HAYNES BOONE

False Claims Act

2025 Year in Review

HB

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 2025 related to the FCA, including:

- The recovery by the government of nearly $6.9 billion in settlements and judgments in FCA cases in 2025—more than twice the previous fiscal year and the most ever in a single year—and a record-high 1,297 new *"qui tam"* cases filed by whistleblowers (also known as relators)
- The government continuing to prioritize the detection, investigation, and prosecution of fraud related to healthcare services, kickback schemes, cybersecurity requirements for government contractors, and COVID-19 relief programs like the Paycheck Protection Program
- The government beginning to use the FCA as an enforcement tool for customs fraud (that is, evasion of tariffs, smuggling of prohibited goods, and other violations of U.S. trade laws) and against federal funding recipients or contractors that maintain diversity, equity, and inclusion programs
- 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, when claims are considered "false," what it means for a defendant to act "knowingly," and what it takes to satisfy the various elements of an FCA retaliation claim, among many other issues

In 2025, 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 end-of-year review or in our previously published Mid-Year Update, please let us know. We look forward to working with our friends and clients in 2026 and beyond.

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

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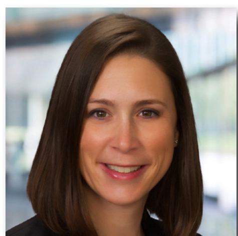

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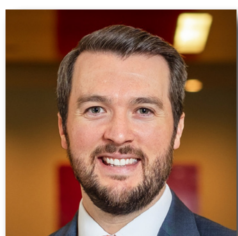

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I. INTRODUCTION

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, fictitious, 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.

In 2025, the government recovered $6.9 billion in settlements and judgements in FCA cases. This is more than double the recovery in 2024 and a record-high for a single year. Total recoveries since 1986—when Congress significantly strengthened the FCA—now exceed $85.6 billion.

DOJ further reported:

- Of the nearly $6.9 billion recovered, over $5.7 billion came from the healthcare industry.
- Private whistleblowers (also known as relators) filed 1,297 new *"qui tam"* actions in 2025—the highest number in a single year.
- Of the nearly $6.9 billion recovered, over $5.3 billion related to cases filed by relators, with relators receiving over $330 million for their share of the rewards (including over $44 million in cases where the government declined to intervene).

II. NOTABLE SETTLEMENTS AND ENFORCEMENT TRENDS

A. Healthcare

As reflected in the recovery data, a majority of FCA cases involve the healthcare industry, and the DOJ is taking measures to try to keep pace with the increasing complexity and scale of healthcare fraud. For instance, the DOJ's Health Care Fraud Unit has had a data analytics team since 2018. Last year, the DOJ announced that it would work with the Department of Health and Human Services Office of Inspector General ("HHS OIG") and other agencies to create a Health Care Fraud Data Fusion Center, which would "leverage cloud computing, artificial intelligence, and advanced analytics to identify emerging health care fraud schemes."[1] Since that announcement, we are already seeing the DOJ and other agencies regularly use artificial intelligence and analytics tools to flag potential indicators of fraud, such as abnormal billing patterns, upcoding, and risk-adjustment irregularities.

Additionally, some of the largest healthcare-related FCA settlements in 2025 were the result of continued fallout from the opioid crisis. For example, a national pharmacy chain agreed to pay $300 million to resolve allegations that it illegally filled millions of invalid opioid prescriptions and other controlled substances in violation of the Controlled Substances Act and then sought payment for many of those prescriptions from Medicare and other federal healthcare programs in violation of the FCA.[2]

The DOJ also made significant recoveries in the healthcare sector under the Anti-Kickback Statute ("AKS"). In the largest of these, a pharmaceutical manufacturer paid $202 million to resolve allegations that it paid kickbacks to healthcare practitioners in the form of speaker program payments, meals, and travel expenses to induce them to prescribe its HIV antiretroviral drugs.[3]

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[1] Release available at https://www.justice.gov/opa/pr/national-health-care-fraud-takedown-results-324-defendants-charged-connection-over-146.

[2] Release available at https://www.justice.gov/opa/pr/walgreens-agrees-pay-350m-illegally-filling-unlawful-opioid-prescriptions-and-submitting.

[3] Release available at https://www.justice.gov/usao-sdny/pr/us-attorney-announces-202-million-settlement-gilead-sciences-using-speaker-programs.

We also saw the first FCA settlement involving remote patient monitoring ("RPM"). In June, a Georgia-based company providing RPM and chronic care management services and its physician owner agreed to pay $1.3 million to resolve allegations they billed Medicare for RPM services without furnishing devices capable of automatically collecting and transmitting patient data—a basic coverage requirement for RPM.[4]

Since 2019, the use of RPM has increased dramatically, including among Medicare beneficiaries, with nearly one million Medicare enrollees receiving RPM in 2024. The DOJ and HHS OIG have correspondingly focused on potential fraud in Medicare reimbursement claims for these products and services.

In September 2024, HHS OIG issued a report urging the Centers for Medicare and Medicaid Services ("CMS") to institute additional oversight of RPM.[5] In August 2025, HHS OIG released a data snapshot reporting that Medicare payments for RPM exceeded $500 million in 2025 and discussing several measures to monitor for RPM-related fraud, such as flagging providers that bill for multiple devices per month for an enrollee or bill a high proportion of patients with no prior history at the practice.[6]

B. Defense Contractors

As in most years, 2025 also saw several notable settlements involving false claims made to the Department of Defense ("DOD"). For example, a Utah-based communications equipment manufacturer agreed to pay $62 million to resolve allegations that it failed to disclose cost or pricing data related to products sold to the DOD under sole-source, fixed-price contracts, as required by the Truth in Negotiations Act.[7] The DOJ alleged the company provided false or inaccurate data over more than seven years. Most of the notable settlements by defense contractors involved cybersecurity issues, which are discussed below.

C. Cybersecurity

Since the DOJ launched its Civil Cyber-Fraud Initiative in 2021, we have reported on settlements involving cyber-fraud and failures to safeguard personally identifiable information. In 2025, the government continued using the FCA to ensure compliance with a variety of cybersecurity measures required by federal contracts.

For example, the initiative secured a $4.6 million settlement to resolve claims that a defense contractor violated the FCA by falsely certifying compliance with the cybersecurity requirements of its contracts with the Army and Air Force.[8] The settlement resolved allegations that the contractor used a third party to host its email without requiring and ensuring it met the applicable security requirements, failed to implement required cybersecurity controls, lacked the required consolidated written plan for its information systems, and submitted an incorrect security control test score to the DOD.

In another example, a California healthcare administration services provider and its Missouri-based parent agreed to pay $11.3 million to resolve allegations they falsely certified compliance with cybersecurity requirements in a contract to administer a Defense Health Agency benefits program for servicemembers and their families.[9] The settlement resolved allegations that the provider falsely certified it was in compliance with program requirements when it failed to timely scan for and remediate known vulnerabilities, and ignored reports

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[4] Release available at https://www.justice.gov/usao-ndga/pr/remote-patient-monitoring-company-settles-false-claims-act-lawsuit-129-million.

[5] Report available at https://oig.hhs.gov/documents/evaluation/10001/OEI-02-23-00260.pdf.

[6] Report available at https://oig.hhs.gov/documents/evaluation/10901/OEI-02-23-00261.pdf.

[7] Release available at https://www.justice.gov/opa/pr/l3-technologies-inc-agrees-pay-62000000-resolve-false-claims-act-allegations-arising.

[8] Release available at https://www.justice.gov/opa/pr/defense-contractor-morsecorp-inc-agrees-pay-46-million-settle-cybersecurity-fraud.

[9] Release available at https://www.justice.gov/opa/pr/health-net-federal-services-llc-and-centene-corporation-agree-pay-over-11-million-resolve.

from third-party and internal auditors of cybersecurity risks.

Another settlement highlights the risks acquirers face from prior compliance lapses by the acquired entity. A defense contractor, its acquired subsidiary, and the selling parent company agreed to pay $8.4 million to resolve allegations that the selling parent and subsidiary failed to implement cybersecurity controls on internal document systems as required by the Federal Acquisition Regulation and Defense Federal Acquisition Regulation Supplement during its performance of 29 defense contracts and subcontracts from 2015 to 2021, prior to the acquisition.[10]

Also, a Georgia-based research company agreed to pay $875,000 to resolve allegations that it failed to meet cybersecurity requirements for Air Force and Defense Advanced Research Projects Agency contracts by failing to install, update, or run anti-virus or anti-malware tools on computers and networks used to conduct sensitive research under the contracts and submitting fictitious cybersecurity assessment scores to the DOD.[11]

The year's cybersecurity settlements were not limited to defense contractors. For instance, a California-based biotechnology company agreed to pay $9.8 million to resolve allegations that it sold federal agencies certain genomic sequencing systems with cybersecurity vulnerabilities despite falsely representing that they complied with contractually required cybersecurity standards.[12]

D. COVID-19 Relief Programs

Unprecedented federal spending in response to the COVID-19 pandemic spawned similarly unprecedented fraud. According to an April 2025 U.S. Government Accountability Office ("GAO") report, hundreds of billions of dollars were disbursed in potentially fraudulent payments, though the full extent of pandemic-relief program fraud is likely unknowable.[13] In response, the government is taking efforts to punish fraudsters and improve oversight of fraud in government lending.

In January 2025, a bipartisan group of members of Congress introduced House Bill 826, the "COVID Fraud Transparency Act of 2025."[14] The bill would require the Inspector General of the Small Business Administration ("SBA") to submit reports to Congress with information on the number and amount of outstanding Paycheck Protection Program ("PPP") loans and the number of new, suspected, and resolved fraud cases involving PPP loans. The bill is before the House Committee on Small Business.

The FCA remains one of the government's most potent tools for addressing COVID-19 relief fraud, and 2025 saw a number of significant recoveries. In one matter, two California businesses and their owners agreed to pay over $150,000 to resolve allegations they submitted false statements and certifications to obtain PPP loans for which the businesses were not eligible.[15] The government alleged they knowingly misled their lender by underreporting the total number of employees, failing to disclose affiliated companies, and falsely certifying loan eligibility.

In another major settlement, a Florida businessman and 10 companies he owned or operated agreed to pay $20.1 million to resolve allegations they violated the FCA by submitting false information in PPP and Economic Injury Disaster Loan applications regarding employee rosters and payrolls, including by submitting applications on behalf of dormant or inactive companies.[16] The same businessman also pleaded guilty to wire fraud and money laundering in connection with the fraudulent loans and is serving a 66-month sentence.[17]

Additionally, a family of restaurant companies agreed to pay $3.6 million to resolve allegations that they violated the FCA by falsely certifying they were eligible for second-draw PPP loans in a total amount that exceeded the applicable corporate group limit for second-draw loans.[18]

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[10] Release available at https://www.justice.gov/opa/pr/raytheon-companies-and-nightwing-group-pay-84m-resolve-false-claims-act-allegations-relating.

[11] Release available at https://www.justice.gov/opa/pr/georgia-tech-research-corporation-agrees-pay-875000-resolve-civil-cyber-fraud-litigation.

[12] Release available at https://www.justice.gov/opa/pr/illumina-inc-pay-98m-resolve-false-claims-act-allegations-arising-cybersecurity.

[13] Report available at https://www.gao.gov/assets/gao-25-107746.pdf.

[14] Bill available at https://www.congress.gov/bill/119th-congress/house-bill/826/text.

[15] Release available at https://www.justice.gov/opa/pr/two-california-businesses-and-their-owners-resolve-allegations-they-misrepresented.

[16] Release available at https://www.justice.gov/opa/pr/florida-businessman-patrick-walsh-and-affiliated-companies-agree-20m-consent-judgment-settle.

[17] Release available at https://www.justice.gov/usao-ndfl/pr/north-central-florida-blimp-company-executive-sentenced-over-five-years-federal-prison.

[18] Release available at https://www.justice.gov/opa/pr/azumi-limited-restaurants-agree-pay-36m-resolve-false-claims-act-allegations-relating.

