HAYNES BOONE

False Claims Act

2025 Mid-Year Update

Clients and Friends,

The False Claims Act continues to be one of the most commonly used weapons in the government's enforcement arsenal to address various forms of fraud. In addition to our "Year in Review" publication providing an overview of the previous year's developments, we are issuing a "Mid-Year Update" for the first time to highlight some of the key developments relating to the FCA from the first half of calendar year 2025. They include:

- The government announcing its intent to use the FCA to target new enforcement areas, such as customs fraud and illegal discrimination.
- Congress enacting a new law that significantly expands the types of false claims federal agencies can pursue administratively.
- Continued judicial efforts to interpret the substantive elements of an FCA claim, including what it means for a claim to be submitted "knowingly," what it means for noncompliance or a violation to be "material," and what it takes to plead a claim with particularity under Rule 9(b)'s heightened pleading standard.
- Significant judicial decisions regarding whether reimbursement requests for a government program administered by a private corporation constitute "claims," what requirements the government must satisfy to move to dismiss an FCA case over a relator's objection, and when an FCA claim "results from" a kickback violation, among other issues.

In the first half of 2025, Haynes Boone represented healthcare providers, defense contractors, and individuals in FCA investigations and lawsuits. We successfully resolved matters before lawsuits were filed, negotiated favorable settlements at all stages, and defended our clients in active litigation and appeals. We also advised many healthcare providers and contractors regarding FCA compliance and other related issues.

If you have any questions about the issues or cases covered in this Mid-Year Update, please let us know. We look forward to working with our friends and clients for the remainder of this year and beyond.

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

HAYNES BOONE

Table of Contents

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

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

JOHN PACHTER has been a practitioner of government contract law for more than 50 years. He has engaged in litigation before the Boards of Contract Appeals, the U.S. Court of Federal Claims, Federal District Courts, and the U.S. Court of Appeals for the Federal Circuit. He has represented clients on fraud and compliance investigations, audits, corporate governance and ethics, and defense of qui tam actions.

EDMUND AMOROSI represents clients in the government contracts and construction industries. He has appeared on behalf of clients in federal and state courts, before administrative agencies and boards, and in alternative dispute resolution settings including mediation and arbitration, both domestic and international. His practice includes experience in False Claims Act matters.

KATHRYN "KATIE" MULDOON GRIFFIN represents contractors across a range of industries on federal, state, and private projects involving construction, government contracts, and white-collar issues. She has experience in representing construction, engineering, and technology firms in resolving contract claims and disputes with the federal government and prime-subcontractor disputes on federal and federally funded projects. Her practice also includes experience in False Claims Act matters.

ANDREW GUTHRIE is a partner who focuses his practice on appeals and critical trial court briefing across an array of subject matters, including the False Claims Act, business disputes, bankruptcy, energy, products liability, and intellectual property. Prior to joining the firm, Andrew clerked for the Honorable Don R. Willett of the Texas Supreme Court.

TARYN MCDONALD focuses her practice on government investigations and healthcare litigation, representing individuals and companies facing actual or threatened government enforcement actions. Taryn has experience defending clients in qui tam and False Claims Act investigations and lawsuits and regularly provides counsel on regulatory issues.

TODD GARLAND is an experienced government contracts attorney and litigator focusing on contract claims and disputes with the federal government. His practice involves advising clients on legal issues arising from relationships with the federal government and private partners. Todd also counsels clients regarding white collar issues involving anticorruption, the Foreign Corrupt Practices Act (FCPA), and civil False Claims Act (FCA).

ZACHARY PRINCE counsels domestic and international clients on a wide range of government contract law issues. Zach served as a law clerk for the Honorable Mary Ellen Coster Williams of the United States Court of Federal Claims. He is a Professorial Lecturer in Law at the George Washington University Law School and regularly lectures and writes on matters relating to government contracts.

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

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

CONTRIBUTORS

Scott Whitman
Associate | Washington, D.C.

Connor Madden
Associate | Dallas

Jesse Cardinal
Associate | Northern Virginia

Samara Taper
Associate | Dallas

John Tanner
Associate | Northern Virginia

Mitchell McFetridge
2025 Summer Associate | Dallas

Jennifer Clarady
2025 Summer Associate | Dallas

Simon Falokun
2025 Summer Associate | Dallas

I. INTRODUCTION

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

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

II. UPDATE ON LEGISLATION AND ENFORCEMENT

The current administration has announced several new FCA enforcement priorities, including customs enforcement and Diversity, Equity, and Inclusion ("DEI"),[1] while reiterating the traditional concerns for healthcare fraud, procurement fraud, and general waste, fraud, and abuse.[2] Congress has also taken steps to enhance false claims enforcement by increasing the authority of and incentive for agencies to bring enforcement actions for false claims on which the DOJ declines to act.

