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The False Claims Act Year in Review—Part III

By Andrew Guthrie, Zachary Prince, Neil Issar, Matthew Liptrot Brenna Scully, Justin Manchester, Payton Roberts, Michael Maroulis, Scott Whitman and Samuel Mallick*

The False Claims Act (FCA) continues to be one of the most commonly used weapons in the federal government's enforcement arsenal to address various forms of fraud. This three-part article highlights key developments from 2024 related to the FCA. The first part, published in the April 2025 issue of Pratt's Government Contracting Law Report, *discussed notable settlements, provided an update on legislation and enforcement trends and policies, and examined significant judicial decisions with respect to agency deference, the seal requirement, and the initial hurdles an FCA plaintiff must overcome. The second part, published in the May 2025 issue of this journal, reviewed significant judicial decisions examining the substantive elements of an FCA claim. Now, the conclusion of this article reviews significant judicial decisions on reverse false claims, retaliation, damages and attorneys' fees, the constitutionality of the qui tam provision, and claims that FCA defendants may bring.*

REVERSE FALSE CLAIMS

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

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

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

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

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when it hid failures in its management of third-party risks in order to avoid paying regulatory fines and penalties to the government.

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

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

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

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

RETALIATION

To protect whistleblowers, the FCA has an anti-retaliation provision that imposes liability on an employer if an employee is "discharged, demoted,

suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee . . . in furtherance of an [FCA] action . . . or other efforts to stop one or more violations of [the FCA].” 31 U.S.C. § 3730(h)(1).

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

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

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

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

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

In *United States ex rel. Johnson v. Raytheon Co.*, the plaintiff filed an FCA retaliation claim against his former employer. 93 F.4th 776, 779 (5th Cir. 2024). The plaintiff claimed the defendant, a government defense contractor that primarily provided services to the Navy, had concealed software and other technical problems from the government and that he engaged in protected activity when he identified and spoke out about these issues. He also claimed

that the defendant retaliated against him by (1) instructing him not to report the issues, (2) monitoring his activity, (3) reporting false concerns about his security clearance to the Navy, and (4) terminating his employment.

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

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

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

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

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

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

The Eleventh Circuit has previously ruled that whistleblowers are required to show that the alleged misconduct had "something to do with the False Claims

Act—or at least that a reasonable person might have thought so." *Hickman v. Spirit of Athens, Ala., Inc.*, 985 F.3d 1284, 1289 (11th Cir. 2021).

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.; see also Sullivan (holding that "the time between the most alleged protected activity and the adverse employment action is not close enough to raise a fact

question concerning the causation element of the prima facie case" when the alleged protected activity occurred in March of 2019 and the employment termination occurred in October 2019).

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

See id. at 1097.

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

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

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

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

RECOVERY, DAMAGES, AND FEES

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

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

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

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

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

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

As a result, the Seventh Circuit remanded for recalculation because the record was insufficient to affirm that all 673 claims actually resulted from AKS

violations. *Id.* at 908–909; *see also United States ex rel. Aldridge v. Corp. Mgmt., Inc.*, No. 22-60264 (5th Cir. Mar. 7, 2024) (vacating and remanding for recalculation of damages consistent with appellate decision revising an FCA award to exclude claims outside of the FCA's statute of limitations).

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

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

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

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

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

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

The Fifth Circuit held that relators are not entitled to a share of FCA settlement proceeds and may not recover attorneys' fees when the government

intervenes and ultimately settles related but factually distinct FCA claims. *See United States ex rel. Conyers v. Conyers*, 108 F.4th 351, 359 (5th Cir. 2024).

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

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

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

CONSTITUTIONALITY OF THE *QUI TAM* PROVISION

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

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

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

In September 2024, the constitutionality of the *qui tam* provision took its first serious blow when a Florida federal district court held that the FCA's *qui*

tam provision is unconstitutional because, by allowing relators to "appoint[] themselves as the federal government's avatar in litigation," it permits "unaccountable, unsworn, private actors to exercise core executive power with substantial consequences to members of the public." *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, No. 8:19-cv-01236 (M.D. Fla. Sept. 30, 2024).

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

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

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

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

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

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

After the government declined to intervene, the defendant filed a motion for summary judgment and argued, among other things, that "31 U.S.C. § 3730(b)(4)(B),

so far as it authorizes a private litigant to maintain a *qui tam* action in which the United States has declined to intervene, is unconstitutional."

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

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

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

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

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

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

Other trial courts similarly concluded that constitutional challenges to the *qui tam* provision are unfounded and that the established practice of *qui tam* actions is firmly rooted under the FCA. *See, e.g., United States ex rel. Lagatta v. Reditus Labs., LLC*, No. 1:22-cv-01203 (C.D. Ill. Sept. 30, 2024) (emphasizing

that "Defendants cite no binding precedent to support their Article II argument, only a dissent" and that "the Supreme Court has held that a private relator has standing to bring suit under the FCA"); *United States ex rel. Adams v. Chattanooga Hamilton Cty. Hosp. Auth.*, No. 1:21-cv-00084 (E.D. Tenn. Nov. 7, 2024) (rejecting *Zafirov* because "[i]ts holding relies chiefly on selections of dissents, concurrences, and law review articles" and "[a] single, outlier trial-court decision that whistles past precedent binding upon this Court provides no basis to ignore that precedent.")

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

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

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

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

CLAIMS BY FCA DEFENDANTS

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

In February 2024, the Northern District of Georgia reiterated that FCA defendants have a right to assert counterclaims against relators as long as their

claims satisfy certain criteria. *See United States ex rel. Cooley v. ERMI, LLC*, No. 1:20-cv-04181 (N.D. Ga. Feb. 27, 2024).

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

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

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

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

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

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

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

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