The DOJ has also focused on identifying and punishing foreign-owned companies that fraudulently secured PPP loans. For example, in two cases, American entities owned and controlled by the Chinese government agreed to pay $21.7 million[19] and $14.2 million,[20] respectively, to resolve allegations they submitted false claims to obtain PPP loans for which they were not eligible. The entities allegedly employed more individuals than permitted by the SBA's industry-specific size standards and were impermissibly owned by a government entity.

COVID-19 relief fraud was not limited to PPP loans. The DOJ is also using the FCA to target medical providers who took advantage of COVID-19-related relief programs to commit fraud. For example, a North Texas physician agreed to pay $3.5 million to resolve allegations that he violated the FCA by knowingly submitting or causing the submission of false claims to the Health Resources & Services Administration's COVID-19 Uninsured Program.[21] The DOJ alleged that the physician, in conjunction with and at the direction of the management company of the medical clinic he owned, submitted or caused the submission of approximately 400,000 claims to the Uninsured Program for evaluation and management services but the majority of these claims involved only collecting COVID-19 specimens or providing test results, which were eligible for lower reimbursement than the claimed evaluation and management services.

E. Customs Fraud

In 2025, the government repeatedly emphasized its focus on prosecuting individuals and companies that violate U.S. trade laws, and the DOJ committed to leverage the FCA to fight against fraud involving customs duties. As background, goods imported into the country may be subject to customs duties, with importers required to accurately disclose the date of import, the importer of record, the type and value of the goods, and the country of origin, along with supporting documentation, to allow Customs and Border Protection ("CBP") to assess and collect the appropriate duties.

The United States may also impose additional duties on imported goods that are being dumped (i.e., sold in the United States at prices below the producer's cost of production or sales price in the country of origin) or for which foreign manufacturers are receiving unfair subsidies. 19 U.S.C. §§ 1671, 1673. Antidumping duties are imposed to counter dumping, while countervailing duties concern unfair subsidies received by foreign manufacturers (collectively, "AD/CVD duties"). Moreover, countries engaged in unfair trade practices, like intellectual property theft or forced technology transfer, may be subject to additional punitive duties under Section 301 of the Trade Act of 1974. These Section 301 duties have primarily been imposed on certain Chinese imports.

In August, the DOJ launched a Trade Fraud Task Force that will work across government agencies to pursue enforcement actions against those that evade payment of duties, *smuggle* prohibited goods, or otherwise violate trade laws.[22] In the Task Force launch announcement, the DOJ explicitly encouraged whistleblowers to utilize the FCA's *qui tam* provisions to bring credible allegations of trade fraud to the government's attention.

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[19] Release available at https://www.justice.gov/usao-edwi/pr/three-chinese-owned-companies-pay-more-216m-resolve-false-claims-act-allegations

[20] Release available at https://www.justice.gov/opa/pr/subsidiary-chinese-state-owned-entity-pay-142m-resolve-false-claims-act-allegations-relating.

[21] Release available at https://www.justice.gov/usao-edtx/pr/collin-county-physician-agrees-pay-35-million-resolve-false-claims-act-allegations.

[22] *See* release available at https://www.justice.gov/opa/pr/departments-justice-and-homeland-security-partnering-cross-agency-trade-fraud-task-force.

A Ninth Circuit ruling issued in June will likely encourage additional *qui tam* enforcement of customs fraud through the FCA. The Ninth Circuit held that federal district courts (as opposed to the U.S. Court of International Trade alone) have jurisdiction over customs-related *qui tam* actions and affirmed a jury verdict of over $25 million against a pipe importer evading payment of duties through false statements on customs forms.[23]

As an example of the enforcement focus on customs fraud in action, a North Carolina-based distributor of tungsten carbide products recently agreed to pay $54.4 million to resolve allegations that it misrepresented the country of origin on Chinese-manufactured tungsten carbide products as Taiwan, in addition to misclassifying the products, to avoid paying both regular customs duties and Section 301 duties.[24]

In another example, two subsidiaries of a New York-based plastic resin distributor agreed to pay $6.8 million to settle allegations that they did not properly declare the country of origin and value of plastic resin imported from China, which in turn caused underpayment of customs duties.[25] The government noted that the defendants received cooperation credit for voluntarily self-disclosing the potential violations and taking remedial actions during the investigation.

There were also numerous settlements in 2025 of cases involving AD/CVD duties. For example, a California-based importer of multilayered wood flooring and its owners agreed to pay $8.1 million to resolve FCA allegations that they evaded AD/CVD duties owed on Chinese flooring products by falsely declaring their imports originated from other countries and concealing the true manufacturer of the imported goods.[26]

Similarly, a Pennsylvania-based patio furniture company, a Connecticut-based audio electronics company, and a Texas-based supplier of countertop and cabinetry products, paid $4.9 million,[27] $11.8 million,[28] and $12.4 million,[29] respectively, to settle allegations that they evaded or conspired to evade AD/CVD duties. The Pennsylvania and Connecticut companies allegedly submitted false customs forms to CBP claiming that their imported goods containing extruded aluminum from China were not subject to those duties, while the Texas company allegedly misrepresented Chinese quartz surface products as other goods subject to lesser duties.

Customs fraud is also a current *criminal* enforcement priority for the DOJ, as demonstrated in a May memorandum issued by the head of the DOJ Criminal Division, Matthew R. Galeotti, describing the administration's approach to prosecuting corporations for white-collar crimes.[30] The memorandum notes that the Criminal Division views "trade and customs fraud, including tariff evasion," as a "high-impact area." The memorandum also directed the Criminal Division to include "trade, tariff, and customs fraud by corporations" in the division's Corporate Whistleblower Awards Pilot Program under which whistleblowers could receive a percentage of criminal or civil forfeitures resulting from a whistleblower's tip.

Correspondingly, in September, two Colorado-based companies and several executives were charged with criminal wire fraud and conspiracy to commit wire fraud and to enter goods into the United States by means of false or fraudulent statements in connection with an alleged scheme to import forklifts from China, disguise the country of origin, and sell the forklifts to federal agencies as products manufactured domestically.[31]

F. Diversity, Equity, and Inclusion

In January 2025, the President issued Executive Order 14173 entitled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," which was intended to lay the predicate for using the FCA to combat DEI programs that violate Federal anti-discrimination law. Among other measures, the order directed agency heads to include in all contracts terms requiring the contractor to certify that "it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws" and to agree that compliance with Federal anti-discrimination law is material to

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[23] *See generally Island Indus., Inc. v. Sigma Corp.*, 151 F.4th 1003 (9th Cir. 2025). Please see our Mid-Year Update for additional discussion of this decision.

[24] Release available at https://www.justice.gov/opa/pr/ceratizit-usa-llc-agrees-pay-544m-settle-false-claims-act-allegations-relating-evaded-0.

[25] Release available at https://www.justice.gov/opa/pr/importers-agree-pay-68m-resolve-false-claims-act-liability-relating-voluntary-self.

[26] Release available at https://www.justice.gov/opa/pr/evolutions-flooring-inc-and-its-owners-pay-81-million-settle-false-claims-act-allegations.

[27] Release available at https://www.justice.gov/opa/pr/patio-furniture-company-grosfillex-inc-pay-49-million-resolve-allegations-it-evaded-duties.

[28] Release available at https://www.justice.gov/usao-edmi/pr/international-audio-electronics-company-harman-pays-118-million-settle-fraud.

[29] Release available at https://www.justice.gov/opa/pr/allied-stone-inc-and-company-official-agree-pay-124m-settle-false-claims-act-allegations.

[30] Memorandum available at https://www.justice.gov/criminal/media/1400046/dl?inline.

[31] Release available at https://www.justice.gov/opa/pr/two-companies-and-three-executives-indicted-fraudulently-selling-chinese-forklifts-us.

the government's payment decisions.[32] As described in our Mid-Year Update, the current administration then instructed DOJ employees to leverage the FCA to combat illegal discrimination and policies, such as policies relating to DEI.[33]

In May, Deputy Attorney General Todd Blanche announced a Civil Rights Fraud Initiative.[34] Utilizing the FCA, the Initiative will target two categories of potential violations: (1) universities "discriminating against their students" by "encourag[ing] antisemitism, refus[ing] to protect Jewish students, allow[ing] men to intrude into women's bathrooms, or requir[ing] women to compete against men in athletic competitions," and (2) federal funding recipients or contractors who "certify compliance with civil rights laws while knowingly engaging in racist preferences, mandates, policies, programs, and activities, including through diversity, equity, and inclusion ("DEI") programs that assign benefits or burdens on race, ethnicity, or national origin."

In June, Assistant Attorney General Brett A. Shumate issued a memorandum that further articulated the Civil Division's priority to combat illegal discriminatory practices and policies.[35]

The DOJ is specifically prioritizing FCA investigations and enforcement actions against federal fund recipients who knowingly participate in or allow antisemitism and healthcare programs that submit false claims for "any non-covered services related to radical gender experimentation."

Later in the summer, Attorney General Pam Bondi issued additional guidance for federal funding recipients regarding unlawful discrimination and "best practices" for avoiding risk exposure to FCA suits.[36] This memorandum provided several examples of practices that could result in FCA violations, including but not limited to race-based scholarship or program participation, preferential hiring and promotion practices favoring "underrepresented groups" based on protected characteristics such as race, national origin, sex, or religion, and access to particular facilities and resources for students of specific racial or ethnic groups. The guidance emphasized that entities should ensure inclusive access, eliminate diversity quotas and demographic-driven criteria, focus on skills and qualifications, and provide safe reporting mechanisms to ensure compliance with federal laws. The DOJ has reportedly already opened civil investigations into multiple companies' DEI programs.

G. Private Equity

CMS and HHS OIG have long been concerned about the quality of care at nursing homes and similar facilities owned by private equity companies. For example, a 2023 CMS final rule referenced various studies that found declining metrics at privately owned nursing homes and explained that "CMS's concerns about the quality of care and operations of nursing facilities, including . . . those owned by private equity and other types of investment firms, have increased since 2011." 88 Fed. Reg. 80,141, 80,144 (Nov. 17, 2023). As a result, private equity ownership of healthcare companies and government contractors has been in the government's enforcement crosshairs for years, and 2025 was no different.

As an example, in July, a private equity firm and its defense contractor portfolio company agreed to pay $1.75 million to resolve FCA allegations they submitted claims for payment on an Air Force contract that were false due to the contractor's failure to implement required cybersecurity controls.[37] They also allegedly failed to limit access to sensitive defense information to authorized users since a private equity firm employee provided files containing such information to a foreign software company.

The DOJ highlighted the companies' multiple written self-disclosures, cooperation with the government's investigation, and prompt remedial action, which were likely considered in the determination of the settlement amount. But the settlement is also notable for the DOJ alleging direct wrongdoing by the private equity firm, rather than mere liability for ratifying or failing to supervise its portfolio company's actions.

In contrast, a private equity firm is less likely to face FCA liability for the actions of its portfolio company where it is not directly involved in the portfolio company's operations. For example, the U.S. District Court for the District of Nebraska dismissed a private equity firm from

[32] Executive Order available at https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/.

[33] Memorandum available at https://www.justice.gov/dag/media/1400826/dl?inline.

[34] Memorandum available at https://www.justice.gov/dag/media/1400826/dl?inline.

[35] Memorandum available at https://www.justice.gov/civil/media/1404046/dl.

[36] Memorandum available at https://www.justice.gov/ag/media/1409486/dl.

[37] Release available at https://www.justice.gov/opa/pr/california-defense-contractor-and-private-equity-firm-agree-pay-175m-resolve-false-claims.

an FCA retaliation suit where the plaintiff failed to plead "any facts alleging an interrelation of operations" or "common management," the private equity firm had a different principal place of business, and there were insufficient facts "to allow the Court to draw a reasonable inference that [the private equity firm] was a joint employer or an integrated enterprise with [its healthcare portfolio company]." *Panowicz v. Charter Health Holdings, Inc.,* No. 8:23-cv-00483, 2025 WL 2928963, at *6 (D. Neb. Oct. 15, 2025).