A. The Ninth Circuit held that FCA *qui tam* actions can reach customs fraud.

Against the backdrop of new tariffs being imposed on foreign imports, the DOJ has promised to use the FCA to fight against tariff evasion and customs fraud. The Ninth Circuit previously decided that the U.S. Court of International Trade ("CIT"), not federal district courts, had exclusive jurisdiction over FCA cases brought by the federal government for recovery of customs duties or for customs fraud. *See United States v. Universal Fruits & Vegetables Corp.,* 370 F.3d 829, 836–37 (9th Cir. 2004). This decision was based on 28 U.S.C. § 1582, which gives the CIT "exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover customs duties."

Recently, the Ninth Circuit considered (1) whether the CIT also has exclusive jurisdiction over such FCA cases brought by relators (a.k.a. *qui tam* cases), and (2) whether 19 U.S.C. § 1592, a provision of the Tariff Act of 1930 that imposes civil penalties for making a false statement or an omission that deprives the government of customs duties, and not the FCA, provides the exclusive remedy. *See United States ex rel. Island Industries, Inc. v. Sigma Corp.,* No. 22-55063, 2025 WL 1730271, at *6, *7 (9th Cir. June 23, 2025).

The Ninth Circuit held that district courts have jurisdiction over customs-related *qui tam* actions and that 19 U.S.C. § 1592 coexists with the FCA. First, the court declined to extend *Universal Fruits* and held that cases initiated by relators can be brought in federal district court and are not limited to the CIT because they are not "commenced by the United States." *Id.* at *6. Second, the court held that 19 U.S.C. § 1592 does not displace the FCA in cases involving customs duties because the FCA allows the government to pursue alternate remedies and the two statutes' legislative history showed that Congress intended for them to coexist. *See id.* at *8.

B. The government leverages the FCA to combat DEI.

In February, Attorney General Pam Bondi issued a memorandum instructing DOJ employees

1 Release available at https://www.justice.gov/ag/media/1388501/dl?inline.

2 Release available at https://www.justice.gov/criminal/media/1400046/dl?inline.

to enforce federal civil rights laws and take other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including policies relating to DEI."[3] And in May, Deputy Attorney General Todd Blanche issued a memorandum announcing a Civil Rights Fraud Initiative,[4] which will utilize the FCA to target two categories of civil rights violations by federal funding recipients:

- Universities that certify compliance with civil rights law while knowingly "encourage[ing] antisemitism, refus[ing] to protect Jewish students, allow[ing] men to intrude into women's bathrooms, or require[ing] women to compete against men in athletic competitions"; and

- Federal funding recipients or contracts who "certify compliance with civil rights laws while knowingly engaging in racist preferences, mandates, policies, programs, and activities, including through diversity, equity, and inclusion (DEI) programs that assign benefits or burdens on race, ethnicity, or national origin." *Id.*

The initiative will be co-led by the DOJ's Civil Division's Fraud Section and Civil Rights Division, with each of the 93 U.S. Attorney's Offices nominating an assistant U.S. attorney to advance the efforts. Deputy Attorney General Blanche also strongly encouraged *qui tam* actions against federal funding recipients who engage in the discrimination targeted by the initiative. While this initiative remains in its infancy, federal funding recipients would be wise to conduct a review of their internal and external DEI-related programs to assess their risk exposure.

C. The Administrative False Claims Act expands the types of claims agencies can administratively pursue.

The National Defense Authorization Act, enacted in December 2024, increased the

incentive for agencies to bring claims that the DOJ declines to prosecute by replacing the Program Fraud Civil Remedies Act with the Administrative False Claims Act ("AFCA"), 31 U.S.C. §§ 3801 *et seq.*, which raises the monetary limit for claims each federal agency's inspector general can independently pursue from $150,000 to $1 million.

The AFCA also indexes the claims limit to the inflation rate, permits agencies to recoup their investigation and litigation costs from recoveries gained, and extends the statute of limitations. Congress also aligned the AFCA with the FCA by updating the definitions of "material" and "obligation" to match their FCA counterparts and expanding the definition of false claims to include reverse false claim actions.

D. The DOJ and HHS announce a joint FCA working group.

On July 2, 2025, the DOJ and the Department of Health and Human Services ("HHS") announced a joint working group focused on FCA enforcement.[5] As part of the working group, the HHS shall make referrals to the DOJ of potential FCA violations related to certain priority enforcement areas; the agencies will leverage each other's resources to expedite ongoing investigations and identify new leads; and the agencies will jointly discuss questions like whether the HHS should implement a payment suspension or whether the DOJ should exercise its discretion to move to dismiss a *qui tam* complaint.

