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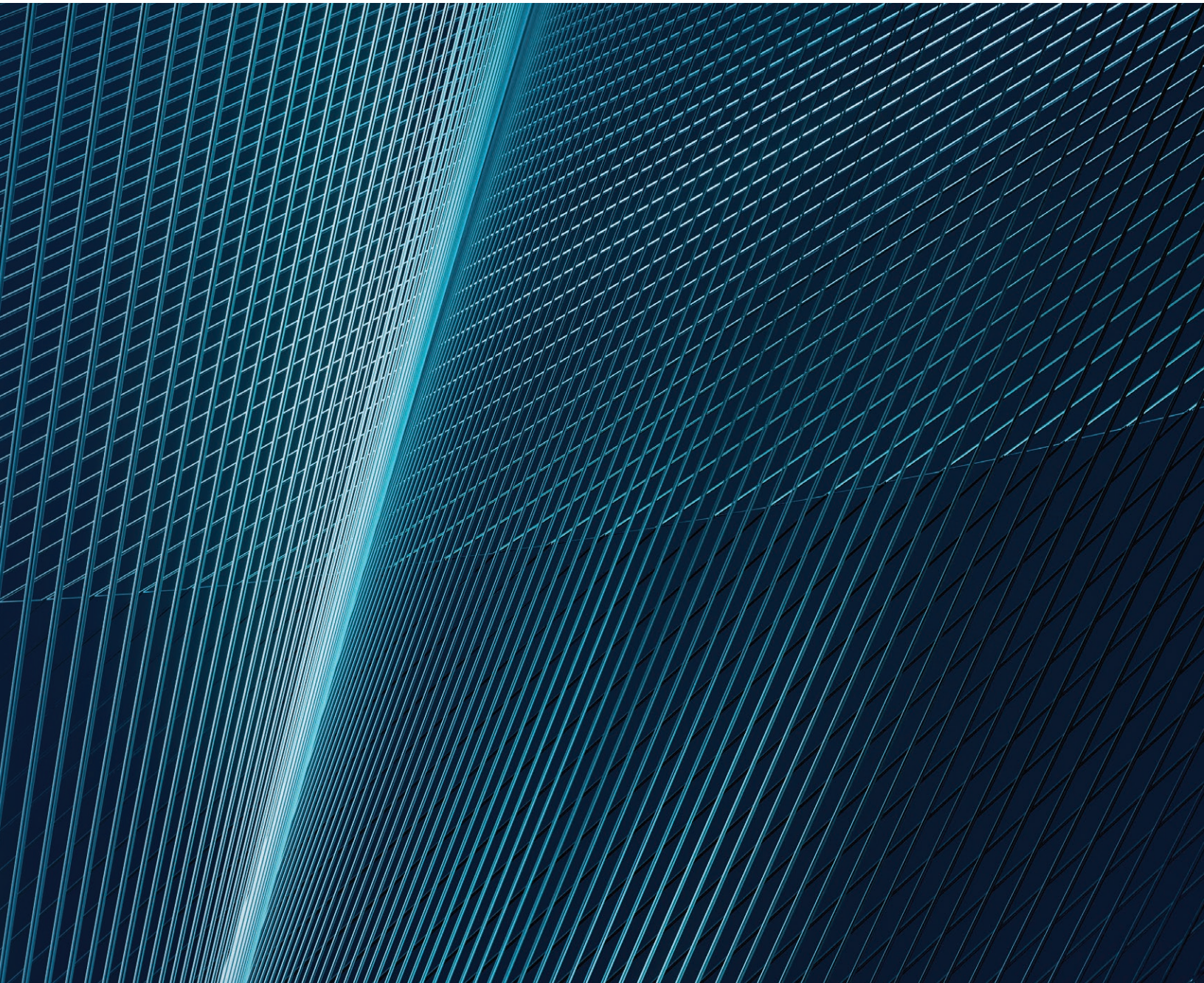
FALSE CLAIMS ACT
2025 YEAR IN REVIEW



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FALSE CLAIMS ACT
2025 YEAR IN REVIEW

In fiscal year 2025, False Claims Act (FCA) recoveries reached their highest mark ever — over $6.8 billion. That total bests the prior record ($6.1 billion) set in fiscal year 2014, and more than doubles the single-year recoveries in any of the last three years. There were also more cases filed — and more cases filed by relators — than ever before. Interestingly, however, the total share of relators' awards went down, notwithstanding the rising cases and recoveries generally.

While 2025 was an outlier among the last several years, in some ways it mirrored the same trends we have come to expect. For example, the healthcare industry continued to be far and away the most targeted industry for FCA actions. Over $5.7 billion of the total — nearly 84% — arose from judgments and settlements involving healthcare industry defendants. Other areas of focus included tariff and custom duties, cybersecurity, and COVID-19-related fraud cases.

The year did not offer a watershed FCA opinion in the appellate courts. The sole Supreme Court opinion involving FCA issues was relatively narrow. It came in February in *Wisconsin Bell, Inc. v. United States ex rel. Heath*, 604 U.S. 140 (2025), in which the Court resolved a circuit split over what constituted a "claim" in the context of obtaining reimbursements from a telecommunication subsidy program.

Meanwhile, lower courts wrestled with many typical FCA issues. FCA liability premised on Anti-Kickback Statute (AKS) violations continued to be a favored theory by the government, and courts continued to address the appropriate causation standard in such cases. Scienter challenges, in the wake of the Supreme Court's 2023 decision in *United States ex rel. Schutte v. SuperValu Inc.,* also continued to wind through the courts. Perhaps the biggest looming issue was heard at the end of the year, when the Eleventh Circuit held oral argument in *United States ex rel. Zafirov v. Florida Medical Associates, LLC* — the appeal from Judge Kathryn Mizzelle's decision in the Middle District of Florida finding that the FCA's *qui tam* provisions were unconstitutional.

But we will have to wait until next year's issue for the result of that case. For now, the pages that follow analyze the key cases and developments from 2025 and trends likely to come. As we enter the second year of the new administration, FCA enforcement remains robust, and FCA jurisprudence continues to be an ever-dynamic area of the law.


THE GOVERNMENT COLLECTED OVER
$6.8
BILLION
IN JUDGMENTS AND RECOVERIES

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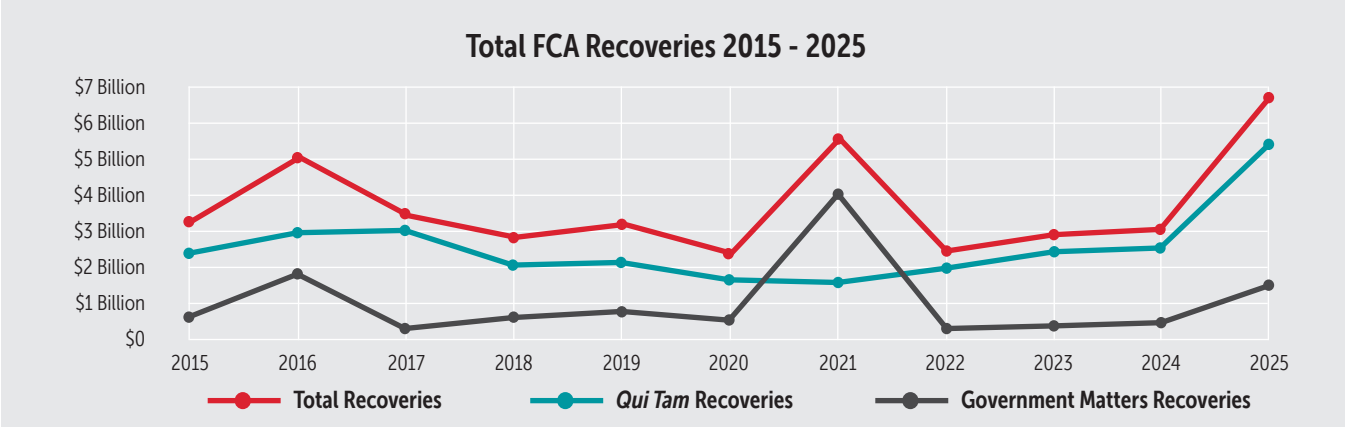
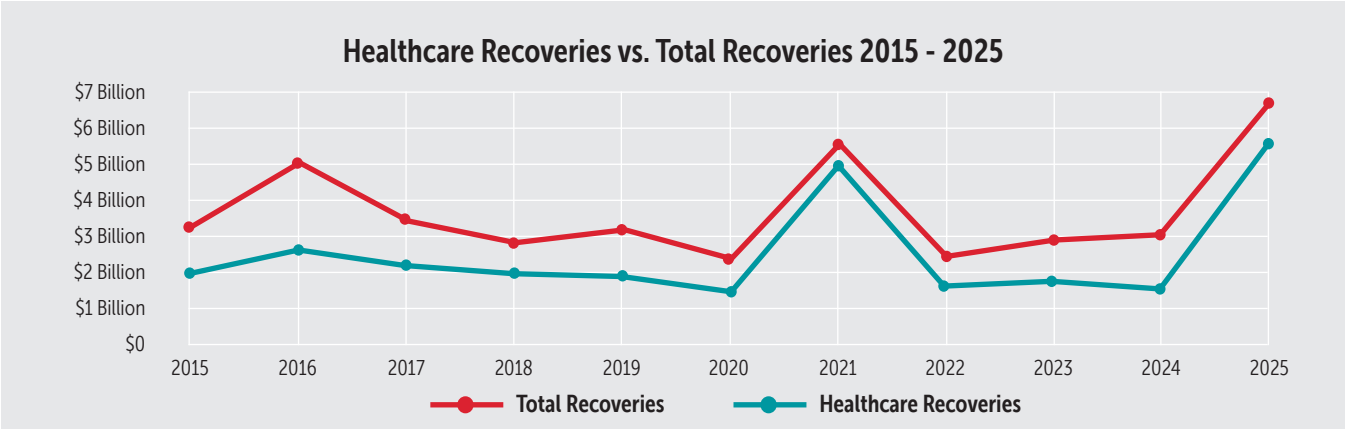
DOJ YEAR-END STATS

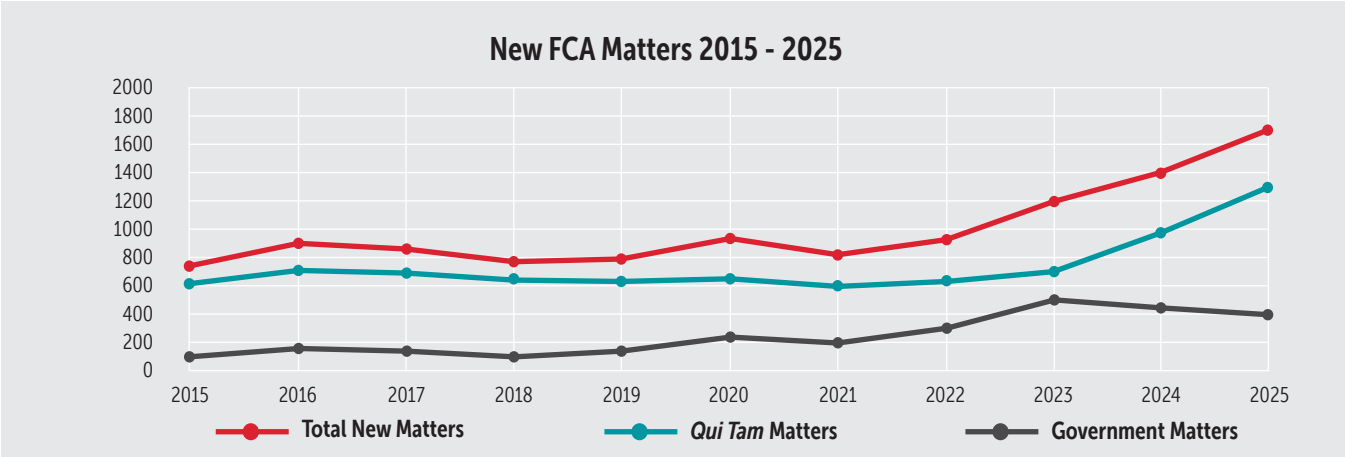
In fiscal year 2025, FCA recoveries topped $6.8 billion. The charts below and throughout the *FCA Year in Review* track notable trends in recoveries and other key metrics over the last decade.



Lead by blockbuster healthcare cases, FCA recoveries set a record in 2025, more than doubling the previous year.



Healthcare recoveries continue to lead the way, constituting over 83% of FCA recoveries.



More FCA matters were opened in 2025 than in any prior year, driven by an increase in whistleblower filings.

KEY DECISIONS & DEVELOPMENTS

WHAT IS A CLAIM?