H. Employment Verification Practices

In September, a New Jersey-based government contractor agreed to pay over $4 million to resolve allegations that it improperly employed individuals who were not authorized to work in the United States on Navy ships.[38] The contractor was alleged to have hired approximately 52 unauthorized individuals in connection to its government contracts between May 2017 and December 2020.

I. Constitutional Challenges to the *Qui Tam* Provision

Constitutional challenges to the *qui tam* provision were a major feature of FCA litigation in 2025. Justice Thomas's 2023 dissent in *United States ex rel. Polansky v. Executive Health Resources, Inc.* invited the modern wave of Article II challenges. 599 U.S. 419, 449-452 (2023) (Thomas, dissenting). Judge Kathryn Mizelle then accelerated the debate when she upheld an Article II Appointments Clause challenge to the provision in 2024. *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC,* 751 F. Supp. 3d 1293 (M.D. Fla. 2024).

While other district courts continued to reject Article II challenges, 2025 saw a meaningful shift in judicial engagement on the issue, with increasing numbers of judges recognizing the complexity of these issues, including the Eleventh Circuit panel that heard oral argument in the *Zafirov* appeal on December 12, 2025. *Zafirov v. Fla. Med. Assocs.,* Nos. 24-13581, 24-13583 (11th Cir.); *see also United States ex rel. Montcrief v. Peripheral Vascular Assocs., P.A.,* 133 F.4th 395, 410-12 (5th Cir. 2025 (Duncan, J. concurring); *United States ex rel. Gentry v. Encompass Health Rehabilitation Hospital of Pearland, LLC,* 157 F.4th 758, 766-67 (5th Cir. 2025 (Ho. J., concurring); *United States ex rel. Shahbabian v. TriHealth, Inc.,* No. 1:20-cv-

00067, 2025 WL 2108197, at *1 (S.D. Ohio July 28, 2025) (certifying the constitutional question for interlocutory appeal as one on which "reasonable jurists could disagree").

With appeals now pending before the Third, and Eleventh Circuits, the constitutionality of the *qui tam* provision promises to be among the most consequential issues of FCA jurisprudence in 2026, though it seems unlikely these issues will be resolved until they reach the Supreme Court. Please see Section III.G below for further discussion of these challenges.

[38] Release available at https://www.justice.gov/usao-nj/pr/government-contractor-pay-over-4-million-settle-false-claims-act-allegations.

III. SIGNIFICANT JUDICIAL DECISIONS

A. Initial Hurdles for the FCA Plaintiff

1. 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 of a previous disclosure of fraud." *Walburn v. Lockheed Martin Corp.,* 431 F.3d 966, 970 (6th Cir. 2005).

a) The Fourth Circuit held the first-to-file rule must be assessed on a per-claim and per-defendant basis.

The Fourth Circuit held that courts applying the FCA's first-to-file bar must consider each properly filed claim on a claim-by-claim and defendant-by-defendant basis. *United States ex rel. Rosales v. Amedisys N.C., LLC,* 128 F.4th 548, 557 (4th. Cir. 2025). The court recognized that claims that plead the "same essential elements" as the claims in an earlier action—even if the allegations are more detailed—are barred. *Id*. at 559–60. So, for example, a prior complaint alleging a parent company and its subsidiaries in one area are engaged in "systematic" or "wide-spread" fraud alerts the government to the possibility that other subsidiaries may be engaged in the same conduct, which therefore bars later-filed suits against the parent and different subsidiaries in another area. *Id*.

b) The District of Maryland interprets *Rosales* to impose a "low bar" for the first-to-file bar to apply.

The U.S. District Court for the District of Maryland affirmed *Rosales*' broad view of the first-to-file bar. *See United States ex rel. Goebel v. Anchorage SNF, LLC,* No. 17-cv-00722, 2025 WL 2898087, at *9 (D. Md. Oct. 10, 2025). In *Goebel*, two relators alleged an Alaskan skilled nursing facility and its owners worked with a medical staffing provider to carry out a multi-part scheme to defraud the government, including fraudulent billing practices and mistreating patients. *Id*. at *2. However, another relator had already brought an FCA *qui tam* action against the medical staffing provider and several other skilled nursing facilities in Pennsylvania, and their owners. *Id*. at *1–2.

The court recognized that *Rosales* set a "low bar" for finding that a prior case alleged nationwide fraud, such that a later case alleging the same fraud would be barred even though it alleged new defendants in a different geographic area. *Id*. at 12. The prior relator's suit had alleged the medical staffing provider and skilled nursing facilities "systematically" engaged in fraudulent billing, performed improper treatments "on a nationwide basis," and brought claims under the laws of fifteen states in addition to the FCA. *Id*.

The court found that the prior suit therefore put the government on notice that the alleged conduct was not limited to Pennsylvania but extended to every skilled nursing facility that the staffing provider worked with, regardless of geographic area. *Id*. at *12–13. As a result, the court dismissed the *Goebel* complaint because the two complaints alleged substantially the same fraudulent scheme and the prior complaint had provided notice to the government that fraud was occurring wherever the staffing provider worked with skilled nursing facilities. *Id*.

2. 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 Cnty. 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." 31 U.S.C. § 3730(e)(4)(A). 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 D.C. Circuit held the public disclosure bar is an affirmative defense.

In 2025, the D.C. Circuit held that 2010 amendments to the FCA converted the public disclosure bar from a jurisdictional limit to an affirmative defense. *United States ex rel. O'Connor v. USCC Wireless Inv., Inc.,* 128 F.4th 276, 284–85 (D.C. Cir. 2025); *see also United States ex rel. Winnon v. Lozano,* 146 F.4th 1197, 1208 (D.C. Cir. 2025); *United States ex rel. O'Connor v. U.S. Cellular Corp.,* 153 F.4th 1272, 1277 (D.C. Cir. 2025).

Prior to the 2010 amendments, the statute provided that "no court shall have jurisdiction over an action under this section" where the public disclosure bar applied. 31 U.S.C. § 3730(e)(4)(A) (1986). But Congress changed the language in 2010 to "[t]he court shall dismiss an action or claim under this section." 31 U.S.C. § 3730(e)(4)(A). Following this change, courts now treat the public disclosure bar as an affirmative defense that defendants must plead and prove. *Winnon*, 146 F.4th at 1208.

The D.C. Circuit's holding follows the Third, Fourth, Ninth, Tenth, and Eleventh Circuits, which "have universally held that the 2010 amendments transformed the public disclosure bar from a jurisdictional bar to an affirmative defense." *United States ex rel. Reed v. KeyPoint Gov't Sols.,* 923 F.3d 729, 737 n.1 (10th Cir. 2019) (collecting cases). While the Seventh Circuit has yet to weigh in on the question, a Northern District of Illinois court agreed with the other circuits that the amendment converted the bar to an affirmative defense. *See United States ex rel. Akeel & Valentine, PLC v. Napleton Auto Grp., Inc., No.* 24-cv-00047, 2025 WL 2930796, at *4 (N.D. Ill. Oct. 15, 2025).

b) The Eleventh and Ninth Circuits found a lawsuit is "substantially the same" as publicly disclosed allegations where the central fraud can be clearly deduced from the disclosures.

In a case regarding false compliance certifications for aviation grant assurances, the Eleventh Circuit found that a relator's allegations were "substantially the same," as prior news articles describing the grant-assurance violations, even where the relator introduced evidence of additional fraudulent events after the articles were published. *See United States ex rel. Smith v. Odom,* 148 F.4th 1322, 1330 (11th Cir. 2025). The court found sufficient overlap between the relator's allegations and the news allegations because the extra details provided by the relator merely focused on misconduct by a different conspirator without changing the scheme's core contours. *Id*.

The D.C. Circuit likewise held that a prior lawsuit, a corporate integrity agreement, and a government press release together disclosed the "who, what, when, and where" of an alleged skilled nursing facility referral therapy scheme, and the relator's attempt to add more examples or extend the time frame of the fraud could not overcome the public disclosure bar. *See Winnon*, 146 F.4th at 1209.

In contrast, the Ninth Circuit found no bar where a relator offered "new and material information," "when viewed at the appropriate level of generality" about the defendants' alleged practice of hiring doctors' relatives in violation of the FCA. *See United States ex rel. Sam Jones Co., LLC v. Biotronik, Inc.,* 152 F.4th 946, 959–60 (9th Cir. 2025). The court concluded that a relator's allegations about a three-way compensation arrangement between the manufacturer, a physician, and the physician's family member hired by the manufacturer differed from a previously publicized newspaper article and prior complaints that discussed improper sales practices. *Id*. The prior reporting described

a scheme that could have been perpetrated at any hospital with public funding whereas the subsequent *qui tam* complaint identified a specific hospital and physician. *Id*. In short, the public materials lacked the "critical mass of facts" from which fraud could be deduced under the FCA. *Id*.

c) An original source "materially add[s]" information where their evidence would meaningfully affect the government's choice to bring a case.

The D.C. Circuit clarified when an original source can satisfy the element of "materially add[ing] to the publicly disclosed allegations." *O'Connor*, 153 F.4th at 1280. New information is material if it "is sufficiently significant or essential to influence the government's decision to prosecute" an FCA case. 153 F.4th at 1281 (quoting *United States ex rel. O'Connor v. USCC Wireless Inv., Inc.,* 128 F.4th 276, 289 (D.C. Cir. 2025)).

In *O'Connor*, which involved an FCC bidding credit scheme, the D.C. Circuit held that relators materially added facts showing a large carrier exercised de facto control over a smaller business and entered into an undisclosed agreement to transfer spectrum licenses that the larger carrier otherwise could not obtain. *O'Connor*, 153 F.4th at 1281–82. The court found that FCC filings did not contain sufficient facts to reveal the fraud and the relators' evidence "substantially strengthen[ed] the case" by revealing that the small business never had a place of business, employees, or business operations and had an undisclosed and impermissible agreement to transfer the licenses to the large carrier, thus qualifying the relators as original sources. *Id*. at 1281–82.

Similarly, the U.S. District Court for the Eastern District of Texas, relying on an unpublished Fifth Circuit decision's favorable citation to First Circuit jurisprudence, found that a relator materially added to existing public disclosures where they provided "specific details about Defendant's fraud and scienter" in its submission of false certifications of compliance when participating in Federal Housing Administration programs because this information was "of such nature that knowledge of the item would affect a person's decision-making." *United States ex rel. Fisher v. Wells Fargo Bank, N.A.,* No. 4:16-cv-00394, 2025 WL 2802967, at *11 (E.D. Tex. Sept. 30, 2025) (quoting *United States ex rel. Vaugh v. Harris Cty. Hosp. Dist.,* No. 22-20659, 2023 WL 8649876, at *4 (5th Cir. 2023)).

Conversely, courts have found that relators failed to "materially add" to public disclosures where they "merely supplement[ed] and contextualize[d] the core fraud hypothesis" already disclosed, or where they added only "speculation, background, or collateral research" without novel, material facts. *See Smith*, 148 F.4th at 1331; *Winnon*, 146 F.4th at 1211.

d) The Southern District of Indiana held that reports made solely to a state agency are not public disclosures.

In *United States ex rel. McCullough v. Anthem Insurance Companies*, relators alleged Indiana managed care entities and hospital networks violated the FCA and its state law equivalent through improper Medicaid billing. No. 1:21-cv-00325, 2025 WL 2782576, at *3 (S.D. Ind. Sept. 30, 2025). To prove their claims, the relators relied upon reports from IBM Watson, an entity serving as a fraud and abuse detection system contractor for Indiana Medicaid. *Id*. The IBM reports were transmitted to state officials but not to any federal officials or agencies. *Id*. at *5.

In denying the defendants' motion to dismiss on the basis of the public disclosure bar, the court found that the IBM reports were not public disclosures. *Id*. at *4–5. The court reasoned that "the 2010 amendments to the FCA significantly changed the scope of the public disclosure bar" to cover only federal reports, hearings, audits, or investigations, and because "[t]he IBM reports were procured pursuant to a contract with *state* Medicaid and provided directly to *state* officials," and not to federal officials, the reports did not qualify as public disclosures. *Id*. (emphasis added). Additionally, the fact that the federal government could audit Indiana Medicaid did not mean the reports were federal. *Id*. at *5.