[3] Release available at https://www.justice.gov/ag/media/1388501/dl?inline.

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

[5] Release available at https://www.justice.gov/opa/pr/doj-hhs-false-claims-act-working-group.

III. SIGNIFICANT JUDICIAL DECISIONS

A. Initial Hurdles for FCA Plaintiff

1. First-to-File Bar

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

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

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

The Fourth Circuit held that courts applying the FCA's first-to-file bar must consider each properly filed claim on a claim-by-claim and defendant-by-defendant basis. *United States ex rel. Rosales v. Amedisys North Carolina, LLC,* 128 F.4th 548, 557 (4th. Cir. 2025).

In *Rosales*, the relator alleged a hospice care provider and its subsidiaries committed fraud to secure additional payments from Medicare and Medicaid. *Id.* at 552–53. She filed her first complaint in June 2020 and then filed an amended complaint in 2021, adding new defendants and a new claim while re-alleging her original claims. *Id.* at 554. The district court dismissed the amended lawsuit under the first-to-file bar, restricting its analysis to the original complaint. *Id.* at 555.

The Fourth Circuit reversed, holding that district courts applying the first-to-file rule must "analyze all properly filed complaints claim-by-claim to determine which relator was the first to bring a specific claim, or to bring that claim against a particular defendant." *Id.* at 557. The court recognized, however, that claims that plead the "same essential elements" as the claims in the earlier action, even if the allegations are more detailed, are barred. *Id.* at 559–60. While the first-to-file bar analysis must also be conducted on a defendant-by-defendant basis, it will not save a complaint providing more specific details to identify a defendant if that defendant was identified categorically in an earlier complaint. *Id.* at 560. The more general, earlier allegations are sufficient to give the government notice of the fraud. *Id.*

2. Public Disclosure Bar & Original Source Exception

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

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

For a relator's case to survive the public disclosure bar, the relator must show that (i) the public disclosure bar does not apply; or (ii) if it does apply, the relator is an "original source." 31 U.S.C. § 3730(e)(4)(A). An "original source" is an individual who either (i) prior to a public disclosure has voluntarily disclosed to the government the information on which

allegations or transactions in a claim are based, or (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the government before filing an FCA action. 31 U.S.C. § 3730(e)(4)(B).

a) The Tenth Circuit held the public disclosure bar does not supply a right to immediate appeal.

The Tenth Circuit held that defendants cannot immediately appeal district court denials of motions to dismiss based on the public disclosure bar. *See United States ex rel. Fiorisce, LLC v. Colorado Tech. Univ., Inc.,* 130 F.4th 811, 820 (10th Cir. 2025).

In *Fiorisce*, the relator alleged that a for-profit submitted false claims under Department of Education financial aid programs. *Id*. at 815. The defendant moved to dismiss, arguing the claims were substantially the same as those previously disclosed, but the district court denied the motion and the defendant filed an interlocutory appeal. *Id*. at 815–16. The Tenth Circuit held, however, that the collateral order doctrine does not reach "denials of motions to dismiss under the FCA's public disclosure bar." *Id*. at 820. The court found that the public disclosure bar does not supply a "right to avoid trial" and that declining to so expand the collateral order doctrine "would not 'imperil a substantial interest' or 'some particular value of high order.'" *Id*. at 821–24.

b) The D.C. Circuit held that relators cannot claim to be original sources through a corporate entity.

The D.C. Circuit held that a relator who was a partner at the original source law firm does not, as an individual, qualify as an original source. *See United States ex rel. O'Connor v. USCC Wireless Inv., Inc.,* 128 F.4th 276, 281 (D.C. Cir. 2025).

In *O'Connor*, the relator alleged the defendant defrauded the FCC by bidding on opportunities through a purported small business that it, in fact, controlled. *Id.* at 282. The relator's law firm filed a *qui tam* action making substantially the same allegations in 2008, but the relator did not file the instant case until 2015. The court held that the public disclosure bar applied because the additional facts the relator supplied described "a fraud that is merely a continuation of, and therefore substantially the same as, the scheme disclosed in the [previous] *qui tam* action." *Id.* at 286.

The court further dismissed the relator's claim that he qualified as an original source as a partner at the law firm that filed the original *qui tam* action. *Id.* at 287. Citing the "fundamental principle of corporate law that a professional

corporation is a legal entity distinct from its shareholders," the court held that the named partner of the law firm that brought the previous *qui tam* action "cannot step into the firm's shoes to qualify as an original source." *Id.*

c) The Ninth Circuit held that a theory of fraud cannot be inferred from speculative or vague public sources.

