)). The court explained that this interpretation of the AKS's willfulness requirement was intended to protect only those "who innocently and inadvertently engage in prohibited conduct." *Id*.

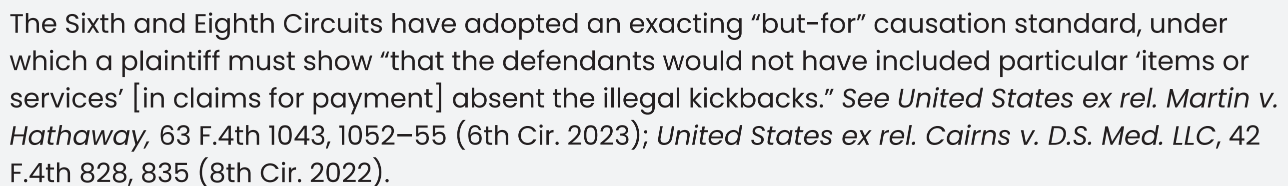
3. Causation

To establish liability under the FCA, the government or relator must demonstrate "causation"—i.e., that a specific false claim or claims "resulted from" the defendant's fraudulent conduct.

The causation requirement has not been applied uniformly across circuits, though most federal courts have required relators to show that the defendant took an "affirmative act," *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 714 (10th Cir. 2006), with "some degree of participation in the claims process," *United States v. President & Fellows of Harvard Coll.*, 323 F. Supp. 2d 151, 186–87 (D. Mass. 2004). *See also United States ex rel. Polansky v. Exec. Health Res., Inc.*, 196 F. Supp. 3d 477, 513 (E.D. Pa. 2016) ("Numerous courts have held that some level of direct involvement in causing the submission of false claims to the government is necessary for direct liability under the FCA."). Courts continued to grapple with this requirement in 2024.

a. A Circuit Split on the Causation Standard for AKS-Premised FCA Claims Continues.

As stated above, the FCA imposes liability for a claim that includes items and services "*resulting from* a violation of [the AKS]." 42 U.S.C. § 1320a-7b(g) (emphasis added). But appellate courts have long struggled to interpret the phrase "resulting from."



The Sixth and Eighth Circuits have adopted an exacting "but-for" causation standard, under which a plaintiff must show "that the defendants would not have included particular 'items or services' [in claims for payment] absent the illegal kickbacks." *See United States ex rel. Martin v. Hathaway,* 63 F.4th 1043, 1052–55 (6th Cir. 2023); *United States ex rel. Cairns v. D.S. Med. LLC*, 42 F.4th 828, 835 (8th Cir. 2022).

In contrast, the Third Circuit ruled that "resulting from" did not require "but-for" causation and instead only a "link" is needed—meaning only the demonstration of "some connection between a kickback and a subsequent reimbursement claim is required." *United States ex rel. Greenfield v. Medco Health Sols., Inc.*, 880 F.3d 89, 96–100 (3d Cir. 2018).

Some circuits have declined to clarify the standard. For example, in 2024, the Seventh Circuit refused to determine whether § 1320a-7b(g) requires a showing of but-for causation or something less since the facts at hand would satisfy even the strictest causal test. *See Stop Illinois Health Care Fraud, LLC v. Sayeed*, 100 F.4th 899, 909 (7th Cir. 2024), *reh'g denied*, No. 22-3295, 2024 WL 2785312 (May 30, 2024).

And in at least one other circuit, the district courts themselves disagree. In the First Circuit, different judges for the District of Massachusetts recently reached different conclusions. Compare *Omni Healthcare, Inc. v. MD Spine Sols. LLC*, No. 18-cv-12558, 2025 WL 32676, at *8 (D. Mass. Jan. 6, 2025) (adopting the but-for causation standard) and *United States v. Regeneron Pharms., Inc.*, No. 20-cv-11217, 2023 WL 6296393, at *11 (D. Mass. Sept. 27, 2023) (same), *perm. app. granted*, No. 23-8036, 2023 WL 8599986 (1st Cir. Dec. 11, 2023), with *United States ex rel. Witkin v. Medtronic, Inc.*, No. 1:11-cv-10790, 2024 WL 1892405, at *18–19 (D. Mass. Mar. 31, 2024) (rejecting but-for causation), and *United States v. Teva Pharms. USA, Inc.*, 682 F. Supp. 3d 142, 148 (D. Mass. 2023) (same). The issue in Massachusetts could be resolved in 2025 because the First Circuit heard oral arguments in the *Regeneron* case.

b. A Fifth Circuit District Court Applied a Flexible Causation Standard.

In line with Fifth Circuit precedent, the Western District of Texas held that the FCA's causation standard is a "flexible" one. *United States ex rel. Hueseman v. Prof'l Compounding Ctrs. of Am., Inc.*, No. 14-cv-00212, 2024 WL 2244818, at *4 (W.D. Tex. May 1, 2024). Specifically, the district court explained that causation requires proximate cause, in which "[a] defendant's conduct may be found to have caused the submission of a claim for . . . reimbursement if the conduct was (1) a substantial factor in inducing providers to submit claims for reimbursement, and (2) if the submission of claims for reimbursement was reasonably fore*See*able or anticipated as a natural consequence of defendants' conduct." *Id.* at *5 (quoting *United States ex rel. Ruckh v. Salus Rehab.*, 963 F.3d 1089, 1107 (11th Cir. 2020)).

In other words, in the Fifth Circuit, the FCA's causation standard "demands more than mere passive acquiescence in the presentation of the claim and some sort of affirmative act that causes or assists the presentation of a false claim." *Id.* (quoting *United States ex rel. Aldridge v. Corp. Mgmt., Inc.*, 78 F.4th 727 (5th Cir. 2023) (cleaned up)).

c. The Ninth Circuit Held That the "But For" Causation Standard Applied to FCA Retaliation Claims.

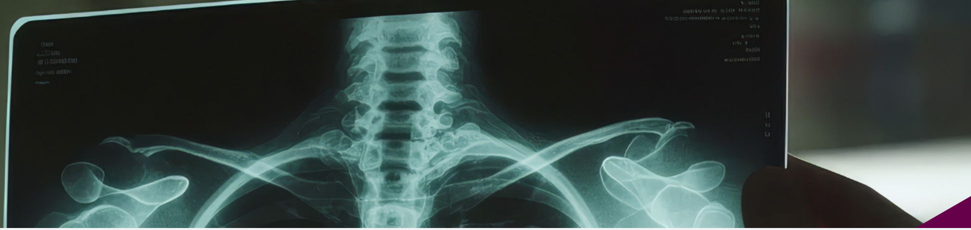
To protect whistleblowers, the FCA has an anti-retaliation provision that imposes liability on an employer if an employee is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment *because of* lawful acts done by the employee . . . in furtherance of an [FCA] action . . . or other efforts to stop one or more violations of [the FCA]." 31 U.S.C. § 3730(h)(1) (emphasis added).

In 2013, the U.S. Supreme Court held that all Title VII retaliation claims must be proved according to traditional principles of "but-for" causation, which "requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 344, 360 (2013).

In 2024, the Ninth Circuit relied on Nassar to rule that the "but-for" causation standard also applies to FCA retaliation claims since the use of "because of" language generally requires "but-for" causation and that language appears in both the FCA and Title VII. *See Mooney v. Fife*, 118 F.4th 1081, 1090 (9th Cir. 2024) (citing *Nassar*, 570 U.S. at 352).

4. Falsity

As the name implies, the FCA only imposes liability for "false claims"—that is, for presenting a false or fraudulent claim or making a false record or statement material to a false or fraudulent claim. 31 U.S.C. § 3729(a)(1)(A)–(B). A defendant may also be liable under the FCA for a "reverse false claim" if it makes or uses a false record or statement for the purpose of avoiding or decreasing an "obligation" owed to the United States. *See* 31 U.S.C. § 3729(a)(1)(G). The terms "false" and "fraudulent" are not defined in the FCA, so the governing standards have been developed through caselaw.



a. The Ninth Circuit Found Falsity Could Be Met Through Allegations of Falling Below the Minimum Standard of Care.

In *United States ex rel. Stenson v. Radiology Ltd.*, the relator alleged that the defendant had charged CMS over $6 million for radiology diagnostic readings that did not qualify for reimbursement because they were conducted on non-FDA-approved, non-medical-grade computer displays, and then violated the FCA by falsely certifying compliance with CMS regulations. No. 22-16571, 2024 WL 1826427, at *1, *3 (9th Cir. Apr. 26, 2024).