3. Government Action Bar

The FCA also bars private suits "based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." 31 U.S.C. § 3730(e)(3).

This government action bar serves the "twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *United States ex rel. Estate of Gadbois v. PharMerica Corp.,* 292 F. Supp. 3d 570, 576 (D.R.I. 2017). It also protects FCA

defendants from suits by future relators where the government has settled related conduct, even if the conduct at issue was not part of the release. *See United States ex rel. Bennett v. Biotronik, Inc.,* 876 F.3d 1011, 1020 (9th Cir. 2017).

The government action bar generally requires that (1) the case is "based upon" the same "allegations or transactions" as an existing case, (2) the existing case is a "civil suit" or "administrative civil money penalty proceeding," and (3) the government is "already a party" to that case. *See United States ex rel. S. Prawer & Co. v. Fleet Bank of Me.,* 24 F.3d 320, 326 (1st Cir. 1994) (urging caution given that the "breadth with which" the statutory language should be interpreted is "not readily apparent from the text of the statute."). Two 2025 decisions offer useful guidance on the scope of each element.

a) The Middle District of Pennsylvania held that the government action bar turns on whether the government knows the fraudulent conduct, not the identity of the defendants.

In *United States ex rel. Polansky v. Spirit,* a physician-relator alleged that four medical providers exploited the disparity between inpatient and outpatient reimbursement rates by relying upon the fraudulent billing practices and policies of their billing vendor, the relator's former employer. 781 F. Supp. 3d 271, 274 (M.D. Pa. 2025). The defendants moved to dismiss under the government action bar, arguing the relator had already brought a *qui tam* action based on the "very same allegedly fraudulent scheme" against the billing vendor. *Id*.

The court characterized the case as "straightforward." *Id*. at 277. When "considering the commonality" between cases, the inquiry centers on "fraudulent conduct"—specifically, whether the "facts disclosing the fraud itself are in the government's possession." *Id*. at 276 (quoting *United States ex rel. Vt. Nat'l Tel. Co. v. Northstar Wireless LLC,* 531 F. Supp. 3d 247, 264 (D.D.C. 2021)). Merely "shift[ing] the target of litigation" to new defendants does not avoid the bar if the operative fraudulent scheme is the same. *Id*. at 277. Because the present case was "based upon the very same allegations or transactions" as the earlier action, it was barred. *Id*. at 278. The fact that the earlier action had been dismissed was of no consequence.

b) The Eastern District of Texas held post-settlement compliance monitoring programs are not part of the prior suit for purposes of the government action bar.

In *United States ex rel. Fisher v. Wells Fargo Bank, N.A.,* a relator alleged FCA violations by a bank that had served as a mortgage loan servicer during the housing crisis of 2008. 2025 WL 2802967, at *1–2 (E.D. Tex. Sept. 30, 2025). The relator advanced a theory substantially similar to one previously resolved by a settlement between the bank and the federal government, except the relator focused on conduct that post-dated the settlement but occurred during the term of an independent compliance monitor mandated by the

settlement. *Id*. at *2. The defendant argued the government action bar applied because the post-settlement compliance monitoring program was part of the prior litigation so the government had "already pursued, and recovered for, the [relator's] claims." *Id*. at *7.

The dispositive question was whether a post-settlement compliance monitoring program was part of a "civil suit" or "administrative money penalty proceeding" under § 3730(e)(3). The FCA does not define either term, but the court followed the reasoning from a Northern District of Alabama decision, which construed the bar as "limited to civil actions resembling administrative money penalties; i.e., *in personam* actions for money." *Id*. at *8 (quoting *Taul ex rel. United States v. Nagel Enters. Inc.*, No. 2:14-cv-00061, 2016 WL 304581, at *5 (N.D. Ala. Jan 25, 2016)). The court held that the compliance monitoring program was merely "an effect of the prior *in personam* action for money" and rejected the defendants' government action bar argument. *Id*. at *9.

4. Government's Right to Dismiss

The FCA authorizes the government to dismiss an action over a relator's objections 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).

a) The Fifth and Sixth Circuits and a District Court in the Ninth Circuit held a live hearing is not required if the government moves for dismissal.

As discussed in our Mid-Year Update, the Fifth and Sixth Circuits held that § 3730(c)(2)(A)'s "opportunity for a hearing" does not require live testimony or an evidentiary proceeding when the government moves to dismiss; a hearing on the briefs suffices.

In *Vanderlan v. United States*, the Fifth Circuit confirmed that written submissions satisfy the hearing requirement and noted the district court in that case had provided more process than necessary by holding multiple rounds of briefing and a live evidentiary hearing on reconsideration. 135 F.4th 257, 266 (5th Cir. 2025).

Similarly, in *United States ex rel. USN4U, LLC v. Wolf Creek Federal Services*, the Sixth Circuit held that a paper hearing met the statute's requirements and emphasized there was no prejudice where the relator could present its

arguments in briefing. No. 24-3022, 2025 WL 1009012 (6th Cir. Mar. 31, 2025), *cert. denied*, No. 25-418, 2025 WL 3507012 (U.S. Dec. 8, 2025).

Together, these decisions reinforce a clear post-*Polansky* rule: § 3730(c)(2)(A)'s hearing requirement is satisfied by full adversarial briefing, and live evidentiary hearings are not required, absent a colorable constitutional claim.

The U.S. District Court for the District of Nevada followed suit in *United States ex rel. CMB Export, LLC v. Tonopah Solar Energy, LLC,* No. 2:20-cv-00196, 2025 WL 2029831 (D. Nev. July 18, 2025). The relator alleged the defendants fraudulently obtained a $275 million Treasury grant connected to a Department of Energy-backed solar project. *Id*. at *1. After initially declining to intervene, the government later moved to do so and dismiss the case under § 3730(c)(2)(A) and Rule 41, citing agency burdens and limited public-interest value in continued litigation. *Id*.

The court found "good cause" for late intervention under § 3730(c)(3), adopting *Polansky*'s flexible standard that a "legally sufficient reason" suffices and noting that the DOJ's dismissal rationale itself may establish good cause. *Id*. at *2. Applying Rule 41, the court emphasized the substantial deference owed to the government's dismissal decision and concluded that the government need not submit an evidentiary record where its explanation reflects a reasoned resource-allocation judgment. *Id*.

In ruling on the hearing requirement, the court cited *Vanderlan* and held that § 3730(c)(2)(A) does not mandate a live evidentiary hearing. *Id*. Absent a colorable constitutional claim, the "opportunity for a hearing" is satisfied by the court's consideration of the parties' written submissions. *Id*. Because the relator did not raise plausible due process or equal protection concerns and had full notice and briefing, the request for a live hearing was denied, and the court granted the government's motion to dismiss. *Id*.

b) Consent by the Attorney General is not required for government dismissal under § 3730(c)(2)(A).

In *United States ex rel. Day v. Boeing*, the relator alleged that five major defense contractors manipulated the Department of Defense's ("DOD") Defense Logistics Agency ("DLA") procurement by using a de facto sole-source process disguised as competition to overcharge for replacement parts, resulting in billions in alleged overpayments. 796 F. Supp. 3d 243 (E.D. Va. Aug. 21, 2025). The government intervened and was successful in dismissing the case pursuant to § 3730(c)(2)(A) and Rule 41.

The relator moved to alter or amend the judgment under Rule 59(e), arguing that dismissal could only be accomplished if the Attorney General herself consented to dismissal and provided "reasons" to justify it since § 3730(b)(1) states that an FCA action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." *See id*. at 245–50.

But the court held that the relator's position relied on "a stringent, and strained, reading of the statutory text" and that § 3730(c)(2)(A) governed and did not require the Attorney General's personal "written consent and reasons." *Id*. at 251–52. Instead, § 3730(c)(2)(A) was satisfied where the government provides notice and the court affords the relator an opportunity for a hearing. *Id*.

Taken together, *Vanderlan, USN4U, CMB Export,* and *Day* confirm a unified post-*Polansky* framework: Courts broadly defer to the government's decision to dismiss, allow § 3730(c)(2)(A)'s hearing requirement to be satisfied by written submission, and permit late intervention for dismissal on flexible "good cause." Technical challenges—such as the argument that § 3730(b)(1)'s Attorney General-consent requirement applies—are largely unavailing. Practically, defendants should align their presentations with the DOJ's resource-allocation and public-interest rationales, while relators face steep headwinds absent a credible constitutional claim or a showing that the DOJ's reasons are unreasonable.

B. Substantive Elements of an FCA Claim

1. Rule 9(b) Particularity

Actions brought under the FCA require the submission of a false or fraudulent claim. False or fraudulent claims are subject to the Rule 9(b) heightened pleading standards, which require a complaint to "state with particularity the circumstances constituting fraud." FED. R. CIV. P. 9(b).

Generally, courts have interpreted the heightened pleading standard to mean that a complaint must specify, at a minimum, the "who, what, when, where, and how of the fraudulent scheme" to successfully overcome a motion to dismiss. However, courts have established various nuances in determining exactly what satisfies Rule 9(b) for FCA claims.

a) The Sixth and Eleventh Circuits require allegations of specific false claims actually submitted to the government.

The Sixth and Eleventh Circuits require that in addition to pleading the who, what, when, where, and how of the alleged fraud, a relator must allege a false claim was actually submitted to the government. *See United States ex rel. O'Laughlin v. Radiation Therapy Servs., P.S.C.,* 148 F.4th 791, 802–04 (6th Cir. 2025), *reh'g denied*, No. 24-5898, 2025 WL 2825876 (6th Cir. Sept. 19, 2025); *United States ex rel. VIB Partners v. LHC Grp., Inc.,* No. 24-5393, 2025 WL 1103997 (6th Cir. 2025); *Vargas v. Lincare, Inc.,* 134 F.4th 1150 (11th Cir. 2025); *United States ex rel. Olsen v. Tenet Healthcare Corp.,* No. 24-1785, 2025 WL 1166894 (6th Cir. 2025); *United States ex rel. McKoy v. Atlanta Primary Care Peachtree, PC*, No. 23-13845, 2025 WL 1823269 (11th Cir. July 2, 2025).

For example, in *O'Laughlin*, the relator alleged a scheme by providers of radiation and chemotherapy services to misrepresent that medical services were performed by or supervised by a qualified physician. 148 F.4th at 795. But instead of pleading a specific fraudulent claim submitted as part of the scheme, the relator stated that fraudulent claims could be identified by comparing the "Master Schedule" to specific physicians' schedule and inferring discrepancies in physicians' locations. *See id*. at 796–97. The court held that this was an "unreliable indicator" of fraud because the Master Schedule did not provide evidence as to whether a physician actually worked at the scheduled time. *Id*. at 804. So, the court affirmed summary judgment in favor of the defendants.

b) The Eleventh Circuit clarifies when pleading standards may be relaxed due to a relator's direct and personal knowledge.

In the Eleventh Circuit, the pleading standard may be "relaxed" if the relator has "direct, personal knowledge of the allegedly fraudulent schemes either because they provided the services billed for or because their job required them to know the defendant's billing practices or placed them in the defendant's billing department." *Atlanta Primary Care Peachtree, PC,* 2025 WL 1823269, at *4.

However, this relaxed standard is only applicable in limited circumstances. Specifically, the relators' personal knowledge of and/or access to relevant information must "translate[] to knowledge of actual tainted claims presented to the government." *Carrel v. AIDS Healthcare Found., Inc.,* 898 F.3d 1267, 1277–78 (11th Cir. 2018).

For instance, in *United States ex rel. Senters v. Quest Diagnostics Inc.,* the Eleventh Circuit held that a relator's access to a laboratory company's billing system was not enough to satisfy Rule 9(b) where the relator "failed to provide any specific details regarding either the dates on or the frequency with which the defendants submitted false claims, the amounts of those claims, or the patients whose treatment served as the basis for the claims," and failed to "claim to have observed the submission of an actual false claim" or that "she personally participate[d] in submitting false claims." No. 24-12998, 2025 WL 1951196, at *3 (11th Cir. July 16, 2025) (citations omitted).