***Wisconsin Bell, Inc. v. U.S. ex rel. Heath,* 604 U.S. 140 (Feb. 21, 2025)**

The Supreme Court resolves a circuit split, holding that requests for reimbursement under the FCC's "E-Rate" program qualify as claims under the FCA.

Relator Todd Heath alleged that common carrier Wisconsin Bell violated the "E-Rate" program, which subsidizes internet and other telecommunications services for schools and libraries across the United States. According to Heath, Wisconsin Bell did so by charging more for those services than allowed under the "lowest corresponding price" (LCP) rule set out in the Telecommunications Act of 1996 and its implementing regulations. The higher front-end price led to higher reimbursement requests to the FCC under the E-Rate program, and the reimbursements were paid out of the FCC's Universal Service Fund. Heath argued that this scheme caused reimbursement requests for amounts higher than the E-Rate program should have had to pay.

The trial court granted summary judgment to Wisconsin Bell on falsity and scienter grounds, holding that Heath failed to show (1) that Wisconsin Bell falsely certified compliance with the LCP rule; and (2) even if its certification was false, it was an honest misreading of the LCP rule rather than a *knowing* submission of false claims. The Seventh Circuit reversed, holding that Heath had presented sufficient evidence of falsity and scienter to proceed to trial. That court also considered two issues for the first time on appeal: (1) whether a jury could find that the alleged falsity of the claims was material to the government's payments; and (2) whether the allegedly fraudulent reimbursement requests for subsidies under the E-Rate program even amount to "claims" under the FCA. The court answered both questions in the affirmative.

The Supreme Court granted certiorari on the claims issue, citing a split between the Fifth and Seventh circuits. At the outset, the Court emphasized that "[t]he E-Rate reimbursement requests at issue count as FCA 'claims' if the Government 'provides or has provided any portion of the money requested.'" With that in mind, the Court echoed the Seventh Circuit's observation that the government has put substantial money into the Universal Service Fund. The Court therefore rejected Wisconsin Bell's argument that the fund consisted entirely of privately provided money. On that basis, the Court resolved a circuit split on the claims issue and determined that Heath's FCA suit could proceed to trial.

6x MORE

Department of Defense recoveries skyrocketed to over $600 million in 2025, over six times the previous year

31%

Although recoveries were way up, relators' share of awards decreased by 31%

32%+

The number of *qui tam* cases filed in 2025 increased by more than 32% from 2024

SCIENTER

To satisfy the FCA's scienter element, a defendant must either have actual knowledge of the falsity of information, act in deliberate ignorance of its truth or falsity, or act in reckless disregard of its truth or falsity.

***U.S. ex rel. Sisselman v. Zocdoc, Inc.,* Case No. 24-2807 (2d Cir. Apr. 14, 2025)**

The Second Circuit affirms lack of AKS or FCA scienter when corporation previously obtained OIG advisory opinions stating corporation's fee structure presented a low risk of fraud.

Zocdoc is an online tool that allows patients to search for and book appointments with various physicians. Physicians pay an annual fee to be listed on the website, and many also pay a "new-patient fee" anytime a new patient uses Zocdoc to book an appointment. If a physician does not pay new-patient fees, new patients cannot book appointments with them through Zocdoc, and the physician's placement or "ranking" in patient search results is affected. Relator Stephen Sisselman — a physician who used Zocdoc but only paid new-patient fees up to a pre-set monthly cap — alleged that Zocdoc's new-patient fees amounted to referral fees in violation of the AKS and FCA.

Zocdoc had previously obtained two advisory opinions from the Office of the Inspector General for the Department of Health and Human Services regarding its fee structure. The opinions stated that Zocdoc's new-patient fees "implicated" but did not violate the AKS, noting that higher fees did not result in better placement in patient search results and that fee amounts were not directly based on "the value of Federal health program business" Zocdoc generated. The U.S. District Court for the Southern District of New York dismissed Sisselman's claims, finding that Zocdoc's applications for advisory opinions demonstrated an effort to comply with applicable law and that Zocdoc did not mislead the OIG or act inconsistently with its opinions. Accordingly, Zocdoc did not possess the scienter required to violate the AKS or FCA. On appeal, the Second Circuit agreed, finding that Sisselman's complaint did not allege any facts to raise a "strong inference of fraudulent intent."

***U.S. ex rel. Omni Healthcare Inc. v. MD Spine Solutions LLC,* 160 F. 4th 248 (1st Cir. Dec. 1, 2025)**

First Circuit holds as a matter of first impression that a laboratory can rely on a doctor's order to establish a rebuttable presumption that a test was "reasonable and necessary" at the summary judgment stage.

Relator Omni Healthcare sued MD Spine Solutions (MD Labs), a laboratory specializing in UTI testing, alleging that the laboratory was recouping payment for a more expensive test that was not "reasonable and necessary," thereby resulting in MD Labs knowingly submitting false claims to the government. The district court granted summary judgment in favor of MD Labs finding that it had provided sufficient evidence that the test was superior to the cheaper alternative, and that Omni, the medical practice that ordered the tests, had failed to provide any evidence to the contrary to submit as a triable issue of fact. Omni appealed.

The First Circuit agreed with the district court and held as a matter of first impression that in FCA cases alleging Medicare fraud against a laboratory, the laboratory can rely on a doctor's order to show that a test was "reasonable and necessary." The burden then shifts to the FCA claimant to provide evidence of scienter to rebut this presumption. The First Circuit reasoned that while doctors' offices work directly with patients, a laboratory completing the requisite tests lacks both the expertise and discretion to diagnose patients, thus making a doctor's order a reliable safe harbor to establish medical necessity. Accordingly, the First Circuit affirmed

the district court's grant of summary judgment in favor of MD Labs. For further analysis of the Omni case, please see this recent **blog post**[1] on Bradley's *Eye on Enforcement* blog.

***U.S. ex rel. Schutte v. SuperValu, Inc.,* Case No. 11-cv-3290 (C.D. Ill. Oct. 31, 2025)**

District court denies relators' and defendant pharmacies' post-trial motions after jury finds that pharmacies had no FCA liability.

Relators brought a *qui tam* action against defendant pharmacies, alleging that the pharmacies submitted inflated claims to Medicare and Medicaid when seeking reimbursement for prescription drugs. In 2020, the district court found that the pharmacies did not possess the scienter required to establish liability under the FCA. In 2021, the Seventh Circuit affirmed the decision, but the Supreme Court reversed and remanded in 2023. The falsity element of FCA liability was not at issue on appeal. The case ultimately went to trial in February 2025. The jury found for relators on the issue of scienter but found for the pharmacies on the issue of causation. Judgment was entered in the pharmacies' favor.

Relators then filed a post-trial motion to amend the judgment and grant a new trial, after which the pharmacies filed a renewed motion for judgment as a matter of law. Relators argued that the verdict should be amended because the district court incorrectly instructed the jury that causation was an element of FCA liability. According to the relators, "causation is not an element of liability for civil penalties, which are recoverable in the absence of damages." The district court denied the motion to amend on the basis that the jury instructions correctly reflected Seventh Circuit law that causation must be proven to establish FCA liability.

The district court also rejected relators' argument that they were entitled to a new trial on damages because the jury was misled or confused about whether the falsity of the pharmacies' claims was at issue at trial. The court noted that the jury instructions explicitly stated that it was not for the jury to decide whether the pharmacies' claims were false or fraudulent. Moreover, the jury found for relators on the issue of knowledge, which, based on the wording of the verdict form, required an understanding that the claims were false.

Finally, the district court denied the pharmacies' renewed motion for judgment as a matter of law on the issue of scienter, holding that a rational jury could have found that the pharmacies had the requisite culpable mental state. While several witnesses testified that they believed their discounted prices were not the "usual and customary price," relators presented documentary evidence that would allow a rational jury to discredit the witnesses testimony. Both relators and defendant pharmacies have appealed the district court's ruling to the Seventh Circuit.

1 https://www.eyeonenforcement.com/2026/01/first-circuit-holds-that-labs-can-generally-rely-on-a-doctors-order-as-proof-of-medical-necessity-under-the-false-claims-act/

Commentary

PENALTIES INCREASE

Over the summer of 2025, DOJ once again adjusted the statutory penalty range for FCA violations, increasing the minimum per claim penalty to $14,308 and the maximum to $28,619. The Bipartisan Budget Act of 2015 requires these revisions each year to account for inflation. This new penalty range for 2025 is applicable to penalties assessed after July 3, 2025 — the date of publication in the Federal Register — for violations occurring after November 2, 2015 — the date of the Bipartisan Budget Act of 2015.

REVERSE FALSE CLAIMS

***U.S. ex rel. Wheeler v. Acadia Healthcare Company, Inc.,* 127 F. 4th 472 (4th Cir. Feb. 3, 2025)**

In a case of first impression, the Fourth Circuit found that a Corporate Integrity Agreement's (CIA) stipulated monetary penalty constituted an "obligation" for the purposes of establishing a reverse false claim.

Relator Lisa Wheeler, a former assistant medical director of a methadone clinic, filed a *qui tam* claim against her former employer, Acadia Healthcare Company, Inc. Wheeler alleged that Acadia failed to provide requisite therapy and fabricated therapy notes. The government declined to intervene. Thereafter, Wheeler amended her complaint, and Acadia moved to dismiss. Adopting the magistrate judge's report and recommendation, the district court granted the motion and dismissed Wheeler's amended complaint in its entirety. The court reasoned that Wheeler failed to plead certain claims with sufficient particularity and failed to plead materiality or presentment to the government for other claims.

Of note, Wheeler's final claim was a "reverse false claim" premised on failure to comply with a preexisting CIA. Specifically, as part of the earlier settlement, Acadia entered a CIA requiring it to (1) train certain employees on government healthcare regulations and the CIA; (2) develop and publicize a disclosure program; and (3) report any potential violation of criminal, civil, or administrative law, including overpayments. The CIA imposed a stipulated monetary penalty for each day Acadia failed to implement or comply with those requirements.

Wheeler alleged that Acadia failed to meet these requirements, which triggered a stipulated penalty that Acadia failed to pay. Acadia argued that the stipulated monetary penalty was not an obligation because it was contingent and might never materialize.

The magistrate judge noted that there was a split among district courts regarding whether such penalties constituted an "obligation" but ultimately concluded they did not because they relied on the government's choosing to enforce them. After the district court adopted the report and dismissed the complaint, Wheeler appealed.

The Fourth Circuit reversed, finding that Wheeler had pleaded her FCA counts with sufficient particularity under Fed. R. Civ. P. 9(b) and adequately pleaded materiality and a claim. Turning to the remaining reverse false claim, the Fourth Circuit likewise rejected the trial court's reasoning. It noted the only contingency was the government's discretion to collect. It drew an analogy to a contracting party's discretion to seek enforcement after a breach, noting a party's discretion to enforce an obligation does not eliminate the existence of that obligation.

ANTI-KICKBACK STATUTE

Under the Affordable Care Act and holdings by every appellate court to rule on the issue, a claim that includes items or services resulting from a violation of the AKS constitutes a false claim for purposes of the FCA.

***United States v. Regeneron Pharmaceuticals, Inc.,* 128 F.4th 324 (1st Cir. Feb. 18, 2025)**

The First Circuit joins the Sixth and Eighth circuits in finding that the phrase "resulting from" as used in the 2010 amendment to the AKS imposes a "but-for" causation standard.

The government sued Regeneron Pharmaceuticals, alleging the company induced physicians to prescribe its eye drug, Elyea, by donating millions of dollars to a charitable co-pay foundation. Specifically, the government contended that, when physicians prescribed Elyea to patients receiving co-pay assistance, those claims "resulted from" a violation of the AKS — even if those same physicians would have prescribed Elyea without Regeneron's co-pay support. Regeneron disagreed, arguing that the text of the 2010 amendment to the AKS — "a claim that includes items or services *resulting from* a violation of the [AKS] constitutes false or fraudulent claims for purposes of" the FCA — requires an AKS violation to be the "but-for" cause of the Medicare claim. In other words, if a physician would have prescribed Elyea regardless of the co-pay assistance, the claim could not have "result[ed] from" Regeneron's allegedly illicit payments.

The district court agreed with Regeneron, holding that the plain meaning of "resulting from" in the AKS required the government to prove that Regeneron's donation was the "but-for" cause of the physicians' prescription of Elyea. But noting the conflict in the case law, the district court certified its ruling for interlocutory appeal, asking the First Circuit to resolve the level of causation needed in AKS cases.