CMS coverage laws require that all reimbursed services be "reasonable and necessary." 42 U.S.C. § 1395y(a)(1)(A). In the Ninth Circuit, "a false certification of medical necessity can give rise to FCA liability." *United States ex rel. Winter v. Gardens Reg'l Hosp. & Med. Ctr., Inc.*, 953 F.3d 1108, 1118 (9th Cir. 2020). So, even if no federal rule, regulation, or law specifically required radiologists to use FDA-approved devices, the general Medicare statute nonetheless required that all physicians provide services that meet minimum efficacy standards. *Stenson*, 2024 WL 1826427, at *3. As a result, the relator could satisfy the falsity element merely by alleging that the defendant knowingly submitted claims for diagnostic readings that fell below the federally mandated minimum standard of care.

b. A Fifth Circuit District Court Held Off-Label Prescriptions Are Not Inherently Factually False or Misleading

In *United States ex rel. Hearrell v. Allergan, Inc.*, the relator brought a *qui tam* action alleging that the defendant violated the FCA by promoting Botox off-label for pediatric migraines and paying illegal kickbacks to physicians. No. 2:21-cv-00204, 2024 WL 1676209, at *2 (E.D. Tex. Apr. 18, 2024). The defendant countered that off-label prescriptions are not false statements because they do not contain inaccurate information.

The district court agreed with the defendant, holding that the facts as alleged did not support the inference that the defendant made a false statement or falsely certified compliance with a statute or regulation. *Id.* at *4. The relator had not alleged any facts showing that an off-label prescription is factually false or misleading, and merely pleading an AKS violation did not automatically satisfy the falsity element of an FCA claim. *Id.*

5. Materiality

The FCA imposes liability where a person "knowingly makes, uses, or causes to be made or used, a false record or statement *material* to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B) (emphasis added). The statute defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4).

The U.S. Supreme Court interprets the materiality requirement to mean that "[a] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 181 (2016).

The Court explained that the FCA is not "a vehicle for punishing garden variety breaches of contract or regulatory violations" or "minor or insubstantial" noncompliance with government contracts. *Id.* at 194. Evaluating materiality accordingly requires a "rigorous" fact-based inquiry. *Id.* at 195 n.6.

Escobar listed three non-exclusive factors that courts can apply when assessing materiality: (1) whether the government expressly conditions payment on compliance with a particular regulation or provision, (2) whether noncompliance goes to the "essence of the bargain" between the government and recipient, and (3) whether the government has refused to pay in response to similar violations. *Id.* at 193–95. In 2024, the First, Third, Eighth, and Ninth Circuits rendered decisions that clarified their application of the *Escobar* factors.

a. The First Circuit Found Noncompliance With Speed Limit Sign Regulations Not Material to an Agency's Decision to Pay Municipal Claims.

In *United States ex rel. Zotos v. Town of Hingham*, the relator alleged that a Massachusetts town falsely represented to the Massachusetts Department of Transportation that speed limit signs it installed complied with relevant state and federal regulations, causing the agency to submit false claims to the Federal Highway Administration. 98 F.4th 339, 342–43 (1st Cir. 2024). The First Circuit applied the three factors from *Escobar* and found the claims were not material. *Id.* at 344.

First, the court noted that the complaint failed to make it clear whether defendants actually certified that they adhered to applicable laws, regulations, and guidelines when seeking reimbursement but that even if they had, there was no express indication in the reimbursement form that compliance with speed limit sign regulations was necessary for federal funding. *Id.* at 345. The court then turned to the second *Escobar* factor and found the regulatory violations alleged did not go to the "essence of the bargain." *Id*. Instead, they were "at best" the kind where the government could refuse to pay if it were aware. *Id.* Finally, the court found that the third factor favored the defendants because the relator filed numerous prior lawsuits alleging "nearly identical allegations" and the government continued to pay the town despite those suits. *Id.*

b. The Eighth Circuit Held Various Alleged Regulatory Violations by Medicare Advantage Participant Insurance Companies and Brokers Were Not Material.

In *United States ex rel. Holt v. Medicare Medicaid Advisors, Inc.*, the Eighth Circuit considered a variety of claims regarding the Medicare Advantage ("MA") program. 115 F. 4th 908, 914 (8th Cir. 2024). The relator sued various insurance companies and their broker, alleging three different schemes resulted in insurance carriers submitting false claims. *Id.* at 914–15. The three schemes involved marketing violations, agent certification, and redirecting beneficiary complaints to allegedly improve plan scores in CMS's MA star rating program. *Id.* The court applied the *Escobar* factors and held that none of the alleged schemes involved material false claims. *Id.* at 920–22.

Starting with the alleged marketing violations, the court found none of the *Escobar* factors favored a materiality finding. *Id.* at 920. The relator alleged that the defendant's marketing efforts violated federal regulations, including by cold-calling potential enrollees, conducting door-to-door sales, and enrolling beneficiaries outside of enrollment season. *Id.* at 915. However, the relator only alleged that carriers made a general certification that they follow MA rules, which was insufficient. *Id.* at 920.

Next, the court found that marketing violations do not go to the essence of CMS's agreement with carriers because the regulations merely *permit* CMS to terminate a carrier over "substantial" noncompliance, rather than require it to do so. *Id.* Finally, the court found the third factor neutral because there was no record evidence of how CMS reacts to marketing violations. *Id.*

The court then turned to agent certification. Agents must be certified to sell MA plans, and the relator alleged the defendant broker used uncertified agents to sell MA plans. *Id.* at 915. The court examined but declined to reach a conclusion regarding the first factor and weighed the third factor as neutral due to lack of evidence. *Id.* at 921. The second *Escobar* factor cut against materiality because under the regulatory scheme, CMS would pay the carrier for a policy sold by an unlicensed agent. *Id.* The government, then, would pay even with knowledge of an agent certification violation. *Id.*

Finally, the court examined the alleged scheme to manipulate the star rating system and found it too was not material. *Id.* The star rating regime is a system CMS uses to rate plans and a plan's rating can affect bonus payments to the carrier. *Id.* at 914. The first two factors suggested the star-rating scheme was not material and the third factor was neutral, so the court found the scheme not material. *Id.* at 921.

c. The Third Circuit Emphasized the Government's Knowledge of the Purported False Statements in Finding Vaccine Misrepresentations Not Material.

In *United States ex rel. Krahling v. Merck & Co.*, the Third Circuit considered an FCA claim against a vaccine manufacturer. No. 23-2553, 2024 WL 3664648, at *1 (Aug. 6, 2024). The relator alleged the vaccine company made false representations to the government regarding the potency and effectiveness of vaccines the Centers for Disease Control and Prevention ("CDC") purchased for its Vaccines for Children program. *Id.* at *1, *4. The relator filed suit in 2010, and the CDC has continued to purchase the vaccine in annually negotiated contracts since then. *Id.* at *5. Even when a competitor vaccine came to market, the FDA approved the two vaccines as equivalent, and the CDC purchased vaccines from both manufacturers rather than switching entirely to the new vaccine. *Id.*

The Third Circuit also noted that the CDC conducts its own effectiveness trials and purchased the manufacturer's vaccines despite those trials showing the vaccine's real-world effectiveness was lower than the manufacturer's reported effectiveness in clinical trials. *Id.* at *7. Based on those facts, the Court concluded any misrepresentations were not material. *Id.* at *9.

d. The Ninth Circuit Reversed a Grant of Summary Judgment That a Radiology Center's Use of Non-Medical Grade Monitors Was Not Material.

In *Stenson*, discussed above, the Ninth Circuit considered whether a radiology center's use of non-medical grade computer monitors was material. 2024 WL 1826427 at *1. The court found that the relator sufficiently pleaded materiality when he alleged that using non-medical grade monitors violated the "reasonable and necessary" requirement of Medicare regulations. *Id.* at *4.

Because CMS "routinely declines to reimburse medical providers for services . . . administered below a federally prescribed standard of care," the Ninth Circuit held that using non-medical grade monitors could be material if the monitors were as unsuited to medical use as the relator alleged. *Id.* at *4. Accordingly, the Ninth Circuit reversed the district court's grant of summary judgment on this issue and remanded the case for further proceedings. *Id.* at *5.