2. Falsity

Naturally, the FCA 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 Fifth Circuit held that the falsity element was not satisfied where a relator failed to allege that information submitted was false, clinicians did not exercise independent judgment, or patients were inappropriately admitted.

In *United States ex rel. Gentry v. Encompass Health Rehabilitation Hospital of Pearland, LLC,* the relator alleged that an inpatient-rehabilitation facility presented false claims to Medicare, used false records to get claims paid, and conspired to get false claims paid by having sales representatives impermissibly act as clinician screeners and by giving its physicians no practical ability to evaluate patients for admission because sales representatives "bombarded" them with too many requests too quickly. 157 F.4th 758, 763–64 (5th Cir. 2025).

The district court granted the defendant's motion to dismiss, and the Fifth Circuit affirmed, holding that the relator's complaint failed to plead sufficient facts to satisfy the falsity element under Rule 8(a) or 9(b) for several reasons. First, the relator's claim that she gathered patient information to produce clinical screening narratives was facially benign, as Medicare permits nonclinical personnel to gather data for preadmission screening. *Id*. at 764. Second, she failed to allege how the sales representatives' screening narratives provided clinical judgments or medical justifications were false or led to the admission of patients who did not require treatment. *Id*. Third, she did not allege any facts suggesting admission decisions rested with anyone other than physicians. *Id*.

Additionally, as discussed in more detail in Section III(G) below, Judge Ho "wr[ote] separately to note that, in an appropriate case, [the court] should revisit whether there are serious constitutional problems with the *qui tam* provisions of the False Claims Act." *Id*. at 766.

b) The Western District of Texas explained the pleading link between factual falsity and legal falsity.

In *United States ex rel. Gomez v. Koman Construction, LLC*, the relators claimed that various defendants defrauded the government by (1) inflating contract prices, (2) exploiting subsidiaries' Small Business Administration 8(a) status to obtain set-aside contracts while passing work to non-8(a) subcontractors, and (3) exchanging kickbacks for subcontracts. 796 F. Supp. 3d. 353, 365–69 (W.D. Tex. Aug. 22, 2025). The relators also claimed that a subsidiary defendant retaliated against them for reporting the alleged fraud. *Id*. at 383. Two groups of defendants moved to dismiss for failure to state claim. *Id*. at 370.

The court found the falsity element was satisfied as to all three of the relators' theories. The relators' inflated-cost scheme allegations were the "archetypal factually false" claims of billing for goods and services not provided or overcharging for them. *Id*. at 375. The relators also sufficiently alleged factual falsity in the second theory by alleging the 8(a) eligible entity subcontracted the entirety of the implicated contract to an ineligible entity and billed for management and supervisory costs it never provided. *Id*. at 377–78.

Finally, the court determined that the kickback allegations "support[ed] the legal falsity of claims already alleged to be factually false—on the theory that those claims were also tainted by ongoing violations of the [Anti-Kickback Act]." *Id*. at 379. In the court's view, because the relators alleged in detail the way the defendants provided one another with kickbacks to collude in the procurement of contracts under which they later submitted claims, and because those claims ultimately involved a certification of compliance with the Anti-Kickback Act, the relators plausibly alleged their legal falsity. *Id*. at 397–80.

c) The Eastern District of Pennsylvania clarified when reporting drug sale prices to Medicare for reimbursement can constitute a false report.

In *United States ex rel. Behnke v. CVS Caremark Corp.*, a relator alleged that a pharmacy benefit manager ("PBM") caused certain health insurers to misrepresent to the government the amounts paid for prescription drugs on behalf of Medicare beneficiaries. No. 14-cv-00824, 2025 WL 1758623, at *1 (E.D. Pa. June 25, 2025).

Specifically, the relator claimed that the PBM reported a high "maximum allowable cost" for generic prescription drugs to those insurers and, by extension, to CMS. Simultaneously, the PBM negotiated and paid significantly lower fixed average prices to pharmacies for the same drugs but failed to disclose these lower prices to the insurers or CMS, as required by Medicare Part D program rules. This meant that the government overpaid for drug subsidies, and Medicare Part D beneficiaries also faced hundreds of millions of dollars in inflated co-pays and other cost-sharing because their payments were based on the artificially high reported prices.

In 2024, the court partially granted the relator's motion for summary judgment on the issue of falsity for cases where the defendant had average prices set through contracts with pharmacies, concluding that price reports in those cases were false as a matter of law because they did not reflect the price actually paid for the drugs. *See id*. at *6, *22. The court left for trial the issue of falsity for cases where the defendant had negotiated "target" average prices, rather than contractually set average prices.

In 2025, following an eight-day bench trial, the court found that defendants' reporting of actual individual sales prices was not false, despite an agreed target average price, because the target average was merely a forecast and there was no reconciliation or claw-back mechanism to true up the aggregate price to the budget. *See id*. at *9–10, *22.

d) The District of Rhode Island found certain policies of a mortgage lender constituted false claims and survived summary judgment.

In *United States ex rel. Souza v. Embrace Home Loans, Inc.*, a relator alleged that a mortgage lender and three individuals made false representations to the U.S. Department of Housing and Urban Development ("HUD") while certifying residential mortgage loans for insurance coverage from the Federal Housing Administration ("FHA"). No. 1:22-cv-00453, 2025 WL 3072653, at *16–22 (D.R.I. Nov. 4, 2025).

The relator alleged that the defendants falsely certified that certain loans complied with HUD underwriting requirements, and that their annual certifications of compliance with HUD's program requirements were also false. *Id*. at *4. The relator identified eight policies and practices that allegedly violated HUD requirements. *Id*. at *5.

The court reviewed each of the policies and practices and found genuine issues of material fact with respect to whether several of them violated HUD guidelines and therefore satisfied the falsity element. *See id*. at *16. Specifically, the court found genuine issues of material fact as to whether the defendants had a policy not to decline loan applications; had loan officers give "customer service scores" for underwriters, violating HUD's requirement that underwriters be wholly independent from loan officers; and employed improper documentation practices, such as burying documents that would render the file noncompliant in a "miscellaneous" folder. *See id*. at *16–22, *31. The court denied the lender's motion for summary judgment on those issues.

3. 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. Wisc. Bell, Inc.*, 92 F.4th 654, 663 (7th Cir. 2024) (reversing lower court and applying *SuperValu* scienter standard to find a 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 First Circuit held that a laboratory can use reliance on a physician's orders as a defense against a finding of scienter.

As a matter of first impression, the First Circuit held that laboratories may generally rely on physicians' orders as evidence that tests are "reasonable and necessary," which defeats scienter unless a relator can rebut, discredit, or undermine to raise a genuine dispute of material fact as to the laboratory's scienter. *United States ex rel. Omni Healthcare Inc. v. MD Spine Sols. LLC*, 160 F.4th 248, 261–62 (1st Cir. 2025).

The relator, a medical practice, sent the defendant, an independent clinical laboratory, nearly 600 requisition forms and samples for urinary tract infection ("UTI") testing over a three-year period. *Id*. at 256. But unbeknownst to the defendant, the relator's owner was instructing his medical assistants to order only more sophisticated and expensive polymerase chain reaction ("PCR") tests, even if the provider had requested traditional and cheaper bacterial urine culture ("BUC") tests. The relator's owner admitted he did so in an attempt to "beef up a Medicare fraud case" against the defendant on the basis that the PCR tests were medically unnecessary. *Id*.

But the district court granted summary judgment in favor of the defendant, and the First Circuit affirmed, because nothing in the evidentiary record showed that the defendant, as a clinical laboratory whose role is to process tests rather than diagnose patients, had reason to second-guess the relator's orders and attempt to make its own medical necessity determinations. *Id*. at 260–65. In short, the relator failed to show scienter because a "doctor's determination of medical necessity . . . demonstrates 'the absence of any genuine issue of material fact" about a lab's scienter of a false claim." *Id*. at 262.

b) The Fifth Circuit and Eastern District of Pennsylvania held that a corporate defendant's "ostrich-like" behavior could establish scienter.

As discussed in our Mid-Year Update, the Fifth Circuit concluded that scienter could be established by evidence that certifying physicians were "conscious of a substantial and unjustifiable risk" that necessary steps had not been completed prior to billing. *United States ex rel. Montcrief v. Peripheral Vascular Assocs., P.A.*, 133 F.4th 395, 406 (5th Cir. 2025). The court explained that actual knowledge of wrongdoing was not required where the defendant "either intentionally avoided taking steps' to learn whether the . . . claims were false or took a substantial and unjustifiable risk that they may have been false." *Id*.

In *United States ex rel. Behnke v. CVS Caremark Corp.*, discussed above, the U.S. District Court for the Eastern District of Pennsylvania rendered findings of fact and conclusions of law concerning, among other things, whether the defendant acted recklessly or with deliberate ignorance as to its false reporting of prices actually paid at the point of sale to pharmacies. No. 14-cv-00824, 2025 WL 1758623, at *32–33 (E.D. Pa. June 25, 2025).

As a threshold matter, the court noted that the Third Circuit had not decided whether a corporate defendant's collective knowledge was sufficient to prove scienter but that other appellate and districts courts had rejected the collective corporate knowledge theory. *Id*. at *33 (citations omitted). The court nonetheless determined that the defendant's corporate systems, information, interests, and employee actions and beliefs could evidence deliberate ignorance or recklessness. *Id*. at *33–34.

After considering whether the defendant knew of regulations and guidance from CMS, concealed relevant facts, refused to conduct reasonable and prudent investigations, and created and enforced internal guidance, the court concluded that the relator had established scienter. *See id*. at *34–47. In particular, evidence that the defendant recognized the financial upside of its conduct, selectively shared information with pharmacies, avoided internal documentation, and failed to seek clarification from CMS regarding appropriate practices supported an inference that the defendant consciously disregarded a substantial risk that its reporting was inaccurate. *See id*. at *34–41. In other words, the defendant's "ostrich-like behavior" was enough to conclude it acted "knowingly."

c) The Seventh Circuit outlined different types of evidence that could support or oppose a finding of scienter.

In September, the Seventh Circuit affirmed a jury's finding of scienter in a *qui tam* action in which the relator alleged a drug manufacturer falsely lowered average manufacturer prices ("AMPs") reported to the government for its drugs covered by Medicaid, though the court characterized the analysis as a "close call" and acknowledged that "reckless disregard" is "the most capacious of the three mental states" under the FCA. *See United States ex rel. Streck v. Eli Lilly & Co.*, 152 F.4th 816, 842 (7th Cir. 2025) (cleaned up).

The court reviewed the jury's finding deferentially, but it analyzed evidence on both sides of the scienter fence, providing helpful reference points for litigants. *Id*. at 842–46. On the one hand, the defendant adopted an objectively unreasonable interpretation of relevant law and knew that it benefitted from its conduct, yet it failed to notify the government of its practices until after the relator brought the claim, and even then did so only in a letter format the government had already explained it would not accept. *Id*. at 842–45.

On the other hand, the defendant offered a plausible explanation for its conduct and made a candid admission to the government even if late and in an unacceptable format. *Id*. The court recognized that while government knowledge and approval of the particulars of a claim can negate scienter, a mere showing of some government knowledge is insufficient. *Id*. at 845. Rather, there must be evidence of the government's cooperation and collaborative problem-solving or explicit approval to negate scienter. *Id*. at 845.

4. 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 Supreme Court has 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. *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 194 (2016). Accordingly, the Court interprets the materiality requirement as requiring that "[a] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision." *Id*. at 181.

Evaluating materiality requires a "rigorous" fact-based inquiry. *Id*. at 195 n.6. *Escobar* listed three non-exclusive factors for assessing materiality: (1) whether the complying with a particular regulation or provision is an express payment condition, (2) whether noncompliance goes to the "essence of the bargain" between the government and recipient, and (3) the government's response to similar violations. *Id*. at 193–95. In 2025, the Fourth Circuit, Seventh Circuit, and several district courts issued decisions addressing materiality issues.

a) The Fourth Circuit held concealing noncompliance with requirements is evidence those requirements were material.