The First Circuit affirmed. The court held that the government must show that an illicit kickback was the "but-for" cause of a submitted claim to demonstrate falsity under the 2010 amendment to the AKS. In doing so, the First Circuit explored and rejected the government's "textual or contextual" arguments for deviating from the default presumption that the phrase "resulting from" requires "but-for" causation and instead joined the Sixth and Eighth circuits in applying the more stringent standard.

***U.S. ex rel. Flanagan v. Fresenius Med. Care Holdings, Inc.*, 142 F.4th 25 (1st Cir. June 27, 2025)**

The First Circuit reaffirmed its holding in *Regeneron* that an FCA complaint must adequately plead that the alleged AKS violations were the "but-for" cause of the submitted claims to satisfy Rule 9(b).

Relator Martin Flanagan filed a *qui tam* action alleging that Fresenius, his former employer, participated in an elaborate kickback scheme utilized to induce referrals to Fresenius clinics. The district court dismissed Flanagan's amended complaint under Rule 9(b) for failing to describe the false claims with the requisite level of specificity. Though the district court considered whether causation was adequately pleaded, it ultimately dismissed the claims under Rule 9(b). Flanagan appealed.

The First Circuit affirmed, clarifying the causation standard required for an FCA complaint to survive a motion to dismiss. In doing so, the court reaffirmed that its ruling in *United States v. Regeneron Pharms., Inc.*, 128 F.4th 324 (1st Cir. 2025), applies here: The complaint must adequately plead that the alleged AKS violations were the "but-for" cause of the submitted claims. Applying the *Regeneron* standard, the First Circuit held that Flanagan's amended complaint lacked the detail needed to plausibly allege "but-for" causation as the amended complaint included no information that would permit an inference of causation.

The First Circuit also found that Flanagan's amended complaint failed to state false representation claims under 31 U.S.C. §3729(a)(1)(B). The court held that Flanagan did not "plead with particularity the connection between false records and/or statements and the intent to have a false claim paid for by the government programs." Accordingly, the amended complaint did not satisfy the heighted standard of Rule 9(b).

***United States v. Sorensen*, 134 F.4th 493 (7th Cir. Apr. 14, 2025)**

In a non-FCA case with potential ramifications for FCA cases, the Seventh Circuit overturns a conviction under the AKS where payments were made to advertisers, instead of directly to physicians, because the defendant's intent to induce a referral was not clear.

Mark Sorenson owned a durable medical equipment (DME) distributor company. Sorenson, along with a DME manufacturer, a marketer, and a medical biller, was indicted for conspiracy and violations of the AKS. The government premised those charges on the conspirators' alleged scheme to advertise orthopedic braces to patients, obtain prescriptions from providers, and collect the reimbursement. In particular, Sorenson paid marketers to advertise and procure potential patients. The government characterized these payments as unlawful kickbacks in return for referrals under the AKS.

Sorenson was convicted at trial and appealed to the Seventh Circuit. Finding the matter one of first impression, the Seventh Circuit overturned Sorensen's conviction.

The court concluded that because payments Sorenson made were to *marketing firms* — rather than directly to *physicians* — they were not made to "refer" patients within the meaning of the AKS. The Seventh Circuit emphasized that, for a payment to fall within the AKS, the payor must have acted with an intent to induce a referral from the payee. Here, Sorensen made payments to advertisers to find patients interested in his medical equipment and a manufacturer/distributor to supply the equipment.

The Seventh Circuit described how when a payment is made directly to a physician a defendant's intent to induce is clear. Whereas here, when a payment is only made to an advertiser, there must be some evidence proving the advertisers leveraged power or influence over healthcare decisions such that a payor's intent to induce can be inferred — an important distinction that has often been lacking in other DME-based "telemedicine" prosecutions that the government has successfully brought in recent years.

Here, the Seventh Circuit found no such evidence. Instead, as a key point in overturning Sorensen's conviction, the court pointed out how there was no proof any physician lacked ultimate control over a patient's healthcare or failed to exercise their own independent judgment. To the contrary, over 80% of orders sent by the advertisers were denied by physicians.

CUSTOMS ENFORCEMENT

***Island Industries, Inc. v. Sigma Corp.*, 151 F.4th 1003 (9th Cir. June 23, 2025)**

The Ninth Circuit held that (1) the district court had jurisdiction to hear customs-related actions brought by relators, (2) §1592 of the Tariff Act does not bar FCA claims, and (3) Sigma knowingly avoided payment of its customs duties.

Relator Island Industries alleged that its competitor, Sigma Corporation, and five other importers made false statements on customs forms to avoid paying antidumping duties on welded outlets imported from China. At trial, the jury returned a general verdict for Island, finding Sigma liable for violating the FCA and that it owed over $8 million. Sigma moved for judgment as a matter of law and alternatively for a new trial. The district court denied that motion and Sigma appealed.

On appeal, the Ninth Circuit first addressed whether the district court had subject matter jurisdiction over actions stemming from evasion of customs duties in light of a previous decision where it held that FCA suits by the government seeking to recover antidumping duties fall within the Court of International Trade's exclusive jurisdiction. The court reasoned that there was no jurisdictional limitation in this case because this action was commenced by a relator and not the government itself.

The court then addressed whether §1592 of the Tariff Act provided an exclusive remedy for Island's claims, which would displace any FCA claims for the underpayment of duties. The court held that §1592 and the FCA coexist with one another to provide alternative remedies to the government and highlighted that the statutory and legislative history of the FCA and §1592 confirms that Congress specifically intended the two statutes to coexist.

Lastly, the court addressed Sigma's argument that it lacked the requisite scienter needed to establish FCA liability. The court, citing the subjective standard from *Supervalu*, held that there was substantial evidence supporting scienter because Sigma never investigated whether duties applied, had not reviewed the decades-old antidumping order, and made no inquiries to the Department of Commerce as to whether its imports were subject to antidumping duties. Further, there was evidence that Sigma marketed its products as welded outlets in its catalogs but referred to them as steel couplings on customs forms.

Commentary

INCREASED USE OF FCA AS A CUSTOMS ENFORCEMENT TOOL

Under the current administration, DOJ has increased its use of the FCA against entities and individuals alleged to have evaded tariff and customs requirements.

In August 2025, DOJ announced a cross-agency Trade Fraud Task Force "to aggressively pursue enforcement actions against any parties who seek to evade tariffs and other duties, as well as smugglers who seek to import prohibited goods into the American economy." The Trade Fraud Task Force is composed of personnel from both the Civil Division and Criminal Division of DOJ, as well as law enforcement participants from the Department of Homeland Security, specifically U.S. Customs and Border Protection and Homeland Security Investigations. DOJ made clear that the Trade Fraud Task Force would be instituting FCA actions in addition to duty and penalty collection actions (under the Tariff Act of 1930) and parallel criminal investigations and cases.

In the announcement regarding the Trade Fraud Task Force, DOJ outlined some of its recent accomplishments in the area of customs enforcement, noting that since March 2025, DOJ's Commercial Litigation Branch had "reached civil settlements to resolve allegations of improperly evaded customs duties across a wide range of products, including multi-layered wood flooring, plastic resin, extruded aluminum products, and quartz surface products." All of those settlements involved the FCA, with Evolutions Flooring paying $8.1 million to settle allegations it evaded customs duties on imports of multi-layered wood flooring from the People's Republic of China (PRC); two subsidiaries of MGI International LLC paying $6.8 million to resolve allegations they failed to pay duties on certain plastic resin imported from the PRC; Grosfillex Inc. paying $4.9 million to resolve allegations it evaded duties on items made of extruded aluminum originating from the PRC; and Allied Stone Inc. and its president paying a total of $12.4 million to resolve allegations they evaded duties owed on quartz surface products imported from the PRC.

In addition, in December 2025, DOJ announced a significant FCA settlement with Ceratizit USA LLC based on allegations of customs violations. Pursuant to that agreement, Ceratizit agreed to pay $54.4 million to settle FCA allegations that it failed to pay duties owed on tungsten carbide products imported from the PRC.

Given the formation of the Trade Fraud Task Force and the settlements outlined above, it is clear that the FCA will continue to constitute a critical component of DOJ's increased customs enforcement efforts. Indeed, in its January 2026 press release announcing that its fiscal year 2025 settlements and judgments under the FCA exceeded $6.8 billion, DOJ reiterated that "redressing the improper avoidance of tariffs and customs duties" remained one of its "key enforcement areas" under the FCA.

Commentary

CONSTITUTIONALITY OF FCA'S *QUI TAM* PROVISIONS WEIGHED BY APPELLATE COURTS

As discussed in last year's *FCA Year in Review*, the defense bar witnessed its first district court dismissal on the grounds that the FCA's *qui tam* provisions violate the Appointments Clause of the United States Constitution in *United States ex rel. Zafirov v. Florida Medical Associates, LLC*. The opinion, written by Judge Kathryn Mizelle of the Middle District of Florida, was issued in the wake of concerns voiced by Supreme Court justices regarding the constitutionality of the provisions. The decision has inspired a flurry of similar constitutional challenges by FCA defendants, and more federal appellate courts have appeared open to considering the question.

Supreme Court Justices Express Skepticism

Three Supreme Court justices have written to express their skepticism as to the constitutionality of the FCA's *qui tam* provisions. In *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419 (2023), Justice Clarence Thomas wrote a dissent in which he referred to the provisions as the "constitutional Twilight Zone," and Justices Brett Kavanaugh and Amy Coney Barrett, concurring with the majority's opinion, likewise agreed that there were constitutional concerns with the *qui tam* provisions. In *Wisconsin Bell, Inc. v. United States ex rel. Heath*, 145 S. Ct. 498 (2025), Justices Kavanaugh and Thomas filed a concurrence again inviting challenges to the constitutionality of the *qui tam* provisions.

Judge Mizelle's Decision in *Zafirov*

Following the Court's decision in *Polansky*, Judge Mizelle granted defendants' motion to dismiss an FCA complaint on the basis that the relator was appointed in violation of the Appointments Clause. Judge Mizelle, who clerked for Justice Thomas, held that a private FCA relator exercises significant authority that is constitutionally reserved for the executive branch, including the right to bring an enforcement action on behalf of the United States and to recover money for the United States Treasury. In doing so, a relator chooses which claims to prosecute, which theories to raise, which defendants to sue, and which arguments to make on appeal, resulting in precedent that binds the United States. Yet, a relator is not appointed by the president, a department head, or a court of law under Article II, making the *qui tam* device unconstitutional.

Judge Mizelle distinguished historical *qui tam* statutes, which were largely abandoned early in our nation's history, on the ground that few gave a relator the level of authority the FCA does. And while the FCA itself dates back to the Civil War, the statute largely remained dormant (aside from a flurry of use in the 1930s and 1940s) until the 1986 amendments set off a new wave of *qui tam* litigation.

Eleventh Circuit Considers *Zafirov* Appeal

In December, an Eleventh Circuit panel heard oral arguments in the *Zafirov* case. The panel consisted of Trump-appointed Judges Elizabeth Branch and Robert Luck and George H.W. Bush-appointed Judge Federico Moreno sitting by designation from the Southern District of Florida. While the parties briefed issues surrounding the Vesting Clause and Take Care Clause of the Constitution, the court zeroed in on whether the *qui tam* mechanism violates the Appointments Clause, which governs the appointment of "Officers of the United States," by allowing a private person to exercise core executive power without executive appointment, oversight, or control.

Though the Eleventh Circuit has not yet issued its decision, the panel appeared open to considering the potential constitutional concerns during the oral argument. The panel focused its questions on the history of *qui tam* provisions since the founding, with Judge Luck pressing counsel for all parties to explain whether the existence of those early *qui tam* statutes supports the constitutionality of the modern FCA. He emphasized concerns that early provisions may have allowed for private criminal enforcement actions, which would almost certainly be considered unconstitutional today. Judge Luck likewise questioned whether a private person could be subject to the Appointments Clause at all, asking all counsel to answer whether any court had ever

applied the clause to a private person wholly unconnected to the government. He further questioned whether the panel should remand to the district court to determine whether the provision violates the Vesting and Take Care clauses.

Judge Branch asked the government to explain its recent change in position from its initial brief regarding the Appointments Clause. The government had initially argued that it was not implicated because relators are private persons outside the government. However, in its reply brief and at oral argument, the government conceded that relators exercise significant authority under the Appointments Clause. However, government counsel argued nonetheless that there was no constitutional violation because relators do not occupy a continuing position, the authority that relators exercise is not unilateral, and the Department of Justice retains sufficient control to alleviate any concerns.

Judge Moreno expressed doubt as to the government's ability to control relator-led litigation. Remarking that he had seen many *qui tam* actions but only a small number where the government intervened, he appeared to disagree with the government's contention that it retained sufficient control over these cases.