6. Submission of a "Claim"

In *Heath*, discussed above, the Seventh Circuit also held that reimbursement requests under the E-Rate program constituted "claims" under the FCA. 92 F.4th at 666. The defendant had argued otherwise because the E-Rate program is funded entirely by contributions of private telecommunications carriers and is administered by a private nonprofit corporation, which meant, according to the defendant, that there are no federal funds involved, and the government is not hurt by fraud in the program. *See id.* at 665. The Fifth Circuit had reached the same conclusion in *United States ex rel. Shupe v. Cisco Systems, Inc.*, 759 F.3d 379 (5th Cir. 2014).

But the Seventh Circuit rejected the argument and *Shupe's* holding, creating a circuit split. The Seventh Circuit held instead that federal funds were involved since the U.S. Treasury collects unpaid debts owed to the E-Rate program and provides criminal restitution payments and civil settlements stemming from the program. 92 F.4th at 667. The court also concluded that the nonprofit corporation administering the program was an agent of the United States in that it was subject to ultimate control by the FCC. *Id.* at 668. Finally, the court held that the federal government's role in establishing and overseeing the E-Rate program was sufficient to say the government "provided" funds to the program. *Id.* at 668–69.

In June 2024, the U.S. Supreme Court granted certiorari to determine whether reimbursement requests submitted to the E-Rate program qualify as "claims" under the FCA. The Court has already heard oral argument and we expect guidance to help answer this question in mid-2025.

E. REVERSE FALSE CLAIMS

The FCA's reverse false claims provision provides that a relator may recover against a person who knowingly fails to pay an "obligation" to the government. 31 U.S.C. § 3729(a)(1)(G). The FCA defines an "obligation" as "an established duty, whether or not fixed, arising from" enumerated sources. 31 U.S.C. § 3729(b)(3).

In 2024, the Second and Ninth Circuits considered the pleading standard to establish the existence of an "obligation" for a reverse false claims suit.

1. The Second Circuit Determined That Violations of Consent Decrees Do Not Create an Obligation Until the Government has Determined a Fine Must Be Paid.

In *Miller v. United States ex rel. Miller*, the Second Circuit considered whether discretionary penalties arising from violations of consent decrees are "obligations" under the FCA. 110 F.4th 533, 546–47 (2d Cir. 2024). The relator had filed a reverse false claim *qui tam* action, alleging that the defendant, a global bank, violated consent orders it entered into with the Consumer Financial Protection Bureau and Office of the Comptroller of the Currency when it hid failures in its management of third-party risks in order to avoid paying regulatory fines and penalties to the government.

The district court dismissed the relator's action, and the Second Circuit affirmed, finding that (1) the penalties at issue were discretionary, not mandatory; (2) the existence of a cognizable "obligation" under the reverse-false-claim provision of the FCA turns on whether a duty is established; and (3) a "duty to pay is 'established' only when it triggers an immediate and self-executing duty to pay." *See id.* at 542–45. Thus, a violation where the imposition of penalties depends on government discretion does not create an obligation unless and until the government has exercised that discretion to determine the fine must be paid. *Id.* at 545–46.

2. The Ninth Circuit Affirmed Pre-2009 Precedent as Consistent with the FCA's Definition of "Obligation."

In *United States ex rel. Lesnick v. ISM Vuzem d.o.o.*, the Ninth Circuit addressed when an "obligation" is established for purposes of a reverse false claims suit for the first time since the "obligation" definition was included in the statute in 2009. 112 F.4th 816, 819 (9th Cir. 2024). In *Lesnick*, noncitizen laborers who were brought to the United States for construction work by the defendants sued their employers, alleging they violated the FCA by fraudulently applying for employment visas for the plaintiffs that cost less than the ones for which they should have applied. While the defendants made no appearances, the district court dismissed the plaintiffs' claims, reasoning that the defendants had no legal obligation to pay for the more expensive visas they did not apply for—regardless of whether they should have applied for them.

On appeal, the Ninth Circuit looked to its pre-2009 authority, *United States v. Bourseau*, 531 F.3d 1159 (9th Cir. 2008). In *Bourseau*, the Ninth Circuit had embraced the Sixth Circuit's holding that "an 'obligation' exists where a defendant owes the government 'a specific, legal obligation at the time that the alleged false record or statement was made.'" 531 F.3d at 1169–70 (quoting *Am. Textile Mfrs. Inst., Inc. v. The Ltd., Inc.*, 190 F.3d 729, 735 (6th Cir. 1999)). Further, "the obligation cannot be merely a potential liability[;]… a defendant must have a present duty to pay the government." *Lesnick*, 112 F.4th at 819 (quoting *Am. Textile*, 190 F.3d at 735). The Ninth Circuit found Congress confirmed this interpretation with its statutory definition of "obligation" and therefore upheld the district court's dismissal because the defendants had no obligation to pay the government for visa applications they never actually submitted. *Id.* at 820.

F. RETALIATION

To protect whistleblowers, the FCA has an anti-retaliation provision that imposes liability on an employer if an employee is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee . . . in furtherance of an [FCA] action . . . or other efforts to stop one or more violations of [the FCA]." 31 U.S.C. § 3730(h)(1).

Courts have generally held that when there is no direct evidence of retaliation, an FCA retaliation claim can be analyzed under a three-step, burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

Under the first step of the framework, an employee must prove that (1) she was engaged in a protected activity; (2) her employer had knowledge of this conduct; and (3) the employer retaliated against the employee (i.e., took an adverse employment action) because of this conduct. *See, e.g., Harrington v. Aggregate Indus. Ne. Region, Inc.*, 668 F.3d 25, 31 (1st Cir. 2012) (citations omitted). If the employee proves these three elements, then the second step shifts the burden of proof to the employer to provide a legitimate, non-retaliatory explanation for its allegedly retaliatory action*. See id.* The third step of the framework shifts the burden back to the employee to demonstrate that the employer's proffered explanation is a pretext calculated to mask retaliation*. See id.*

To qualify as "protected activity" under the first element of step one, the statutory text requires (i) acts in furtherance of an FCA action, or (ii) other "efforts to stop" one or more FCA violations. *See Hickman v. Spirit of Athens, Alabama, Inc.*, 985 F.3d 1284, 1288 (11th Cir. 2021) (citing *United States ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 95–98 (2d Cir. 2017)).

But courts continue to differ on, among other things, what constitutes "acts in furtherance of" an FCA action, whether an FCA lawsuit needs to be a "distinct possibility" at the time of the protected activity, and whether the "efforts to stop" an FCA violation need to be based on "an objectively reasonable belief that violations had occurred." In 2024, several court opinions provided guidance on these issues and other aspects of the retaliation framework.

1. The Fifth Circuit Held It Lacks Jurisdiction Over FCA Retaliation Claims If It Involved a Federal Security Clearance Decision.

In *United States ex rel. Johnson v. Raytheon Co.*, the plaintiff filed an FCA retaliation claim against his former employer. 93 F.4th 776, 779 (5th Cir. 2024). The plaintiff claimed the defendant, a government defense contractor that primarily provided services to the Navy, had concealed software and other technical problems from the government and that he engaged in protected activity when he identified and spoke out about these issues. He also claimed that the defendant retaliated against him by (1) instructing him not to report the issues, (2) monitoring his activity, (3) reporting false concerns about his security clearance to the Navy, and (4) terminating his employment.

The Fifth Circuit affirmed the summary judgment dismissal of the plaintiff's claim. Under the second step of the *McDonnell Douglas* burden-shifting framework, the defendant's stated non-retaliatory explanation for the conduct underlying the plaintiff's second, third, and fourth claims of retaliation was that the plaintiff had violated national security policies. But the court held "there [wa]s no way to assess whether the defendant's reason was pretextual without treading on the DOD CAF's security clearance decision, which credited the Navy's investigation and [found] that [the relator] did commit security violations." 93 F.4th at 788. Doing so would contravene Supreme Court precedent holding that security clearance decisions are not subject to review. As such, the court lacked jurisdiction over those claims of retaliation.

2. The Eleventh Circuit Held It Lacks Jurisdiction Over FCA Retaliation Claims Against Arms of the State.

The Eleventh Circuit held that federal courts lack jurisdiction to hear FCA retaliation claims against defendants who are arms of the state. In *Monroe v. Fort Valley State University*, a former program director for pre-school programs administered by a public university brought an FCA retaliation lawsuit against the Board of Regents of the university system. 93 F.4th 1269, 1273–74 (11th Cir. 2024). The plaintiff alleged that she was fired because she reported alleged improprieties about the school's operations to the executive director.