As covered in our Mid-Year Update, the Fourth Circuit found that a government contractor's efforts to conceal its failure to comply with requirements showed that the company perceived those requirements as material. *See United States ex rel. Wheeler v. Acadia Healthcare Co.*, 127 F.4th 472, 491 (4th Cir. 2025). The relator alleged her employer, a healthcare company operating methadone-assisted opioid treatment, falsified notes for therapy sessions that did not actually occur to support fraudulent claims for reimbursement. *Id*. at 479. The court found that compliance with federal methadone-assisted treatment regulations was "so central" that the government would not have paid the claims if it were aware of the violations. *Id*. at 490. Additionally, the court held that "the very act of falsifying records to feign compliance with requirements suggests that [the company] itself thought that those requirements were material." *Id*. at 491 (quoting *United States v. Walgreens Co.*, 78 F.4th 81, 94 (4th Cir. 2023)).

b) The Eastern District of Pennsylvania held accurate reporting of Medicare Part D prescription costs is material.

In *United States ex rel. Behnke v. CVS Caremark Corp.*, discussed above, the U.S. District Court for the Eastern District of Pennsylvania concluded that compliance with reporting requirements regarding prescription drug

costs was material to the government's payment decisions. No. 14-cv-00824, 2025 WL 1758623, at *30 (E.D. Pa. June 25, 2025).

Applying *Escobar*'s holistic analysis, the court found that CMS expressly conditions payment on the accuracy, completeness, and truthfulness of Prescription Drug Event and Direct and Indirect Remuneration data. *Id*. at *26. The court further found that such reporting went to the essence of the bargain—ensuring that Medicare subsidizes only amounts actually paid. *Id*. at *27–28. The court emphasized that the alleged misreporting of actual drug costs inflated government subsidies by tens of millions of dollars, rendering the noncompliance neither minor nor insubstantial. *Id*. at *27.

Addressing government knowledge, the court rejected the defendant's contention that CMS's continued payments opposed a finding of materiality. The court explained that the record did not show CMS had actual knowledge of the specific offsetting provisions in the company's Generic Effective Rate guarantees or their economic effect, and the company's communications omitted those facts. *Id*. at *28–30. As a result, CMS's continued payment carried little probative value. *Id*. The court held that the relator established materiality because all three *Escobar* factors supported materiality. *Id*. at *30.

c) The Southern District of Indiana found no materiality where the state paid the defendants' claims despite actual knowledge of the alleged violations.

The U.S. District Court for the Southern District of Indiana found no materiality in a case involving changes to Indiana Medicaid's efforts to recoup overpayments. *United States ex rel. McCullough v. Anthem Ins. Cos.*, No. 1:21-cv-00325, 2025 WL 2782576 (S.D. Ind. Sept. 30, 2025). The relators, former state government employees, alleged that the state decided to stop acting on reports generated by IBM Watson for political reasons. *Id*. at *2. IBM Watson served as a fraud and abuse detection system contractor for Indiana Medicaid and detected overpayments using a computer algorithm. *Id*. at *2–3.

The court found that the alleged violations were not material, relying heavily on the State of Indiana's actual knowledge of the alleged violations and payment notwithstanding that knowledge. *Id*. at *9–10. The defendants

argued that the relators' own allegations showed that Indiana knew of the alleged violations, reviewed them with IBM, and chose not to take any action. *Id*. at *9. The court agreed with the defendants and noted that even if relators were correct that political pressure caused Indiana not to pursue these claims, that issue was not before the court, and Indiana's payment, despite actual knowledge of the alleged violations, defeated materiality. *Id*. at *10.

d) The District of Rhode Island found false certifications for FHA mortgage insurance material.

The U.S. District Court for the District of Rhode Island found false certifications submitted by a mortgage lender to obtain FHA insurance were material. *United States ex rel. Souza v. Embrace Home Loans, Inc.*, No. 1:22-cv-00453, 2025 WL 3072653 at *25–28 (D.R.I. Nov. 4, 2025). Lenders can obtain mortgage insurance from the FHA for mortgages that meet certain requirements, and the insurance allows lenders to receive the outstanding loan balance from the FHA in the event of a default. *Id*. at *2. Mortgage companies approved as Direct Endorsement lenders can submit mortgages to the FHA for insurance coverage with a certification that the loan meets requirements, and the FHA does not review the loans until after the mortgage is executed. *Id*.

The relator, a former underwriter for a mortgage company approved as a Direct Endorsement lender, alleged that the company committed violations such as "directing underwriters not to decline ineligible loans, implementing practices that lead loan officers to improperly manage underwriters, hiding adverse documentation ..., and failing to timely submit [quality control] reports." *Id*. at *28. Applying the *Escobar* factors, the court held that the alleged violations were material. *Id*. First, the court emphasized that, in the FHA insurance context, lenders' certifications of compliance with underwriting requirements are repeatedly framed as prerequisites to endorsement and

claims payment. *Id*. at *26. Second, the court found that the record showed the government reviewed only a fraction of the loans at issue, and there was a genuine dispute over whether the government had actual knowledge of the alleged violations. *Id*. at *27–28.

The court also noted that the purpose of the Direct Endorsement program is for mortgage companies to certify compliance so that the government does not need to conduct a detailed review, saying that under these circumstances, "that [the government] did not catch a violation of the rules does not automatically exonerate" the company. *Id*. at *28. Finally, the court found that the alleged violations went to the very essence of the FHA insurance bargain and were not mere minor or insubstantial noncompliance, citing other cases regarding FHA underwriting requirements. *Id*. at *28 (citations omitted).

e) The Seventh Circuit held reporting deflated AMPs to Medicaid material.

In *United States ex rel. Streck v. Eli Lilly and Company*, the Seventh Circuit affirmed a jury verdict against a drug manufacturer, holding that incorrectly reported AMPs were material. 152 F.4th 816, 826–27 (7th Cir. 2025). The relator alleged that the defendant falsely underreported AMPs for multiple drugs covered by Medicaid by excluding post-sale price increases it recovered from wholesalers, thereby lowering the amount the defendant owed the government. *Id*.

Applying the *Escobar* factors, the Seventh Circuit held that the jury could reasonably find materiality. *Id*. at 826–27. The court relied heavily on the Seventh Circuit's prior decision in *United States ex rel. Heath v. Wisconsin Bell, Inc.*, 92 F.4th 654 (7th Cir. 2024). First, the court noted that the defendant's contracts with the government expressly required it to provide correct AMP information. *Id*. at 847.

The court also considered the hundreds of millions of dollars in incorrectly represented costs in light of its prior findings in *Wisconsin Bell*, noting that requiring manufacturers to pay costs in line with the AMPs is intended to curtail Medicaid costs, so misrepresentations that increase Medicaid costs go to the essence of the bargain. *Id.* at 846–47. Although the government continued to make payments after some interactions with the manufacturer, that fact was not dispositive because the extent of government knowledge was unclear, the misreporting involved substantial sums, and the manufacturer later changed course and began including the price increases in its AMP calculations. *Id*. at 847–48.

C. Reverse False Claim

Under the FCA's reverse false claims provision, a relator may recover against a person who knowingly fails to pay an "obligation"—defined as "an established duty, whether or not fixed, arising from" enumerated sources—to the government. 31 U.S.C. § 3729(a)(1)(G), (b)(3). Typically, a reverse false claim involves allegations of concealing or avoiding payment to the government.

1. *The D.C. Circuit held an employer fraudulently certifying employees for cheaper visas does not create an obligation to pay for H-1B visas or pay payroll taxes on unpaid wages.*

The D.C. Circuit joined the Second Circuit in holding that a relator fails to plead a reverse false claim based on allegations that an employer avoided federal payroll taxes and visa application fees by fraudulently certifying employees under L-1 and B-1 visas instead of H-1B visas. *See United States ex rel. Kini v. Tata Consultancy Serv., Ltd.*, 146 F.4th 1184, 1192–93 (D.C. Cir. 2025); *United States ex rel. Billington v. HCL Techs. Ltd.,* 126 F.4th 799, 801 (2d Cir. 2025) (also discussed in our Mid-Year Update).

The court first held that the regulation setting the required wage rate for H-1B visa holders, 20 C.F.R. § 655.731(a), does not itself create an "obligation" (as required for a reverse false claim) because it compels employers to pay H-1B employees specific wages, not to pay the government anything. *Kini*, 146 F.4th at 1193. Next, the court held that the relator failed to state a reverse false claim based on the federal payroll tax requirement because "the tax code only mandates an employer to pay taxes on wages it actually paid to its employees." *Id*. (citing 26 U.S.C. § 3111(a).

Similarly, the court rejected the relator's reverse false claim based on the employer's allegedly fraudulent application for cheaper

L-1 or B-1 visas, instead of H-1B visas, because an employer is not required "to pay for visas it never sought." *Id*. at 1194. Therefore, the employer's failure to submit H-1B visa applications or pay their more expensive application fees was not a failure to pay an obligation to the United States under the FCA. *Id*.

In short, under *Kini* and *Billington*, a relator cannot allege a reverse false claim based on an employer's failure to pay federal payroll taxes on wages that the employer did not pay and visa application fees for visas that the employer did not apply for—even if the employer's failure to pay the underlying wages and visa application fees was fraudulent.

D. 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, Ala., 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 2025, several court opinions provided guidance on the "but-for" causation threshold, the heightened pleading standard for compliance employees to demonstrate "protected activity" in certain jurisdictions, temporal proximity considerations, the interplay between protected activities and the employee's reasonable beliefs of what conduct violates the FCA, compliance with legal standards versus fraud with respect to notice requirements, and sufficiency of retaliation claim pleadings at the summary judgment stage.

1. *The First Circuit held FCA retaliation claimants must establish their protected activity was the "but-for" cause of the adverse employment action.*

As discussed in our Mid-Year Update, the First Circuit held in *Morgan-Lee v. Therapy Resources Management, LLC* that FCA retaliation claims are subject to a "but-for" causation standard, requiring plaintiffs to establish their protected activity was the determining factor in the adverse employment action. 129 F.4th 93 (1st Cir. 2025).

Moreover, the First Circuit agreed with the Tenth Circuit that compliance employees have a heightened burden to show that their employer was on notice that they were engaged in protected activity. *Id*. at 97 (citing *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 767 (10th Cir. 2019)).[39]

2. *The Second Circuit held that complaints about use of PPP funds did not constitute protected activity.*

In *Flanagan v. Girl Scouts of Suffolk County, Inc.*, the plaintiffs asserted an FCA retaliation claim based on the allegation they were fired after submitting a letter that, among other things, claimed that, by firing employees, the defendant might need to return a portion of PPP loans it had received. No. 23-cv-07900, 2025 WL 1501751, at *6 (2d Cir. 2025). The district court dismissed the plaintiffs' claim, and the Second Circuit affirmed, emphasizing that the purported protected activity must clearly have been "intended, and reasonably could be expected, to prevent the submission of a false claim to the government." *Id*. at *6 (quoting *United States ex rel. Chorches for Bankr. Est. of Fabula v. Am. Med. Response, Inc.*, 865 F.3d 71, 96–97 (2d Cir. 2019)). The plaintiffs' letter, the court noted, did not establish that the defendant had submitted false information in its PPP application or that the plaintiffs' activities were directed at exposing or deterring fraud on the government. *Id*.

3. *The District of Rhode Island clarified that a gap of more than three months between protected activity and adverse employment action can still constitute strong evidence to establish causation.*

In *United States ex rel. Souza v. Embrace Home Loans, Inc.*, the U.S. District Court for the District of Rhode Island found that the temporal proximity between the time of plaintiff's meeting with management and the time of her dismissal strongly suggested pretext. No. 1:22-cv-00453, 2025 WL 3072653, at *32–33 (D.R.I. Nov. 4, 2025). Applying the *McDonnell Douglas* burden-shifting framework, the district court found evidence that a plaintiff who complained to management that the defendant was approving government loans that did not meet HUD requirements and reported pressure to manipulate files before being terminated put the employer on notice that she was engaged in protected conduct. *Id*. at *32–33.