The panel's ultimate decision is expected in 2026. Whatever the outcome, it will likely be appealed to the Supreme Court for consideration.

Other Appellate Courts Consider FCA's Constitutionality

In the wake of *Polansky* and *Zafirov*, the question of the FCA's constitutionality has been posed to two other appellate courts and questioned by a third. On January 9, 2026, the Sixth Circuit denied a request for interlocutory appeal after a district court judge certified the constitutional question in July for two cases: *United States ex rel. Shahbabian v. TriHealth Inc.* and *United States ex rel. Murphy v. TriHealth Inc*. The Sixth Circuit rejected the petition, noting that the court decided that *qui tam* suits are constitutional in its 1994 opinion *United States ex rel. Taxpayers Against Fraud v. General Electric Co*.

The Third Circuit is set to consider briefs on the constitutionality of the FCA in *United States ex rel. Penelow v. Janssen Products LP*. Unlike the Sixth Circuit, the Third Circuit has never addressed the question of the FCA's constitutionality.

And while the Fifth Circuit also has prior precedent declaring the FCA to be constitutional and has not decided to revisit the issue, two Fifth Circuit judges have voiced their concerns in concurrences. In *United States ex rel. Montcrief v. Peripheral Vascular Associates, P.A.,* 133 F.4th 395 (5th Cir. 2025), Judge Kyle Duncan argued that the *qui tam* provisions violate the Appointments Clause because relators exercise core executive authority without being properly appointed as an "Officer of the United States." In *United States ex rel. Gentry v. Encompass Health Rehabilitation Hospital of Pearland, L.L.C.*, No. 25-20093 (5th Cir. Nov. 3, 2025), Judge James Ho expressed similar concerns.

Conclusion

Regardless of how the appellate courts rule, the FCA's constitutionality is very likely to make its way to the Supreme Court sometime soon. With the Court's recent emphasis on the protection of the executive branch's Article II power, the current structure of the *qui tam* provision may be on its last leg. In the face of heightened constitutional scrutiny, it remains to be seen whether the Court will leave the current iteration of the FCA's *qui tam* provisions in place.

CONSTITUTIONALITY

***U.S. ex rel. Montcrief v. Peripheral Vascular Associates, P.A.*, 133 F.4th 395 (5th Cir. Mar. 28, 2025)**

The Fifth Circuit affirms in part and reverses in part an FCA complaint premised on technical billing requirements. Judge Kyle Duncan adds a notable concurrence, agreeing with the majority's analysis but questioning the constitutionality of the FCA's *qui tam* provisions, as first raised by Justice Clarence Thomas' dissent in *Polansky* and currently pending before the Eleventh Circuit in *Zafirov*.

Relator Tiffany Montcrief was a vascular technologist at Peripheral Vascular Associates (PVA), a vascular surgery practice in south Texas. She and other relators filed an FCA complaint against PVA, alleging that PVA had violated the FCA by submitting claims for ultrasound services that were not complete or otherwise failed to meet the billing requirements for reimbursement. Notably, particularly for Judge Duncan's concurring opinion discussed below, the government declined to intervene, and relators continued to litigate the case privately on behalf of the United States.

The trial court eventually granted partial summary judgment for Montcrief on falsity and scienter. Thereafter, the case proceeded to trial to determine materiality and damages. The jury found in Montcrief's favor, and the district court ultimately awarded a $28.7 million judgment on PVA. PVA appealed.

On appeal, the Fifth Circuit affirmed summary judgment for the relators on one theory of liability but reversed it as to a second theory of liability. For the reversed claims, the court found that the language in the government's billing guidance manual was ambiguous, which prevented FCA liability from attaching. For the affirmed claims, the relators' victory was still only partial. Despite affirming those claims, the Seventh Circuit found there was insufficient information to calculate damages and therefore vacated the damage award and remanded for a new trial on damages.

Beyond resolution of the core issues, *Montcrief* is perhaps most notable for the concurring opinion filed by Judge Duncan. The concurrence agreed with the majority's opinion but wrote separately to raise the "constitutional flaws in the FCA's *qui tam* device." Echoing the analysis in *United States ex rel. Zafirov v. Florida Medical Associates, LLC,* 751 F. Supp. 3d 1293 (M.D. Fla. 2024), which found the FCA's *qui tam* provisions unconstitutional based on a violation of the Appointments Clause and Justice Thomas' earlier dissent in *U.S. ex rel. Polansky v. Exec. Health Res., Inc.,* 599 U.S. 419 (2023), on that issue, Judge Duncan stated that the Constitution does not allow "outsourcing of prosecutorial power to a private person."

FAILURE TO PLEAD WITH RULE 9(B) PARTICULARITY

Federal Rule of Civil Procedure 9(b) continues to be a fertile source of FCA litigation and a point of contention in nearly every motion to dismiss. Because FCA claims allege fraud, they must meet heightened pleading standards beyond those that apply in ordinary civil actions. Specifically, Rule 9(b) requires plaintiffs to state with particularity the circumstances constituting the fraud, a showing that generally requires details about the time, place, and content of the misrepresentations; the fraudulent scheme; the defendants' fraudulent intent; and the injury resulting from the fraud.

U.S. ex rel. Bennett v. Bayer Corporation, **Case No. 24-1807, 2025 WL 1435591 (3d Cir. Apr. 10, 2025)**

The Third Circuit affirms dismissal where the complaint fails both to allege what the companies knew or withheld from the FDA and to plead adequately that disaggregated data would have been material to the FDA.

Relator Dr. Charles Bennett alleged that pharmaceutical companies Bayer, Johnson & Johnson, and others fraudulently induced the FDA to approve certain antibiotic drugs without disclosing the side effects. He said the companies knew the drugs caused neurological and psychiatric damage, but omitted or misrepresented information about these side effects during the New Drug Application process. In turn, Bennett alleged prescriptions for these drugs caused the submission of millions of claims to federal healthcare programs each year. The district court dismissed Bennett's complaint. It found the fraudulent inducement theory not viable because the government was not induced to enter into a contract with the companies, and even if Bennett's theory of liability was viable, Bennett failed to plead falsity.

Bennett appealed, and the Third Circuit affirmed the dismissal, finding that Bennett failed to meet Rule 9(b)'s heightened pleading standard as to falsity and materiality. Bennett's allegation that the companies "had to have known" about the adverse side effects was a textbook Rule 9(b) pleading deficiency because it was speculation. The court said the companies' conduct did not amount to an omission, as they "neither hid, nor denied, the existence of the data."

As for Bennett's allegation of fraud based on the companies' use of disaggregated data, the court found Bennett not only failed to allege that the disaggregated data was false but also failed to allege that the aggregated data would be material. Bennett failed to plausibly allege with specificity that the FDA would have denied the drug applications or taken other action had it been armed with that data.

U.S. ex rel. VIB Partners v. LHC Group, Inc., **Case No. 24-5393, 2025 WL 1103997 (6th Cir. Apr. 14, 2025)**

The Sixth Circuit holds that to satisfy Rule 9(b)'s particularity requirement, a relator must either identify a representative claim that was actually submitted to the government for reimbursement or must establish a strong inference that a claim was submitted by alleging personal knowledge of billing practices.

Relator VIB Partners filed a *qui tam* action under the FCA against LHC Group, a home healthcare provider for elderly patients. VIB alleged that LHC altered data to exaggerate patient needs and increase Medicare eligibility, thereby inflating its reimbursement rates. The government declined to intervene. LHC moved to dismiss the case, arguing that VIB failed to satisfy Rule 9(b)'s pleading standard and that the case was barred under the FCA's first-to-file rule due to a previous case involving the same allegations. The district court dismissed the case under the first-to-file rule and VIB appealed. On appeal, the Sixth Circuit found that it did not need to address the first-to-file rule because VIB failed to satisfy Rule 9(b)'s particularity requirements. While VIB argued that its allegations of manipulated data supported a "strong inference" that LHC submitted false claims to the government, the Sixth Circuit found this information insufficient to establish a connection between the false data and actual claims submitted for reimbursement. Rather, the Sixth Circuit held that to meet Rule 9(b)'s heightened standard, a relator must either identify a representative claim that was actually submitted to the government or present facts based on personal knowledge of billing practices. Without providing either, the Sixth Circuit concluded that VIB failed to establish a direct link to actual false claims and thus failed to plead with particularity pursuant to Rule 9(b). Relators countered by arguing that a relaxed Rule 9(b) standard should apply given that the billing records were in LHC's possession. However, the Sixth Circuit found that VIB's complaint lacked sufficient detail, preventing it from even considering the application of a more relaxed standard. Last, the Sixth Circuit rejected VIB's request for leave to amend its complaint for failing to provide a meaningful basis for the request. Accordingly, the Sixth Circuit affirmed the dismissal of VIB's complaint.

"[A] party must state with particularity the circumstances constituting fraud or mistake" – Rule 9(b)

***U.S. ex rel. Olsen v. Tenet Healthcare Corp.,* Case No. 24-1785, 2025 WL 1166894 (6th Cir. Apr. 22, 2025)**

The Sixth Circuit emphasizes that liability under the FCA only attaches when allegations of underlying fraudulent activity are connected to specific fraudulent claims for payment.

Relators Erik Olsen, Sajith Matthews, and William Berk are current and former physicians from Detroit-area hospitals who alleged the hospitals' parent company, Tenet Healthcare Organization, and its subsidiary, Detroit Medical Center, submitted fraudulent bills to the government for inpatient care that patients did not receive. The relators alleged that a twofold scheme of understaffing and profit prioritization created a system of fraudulent billing. The district court dismissed the relators' amended complaint for failure to state a claim, finding that the amended complaint did not satisfy Rule 9(b) or Rule 12(b)(6) because relators failed to include specific allegations that defendants were directly involved in the billing practices, or the billing was done at the direction of defendants with knowledge of fraud.

The Sixth Circuit affirmed. Although the court was troubled by the allegations made by the relators, it found the relators nonetheless failed to plead with particularity any specific fraudulent claim for payment. The court emphasized that liability under the FCA only attaches when a fraudulent claim for payment is made; pleading the underlying fraudulent activity is not enough by itself. Relators claimed at least six specific instances of fraud had been pleaded, but the Sixth Circuit found nothing that pertained to the filing of actual claims or any automatic inference of fraud.

***U.S. ex rel. Collado v. Bracco USA, Inc.,* Case No. 24-1668, 2025 WL 1261779 (3d Cir. May 1, 2025)**

The Third Circuit holds that a relator failed to comply with Rule 9(b) because allegations of AKS violations were based solely upon information and belief, without any other specific facts to support them.

Relator John Collado alleged that the manufacturer was providing free power injector machines to medical facilities in exchange for the medical facilities' agreement to buy 90% of the manufacturer's imaging agents. Both the manufacturer and the medical facilities were named as defendants. According to the relator, the defendants had agreements that required disclosure of the value of the power injector machines, which the relator attached as exhibits. The relator claimed these agreements were "shams," and upon the relator's "information and belief," the defendants were not in fact reporting the free power injectors to federal agencies and were therefore falsely certifying compliance with the AKS. According to the relator, the defendants were therefore submitting

legally false claims for Medicare and Medicaid reimbursement. The district court dismissed Collado's second amended complaint with prejudice for failure to satisfy Rule 9(b)'s particularity requirement. Collado appealed.

The Third Circuit affirmed, holding that the complaint did not satisfy Rule 9(b)'s heightened pleading requirement. The court found that Collado failed to plead with particularity any "reliable indicia" suggesting that the defendants did not disclose the free injector machines to the government. Rather, Collado's allegations of fraud were based purely on information and belief, and his complaint did not provide specific facts upon which that belief was based. Further, the defendants' agreements suggested, if anything, that false claims were not submitted as the agreements required the defendants to comply with the AKS.

***U.S. ex rel. O'Laughlin v. Radiation Therapy Services, P.S.C.,* 148 F.4th 791 (6th Cir. Aug. 21, 2025)**

Establishing FCA liability under a false-certification theory requires more than minor or insubstantial regulatory noncompliance, and a relator must identify at least one false claim actually submitted to the government.