The Board of Regents filed a motion for summary judgment, arguing that it was entitled to immunity under the Eleventh Amendment as an arm of the state. The district court granted the motion, and the Eleventh Circuit affirmed. The court of appeals reasoned that the Eleventh Amendment grants immunity to states and arms of the state unless Congress clearly abrogates the immunity in statutory text.

Examining the text of the FCA anti-retaliation provision, the court reasoned that there was no "unmistakably clear" abrogation*. Id.* at 1276. Specifically, the provision lacked several critical components of abrogation: the provision does not mention (a) "the Eleventh Amendment," (b) "the States," (c) "abrogation," or (d) "who may be sued for violating it." *Id*. Accordingly, the Eleventh Circuit held that the plaintiff could not maintain her suit against the Board of Regents.

3. The Ninth Circuit Held Protected Activity May Be Shown by Good-Faith Belief That One's Employer is Possibly Committing Fraud Against the Government.

In our 2021 Review, we explained that the Eleventh Circuit held that whistleblowers are required to show that the alleged misconduct had "something to do with the False Claims Act—or at least that a reasonable person might have thought so." *Hickman v. Spirit of Athens, Alsa., Inc*., 985 F.3d 1284, 1289 (11th Cir. 2021).

In 2024, the Ninth Circuit joined the *Hickman* court and held that protected activity may be established when "the employee in good faith believes that the employer is possibly committing fraud against the government." *Mooney v. Fife*, 118 F.4th 1081, 1092 (9th Cir. 2024). "Thus, the employee need not know for certain that the employer has committed fraud." *Id.*

In addition to a subjective good faith belief, a plaintiff must also demonstrate that a reasonable employee in the same or similar circumstances might also believe the employer was committing fraud against the government. *See id.* In other words, the Ninth Circuit's protected activity test has both subjective and objective elements.

4. Courts Are Split Over Whether Employees With Compliance Duties Must Meet a Higher Standard to Establish That Their Employer Was on Notice of Protected Activity.

In *Mooney*, discussed above, the Ninth Circuit also declined to adopt a stricter standard observed by the Fourth, Fifth, and Tenth Circuits for employees with compliance duties. *See Mooney*, 118 F.4th at 1094. Instead, the Ninth Circuit held that the FCA's anti-retaliation provision "does not hold an employee with compliance duties to a different standard than employees without such duties." *Id*. at 1096. "Regardless of whether the employee has compliance duties, to satisfy the second element—the notice requirement—of an FCA retaliation claim, the employer need only be aware of an employee's efforts to stop 1 or more violations of the FCA." *Id*. (cleaned up).

The other approach may be seen in a recent magistrate judge's opinion in a case dismissed from the Northern District of Texas. In *Sullivan v. City of Dallas*, a City of Dallas employee working on public roads raised concerns about road health scores and repair budgets proposed by a private pavement management consulting firm retained by the city. No. 3:21-cv-00915, 2024 WL 3767973, at *7 (N.D. Tex. July 15, 2024). The plaintiff was suspended and then terminated and filed an FCA retaliation claim against the City of Dallas.

The magistrate judge recommended that the court grant summary judgment on the FCA retaliation claim because, among other reasons, the plaintiff could not demonstrate that the City of Dallas was on notice of his protected conduct. The magistrate explained that "raising concerns about potential inaccuracies in [Pavement Condition Index] data was part of [the plaintiff's] job duties as a GIS Analyst II. . . . [the plaintiff] did not mention fraud in his communications with his chain of command or the City Council members." *Id.* In the absence of a complaint to a city council member, the magistrate could not find a material issue of fact concerning whether the city had notice. *See id.*

5. The Fifth Circuit Held That Retaliatory Conduct Requires a Showing That the Action Would Have Dissuaded a Reasonable Worker From Engaging in Protected Conduct.

In *Johnson*, discussed above, the Fifth Circuit also clarified the type of conduct plaintiffs must prove to demonstrate an adverse employment action. 93 F.4th at 790. Though the Fifth Circuit held that it did not have jurisdiction to assess three out of the relator's four grounds for retaliation, it concluded it did have jurisdiction to consider whether the defendant's instruction to prevent the plaintiff from reporting issues to the Navy was a form of retaliation.

On the merits, the court held that it was not. While acknowledging that an order not to report concerns may sometimes be a materially adverse action, the court held that the facts of the case did not support that conclusion. The plaintiff claimed that on two occasions, the same company employee told him to stop reporting his concerns. *Id.* at 791. The employee was not the plaintiff's supervisor, and the plaintiff was not threatened either time. "Such conduct would not have 'dissuaded a reasonable worker from' reporting to the Navy." *Id.*

6. Courts Are Split on Whether Temporal Proximity Is Sufficient To Show That an Employer's Nonretaliation Reasons For Adverse mployment Action was Pretextual.

In *Ruffolo v. Halifax Health, Inc.*, the Eleventh Circuit held that the plaintiff failed to show that the alleged non-retaliatory reason for her dismissal was pretextual. No. 23-12760, 2024 WL 1733968, at *2 (11th Cir. Apr. 23, 2024) (per curiam). There, the plaintiff's employer claimed she was dismissed because she used the company's relationship with vendors to order products to then resell to third parties. After an investigation, the company found that the plaintiff had been ordering products through company vendors and reselling the products to China.

The plaintiff countered "that the timing of the investigation of her mileage and a reimbursement check were suspicious." *Id*. at *2. However, the Eleventh Circuit held that this was not enough to establish pretext:

> "Because [the defendant]'s asserted legitimate business reason for firing [the plaintiff]—i.e. its belief that she had used her connection with [the defendant], its relationship with the vendor, its email system, and its online ordering system to order products for the benefit of a third party and not [the defendant]—would certainly motivate a rational employer to terminate the employee, [the plaintiff] bore the burden of proving that [the defendant]'s proffered reason was a pretext and the real reason for her termination was retaliation against her for reporting to [her manager] about possible false claims under the FCA."

Id.; see also Sullivan, 2024 WL 3767973, at *8 (holding that "the time between the most alleged protected activity and the adverse employment action is not close enough to raise a fact question concerning the causation element of the prima facie case" when the alleged protected activity occurred in March of 2019 and the employment termination occurred in October 2019).

In contrast, the Ninth Circuit in *Mooney*, discussed above, noted that "temporal proximity of the events undermines the genuineness of [the employer's] proffered reason." 118 F.4th at 1098. The court also acknowledged additional evidence, such as conflicting evidence of whether the employee had been disrespectful and insubordinate, in holding that there was a genuine question of material fact concerning whether the employer's stated reason was pretextual. *See id*. at 1097.

7. The Eighth Circuit Held That a Trial Court Does Not Abuse Its Discretion by Declining to Award Punitive Damages for Retaliation.

In *United States ex rel. Grant v. Zorn*, in a blow to a plaintiff who prevailed on an FCA retaliation claim, the Eighth Circuit held that a district court does not abuse its discretion when it chooses not to award punitive damages. 107 F.4th 782, 796 (8th Cir. 2024). The plaintiff had alleged that the defendants, a medical practice specializing in sleep medicine along with its owner, knowingly overbilled the government for initial and established patient visits and violated the FCA by knowingly soliciting and directing referrals in violation of the AKS. *See id.* at 789–90. The plaintiff also alleged he was fired for reporting the violations to the government.

After a bench trial, the district court held that the defendants submitted over a thousand false claims to the government and awarded $7.59 million in damages. *Id.* at 789. The court also held that the defendants violated the anti-retaliation provision of the FCA and awarded the plaintiff $350,000 for backpay and emotional distress damages. *Id.* at 791. However, the court denied the plaintiff's request for additional punitive damages under the anti-retaliation provision. *Id.*

On appeal, the Eighth Circuit held that this was not an abuse of discretion. The court of appeals noted that the court below reasoned that the FCA requires awarding double backpay to successful plaintiffs under the anti-retaliation provision. *Id.* at 796. This provision would be redundant, however, with punitive damages. "In light of this double backpay provision, we cannot say the district court abused its discretion in declining to award punitive damages. [The plaintiff] fails to cite any cases specifically holding that punitive damages are available under the FCA's anti-retaliation provision." *Id.*

G. RECOVERY, DAMAGES, AND FEES

1. The Seventh Circuit Held That FCA Penalties Would Not Be Unconstitutionally Excessive.

The Eighth Amendment prohibits the government from imposing excessive fines. U.S. Const. amend. 8, cl. 2. Fines are unconstitutionally excessive when "grossly disproportional to the gravity of the defendant's offense." *Stop Illinois Health Care Fraud, LLC v. Sayeed*, 100 F.4th 899, 907 (9th Cir. 2024) (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)).