The court concluded a jury could find but-for causation based on temporal proximity. *Id*. at *33. The employer terminated the relator three months and 11 days after a meeting with her supervisor and an executive to discuss her loan manipulation concerns. A prior court had held "[i]n the First Circuit, termination must follow within roughly three months for temporal proximity alone to establish causation." *Id. (quoting United States v. Shaughnessy-Kaplan Rehab. Hosp., Inc.*, 146 F. Supp. 3d 426, 429 (D. Mass. 2015)). The *Souza* court recognized that this three-month term is not a hard limit, however, and the gap of three months and 11 days was strong evidence not only that her complaint was the but-for cause of her termination, but also that the employer's claimed reason for terminating her (workforce reduction during a downturn in loan volume) was pretextual. *Id*. at *33.

4. *The D.C. and Seventh Circuits required different degrees of specificity in the notice requirement.*

In *United States ex rel. Kini v. Tata Consultancy Services, Ltd*, the D.C. Circuit reversed the district court's dismissal of a relator's retaliation claim while affirming the dismissal of his FCA claim. 146 F.4th 1184, 1196 (D.C. Cir. 2025). Under D.C. Circuit precedent, the FCA's anti-retaliation provisions covers two forms of protected activity: (1) steps taken before bringing an FCA proceeding, and (2) lawful acts done in efforts to stop FCA violations. *Id*. at 1195. The relator pleaded both forms by investigating and escalating concerns that his employer engaged in visa fraud by obtaining L-1 and B-1 visas for IT employees who should have been sponsored under the H-1B visa program. *See id*.

The court further found he plausibly alleged retaliation beginning immediately upon his first escalation of concerns to his employer. *Id*. at 1196. But Judge Katsas dissented from this element of the majority opinion, noting that the relator's communications to his employer only raised concerns about visa fraud without specifically raising FCA

[39] For further discussion of the circuit split regarding whether compliance employees must meet a higher standard to establish that their employer was on notice of protected activity, please see our [False Claims Act 2024 Year in Review.]

concerns, as required by the statute. *Id.* at 1197 (Katsas, J., concurring in part and dissenting in part) (citations omitted).

By contrast, in *Lewis v. AbbVie Inc.*, the Seventh Circuit affirmed the dismissal of a plaintiff's FCA retaliation claim because his internal complaints focused on potential FDA regulatory violations, not on fraud against the government or the submission of false claims, thereby failing the notice element. 152 F.4th 807, 815 (7th Cir. 2025).

The Seventh Circuit explained that under the FCA, protected activity requires that the employer be on notice the employee is attempting to stop fraud on the government; employees need not invoke the FCA by name, but they must clearly link their concerns to preventing false or fraudulent claims. *Id.* at 814. Here, the defendant's marketing campaign did not, on its face, imply fraud, and nothing in the plaintiff's complaints steered the company toward FCA implications. Because the defendant lacked notice that the plaintiff was engaging in FCA-protected conduct, the plaintiff could not show retaliation "because of" such conduct. *Id.* at 815.

5. The Western District of Texas emphasized that internal complaints must tie alleged misconduct to false or fraudulent claims to constitute protected activity.

In *United States ex rel. Gomez v. Koman Construction, LLC*, the U.S. District Court for the Western District of Texas dismissed two relators' FCA retaliation claims because neither relator plausibly alleged they engaged in protected activity. 796 F. Supp. 3d 353, 384–85 (W.D. Tex. Aug. 22, 2025).

Applying Fifth Circuit precedent and the *McDonnell Douglas* burden-shifting framework, the court emphasized that internal complaints are protected only if they are motivated by concern over fraud on the government and tie alleged misconduct to false or fraudulent claims for payment. *Id.* at 383. The first relator's statements—refusing to complete a financial-audit questionnaire due to limited involvement and raising workplace and supervisory concerns—did not allege that defendant submitted or intended to submit false claims; at most, they criticized contractual or regulatory noncompliance and workplace conduct. *Id.*

at 384–85.

The second relator's complaints to HR about sex, race, and possible veteran-status discrimination, even framed as regulatory noncompliance affecting federal contracts, likewise did not connect to any false claim for payment. *Id.* at 385. The district court therefore held that they failed to establish a prima facie case and dismissed their FCA retaliation claims. *Id.*

6. The Eleventh Circuit found the hiring of a replacement during a resignation notice period and document complaints about performance to be legitimate, non-retaliatory reasons for termination.

In *Boodoo v. Alabama Psychiatry, LLC*, the Eleventh Circuit addressed an FCA retaliation claim arising from the plaintiff's early termination during a 120-day resignation notice period after he reported alleged Medicare fraud by the defendant to a probate judge. No. 24-12266, 2025 WL 3213480 (11th Cir. Nov. 18, 2025) (per curiam). Assuming without deciding that the plaintiff made a prima facie showing, the Eleventh Circuit held that the plaintiff failed to create a genuine dispute that the employer's stated reasons were pretextual. *Id.* at *3–4.

The Eleventh Circuit explained that the defendant offered legitimate, non-retaliatory reasons for ending the plaintiff's employment early: it had already hired his replacement, had received patient and staff complaints, and had identified performance issues reflected in a performance improvement plan and related correspondence. *Id.* at *3–4. The Eleventh Circuit found that plaintiff did not show these reasons were false or that retaliation was the real reason, and his challenges largely "quarrel[ed] with the wisdom" of the employer's decision rather than undermining its credibility. *Id.* at *3 (quoting *Berry v. Crestwood Healthcare*

LP, 84 F.4th 1300, 1308 (11th Cir. 2023)). Accordingly, the Eleventh Circuit affirmed summary judgment for the employer on the FCA retaliation claim. *Id*. at *4.

E. Anti-Kickback Statute & Stark Law

1. *Anti-Kickback Statute*

The AKS prohibits knowingly and willfully offering, paying, soliciting, or receiving remuneration to induce or reward referrals for items or services reimbursable by federal healthcare programs. *See generally* 42 U.S.C. § 1320a-7b. A violation of the AKS can render related claims "false" under the FCA, permitting parallel civil and criminal enforcement. *Id*. at 7b(g).

As noted in our Mid-Year Update, the First Circuit joined the Sixth and Eighth Circuits in holding that AKS-premised FCA claims require a showing of "but-for" causation. *United States v. Regeneron Pharm., Inc.,* 128 F.4th 324, 328 (1st Cir. 2025). The court reasoned the AKS's "resulting from" language means "but-for" causation absent "textual or contextual indications" not present in the statute. *Id*. at 330, 336.

In *United States ex rel. Flanagan v. Fresenius Medical Care Holdings, Inc.*, the First Circuit put its new "but-for" causation standard to the test. 142 F.4th 25 (1st Cir. 2025). In *Flanagan*, the relator alleged a dialysis services provider created an illegal kickback scheme to induce referrals. *Id*. at 29. The defendant allegedly sought exclusive contracts with hospitals to provide inpatient dialysis care and instructed its middle managers to obtain hospital contracts "at any cost" (including at a loss) to obtain lucrative exclusive referrals to the defendant's outpatient services. *Id*. at 30.

The relator's causation arguments focused on a single physician who held two medical director positions, whose "compensation in those roles was meant to induce referrals," and who referred 60 patients the defendant's clinics in 2012. *Id*. at 36. However, the court found that the relator made no allegations that the physician would not have made those referrals if he had not received the medical director physicians or otherwise plead anything to infer "but-for" causation. *Id*. In other words, the relator failed to allege "but-for" causation.

2. *Stark Law*

The Stark Law prohibits physicians from referring Medicare or Medicaid patients for designated health services to entities where the physician or a family member has a financial relationship (such as an ownership interest or compensation arrangement). *See* 42 U.S.C. § 1395nn. The Stark Law does not contain a private cause of action, but relators may invoke the FCA when Stark Law violations result in the submission of false claims to the government.

In *United States ex rel. Winnon v. Lozano*, a relator alleged several skilled nursing facilities ("SNFs") and affiliated physicians engaged in an unlawful kickback scheme in which the SNFs paid unlawful remuneration in the form of employee bonuses, sham medical directorships, and marketing gifts in exchange for patient referrals. 146 F.4th 1197, 1204–06 (D.C. Cir. 2025). But the district court dismissed the relator's claims, and the D.C. Circuit affirmed, because the relator failed to provide "concrete allegations connecting the remuneration to actual false claims." *See id*. at 1212–15. The D.C. Circuit explained that Rule 9(b) "demands specificity" about the claims submitted because "an intent to induce referrals" is not enough to establish an FCA claim premised on Stark Law violations. *Id*. at 1215.

F. Damages

1. *The District of New Jersey ruled that when the government receives no tangible, measurable benefit from a defendant's conduct, the proper measure of damages is the full amount paid by the government.*

The U.S. District Court for the District of New Jersey issued an opinion on various post-jury trial motions in a case centered on a drug manufacturer's alleged kickback scheme and off-label promotion of two HIV/AIDS drugs that led to the submission of false claims to Medicare, Medicaid, and the federal AIDS Drug Assistance Program. *See United States ex rel. Penelow v. Janssen Prods., LP*, No. 12-cv-07758, 2025 WL 937504, at *1 (D.N.J. Mar. 28, 2025) (not for publication), *appeal docketed*, No. 25-1818 (3d Cir. Apr. 29, 2025).

After a six-week trial, the jury awarded the federal and state governments over $150 million. *Id*. The manufacturer challenged

the measure of damages, arguing that the "benefit of the bargain" standard should apply because the government received the benefit of effective treatment for patients with HIV. *Id*. at *9. But the court disagreed, reasoning that "such an alleged benefit is intangible and impossible to calculate" and the government "received no measurable or tangible benefit." *Id*. As such, the court held the proper measure of damages was "the full amount the government paid for the false claims." *Id*.

The court also trebled the damages, as required by the FCA, entering a judgment of over $360 million. *Id*. at *15. In addition, the court imposed civil penalties of $8,000 per false claim, totaling nearly $1.3 billion in penalties. *Id*. at *17. The per-claim penalty amount fell near the middle of the statutory range, which the court determined was appropriate given the seriousness of the offense, the manufacturer's pattern of misconduct, and its refusal to accept responsibility. *Id*. at *22. The court cited the manufacturer's post-verdict press release, which stated that the jury verdict was "predicated on a clearly erroneous jury instruction that is contrary to the law" and that the manufacturer was confident the decision would be reversed on appeal, as evidence that the manufacturer had refused to accept responsibility for its conduct. *Id*. at *16.

2. *The Eastern District of Wisconsin held the government's loss for fraudulently obtained FCC E-Rate subsidies equals the entire subsidy amount.*

In our Mid-Year Update, we discussed the Supreme Court's ruling that requests for reimbursement to the FCC's E-Rate program constituted "claims" under the FCA because the Treasury's deposit of nearly $100 million collected from delinquent funds and DOJ activities meant that the government provided a portion of the fund's money. *See Wisc. Bell, Inc. v. United States ex. rel. Heath*, 604 U.S. 140, 148–150 (2025). Under the FCC's E-Rate program, subsidies are available to telecommunications carriers as a percentage of the rates that carriers charge schools, but carriers are not eligible for subsidies if they charge schools more than they would charge similarly situated customers (the "lowest corresponding price" rule). *Id*.

On remand for the issue of damages, the carrier argued that the damages should be either the difference between the $100 million subsidy it received and what the subsidy would have been without the fraud or, failing that, limited to the full $100 million subsidy the government provided. *See United States ex rel. Heath v. Wisc. Bell, Inc.,* No. 08-cv-00724, 2025 WL 3033792, at *6 (E.D. Wis. Oct. 29, 2025). The district court found that the government would have paid no subsidies absent the fraud, so the correct measure of damages includes all subsidies awarded on contracts where the carrier failed to follow the lowest corresponding price rule. *Id*. at *7–8 (citing *United States v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008).

3. *The Southern District of New York found no Eighth Amendment violation after the government exercised its discretion to seek reduced penalties.*

The U.S. District Court for the Southern District of New York awarded nearly a billion dollars after a jury found that a pharmacy services provider and its parent submitted over three million false claims for Medicare reimbursement between 2010 and 2018. *See United States ex rel. Bassan v. Omnicare, Inc.*, No. 15-cv-04179, 2025 WL 1865202, at *2 (S.D.N.Y. July 7, 2025).