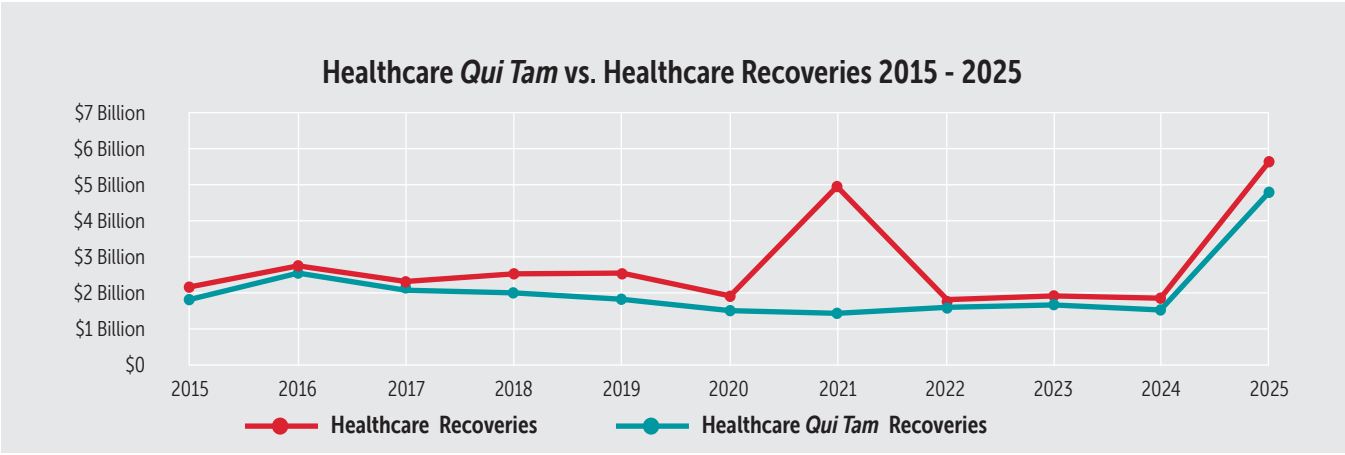
Relator Robert O'Laughlin, a radiation oncologist, brought a *qui tam* action under the FCA against his former employers, providers of radiation and chemotherapy services. He alleged they falsely billed Medicare and other federal programs by representing that services were supervised or performed by qualified physicians when in fact no qualified physicians were present. The district court analyzed the allegations in two categories: "radiation services claims" and "chemotherapy services claims." For the

radiation services claims, the district court dismissed the claims finding that O'Laughlin failed to identify any authority requiring a specific type of physician to provide or supervise the services. Because performance by a radiologist or radiation oncologist was not a material precondition of payment for the Medicare claims, the district court concluded that this theory could not support FCA liability.

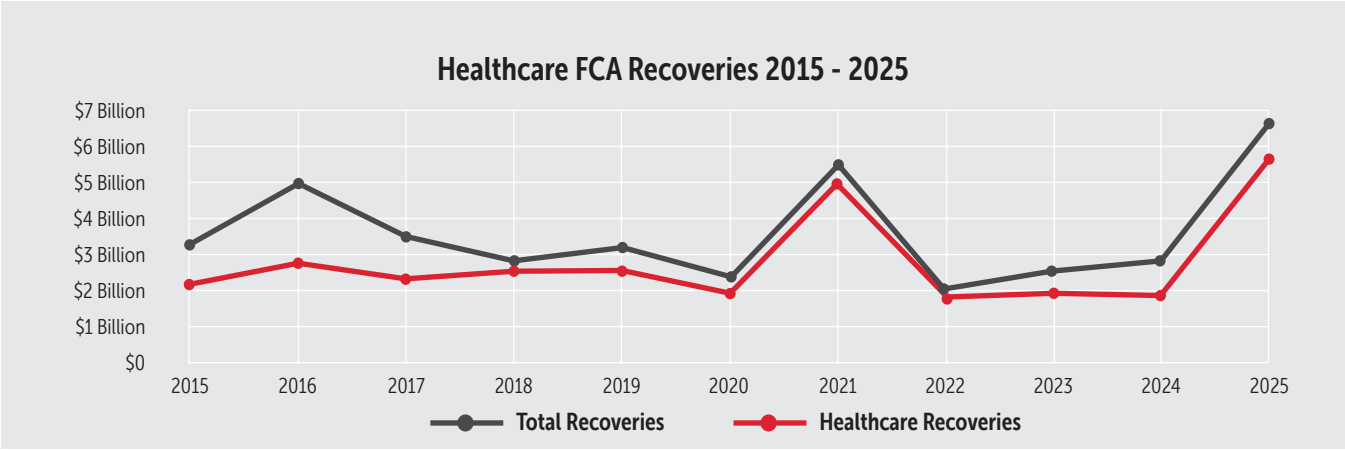
As for the chemotherapy claims, although they survived the motion to dismiss, the district court ultimately rejected the claims, finding that O'Laughlin relied heavily on the centers' master schedules, which did not reliably reflect physicians' actual locations and were not consistently updated. Because no specific false claim was identified, the court granted summary judgment for the defendants.

On appeal, the Sixth Circuit upheld the district court's judgment in full. The court held that under a false-certification theory, O'Laughlin was required to show that compliance with the alleged supervision requirement was a prerequisite to obtaining payment for the radiation services claims and that any noncompliance was material. Because O'Laughlin failed to do so, the court affirmed dismissal of the radiation services claims.

Turning to the chemotherapy claims, the court reiterated the FCA's bedrock requirement that a relator show a representative false claim that was actually submitted to the government. Although O'Laughlin pointed to witness testimony suggesting a "practice" of administering chemotherapy without physicians being present, the court held that such evidence provided at best a hint of a fraudulent scheme and did not identify any specific fraudulent claim. The court further rejected O'Laughlin's reliance on master schedules, explaining they were intended to show when a *patient* would be on the premises, not necessarily when a physician was on the premises. Therefore, it could not be used as a reliable indicator that any fraudulent claim was submitted.



The increased healthcare settlements and judgments in 2025 were largely driven by whistleblower-filed cases.



Healthcare recoveries continue to lead the way, constituting over 83% of FCA recoveries.

***U.S. ex rel. Gentry v. Encompass Health Rehabilitation Hospital of Pearland, LLC,* 157 F.4th 758 (5th Cir. Nov. 3, 2025)**

The Fifth Circuit finds that a *qui tam* relator did not meet the Rule 9(b) standard of particularity by failing to allege any details of a false claim that was actually submitted. Judge James Ho concurs, joining others in raising concerns over the constitutionality of the *qui tam* provisions of the FCA.

Relator Deidra Gentry filed a *qui tam* action under the FCA against her former employer, Encompass Health, alleging that while she worked there Encompass trained non-clinicians such as herself to complete screenings for patients that would generate more admissions. She argued that such screenings caused the reviewing physicians to act as rubberstamps in approving patient admissions, thus violating CMS's requirement that a physician make the ultimate decision whether to admit a patient. The district court granted Encompass' motion to dismiss on all claims, finding that Gentry's second amended complaint was insufficiently plead under Rule 9(b)'s particularity standard and Rule 8's plausibility requirement.

The Fifth Circuit affirmed, finding that Gentry failed to allege how the non-clinical personnel such as herself screened patients in a way that was false or led to the admission of patients who did not require treatment. Further, the complaint did not suggest that the ultimate admission decision rested on anyone besides a clinical physician, nor did it provide any instance of a physician being influenced by the screening information in their decision to admit a patient. Therefore, the Fifth Circuit found that Gentry failed to plead sufficient facts to support her claims.

Judge Ho concurred, questioning whether the *qui tam* provisions of the FCA are even constitutional. In doing so, he expressed his support for revisiting this question, comparing *qui tam* relators to federal civil servants who lack appointment and thus accountability under Article II of the Constitution.

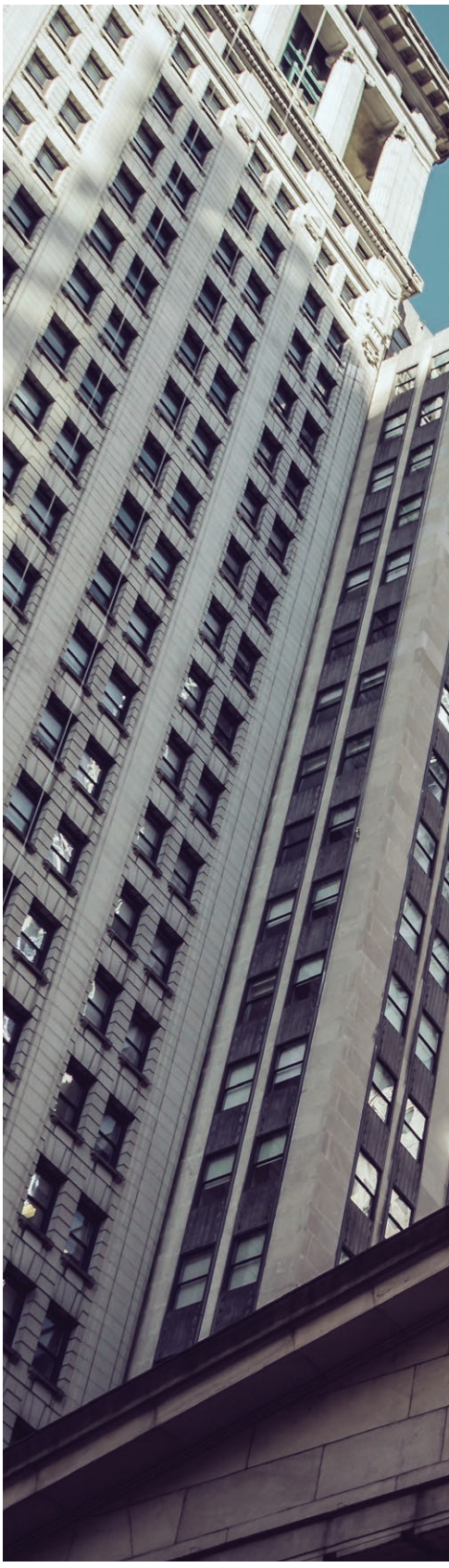
DISMISSAL UNDER §3730(C)(2)(A)

In the 2023 decision *United States ex rel. Polansky v. Executive Health Resources*, the Supreme Court held that the government may intervene and move to dismiss an FCA suit under 31 U.S.C. §3730(c)(2)(A) at any time during the life of the case, and that such motions should be evaluated under the Federal Rule of Civil Procedure 41(a) voluntary dismissal standard. However, the Court did not definitively decide what it means for a relator in such a case to have "an opportunity for a hearing on the motion," as mandated by §3730(c)(2)(A).

***Vanderlan v. United States,* 135 F.4th 257 (5th Cir. Apr. 18, 2025)**

The Fifth Circuit held that the government retains the right to dismiss a relator's *qui tam* case before an answer is filed despite a relator's objection.

Relator Dr. Blake Vanderlan, a physician at a hospital operated by Jackson HMA, LLC, filed a *qui tam* complaint alleging that the hospital violated the Emergency Medical Treatment and Labor Act (EMTALA). Vanderlan reported the purported violations, and CMS began the administrative process to assess whether Jackson HMA violated EMTALA. Vanderlan sued Jackson HMA for FCA violations and sought to block any settlement Jackson HMA might reach with CMS about EMTALA violations. The government declined to intervene and later moved to dismiss the *qui tam* claims, arguing in part that the suit interfered with settlement negotiations. The district court granted dismissal.



Vanderlan appealed. On appeal, the Fifth Circuit considered whether the district court erred in denying Vanderlan an evidentiary hearing and whether it had discretion to deny the government's dismissal motion under §3730(c)(2)(A).

The Fifth Circuit found the district court did not err by denying Vanderlan an evidentiary hearing. Because the district court had reconsidered its decision, allowed multiple rounds of briefing, held a live hearing where Vanderlan presented his arguments, and gave him the opportunity to submit evidence, the district court met its duties under (c)(2)(A).

Further, the Fifth Circuit held that the court has no adjudicatory role in disposing of a pre-answer (c)(2)(A) motion and no discretion to deny dismissal absent a claim that the Constitution forbids it. Accordingly, the Fifth Circuit affirmed the district court's dismissal of Vanderlan's claims.

PUBLIC DISCLOSURE BAR

A court is required to dismiss an FCA action "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed… unless the action is brought by the Attorney General or the person bringing the action is an original source of the information" (31 U.S.C. §3730(e)(4)(A)). Only certain types of disclosure, however, qualify as public disclosures under the statute. This year the appellate courts addressed when additional information from a relator is sufficient to allow a case to proceed despite publicly disclosed information.

***U.S. ex rel. Silbersher v. Allergan, Inc.,* Case No. 23-15613 (9th Cir. Jan. 29, 2025)**

The Ninth Circuit clarified that a relator's expertise in connecting publicly available information is analyzed under the "substantially the same" prong of the public disclosure bar rather than the original source exception.

Qui tam relator Zachary Silbersher alleged that Allergan and Adamas Pharmaceuticals fraudulently obtained patents for two Alzheimer's drugs, which allowed them to block generic competition and charge artificially inflated prices to Medicare, Medicaid, and other federal and state health programs. This was Silbersher's second appeal in the case, following an earlier remand.