Assuming without deciding that FCA damages are subject to scrutiny under the Eighth Amendment, the Seventh Circuit reasoned that FCA damages are not unconstitutionally excessive when the district court had imposed the lowest statutorily mandated per-claim penalty for an illegal patient referral scheme that exploited vulnerable seniors for profit. *Id.* at 906–08. The Seventh Circuit reasoned that the FCA's inflation-adjusted penalties of $5,500–$11,000 per claim warrant "a strong presumption of constitutionality" because they "reflect[] the considered legislative judgment as to what is excessive, and a court should be hesitant to substitute its opinion for that of the people." *Id*. at 907 (quoting *United States v. Malewicka*, 664 F.3d 1099, 1104 (7th Cir. 2011)).

2. The Seventh Circuit Remanded FCA Damages Award for Recalculation Where It May Have Been Based in Part on Lawful Claims.

Sayeed, cited above, involved an unlawful patient referral scheme between a healthcare provider and a non-governmental organization ("NGO") that contracted with the state to help coordinate healthcare for low-income seniors. 100 F.4th at 902–03. The NGO collected low-income seniors' medical information on questionnaires and then lawfully referred the seniors to local healthcare providers it partnered with on a rotational basis. *See id.* at 903. But the defendant, one of those healthcare providers, was also paying the NGO for access to the questionnaires to solicit new patients in violation of the AKS. *Id.* This amounted to a violation of the FCA to the extent the defendant submitted claims for Medicare reimbursement resulting from the unlawfully solicited clients.

To quantify FCA damages, the relator had proffered a spreadsheet of 673 claims for Medicare reimbursement that the defendant submitted during the illegal patient referral scheme. *Id.* at 906. Although the defendant maintained that the spreadsheet included claims resulting from lawful rotational referrals, the district court included all 673 claims in calculating a $6 million damages award.

As a result, the Seventh Circuit remanded for recalculation because the record was insufficient to affirm that all 673 claims actually resulted from AKS violations. *Id.* at 908–909; *see also United States ex rel. Aldridge v. Corp. Mgmt., Inc.*, No. 22-60264, 2024 WL 983560 (5th Cir. Mar. 7, 2024) (vacating and remanding for recalculation of damages consistent with appellate decision revising an FCA award to exclude claims outside of the FCA's statute of limitations).

3. The Ninth Circuit Sanctioned Several Attorneys for Recklessly Allowing a Meritless Motion for Reconsideration to Unreasonably Multiply Proceedings.

In *United States ex rel. Caputo v. Tungsten Heavy Powder, Inc.*, a defendant moved for reconsideration based on "newly discovered evidence" after settling a lawsuit alleging FCA violations. 96 F.4th 1111, 1123 (9th Cir. 2024). The Ninth Circuit held several attorneys jointly and severally liable with the defendant for $250,000 in sanctions under 28 U.S.C. § 1927, which prohibits any attorney from unreasonably multiplying proceedings in bad faith. *See id.* at 1153.

After settling the FCA case, the defendant moved *ex parte* for reconsideration based on newly discovered evidence. A district court may grant relief from a final judgment based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial. . . ." FED. R. CIV. P. 60(b)(2). Here, the "newly discovered evidence" was information from a defendant employee that allegedly corroborated claims of corporate espionage by the relators to obtain documents in support of the FCA action. However, the motion for reconsideration was drafted by an associate and "riddled with misstatements of law and fact." *Id.* at 1155. The supervising partner then accepted the motion at face value without independent verification of the law and facts. The defendant's general counsel rubber-stamped it, and it was argued multiple times. *See id.* at 1154–56.

While the supervising partner testified during the sanctions hearing that he accepted the argument that this evidence was newly discovered because it would have been new to the presiding judge, evidence within the moving party's possession at the time of trial or otherwise discoverable through reasonable diligence is not "newly discovered." *See id.* at 1134.

The Ninth Circuit held that the associate was jointly and severally liable with the contractor for 10 percent of the sanctions; the supervising partner, 20 percent; and the defendant's general counsel, 50 percent. *Id.* at 1158. Further, all three attorneys would be referred to their respective state bar associations for possible disciplinary proceedings. *See id.* at 1162–63.

4. The Fifth Circuit Held a Relator is Not Entitled to a Share of Settlement Proceeds from Related Claims Added by the Government.

The Fifth Circuit held that relators are not entitled to a share of FCA settlement proceeds and may not recover attorneys' fees when the government intervenes and ultimately settles related but factually distinct FCA claims. *See United States ex rel. Conyers v. Conyers*, 108 F.4th 351, 359 (5th Cir. 2024).

In *Conyers*, the relator pursued an FCA action against a government contractor. The government intervened, added additional claims, and informed the parties during discovery that it would not pursue the relator's original claims. *Id.* at 355. Although entitled to pursue the original claims itself, the relator elected not to do so. *Id.*

The Fifth Circuit reversed the district court's award of attorney's fees and 25 percent relator's share, explaining that a relator who "put the government on notice of fraud" and "arguably impelled and/or focused its investigation into" distinct claims is not entitled to a share of settlement proceeds or attorneys' fees. *Id.* The Fifth Circuit reasoned that the plain language, statutory context and purposes of the FCA foreclosed the award of the relator's share and attorneys' fees in such circumstances. *Id.* at 356–60.

In short, the FCA entitles relators to a share of the proceeds when the government intervenes and settles "the claim." 31 U.S.C. § 3730(d)(1). The statute does not entitle relators to proceeds of "any additional claims with respect to which the government contends it is entitled to relief." *Conyers*, 108 F.4th at 357 (quoting 31 U.S.C. § 3731(c)) (emphasis in original).

H. CONSTITUTIONALITY OF THE *QUI TAM* PROVISION

An emerging issue in FCA litigation is the argument that the *qui tam* provision itself violates the Constitution. Though private whistleblowers or *qui tam* relators may file FCA lawsuits "for [themselves] and for the United States Government," 31 U.S.C. § 3730(b)(1), the U.S. Supreme Court has reiterated that "[t]he Government, after all," is the "'real party in interest' in a *qui tam* action." *United States ex rel. Polansky v. Exec. Health Res., Inc.,* 599 U.S. 419, 426 (2023) (quoting *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 930 (2009)).

In dissent, Justice Thomas wrote that "[t]he FCA's *qui tam* provisions have long inhabited something of a constitutional twilight zone" and "there is good reason to suspect that Article II does not permit private relators to represent the United States' interests in FCA suits." *Id.* at 449, 451 (emphasis added). Following Justice Thomas's lead, one district court recently held that the *qui tam* provision is indeed at odds with Article II of the Constitution. Other district courts also grappled with this foundational question in 2024.

1. A Florida District Court Held the *Qui Tam* Provision Unconstitutional.

In September 2024, the constitutionality of the *qui tam* provision took its first serious blow when a Florida federal district court held that the FCA's *qui tam* provision is unconstitutional because, by allowing relators to "appoint[] themselves as the federal government's avatar in litigation," it permits "unaccountable, unsworn, private actors to exercise core executive power with substantial consequences to members of the public." *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, No. 8:19-cv-01236, 2024 WL 4349242, at *19 (M.D. Fla. Sept. 30, 2024).

The relator in *Zafirov* alleged that a group of MA and provider organizations misrepresented patients' medical conditions to Medicare. *Id.* at *3. The government opted not to intervene, and, relatedly, the court noted that the relator never claimed that "the defendants' allegedly illegal conduct harmed her," but "[i]nstead, like a United States Attorney, [] proceed[ed] on behalf of the real party of interest in this case, the United States of America, . . . to avenge a wrong to the public as a whole." *Id.*

Over objections from the government and several *amici*, the court held that the *qui tam* provision is inconsistent with the U.S. Constitution's Appointments Clause, which requires all "Officers of the United States" to be appointed by the president, subject to the advice and consent of the Senate.

The court concluded a relator is an "Officer of the United States" because (1) a relator exercises significant authority on behalf of the United States regarding litigation strategy and even acts "with greater independence than a Senate-confirmed United States attorney" with the power to independently lead litigation and "shap[e] the broader legal landscape for the federal government"; and (2) "the FCA prescribes a relator's statutory duties, powers, and emoluments," but "no one—not the President, not a department head, and not a court of law—appointed [the relator]." *Id.* at *4–6. Accordingly, the district court concluded that the *qui tam* provision violates the Appointments Clause and dismissed the lawsuit with prejudice. *Id.* at *20.