The FCA calls for a penalty of at least $5,000 per false claim submitted to the government. 31 U.S.C. § 3729(a). The literal application of that rule to over three million claims would result in a nearly $27 billion penalty, in addition to more than $400 million in trebled damages, and the court recognized that such an award would have raised significant Eight Amendment problems. *Id*. at *2. The government "prudently" exercised its prosecutorial discretion and asked for penalties of only $542 million, for a total award of nearly $1 billion. *Id*. The court rejected the defendant's argument that

penalties exceeding a one-to-one ratio with substantial damages violated due process. *Id*. at *5–6.

G. Constitutionality of the *Qui Tam* Provision

The False Claims Act's *qui tam* mechanism has long been regarded as constitutionally sound, yet recent decisions have demonstrated a renewed judicial interest in whether private relators may wield executive enforcement authority consistent with Article II of the U.S. Constitution.

The conversation accelerated after a federal district court in Florida concluded that the FCA's *qui tam* provision is unconstitutional, prompting a wave of responsive decisions—most of which reaffirmed the provision's validity. As these cases begin percolating up to the appellate courts, the emerging themes suggest that the constitutional status of relator-initiated enforcement will remain a significant feature of FCA litigation in the year ahead—just as they were in 2025.

1. *The Middle District of Florida first declared* qui tam *enforcement unconstitutional, setting up Eleventh Circuit review.*

The modern wave of Article II challenges began when Justice Thomas (joined in relevant part by Justices Kavanaugh and Barrett) questioned whether *qui tam* relators may constitutionally exercise Article II authority. *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 449–52 (2023) (Thomas, J., dissenting). Judge Kathryn Mizelle's decision the following year in *United States ex rel. Zafirov v. Florida Medical Associates, LLC* has become a focal point for constitutional scrutiny of the FCA. 751 F. Supp. 3d 1293 (M.D. Fla. 2024). In *Zafirov*, the relator alleged that providers submitted false Medicare claims by overstating diagnoses. *Id*. at 1303. The defendants challenged the FCA under the Appointments Clause, arguing that the statute impermissibly allowed "any person" to prosecute enforcement actions in the government's name without presidential appointment. *Id*. at 1303.

Judge Mizelle agreed, holding that relators exercise "significant authority" by initiating litigation on behalf of the United States, steering case strategy, seeking punitive civil penalties, and binding the government to judgments. *See id*. at 1307–09. Because relators are not appointed through any Article II-compliant mechanism, the court concluded that relators unconstitutionally wield executive power and dismissed the case. *See id*. at 1318–22.

Judge Mizelle's decision is currently pending before the Eleventh Circuit, making it the first appellate court to directly address the compatibility of the *qui tam* mechanism with Article II. *Zafirov v. Fla. Med. Assocs., LLC*, Nos. 24-13581, 24-13583 (11th Cir.). The case has attracted significant briefing from stakeholders on all sides, with the government, relators, defendants, and multiple amici filing detailed briefs urging affirmance or reversal based on Article II doctrine, the historical pedigree of *qui tam* enforcement, and Supreme Court precedent such as *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765 (2000).

Oral argument took place on December 12, 2025. The panel initially focused on whether the Appointments Clause has ever been applied to private actors outside the government and whether a relator's role—particularly in a declined case—amounts to "significant authority" or instead reflects a non-continuing private litigation function subject to meaningful executive control. Much of the discussion centered on practical supervision: whether relators truly sit "in the driver's seat," or whether the DOJ retains sufficient authority to intervene, dismiss, or otherwise "grab the wheel." Despite expectations in some quarters that the district court decision might be affirmed given the composition of the panel, the outcome remains difficult to predict following oral argument—with the court actively probing both sides' attempts to reconcile historical *qui tam* practice with modern separation-of-powers doctrine.

Because a ruling for the defendants would create a direct conflict with longstanding circuit precedent upholding the statute and heighten the likelihood of Supreme Court review, the *Zafirov* appeal is widely viewed as a potential inflection point for the future of FCA litigation. Beyond *Zafirov*, several other courts joined this debate over the past year.

2. *Some federal and state appellate courts expressed skepticism about the qui tam provision's compatibility with Article II.*

The Fifth Circuit, sitting *en banc*, found *qui tam* suits constitutional in *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749, 753 (5th Cir. 2001) (*en banc*). The Fifth Circuit held that the FCA does not violate Article II because even when the government declines to intervene, the executive branch retains sufficient statutory authority to supervise relator-led litigation—including the power to intervene, dismiss, or settle the action. *Id*. at 753–57. This retained oversight, the court reasoned, ensures that relators do not exercise executive power wholly independent of presidential control. *Id*. at 757–58.

But recently two Fifth Circuit judges have expressed doubt on whether *Riley*'s framework aligns with modern separation-of-powers doctrine. In a concurrence in *United States ex rel. Montcrief v. Peripheral Vascular Associates, P.A.*, Judge Duncan argued that, under contemporary Article II principles, relators wield prosecutorial authority on behalf of the United States without meaningful presidential supervision, raising serious Appointments Clause and Take Care Clause concerns. 133 F.4th 395, 410–12 (5th Cir. 2025) (Duncan, J., concurring).

Judge Ho expressed similar views in a concurrence in *United States ex rel. Gentry v. Encompass Health Rehabilitation Hospital of Pearland, LLC*, observing that *qui tam* suits can impose massive financial and policy burdens while the executive branch plays little or no role. 157 F.4th 758, 766–67 (5th Cir. 2025) (Ho, J., concurring). Both Duncan and Ho urged the full court to revisit *Riley*, suggesting that its assumptions about executive control may no longer hold.

Although these concurrences do not modify Fifth Circuit precedent, they signal a growing judicial view that *Riley* may be on unstable footing, and that the constitutional basis for relator-driven enforcement is undergoing active reassessment.

This issue is not confined to federal courts. A Texas Supreme Court decision, *In re Novartis Pharmaceuticals Corp.*, denied mandamus relief in a Medicaid-fraud action brought under Texas's *qui tam*-like statute. 722 S.W.3d 720, 720 (Tex. 2025). While the court

did not rule on the statute's constitutionality, a separate statement by two justices highlighted standing and separation-of-powers concerns.

As to standing, the justices noted a relator could have standing under the FCA as a partial assignee of the government's damages claim, but the Texas statute is different in that it imposes penalties, not compensatory damages. That difference raises the question of whether there is any "injury in fact" that the State could assign to a relator in Texas. And as to separation of powers, the justices acknowledged the potential problems with letting private relators represent the State, particularly given Texas Constitution's "strong" separation-of-powers text and assignment of representation of the State in court to the Attorney General and local prosecutors. Although not binding, these remarks reflect the same doctrinal tensions emerging in federal courts.

3. *Several federal district courts reaffirmed the constitutionality of* qui tam *suits and declined to follow* Zafirov*.*

Despite the renewed attention to Article II concerns, district courts in 2025 overwhelmingly rejected *Zafirov* and reaffirmed the FCA's constitutionality.

For example, the U.S. District Court for the District of Maryland undertook a detailed analysis of this issue. J*osephs v. Amentum Servs. Inc.,* No. 25-cv-01477, 2025 WL 3223772 (D. Md. Nov. 19, 2025). Relying on Supreme Court precedent, historical practice, and the executive's statutory powers, the court determined that relators do not meet the criteria for "Officers of the United States" and that existing oversight mechanisms satisfy Article II. *Id*. at *12–14. The court thus expressly declined to follow *Zafirov*,

emphasizing that "every court of appeals that has done so has upheld the validity of the *qui tam* provisions" and that "[i]t appears that only one district court has disagreed." *Id*. at *12.

Similarly, the U.S. District Court for the District of Arizona held that Ninth Circuit precedent—particularly *United States ex rel. Kelly v. Boeing Co.,* 9 F.3d 743 (9th Cir. 1993)—foreclosed challenges under both the Appointments Clause and the Take Care Clause. *United States ex rel. Stenson v. Radiology Ltd., LLC,* No. 19-cv-00306, 2025 WL 1785266, at *2 (D. Ariz. June 27, 2025). *Kelly* had concluded that the DOJ's statutory authority to intervene, dismiss, or settle actions provided sufficient executive control and that relators do not hold a "continuing" federal office.

District courts in New Jersey, Indiana, and Rhode Island reached the same result. *See United States ex rel. Penelow v. Janssen Prods., LP*, Civ. No. 12-7758, 2025 WL 937504, at *12 (D.N.J. Mar. 28, 2025) (rejecting *Zafirov* as an unpersuasive outlier in light of unanimous appellate authority upholding the FCA); *United States ex rel. McCullough v. Anthem Ins. Cos.*, No. 1:21-cv-00325, 2025 WL 2782576, at *15 (S.D. Ind. Sept. 30, 2025) (rejecting *Zafirov* because "every circuit court that has examined this issued has upheld the constitutionality of the FCA" and "[d]istrict courts in this Circuit have also considered such constitutional challenges and have already squarely rejected [these] precise arguments."); *United States ex rel. Souza v. Embrace Home Loans, Inc.*, No. 1:22-cv-00453, 2025 WL 3072653, at *1 n.1 (D.R.I. Nov. 4, 2025) (explaining that "every circuit court to consider the Appointments Clause issue has ruled precisely the opposite" and seeing "no reason to go against the clear weight of authority by ruling that the FCA's *qui tam* provisions are unconstitutional"). The *Penelow* case has been appealed to the Third Circuit.

Some courts have, however, acknowledged the increasingly serious nature of Article II arguments. For example, the U.S. District Court for the Southern District of Ohio upheld the FCA but certified the constitutional question for interlocutory appeal, explicitly recognizing that "reasonable jurists could disagree." *United States ex rel. Shahbabian v. TriHealth, Inc.*, No. 1:20-cv-00067, 2025 WL 2108197, at *1 (S.D. Ohio July 28, 2025).

Likewise, the U.S. District Court for the Eastern District of Wisconsin granted the defendant leave to amend its answer to add the constitutional challenge, expressly stating that the Appointments Clause argument was not futile in light of *Zafirov* and the evolving landscape of separation-of-powers jurisprudence. *United States ex rel. Heath v. Wisc. Bell, Inc.*, No. 08-cv-00724, 2025 WL 3033792, at *3 (E.D. Wis. Oct. 29, 2025). This decision reflects the complicated state of the law on this issue: Although current precedent forecloses invalidation of the qui tam provision of statute in its entirety, at least some courts believe this issue remains sufficiently live and substantial to warrant preservation for appellate review.

4. ***Courts have recognized growing constitutional tension, but definitive resolution awaits appellate and Supreme Court review.***

These decisions from the past year reflect a meaningful shift in judicial engagement with Article II challenges. Courts increasingly

acknowledge that modern separation-of-powers doctrine may place new pressure on the traditional understanding of *qui tam* enforcement. They are requesting supplemental briefing, permitting amendment to raise constitutional defenses, inviting government intervention under 28 U.S.C. § 2403, and certifying questions for appellate review.

The appeals now pending in the Third, and Eleventh Circuits represent the first significant opportunities for appellate courts to reconsider the constitutional foundation of private enforcement under the FCA. Although the Supreme Court has repeatedly assumed the statute's validity, it has never squarely addressed the Appointments Clause and Take Care Clause challenges now being advanced. Several Justices have signaled willingness to consider the question more directly, most prominently in *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419, 449–52 (2023) (Thomas, J., dissenting), where Justice Thomas (joined in relevant part by Justices Kavanaugh and Barrett) questioned whether *qui tam* relators may constitutionally exercise Article II authority.

For now, district courts are likely to continue upholding the FCA while acknowledging that the constitutional terrain is shifting. The coming appellate decisions may either reaffirm the longstanding consensus or signal a new doctrinal trajectory. Either way, the constitutionality of *qui tam* enforcement has become one of the most consequential issues in FCA jurisprudence heading into 2026—and a trip to the highest court in the land seems inevitable.

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