The district court found that Silbersher's complaint alleged substantially the same transactions as information already contained in public disclosures — specifically, patent prosecution histories. Concluding that Silbersher did not qualify as an "original source" under §3730(e)(4)(B), the district court dismissed the case.

On appeal, the Ninth Circuit affirmed the dismissal, holding that Silbersher had waived his argument that the public disclosure bar did not apply by conceding at an earlier hearing that the relevant fraud information was contained in the patent prosecution history. Silbersher argued that the court's decision in *Silbersher v. Valeant Pharmaceuticals International, Inc.*, 89 F.4th 1154 (9th Cir. 2024), another *qui tam* case he brought, should be a basis for reconsideration of the issue. In that case, Silbersher had successfully argued that his expertise helped connect the "scattered public disclosures" together to "provide a critical fact necessary for scienter" regarding the defendant's conflicting positions at their patent prosecutions.

The court rejected this argument, noting that *Valeant* actually clarified that arguments about a relator's expertise in piecing together information belong under the "substantially the same" prong of the public disclosure bar analysis, not the original source exception — and Silbersher had already conceded that prong.

***U.S. ex rel. 3729, LLC v. Evernorth Health, Inc.,* Case No. 23-55645 (9th Cir. Feb. 4, 2025)**

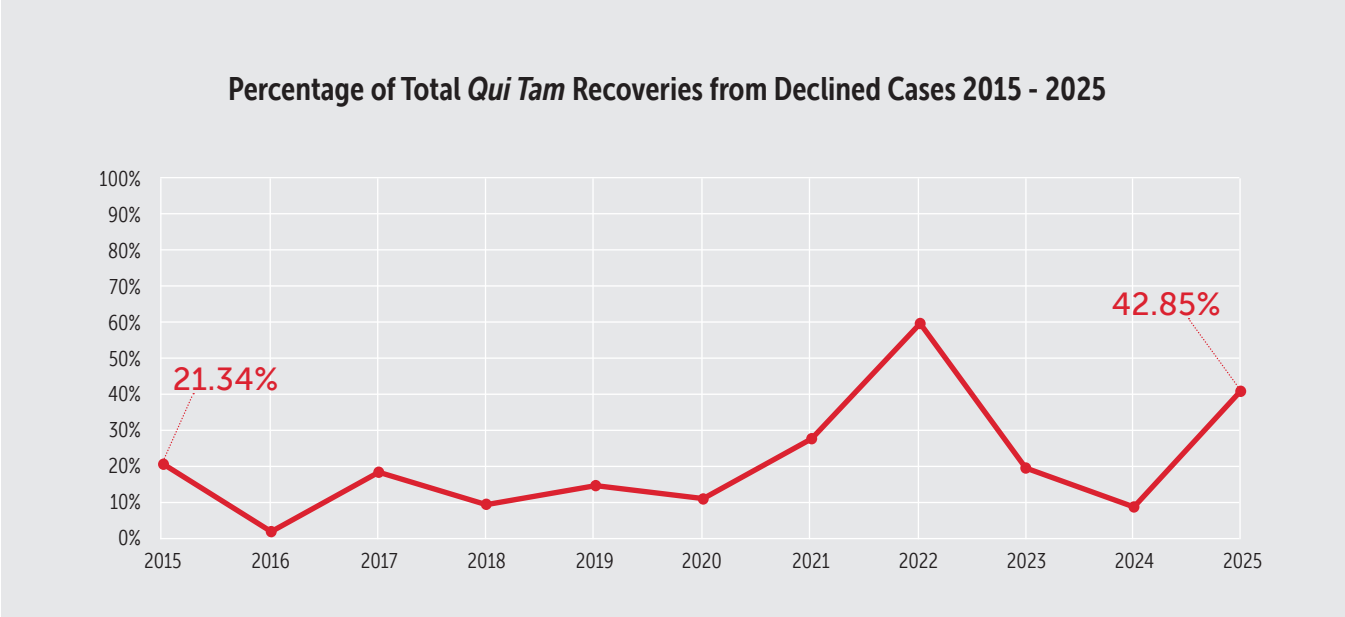
The Ninth Circuit reversed the district court's dismissal based on the public disclosure bar because the sources referred to were vague and lacked information necessary to create an inference of fraud.

Relator 3729, LLC alleged that between 2009 and 2018, Express Scripts systematically dispensed significantly more pills than TRICARE beneficiaries needed. 3729 alleged specifically that Express Scripts enrolled as many TRICARE beneficiaries as possible into its automatic delivery program and calibrated the logic of its pharmacy dispensing software so that for a 90-day supply prescription on auto-refill, a full 90-day supply of pills was dispensed on day 60 and again every 60 days thereafter, resulting in an excess of 265 pills over the course of a year, assuming a dosage of one pill per day.

Express Scripts moved to dismiss the complaint, arguing that the FCA's public disclosure bar precluded the action because two sources publicly disclosed substantially the same allegations or transactions as alleged in the complaint. The first source was an article from the *Army Times* published in December 2013 that reported that the mail-order, auto-refill medication program was wasteful and inefficient. A beneficiary interviewed for the article stated that "[s]omebody needs to look at Express Scripts," asserting that the company was "making a fortune off the government[.]" The second source was an interim final rule issued by the Department of Defense (DoD) where a professional association submitted comments regarding unnecessary waste resulting from auto-ship policies.

The district court agreed with Express Scripts, finding that the *Army Times* article and the DoD final rule commentary publicly disclosed the allegedly fraudulent transactions at issue and that the relator's allegations did not materially add to the information disclosed by those sources. The district court dismissed the action, and 3729 appealed to the Ninth Circuit.

In order for the public disclosure bar to apply, the previously disclosed information must contain "facts from which fraud can be inferred," and the fraud disclosed publicly must be "substantially similar" to the fraud alleged in the *qui tam* action. The Ninth Circuit found that neither source identified by Express Scripts satisfied that standard because they were vague and did not contain facts from which the fraud could be inferred. The Ninth Circuit reversed and remanded the case to the district court for further proceedings.



The percentage of total *qui tam* recoveries from *qui tam* cases where DOJ declined to intervene bounced back sharply in 2025.

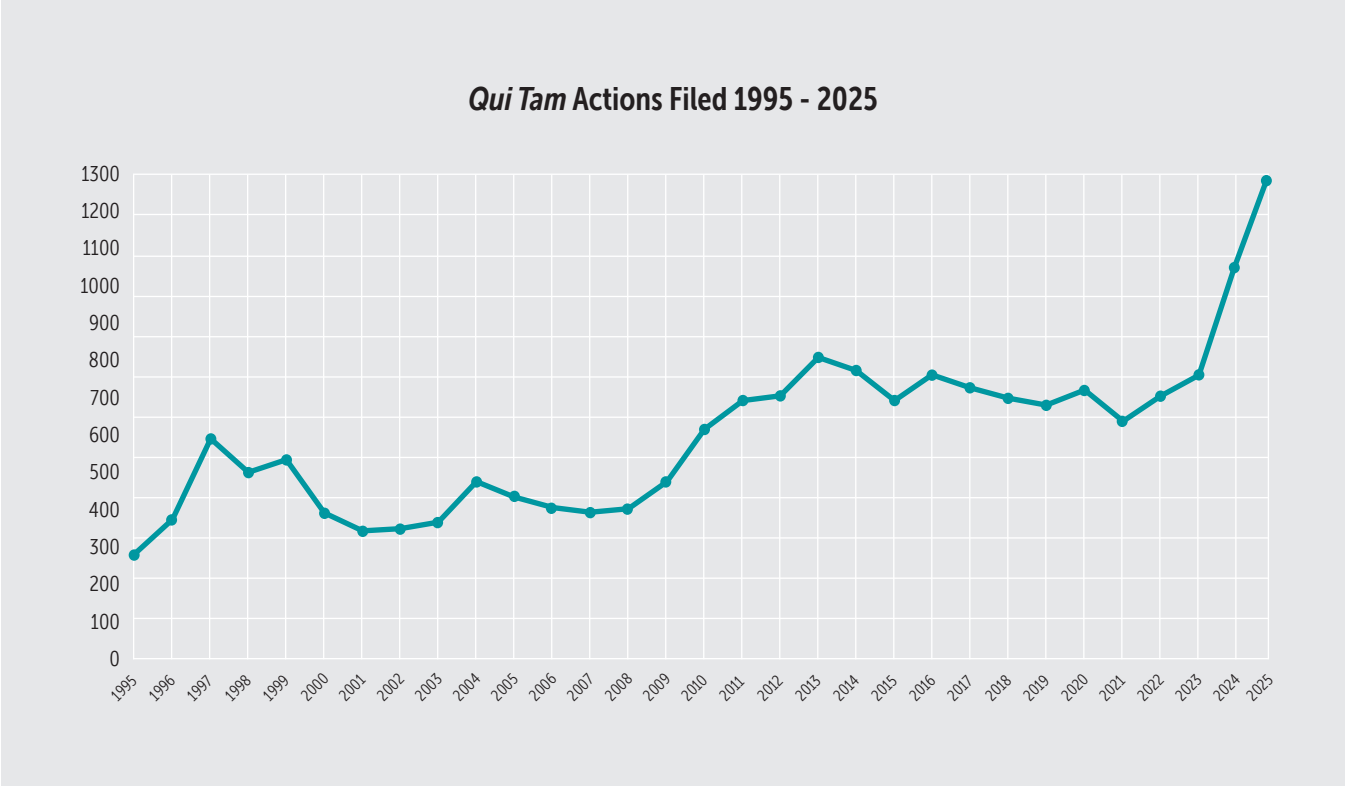
***U.S. ex rel. O'Connor v. USCC Wireless Investment, Inc.,* Case No. 23-7044 (D.C. Cir. Feb. 11, 2025)**

The D.C. Circuit underscores the exacting nature of the FCA's public disclosure bar and the challenge relators face in asserting claims based on fraud schemes previously made public, even when they present additional details.

Relators Mark J. O'Connor and Sara F. Leibman brought a FCA *qui tam* suit against U.S. Cellular and related entities, alleging that they used sham "designated entities" to obtain and retain discounted Federal Communication Commission wireless spectrum licenses worth millions of dollars. The complaint claimed that these entities, which purported to be independent small businesses qualifying for bidding credits, were in fact fronts controlled by U.S. Cellular and that false statements were made to the government to secure and retain those credits. O'Connor and Leibman emphasized additional post-licensing conduct — including alleged concealment of spectrum use and agreements transferring spectrum rights — that they argued demonstrated ongoing fraud. The government declined to intervene.

The district court dismissed the complaint under the FCA's public disclosure bar, concluding that O'Connor and Leibman's current allegations were "substantially the same" as those in a 2008 *qui tam* action alleging similar fraudulent use of designated entities to secure bidding credits. Although O'Connor and Leibman added details about retention of credits and spectrum use, the court found the core elements of the scheme had already been publicly disclosed in the earlier case, thus barring the suit. The court also held that O'Connor and Leibman did not qualify as original sources of the information because they did not materially add to what was already publicly disclosed.

On appeal, the D.C. Circuit affirmed the district court's dismissal. The appellate court agreed that O'Connor and Leibman's complaint described essentially the same fraud previously disclosed, despite additional particulars, and thus fell within the FCA's public disclosure bar. It emphasized that merely elaborating on how defendants concealed or maintained the benefits of the fraud did not overcome the bar. The court also upheld the district court's finding that O'Connor and Leibman failed to qualify as original sources because they neither voluntarily disclosed the information prior to public disclosure, nor materially added independent information that would affect the government's awareness of the fraud.



Qui tam cases continue to increase breaking last year's record by over 300 cases.

***U.S. ex rel. Fiorisce, LLC v. Colorado Technical University, Inc.,* 130 F.4th 811 (10th Cir. Mar. 4, 2025)**

The Tenth Circuit joined other circuit courts in holding that the public disclosure bar is non-jurisdictional. The court also ruled that denials of motions to dismiss under the FCA's public disclosure bar are not immediately appealable under the collateral order doctrine.

Fiorisce, LLC brought this *qui tam* action against Colorado Technical University (CTU), alleging that the school fraudulently obtained federal student aid funds by misrepresenting compliance with Department of Education credit hour requirements. Fiorisce, whose sole principal was a former faculty member, claimed that CTU's online learning platform provided students with less educational content than required and allowed students to automatically skip through course work by completing rudimentary diagnostic tests. According to Fiorisce, CTU counted the bypassed content towards federal credit hour minimums. During a 2017 audit, CTU allegedly submitted inflated learning hour calculations using data from a small number of outlier students who took the longest to complete the courses, creating the false appearance of compliance while most students received only a fraction of the required content.