Zafirov is the first court decision to deem the *qui tam* provision unconstitutional. Other district courts, though, reached the opposite conclusion in 2024, as described below. Unsurprisingly, the relator in *Zafirov* has appealed to the Eleventh Circuit, and this issue may be taken up by the U.S. Supreme Court.

2. Multiple District Courts Rejected the Assertion That the *Qui Tam* Provision is Unconstitutional.

In contrast to *Zafirov*, the Southern District of Florida rejected the notion that the *qui tam* provision is unconstitutional. *See United States ex rel. CLJ, LLC v. Halickman*, No. 20-cv-80645, 2024 WL 3332055, at *21 n.5 (S.D. Fla. June 14, 2024). In *CLJ*, the purchaser of a medical practice brought a *qui tam* action against the founding physician of the practice, alleging that he and others fraudulently billed the Department of Health and Human Services and CMS in violation of the FCA. *Id.* at *1.

After the government declined to intervene, the defendant filed a motion for summary judgment and argued, among other things, that "31 U.S.C. § 3730(b)(4)(B), so far as it authorizes a private litigant to maintain a *qui tam* action in which the United States has declined to intervene, is unconstitutional." *Id.* at *6.

The district court rejected the defendant's contention. *See id.* at *21 n.5. The court rebuffed the defendant's reliance on Justice Thomas's dissent in *Polansky*, and instead pointed to Justice Kagan's majority opinion, which reaffirmed the "unique public-private scheme" Congress designed in enacting the FCA, whereby "Federal prosecutors may . . . sue an alleged violator[] all on their own, [b]ut private parties . . . may also sue, in so-called *qui tam* actions." *Id.*

Three months later, the Southern District of Florida again rejected this argument—this time more emphatically. *See United States ex rel. Butler v. Shikara*, No. 20-cv-80483, 2024 WL 4354807, at *13 (S.D. Fla. Sept. 6, 2024).

WATCH
YOUR
STEP

In *Butler*, the relator filed a *qui tam* action against 10 separate defendants alleging Medicare fraud and specifically alleging that a physician and three of his companies had violated the FCA by exploiting various *quid pro quo* relationships to obtain improperly elevated rates. *Id.* at *1–*3. The government declined to intervene and, as part of the defendants' motions to dismiss, one defendant argued:

> "[B]y delegating litigation of the FCA to private third parties, Congress authorizes unappointed individuals to act as Officers of the United States, [which] not only violates the Appointments Clause, as relators in FCA cases obviously do not undergo the appointment process, but also violates the Take Care Clause, which provides that the President shall 'take Care that the Laws be faithfully executed.'"

Id. at *10 (quoting U.S. Const. art. II § 3).

The district court roundly rejected this argument and emphasized that every circuit that has considered the issue has deemed the provision constitutional. *Id.* at *11. Moreover, the court highlighted that although there may be times when relators drive the litigation, they "certainly do not hold unchecked power over prosecuting the alleged violations of the FCA: The United States exercises significant control over all aspects of th[e] lawsuit, from commencement to disposition." *Id.* at *12. As such, the district court concluded that "nothing about the statute's objective suggests that the Government should have to take a back-seat to its co-party relator." *Id.* (quoting *Polansky*, 599 U.S. at 435). That is, regardless of the implications of the relator-government relationship, there was no formal "appointment" to run afoul of Article II.

Other trial courts similarly concluded that constitutional challenges to the *qui tam* provision are unfounded and that the established practice of *qui tam* actions is firmly rooted under the FCA. *See*, *e.g., United States ex rel. Lagatta v. Reditus Labs., LLC*, No. 1:22-cv-01203, 2024 WL 4351862, at *7 (C.D. Ill. Sept. 30, 2024) (emphasizing that "Defendants cite no binding precedent to support their Article II argument, only a dissent" and that "the Supreme Court has held that a private relator has standing to bring suit under the FCA"); *United States ex rel. Adams v. Chattanooga Hamilton Cty. Hosp. Auth*., No. 1:21-cv-00084, 2024 WL 4784372, at *3 (E.D. Tenn. Nov. 7, 2024) (rejecting *Zafirov* because "[i]ts holding relies chiefly on selections of dissents, concurrences, and law review articles" and "[a] single, outlier trial-court decision that whistles past precedent binding upon this Court provides no basis to ignore that precedent.")

In a further win for the relators' bar, a New Jersey federal court rejected the view that the *qui tam* provision is unconstitutional even more forcefully by emphasizing the historical concept of third-party relators as deeply entrenched in the U.S. legal system. *See* U*nited States ex rel. Bolinger v. 24th St., Inc*., No. 18-cv-15446, 2024 WL 3272828 (D.N.J. June 30, 2024).

In *Bolinger*, the relator, a member of the defendant's legal department, alleged the defendant fraudulently billed Medicaid and Medicare and engaged in retaliatory discharge in violation of the FCA. *Id.* at *2–4. The defendant moved to dismiss and argued that the relator had failed to state a claim under Rule 12(b)(6) since the *qui tam* provision of the FCA is unconstitutional and the relator therefore lacked standing. *Id.* In support of this argument, the defendant cited Justice Thomas's dissent in *Polansky. Id.* at *9 n.3.

The court first rejected this basis for dismissal, like the court in *CLJ*, by noting that it is not bound by a Supreme Court dissent. *Id.* Further, the court cited the U.S. Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, for the proposition that "based on the 'long tradition of *qui tam* actions in England and the American Colonies [the] . . . United States' injury in fact suffices to confer standing' upon relators in FCA matters, thus belying any contention that *Qui Tam* actions are unconstitutional." *Id.* (quoting 529 U.S. 765, 774 (2000)).

In other words, notwithstanding any theoretical constitutional arguments, the sort of legal standing a *qui tam* relator is armed with derives from a historic form of standing that always has existed in American law and its English predecessor. The *Bolinger*, *CLJ*, and *Butler* decisions highlight the difficulty defendants would face in advancing a constitutional challenge to the *qui tam* provision, notwithstanding the *Zafirov* decision and Justice Thomas's dissenting argument in *Polansky.*

I. CLAIMS BY FCA DEFENDANTS

1. Georgia District Court Permitted Counterclaims for Breach of Fiduciary Duty and Breach of Contract to Proceed.

In February 2024, the Northern District of Georgia reiterated that FCA defendants have a right to assert counterclaims against relators as long as their claims satisfy certain criteria. *See United States ex rel. Cooley v. ERMI, LLC*, No. 1:20-cv-04181, 2024 WL 815514, at *2 (N.D. Ga. Feb. 27, 2024).

Specifically, FCA defendants' counterclaims must be based on "independent damages"—that is, they cannot have the same effect as indemnification or contribution and Seek merely to reduce or offset the damages defendants would face from FCA liability. *See id.* Counterclaims are based on independent damages where their underlying acts are separate from those forming the basis of FCA liability, ensuring that the counterclaim can succeed independently of the outcome in the FCA case, or where "the defendant's counterclaim, though bound up in the facts of the FCA case, can only prevail if the defendant is found not liable in the FCA case." *Id*. (quoting *United States ex rel. Head v. Kane Co*., 668 F. Supp. 2d 146, 153 (D.D.C. 2009)).

In *Cooley*, the defendant, a manufacturer of orthopedic equipment, asserted counterclaims for breach of fiduciary duty and breach of contract in response to a *qui tam* lawsuit brought by its chief compliance officer. *See id.* at *1. Specifically, the defendant alleged the relator violated her fiduciary duty as a corporate officer and breached a confidentiality agreement when she misled the defendant that she was providing legal advice, made misrepresentations about a state license renewal process, and retained confidential documents after her employment ended. *See id.* at *2.

The relator moved to dismiss the counterclaims as prohibited by public policy. But the court denied the relator's motion, holding there were sufficient facts alleged about some of the conduct underlying the breach-of-fiduciary-duty counterclaim to conclude it was distinct from the conduct underlying the relator's FCA claims. *See id.* at *7. And as to the breach-of-contract counterclaim, the court concluded it was too early to determine whether improperly retained documents bore a relationship to the relator's FCA claim, or whether a safe-harbor clause in the confidentiality agreement, which permitted breach for whistleblowing purposes, applied. *See id.* at *7–*8.

2. Maryland District Court Allowed Third-Party Claims to Survive Pending Resolution of the Underlying FCA Lawsuit.

In *United States ex rel. Schnupp v. Blair Pharmacy,* the relator sued its former employer, a pharmacy, for violating the AKS and the FCA by allegedly submitting false claims to Medicare and TRICARE by way of bills for compound drugs that did not contain the drugs described or the quantities that were promised. No. 17-cv-02335, 2024 WL 4108591, at *4 (D. Md. Sept. 5, 2024). In its complaint, the relator implicated two other parties as being involved in the marketing and selling of defendant's drug prescriptions but did not name those parties as defendants. *Id.* Accordingly, the defendant filed a third-party complaint for contribution and indemnification against those two parties. *Id.* at *5.

The third-party defendants moved to dismiss the third-party complaint on the grounds that the FCA does not permit claims for indemnification and contribution. But the court explained it was less clear whether the FCA allowed *third-party* claims for indemnification and contribution. As in *Cooley*, the court recognized the distinction drawn between "claims for damages which '*only* have the effect of offsetting liability'" and "those that are not dependent on a *qui tam* defendant's liability under the FCA." *Id.* at *22 (quoting *Cell Therapeutics, Inc. v. Lash Grp., Inc.*, 586 F.3d 1204, 1209 (9th Cir. 2009)).

Ultimately, the court concluded it was premature at the dismissal stage to determine whether the defendant's third-party claims were dependent or independent, as even "dependent counterclaims should not be foreclosed until the *qui tam* defendant's liability is established," because "denying a *qui tam* defendant recourse to damages offends procedural due process." *Id.* at *24 (quoting *United States ex rel. Madden v. Gen. Dynamics Corp.*, 4 F.3d 827, 831 (9th Cir. 1993)). So, the court denied the third-party defendants' motion to dismiss and stayed the third-party proceedings until the relator's FCA lawsuit was resolved.

In both *Cooley* and *Schnupp*, the courts took a cautious approach by refusing to dismiss counterclaims and third-party claims while there was an open question as to whether the claims were truly independent of the FCA claims. While such claims may be dismissed later in the case, their survival at the pleading stage is a favorable development for FCA defendants.

TABLE OF AUTHORITIES

CASES PAGES

Am. Textile Mfrs. Inst., Inc. v. The Ltd., Inc.,
190 F.3d 729 (6th Cir. 1999) 40

Bryan v. United States,
524 U.S. 184 (1998) 33

Bureau of Alcohol, Tobacco and Firearms v. FLRA,
464 U.S. 89 (1983) 19

Cell Therapeutics, Inc. v. Lash Grp., Inc.,
586 F.3d 1204 (9th Cir. 2009) 50

Cho on behalf of States v. Surgery Partners, Inc.,
190 F.3d 729 (6th Cir. 1999) 23

Evans v. S. Cal. Intergovernmental Training & Dev. Ctr.,
No. 22-16715, 2023 WL 1930661 (9th Cir. Feb. 2, 2023) 31

Gose v. Native Am. Servs. Corp.,
109 F.4th 1297 (11th Cir. 2024) 28

Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson,
559 U.S. 280 (2010) 23

Harrington v. Aggregate Indus. Ne. Region, Inc.,
668 F.3d 25 (1st Cir. 2012) 40

Hickman v. Spirit of Athens, Alabama, Inc.,
985 F.3d 1284 (11th Cir. 2021) 40

Hopper v. Solvay Pharms., Inc.,
588 F.3d 1318 (11th Cir. 2009) 28

Loper Bright Enters. v. Raimondo,
603 U.S. 369 (2024) 18

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 40

Miller v. United States ex rel. Miller,
110 F.4th 533 (2d Cir. 2024) 39

Mooney v. Fife,
118 F.4th 1081 (9th Cir. 2024) 35, 41

Omni Healthcare, Inc. v. MD Spine Sols. LLC,
No. 18-cv-12558, 2025 WL 32676 (D. Mass. Jan. 6, 2025) 34

Rothman v. Cabana Series IV Tr.,
No. 23-2455, 2024 WL 1405393 (3d Cir. Apr. 2, 2024) 21

TABLE OF AUTHORITIES

CASES PAGES

Ruffolo v. Halifax Health, Inc.,
No. 23-12760, 2024 WL 1733968 (11th Cir. Apr. 23, 2024) (per curiam) 42

Santos-Zacaria v. Garland,
598 U.S. 411 (2023) 22

Silbersher v. Valeant Pharm. Int'l, Inc.,
89 F.4th 1154 (9th Cir. 2024), cert. denied, No. 23-1093, 2024 WL 4426551 (U.S. Oct. 7, 2024) 25

Stein v. Kaiser Found. Health Plan, Inc.,
115 F.4th 1244 (9th Cir. 2024) (en banc) 21

Stoner v. Santa Clara Cty. Office of Educ.,
502 F.3d 1116 (9th Cir. 2007) 21

Stop Illinois Health Care Fraud, LLC v. Sayeed,
100 F.4th 899 (7th Cir. 2024), reh'g denied, No. 22-3295, 2024 WL 2785312 (May 30, 2024) 43

Sullivan v. City of Dallas,
No. 3:21-cv-00915, 2024 WL 3767973 (N.D. Tex. July 15, 2024) 42

Tlatoani-Teotl Tenamaxtle, Tr. ETO v. Polk,
No. 23-55477, 2024 WL 2828806 (9th Cir. June 4, 2024) 21

United States ex rel. Adams v. Chattanooga Hamilton Cty. Hosp. Auth.,
No. 1:21-cv-00084, 2024 WL 4784372 (E.D. Tenn. Nov. 7, 2024) 48

United States ex rel. Aldridge v. Corp. Mgmt., Inc.,
No. 22-60264, 2024 WL 983560 (5th Cir. Mar. 7, 2024) 35

United States ex rel. Askari v. PharMerica Corp.,
No. 23-909, 2024 WL 1132191 (2d Cir. Mar. 15, 2024) 29

United States ex rel. Bolinger v. 24th St., Inc.,
No. 18-cv-15446, 2024 WL 3272828 (D.N.J. June 30, 2024) 48

United States ex rel. Branch Consultants v. Allstate Ins. Co.,
560 F.3d 371 (5th Cir. 2009) 22

United States ex rel. Butler v. Shikara,
No. 20-cv-80483, 2024 WL 4354807 (S.D. Fla. Sept. 6, 2024) 46

United States ex rel. Cairns v. D.S. Med. LLC,
42 F.4th 828 (8th Cir. 2022) 34

United States ex rel. Caputo v. Tungsten Heavy Powder, Inc.,
96 F.4th 1111 (9th Cir. 2024) 44

United States ex rel. Carew v. Senseonics Holdings, Inc.,
No. 20-cv-00657, 2023 WL 2354915 (W.D. Tex. Mar. 3, 2023) 29

United States ex rel. Carew v. Senseonics Holdings, Inc.,
No. 23-50307, 2024 WL 837042 (5th Cir. Feb. 28, 2024) (per curiam) 29

TABLE OF AUTHORITIES

CASES | PAGES

United States ex rel. Carter v. Halliburton Co.,
710 F.3d 171 (4th Cir. 2013) 23

United States ex rel. Chorches v. Am. Med. Response, Inc.,
865 F.3d 71 (2d Cir. 2017) 40

United States ex rel. CLJ, LLC v. Halickman,
No. 20-cv-80645, 2024 WL 3332055 (S.D. Fla. June 14, 2024) 46

United States ex rel. Conyers v. Conyers,
108 F.4th 351 (5th Cir. 2024) 45

United States ex rel. Cooley v. ERMI, LLC,
No. 1:20-cv-04181, 2024 WL 815514 (N.D. Ga. Feb. 27, 2024) 49

United States ex rel. Day v. Boeing,
No. 3:23-cv-00371, 2024 WL 2978469 (E.D. Va. June 13, 2024) 27

United States ex rel. Devarapally v. Ferncreek Cardiology, P.A.,
No. 5:17-cv-00616, 2024 WL 2981184 (E.D.N.C. June 13, 2024) 20

United States ex rel. Doe v. Credit Suisse AG,
117 F.4th 155 (2024) 27

United States ex rel. Eisenstein v. City of New York,
556 U.S. 928 (2009) 45

United States ex rel. Ferguson v. Lockheed Martin Corp.,
No. 4:24-cv-00025, 2024 WL 3434573 (N.D. Tex. July 16, 2024), appeal docketed, No. 24-10713 (5th Cir. Aug. 7, 2024) 22