The district court denied CTU's motion to dismiss under the FCA's public disclosure bar, finding that Fiorisce's specific allegations about credit hour misrepresentation and the use of the online platform were not "substantially the same" as prior public disclosures, even though CTU and similar institutions had been "on the government's radar for years." The court also indicated that even if the public disclosure bar applied, Fiorisce likely qualified for the "original source" exception. CTU appealed, seeking immediate interlocutory review before final judgment under the collateral order doctrine.

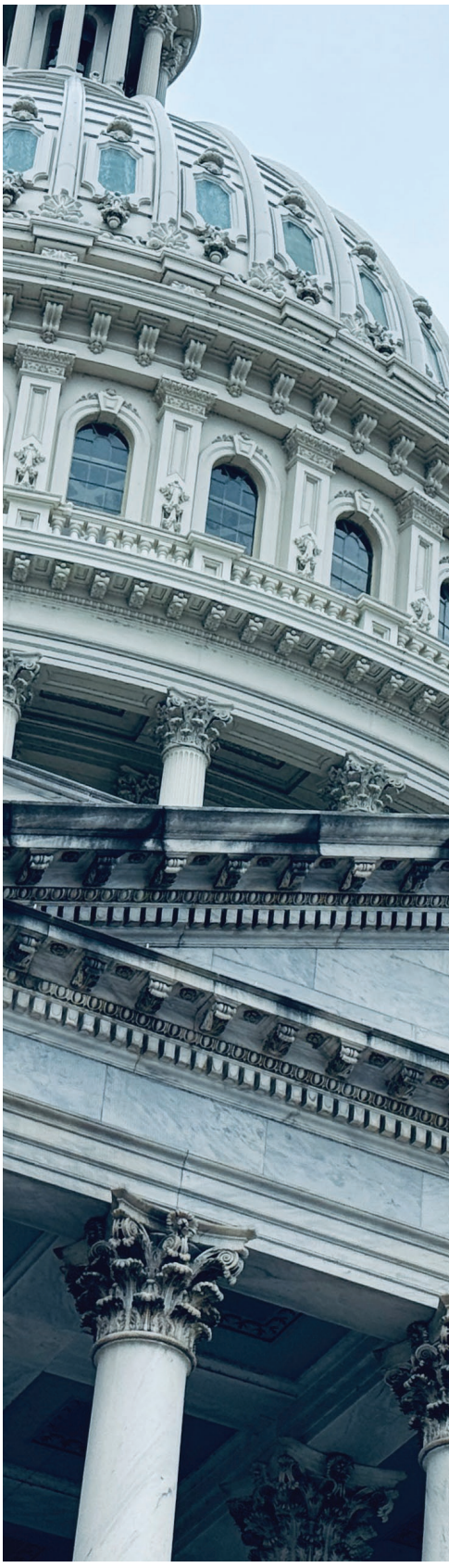
The Tenth Circuit dismissed CTU's appeal for lack of appellate jurisdiction, holding that the collateral order doctrine does not apply to denials of motions to dismiss under the FCA's public disclosure bar. CTU argued that immediate appellate review was necessary because the public disclosure bar confers a "right to avoid trial" and that denial imperils substantial public interests, including separation of powers, government efficiency, and government initiative.

The court rejected these arguments, emphasizing that CTU bore a "heavy burden" to expand the collateral order doctrine and that courts must apply the doctrine's requirements with "skepticism." The court found that the public disclosure bar does not guarantee a defendant will avoid trial because FCA actions may still proceed if the government intervenes, opposes dismissal, or the relator qualifies as an original source. The court also rejected CTU's jurisdictional argument, joining the other circuit courts that have considered the issue in concluding that Congress' 2010 amendment removing "no court shall have jurisdiction" language from the statute made the bar non-jurisdictional.

***U.S. ex rel. Smith v. Odom,* 148 F.4th 1322 (11th Cir. Aug. 22, 2025)**

The Eleventh Circuit found that the public disclosure bar applies where two prior news articles cover the allegations, the complaint's allegations significantly overlap with the news articles, and the relator adds only details, not material additions, to the already disclosed information.

Relator Robert Smith sued an airport sponsor and a former owner after they denied his request to run a second fixed-base operator at the Destin Executive Airport. Smith alleged that the sponsor and former owner violated the FCA by falsely certifying to the government that they were complying with grant assurances for fixed-base operators, which required certifying that the sponsor was not giving any service provider an exclusive right to operate at the airport.



The district court dismissed the case, finding that the public disclosure bar foreclosed the case because Smith's claims had already been disclosed in two news articles.

The Eleventh Circuit affirmed dismissal. It found that the statements in the news articles identifying the FAA grants, certification requirements, and the scheme of common ownership creating exclusivity were more than enough to meet the standard for public disclosure. The court further clarified that when determining whether a complaint's allegations are substantially the same as the publicly disclosed information, "substantially the same does not mean identical." Rather, the public disclosure bar prevents claims where there is significant overlap between the allegations in the complaint and the news articles. The court also concluded that background information and additional details that "merely supplement and contextualize the core fraud hypothesis" are not material additions that qualify a relator as an original source.

***U.S. ex rel. O'Connor v. U.S. Cellular Corp.*, 153 F.4th 1272 (D.C. Cir. Sept. 26, 2025)**

The D.C. Circuit clarifies that relators can survive the public disclosure bar by demonstrating that their allegations materially add to publicly disclosed information, even when the underlying fraud was referenced in regulatory filings, reinforcing the importance of the "original source" exception in *qui tam* actions.

Relators Mark J. O'Connor and Sara F. Leibman filed another FCA *qui tam* action against U.S. Cellular Corporation and affiliated entities, alleging that U.S. Cellular used a purportedly independent shell company, Advantage Spectrum, L.P., to fraudulently obtain nearly $113 million in small business bidding credits during a Federal Communications Commission (FCC) spectrum auction. The complaint asserted that Advantage was not a genuine independent business, that U.S. Cellular exercised de facto control over it, and that undisclosed agreements ensured that U.S. Cellular would reap the benefits of Advantage's spectrum licenses. If true, these allegations could disqualify Advantage from receiving the credits. The defendants countered that the material facts underlying this lawsuit had been previously disclosed and the lawsuit was subject to the FCA's public disclosure bar.

The district court agreed that O'Connor and Leibman's allegations were barred by the FCA's public disclosure provision because the relevant allegedly fraudulent conduct was already revealed in Advantage's public filings with the FCC and related regulatory disclosures. The court concluded that O'Connor and Leibman failed to show that their claims were sufficiently distinct from what was publicly available and did not establish "original source" status, which requires independent knowledge that materially adds to previously disclosed information. Because O'Connor and Leibman's allegations largely tracked the publicly available materials, the court dismissed the case. It did so again with prejudice after O'Connor and Leibman filed an amended complaint.

On appeal, the D.C. Circuit reversed the district court's dismissal. The appellate court acknowledged that the FCC filings and other disclosures constituted public disclosures but concluded that O'Connor and Leibman had sufficiently alleged that they were original sources because their complaint materially added information beyond the publicly disclosed record. Specifically, the court explained that O'Connor and Leibman's detailed allegations that Advantage never operated as an independent business and that there were undisclosed agreements for U.S. Cellular to benefit from Advantage's licenses went beyond mere repetition of public disclosures and could influence the government's decision to pursue enforcement. As a result, O'Connor and Leibman's material contributions to the complaint precluded application of the public disclosure bar at the motion to dismiss stage.

Commentary

DOJ LAUNCHES CIVIL RIGHTS FRAUD INITIATIVE

Following an executive order directing federal agencies to "combat illegal DEI preferences within the private sector," the Department of Justice announced a new Civil Rights Fraud Initiative, which utilizes the FCA to investigate and pursue claims against recipients of federal funds "who knowingly violate[] civil rights laws." While the Civil Rights Fraud Initiative is new, recent reporting confirms several active FCA probes are proceeding under the initiative's umbrella.

Executive Order 14173

On January 21, 2025, President Trump issued Executive Order 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," which orders federal agencies to "combat illegal private-sector DEI preferences, mandates, policies, programs, and activities." This executive order previewed the administration's plans to use the FCA to target DEI programs by directing federal agencies to include in every contract or grant:

1. A certification that the contractor or grant recipient does not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws, and
2. An agreement that the contractor or grant recipient's compliance with federal discrimination laws is "material" to the government's payment decisions for purposes of the FCA.

Several challenges to the certification and materiality provisions of the executive order were brought almost immediately, resulting in a nationwide preliminary injunction issued by a federal court in Maryland that was later stayed by the U.S. Court of Appeals for the Fourth Circuit, allowing these provisions to take effect while the appeal proceeds. Meanwhile other challenges have been brought, including in federal courts in California, D.C. and Illinois, with varying outcomes. Accordingly, the executive order continues to face significant legal challenges, and its future is not yet settled. To the extent the certification and materiality provisions take effect, they present an increased risk of allegations that a defendant has falsely certified compliance.

Civil Rights Fraud Initiative

Consistent with the administration's priorities, DOJ stood up the Civil Rights Fraud Initiative and issued a memorandum authored by Deputy Attorney General Todd Blanche (the "Blanche memo") on May 19, 2025. The Blanche memo describes the FCA as the "primary weapon" to investigate and pursue claims against any recipient of federal funding that "knowingly violates federal civil rights laws" and "falsely certifies compliance with such laws." According to the Blanche memo, the FCA is implicated whenever federal-funding recipients certify compliance with civil rights laws while knowingly engaging in "diversity, equity, and inclusion (DEI) programs that assign benefits or burdens on race, ethnicity, or national origin," enact certain policies relating to gender identity, or encourage antisemitism.

As a pointed example, the Blanche memo warns that a university that accepts federal funds could violate the FCA if it "encourages antisemitism, refuses to protect Jewish students, allows men to intrude into women's bathrooms, or requires women to compete against men in athletic competitions."

The Civil Rights Fraud Initiative is well-staffed; it is co-led by the DOJ Civil Division's Fraud Section and DOJ's Civil Rights Division, with teams that the Blanche memo claims will "aggressively pursue" this work. The Blanche memo also instructs each of the 93 U.S. Attorney's Offices to identify an Assistant U.S. Attorney to support the initiative.

Notably, the Blanche memo "strongly encourages" whistleblowers to file lawsuits under the FCA's *qui tam* provision. The Blanche memo also encourages anyone with knowledge of discrimination by federal-funding recipients to report to the appropriate federal authorities so that DOJ may consider the information and "take any appropriate action."

Additional DOJ Guidance

On July 29, 2025, Attorney General Pam Bondi issued additional guidance regarding the types of programs the DOJ views as unlawfully discriminatory. The memorandum does not expressly reference the FCA but provides a detailed list of policies and practices that may violate federal anti-discrimination laws, emphasizing that they may or may not be described as "Diversity, Equity, and Inclusion" (DEI). The guidance warns against the continuation or implementation of programs that are "DEI by another name," including the use of "proxy" characteristics that are meant to stand in for legally protected characteristics such as sex or race.

The guidance is non-binding, and ultimately, the legality of DEI practices is subject to federal anti-discrimination laws. Nevertheless, the guidance provides a roadmap as to how DOJ and other agencies are likely to interpret those laws as they consider whether to bring enforcement actions.

Investigations Underway

While the Civil Rights Fraud Initiative produced no public complaints or settlements in 2025, investigations prompted by this initiative are underway. Recent reporting confirms investigations into the use of diversity initiatives in hiring and promotion are proceeding at prominent technology and telecommunications companies, as well as at companies in the automotive, pharmaceutical, defense, and utilities industries. DOJ is reportedly using civil investigative demands (CIDs) in connection with potential FCA enforcement actions. These investigations demonstrate that the Civil Rights Fraud Initiative has legs and signal that meaningful enforcement activity may be on the horizon in 2026.

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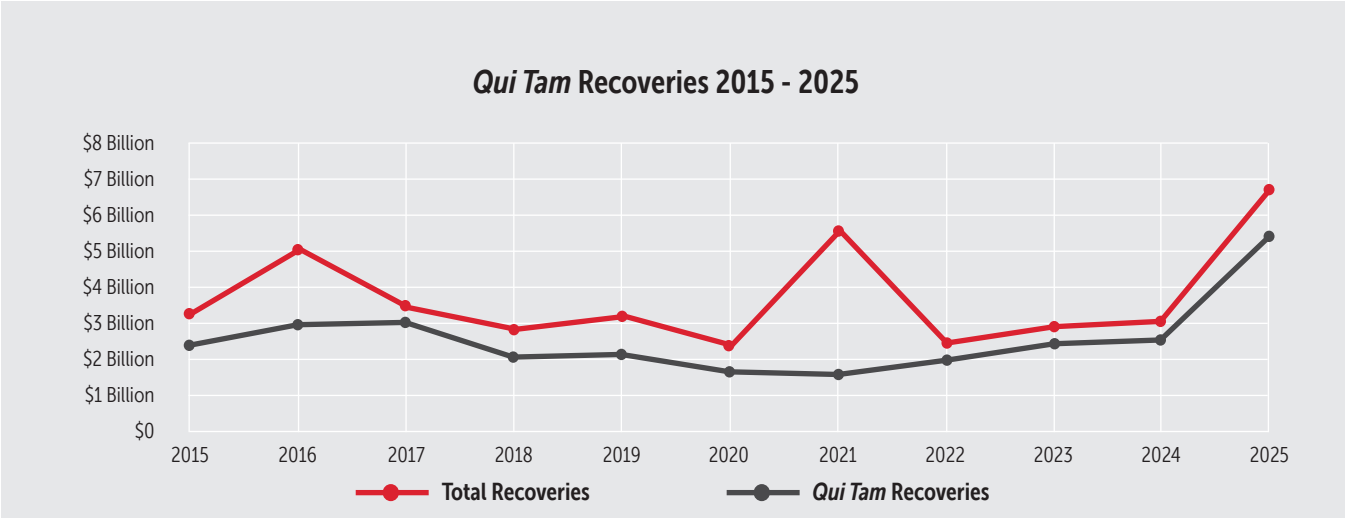
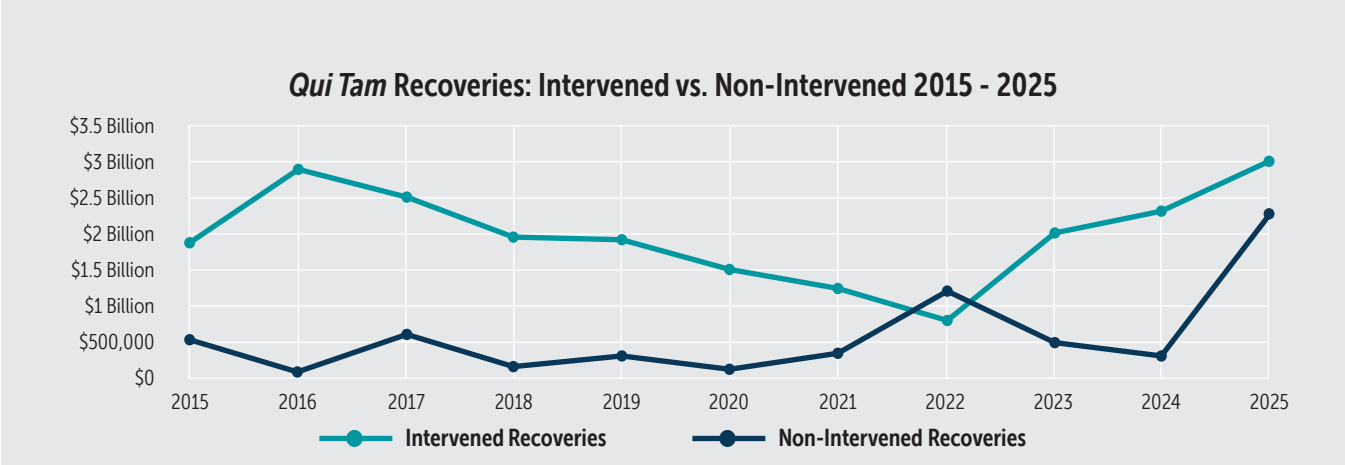


Consistent with overall recoveries in 2025 *qui tam* recoveries more than doubled from 2024 to 2025.



Relators' counsel made a mark this year with a sevenfold increase in recoveries from non-intervened cases.

FIRST-TO-FILE RULE

Under 31 U.S.C. §3730(b)(5), the FCA bars anyone other than the government from bringing "a related action based on the facts underlying the pending action." Courts have interpreted the relationship necessary to trigger the first-to-file rule in different ways.

***U.S. ex rel. Rosales v. Amedisys North Carolina, LLC,* 128 F.4th 548 (4th Cir. Feb. 14, 2025)**

The Fourth Circuit concludes that, when applying the first-to-file rule, courts must look to the most recent properly filed complaint and analyze it on a claim-by-claim or defendant-by-defendant basis.

In June 2020, relator Ganesa Rosales filed a *qui tam* action against defendant Amedisys Holding, a hospice care provider, and several of its subsidiaries, alleging that they engaged in fraudulent billing behavior by admitting non-terminal patients into hospice care to secure payments from Medicare and Medicaid. More than a year later, in October 2021, Rosales amended her complaint to add additional defendants, reasserting her four original claims and incorporating a fifth claim under the AKS. Amedisys moved to dismiss Rosales' action under the first-to-file rule, citing an earlier-filed *qui tam* action — the *Byers* complaint — filed against Amedisys in 2014.

The district court dismissed Rosales' complaint under the first-to-file rule, finding that the previously filed *Byers* complaint barred her claims against the defendants. In doing so, the district court concluded that it was restricted to reviewing Rosales' original complaint against Amedisys and its subsidiaries — not her amended pleading that added additional claims and parties. Rosales appealed, arguing that she was the first individual to bring claims against each of the additional defendants in the amended complaint, as well as the first to bring a claim under the AKS, making dismissal inappropriate.

The Fourth Circuit found that the district court erred in limiting its review to Rosales' original complaint. Instead, when applying the first-to-file rule, courts must look to the most recent properly filed complaint and analyze that complaint claim by claim to determine which relator was the first to bring a specific claim or to bring that claim against a particular defendant. However, the Fourth Circuit also clarified that simply alerting the government to an additional subsidiary or employee's alleged fraud related to a previous scheme already identified in an earlier case brought by a relator is not enough to defeat the first-to-file bar. Therefore, because Rosales' lawsuit hinged on the same scheme alleged in the *Byers* complaint and put forth the same essential elements of fraud, just against additional parties, the Fourth Circuit affirmed the dismissal of Rosales' claims under the first-to-file rule.

RES JUDICATA

***Milner v. Baptist Health Montgomery,* 132 F.4th 1354 (11th Cir. Mar. 31, 2025)**

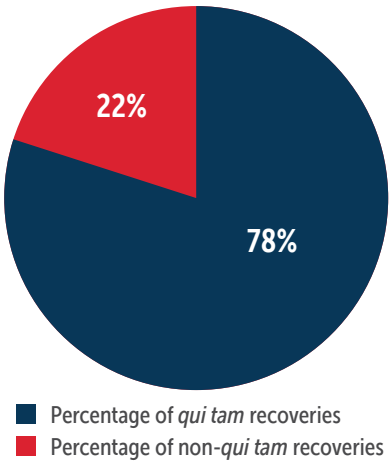
The Eleventh Circuit found an FCA *qui tam* action barred by res judicata due to the whistleblower's prior retaliation claim, which shared the same parties and the same cause of action.

Relator Dr. Jeffery D. Milner, a physician at a hospital owned and operated by the defendants, Baptist Health, alleged that Baptist Health was forcing physicians to overprescribe opioids to patients and fraudulently billing Medicare and Medicaid for them. Milner claims he reported the overprescribing to his superiors and was fired as retaliation for whistleblowing. In 2019, Milner brought an FCA retaliation claim against Baptist Health for his termination, but this action was dismissed with prejudice for failure to state a claim. Milner then filed this action, the government declined to intervene, and the complaint was unsealed. The district court granted Baptist Health's motion to dismiss as barred by res judicata because the employment retaliation claim and the FCA *qui tam* action share the same parties and the same cause of action. Milner appealed.

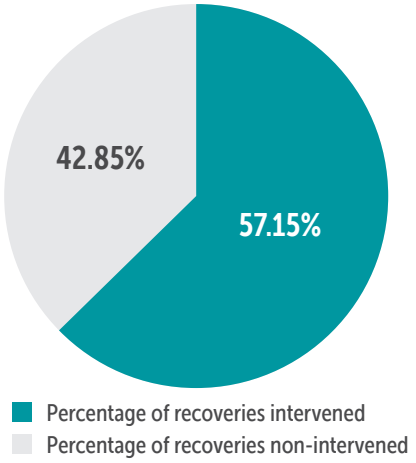
The Eleventh Circuit affirmed dismissal, finding that a plaintiff appearing in an earlier retaliation case satisfies the same party element of res judicata when the plaintiff later appears as a relator in the second case. The court explained that because "relators have unrestricted participation in the litigation," Milner was a party in the *qui tam* action just as he was in the earlier retaliation claim. Further, the court clarified that dismissal of Milner's case would not prevent the United States from pursing its own action for fraud. Because the government declined to intervene, it was not a party to the *qui tam* case and was not barred by res judicata.

As for the issue of whether the cases involved the same cause of action, the court held that an employment retaliation claim and an FCA *qui tam* action generally arise from the same nucleus of operative fact. Milner's lawsuits involve the same time period, the same location, and the same basic facts, foreclosing Milner's second claim under res judicata. Finally, the court made clear that all claims arising out of the same factual predicate must be brought in one lawsuit to avoid the unforgiving bar of res judicata.

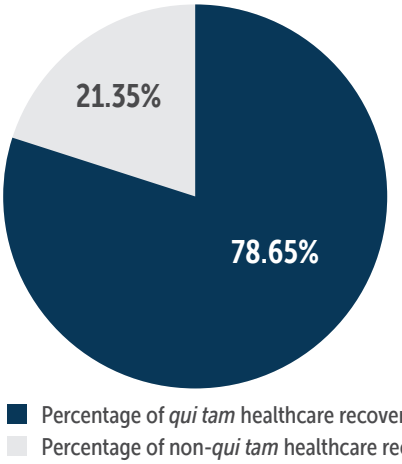
2025 FCA Recoveries: *Qui Tam* vs. Non-*Qui Tam*



2025 *Qui Tam* Recoveries: Intervened vs. Non-Intervened



2025 Healthcare Recoveries: *Qui Tam* vs. Non-*Qui Tam*



WHAT TO WATCH IN 2026

CONSTITUTIONALITY OPINIONS

Two circuit courts are expected to issue opinions in 2026 about the constitutionality of the FCA's *qui tam* provisions in the cases *United States ex rel. Zafirov v. Florida Medical Associates, LLC* (11th Cir.) and *United States ex rel. Penelow v. Janssen Products LP* (3d Cir.). Whether or not they create a circuit split by becoming the first circuits to find the provisions unconstitutional, the issue is likely to find its way to the Supreme Court.

DEVELOPMENT OF DEI CASES

The administration has worked to create an FCA theory of liability to apply to companies that receive federal funds and also have diversity initiatives. It also has encouraged such suits by asking whistleblowers to come forward and by staffing prosecution teams at main Justice and United States Attorneys' offices across the country. All of this activity may result in cases being filed or unsealed in 2026 and courts getting an opportunity to address the new theory.

INCREASED §3730(C)(2)(A) DISMISSALS

In remarks about the Justice Department's 2025 FCA statistics, Deputy Assistant Attorney General Brenna Jenny emphasized an increased commitment to using the government's authority under 31 U.S.C. §3730(c)(2)(A) to move to dismiss relator-filed *qui tam* suits in meritless cases and other appropriate circumstances.

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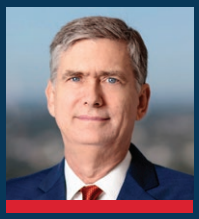

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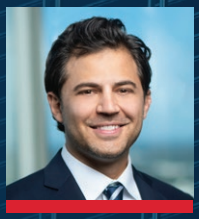

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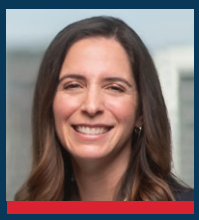

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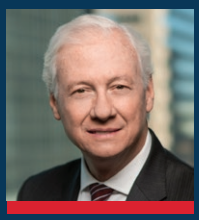

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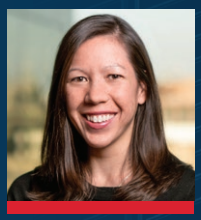

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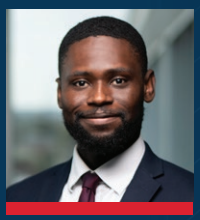

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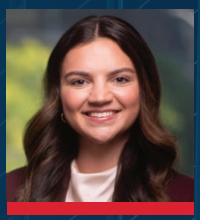

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