United States ex rel. Grant v. Zorn,
107 F.4th 782 (8th Cir. 2024) 25, 43

United States ex rel. Greenfield v. Medco Health Sols., Inc.,
880 F.3d 89 (3d Cir. 2018) 34

United States ex rel. Grubbs v. Kanneganti,
560 F.3d 371 (5th Cir. 2009) 29

United States ex rel. Hart v. McKesson Corp.,
No. 20-cv-80483, 2024 WL 4354807 (S.D. Fla. Sept. 6, 2024) 32

United States ex rel. Hartpence v. Kinetic Concepts, Inc.,
792 F.3d 1121 (9th Cir. 2015) (en banc) 21

United States ex rel. Head v. Kane Co.,
668 F. Supp. 2d 146 (D.D.C. 2009) 49

United States ex rel. Hearrell v. Allergan, Inc.,
No. 2:21-cv-00204, 2024 WL 1676209 (E.D. Tex. Apr. 18, 2024) 36

United States ex rel. Heath v. Wisconsin Bell, Inc.,
92 F.4th 654 (7th Cir. 2024), cert. granted, 144 S. Ct. 2657 (2024) 30

TABLE OF AUTHORITIES

CASES | PAGES

United States ex rel. Heron v. Nationstar Mortg., LLC,
No. 21-1362, 2024 WL 3770843 (10th Cir. Aug. 13, 2024) 26
United States ex rel. Holt v. Medicare Medicaid Advisors, Inc.,
115 F. 4th 908 (8th Cir. 2024) 37
United States ex rel. Hueseman v. Prof'l Compounding Ctrs. of Am., Inc.,
No. 14-cv-00212, 2024 WL 2244818 (W.D. Tex. May 1, 2024) 35
United States ex rel. Jacobs v. JP Morgan Chase Bank, N.A.,
113 F.4th 1294 (11th Cir. 2024) 23
United States ex rel. Jacobs v. Lincare, Inc.,
No. 2:21-cv-01629, 2024 WL 4063386 (D. Nev. Sept. 5, 2024) 20
United States ex rel. Jacobs v. Walgreen Co.,
No. 21-20463, 2022 WL 613160 (5th Cir. Mar. 2, 2022) 30
United States ex rel. Johnson v. Raytheon Co.,
93 F.4th 776 (5th Cir. 2024) 41
United States ex rel. Krahling v. Merck & Co.,
No. 23-2553, 2024 WL 3664648 (Aug. 6, 2024) 38
United States ex rel. Kyer v. Thomas Health Sys., Inc.,
No. 2:20-cv-00732, 2024 WL 4165082 (S.D.W. Va. Sept. 12, 2024) 19
United States ex rel. Lagatta v. Reditus Labs., LLC,
985 F.3d 1284 (11th Cir. 2021) 48
United States ex rel. Lesnick v. ISM Vuzem d.o.o.,
112 F.4th 816 (9th Cir. 2024) 40
United States ex rel. Lujan v. Hughes Aircraft Co.,
67 F.3d 242 (9th Cir. 1995) 20
United States ex rel. Lujan v. Hughes Aircraft Co.,
243 F.3d 1181 (9th Cir. 2001) 21
United States ex rel. Madden v. Gen. Dynamics Corp.,
4 F.3d 827 (9th Cir. 1993) 50
United States ex rel. Martin v. Hathaway,
63 F.4th 1043 (6th Cir. 2023) 34
United States ex rel. Miller v. Reckitt Benckiser Grp. PLC,
No. 1:15-cv-00017, 2023 WL 6849436 (W.D. Va. Oct. 17, 2023) 30
United States ex rel. Pilat v. Amedisys, Inc.,
No. 23-566, 2024 WL 177990 (2d Cir. Jan. 17, 2024) 30

TABLE OF AUTHORITIES

CASES **PAGES**

United States ex rel. Polansky v. Exec. Health Res., Inc.,
196 F. Supp. 3d 477 (E.D. Pa. 2016) 33

United States ex rel. Polansky v. Exec. Health Res., Inc.,
599 U.S. 419 (2023) 45

United States ex rel. Rosales v. Amedisys, Inc.,
No. 7:20-cv-00090, 2024 WL 1559284 (E.D.N.C. Apr. 10, 2024) 23

United States ex rel. Ruckh v. Salus Rehab.,
963 F.3d 1089 (11th Cir. 2020) 35

United States ex rel. Schnupp v. Blair Pharmacy,
No. 17-cv-02335, 2024 WL 4108591 (D. Md. Sept. 5, 2024) 49

United States ex rel. Schutte v. SuperValu Inc.,
598 U.S. 739 (2023) 30

United States ex rel. Sheldon v. Allergan Sales, LLC,
143 S. Ct. 2686 (2023) 30

United States ex rel. Shupe v. Cisco Sys., Inc.,
759 F.3d 379 (5th Cir. 2014) 39

United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah,
472 F.3d 702 (10th Cir. 2006) 33

United States ex rel. Skibo v. Greer Labs., Inc.,
841 F. App'x 527 (4th Cir. 2021) 30

United States ex rel. Stenson v. Radiology Ltd.,
No. 22-16571, 2024 WL 1826427 (9th Cir. Apr. 26, 2024) 35

United States ex rel. USN4U v. Wolf Creek Fed. Servs.,
No. 1:17-cv-0558, 2023 WL 8480085 (N.D. Ohio Dec. 7, 2023) 28

United States ex rel. Winter v. Gardens Reg'l Hosp. & Med. Ctr., Inc.,
953 F.3d 1108 (9th Cir. 2020) 36

United States ex rel. Witkin v. Medtronic, Inc.,
No. 1:11-cv-10790, 2024 WL 1892405 (D. Mass. Mar. 31, 2024) 34

United States ex rel. Zafirov v. Fla. Med. Assocs., LLC,
No. 8:19-cv-01236, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024) 45

United States ex rel. Zotos v. Town of Hingham,
98 F.4th 339 (1st Cir. 2024) 37

United States v. Bajakajian,
524 U.S. 321 (1998) 43

TABLE OF AUTHORITIES

CASES PAGES

United States v. Bourseau,
531 F.3d 1159 (9th Cir. 2008) 40

United States v. Malewicka,
664 F.3d 1099 (7th Cir. 2011) 44

United States v. President & Fellows of Harvard Coll.,
323 F. Supp. 2d 151 (D. Mass. 2004) 33

United States v. Regeneron Pharms., Inc.,
No. 20-cv-11217, 2023 WL 6296393 (D. Mass. Sept. 27, 2023), perm. app. granted, No. 23-8036, 2023 WL 8599986 (1st Cir. Dec. 11, 2023) 34

United States v. Teva Pharms. USA, Inc.,
682 F. Supp. 3d 142 (D. Mass. 2023) 34

Univ. of Tex. Sw. Med. Ctr. v. Nassar,
570 U.S. 338 (2013) 35

Universal Health Servs., Inc. v. United States ex rel. Escobar,
579 U.S. 176 (2016) 36

Vermont Agency of Natural Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 48

Walburn v. Lockheed Martin Corp.,
431 F.3d 966 (6th Cir. 2005) 21

Williams v. WMX Techs., Inc.,
112 F.3d 175 (5th Cir. 1997) 29

STATUTES

18 U.S.C. § 287 10
28 U.S.C. § 1927 44
31 U.S.C. § 3729(a) 10
31 U.S.C. § 3729(b) 30,36,39
31 U.S.C. § 3730(b) 21, 45, 46
31 U.S.C. § 3730(c) 26
31 U.S.C. § 3730(d) 45
31 U.S.C. § 3730(e) 23
31 U.S.C. § 3730(h) 35, 40
31 U.S.C. § 3731(c) 45
42 U.S.C. § 1320a-7b 12, 33
42 U.S.C. § 1395y(a)(1)(A) 36

TABLE OF AUTHORITIES

RULES

PAGES

FED. R. CIV. P. 9(b) 28
FED. R. CIV. P. 12(b)(1) 22
FED. R. CIV. P. 12(b)(6) 49
FED. R. CIV. P. 41 27
FED. R. CIV. P. 60(b)(2) 44

OTHER

U.S. CONST. AMEND. 8, cl. 2 43
U.S. CONST. ART. II § 3 45