The Ninth Circuit reversed and remanded a lower decision that two public sources triggered the public disclosure bar on a scheme by a pharmacy benefit management organization to profit from the systematic overfilling of prescriptions. *See United States ex rel. 3729, LLC v. Evernorth Health, Inc.,* No. 23-55645, 2025 WL 383801, at *1, *2 (9th Cir. Feb. 4, 2025).

In *3729, LLC,* the defendant claimed that both a newspaper article and public comments in response to a rulemaking notice disclosed facts from which one could reasonably infer a scheme substantially similar to the fraud alleged by the relator. *Id.* at *3. But the Ninth Circuit held that neither source qualified as public disclosures because they did not "disclose[] 'facts from which the fraud can be inferred' that [are] 'substantially similar to' the fraud alleged in the complaint." *Id.* at 3. The newspaper article was deficient because it described different practices that suggested some overfilling could have occurred, not the fraudulent scheme the relator alleged. *Id.* at *4. Likewise, the comments were general and vague enough that they applied equally to wasteful yet non-fraudulent practices as to the alleged fraudulent scheme. *Id.*

3. Government Dismissal

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

In the first half of 2025, the Fifth and Sixth Circuits joined the Second and Fourth Circuits in interpreting that the "opportunity for a hearing" required by § 3730(c)(2)(A) may sometimes be satisfied without an in-person hearing if there is an opportunity to file briefing on the motion.

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

The Fifth Circuit addressed whether, following the U.S. Supreme Court's decision in *United States ex rel. Polansky v. Executive Health Resources, Inc.,* 599 U.S. 419 (2023), an in-court hearing is required when the government moves to dismiss a *qui tam* action over the relator's objection before an answer has been filed. *See Vanderlan v. United States*, 135 F.4th 257, 262 (5th Cir. 2025).

In *Vanderlan*, a physician brought a *qui tam* action against the hospital he worked at for allegedly systematically violating the Emergency Medical Treatment and Labor Act. After over six years of litigation, the government moved to dismiss the *qui tam* claims with prejudice. *Id.* at 265. The Fifth Circuit joined the Second and Fourth Circuits in holding that the hearing provision requires only "a hearing on the briefs." *Id.* at 266.

In so holding, the court distinguished dicta in *United States v. Eli Lilly & Co., Inc.,* 4 F.4th 255, 265 (5th Cir. 2021), a pre-*Polansky* decision where the Fifth Circuit doubted the government's argument that a hearing meant "merely an opportunity for the government to publicly broadcast its reasons for dismissal and for the relator to convince the government to change its mind." *Id.* at 266 n.3. The court recognized that the district court had exceeded the required process by reconsidering its rulings, holding multiple rounds of briefing, and even holding a live evidentiary hearing on reconsideration. *Id.* at 266.

In *United States ex rel. USN4U, LLC*, a pipefitter brought a *qui tam* action alleging his employer defrauded NASA by inflating its project proposal prices. *See* No. 24-3022, 2025 WL 1009012, at *1 (6th Cir. Mar. 31, 2025). After extending the seal period five times, the government declined to intervene. But after multiple rounds of dismissal briefing, the government moved to intervene and dismiss the case at the district court's request, and the district court granted the motion. *Id.* at *5.

On appeal, the relator argued (1) that the district court violated the separation of powers by directing the government to take over or conclude the case; (2) the government failed to establish good cause to intervene; and (3) the district court erred in failing to hold a hearing on the government's motion to dismiss. *Id.* at *6–8. Regarding the first argument, the Sixth Circuit deferred to the government's interpretation of the district court's request as a request for notification of whether the government would consider intervention or dismissal and thus did not find a breach the separation of powers. *Id.* at *6.

In addition, the Sixth Circuit recognized that the government's reasons to intervene, including the tenuous prospects for success, burden on resources, and the relator's damaged credibility, satisfied the "flexible and capacious" requirement to provide only "a legally sufficient reason." *Id.* at *7 (citing *Polansky v. Executive Health Resources Inc.,* 17 F.4th 376, 387 (3d Cir. 2021)). Finally, the Sixth Circuit joined the Second and Fourth Circuits in holding that a hearing on the briefs, which the district court provided, is all that is required post-*Polansky. Id.* at *8 (citing *United States ex rel. Doe v. Credit Suisse AG,* 117 F.4th 155, 161 (4th Cir. 2024) and *Brutus Trading, LLC v. Standard Chartered Bank,* No. 20-2578, 2023 WL 5344973, at *2 (2d Cir. Aug. 21, 2023)). The Sixth Circuit further noted that the relator was fully aware of the government's bases for dismissal but could identify no arguments or evidence it was unable to present due to the lack of a hearing, and thus there was no reason to believe the relator was prejudiced.

B. Substantive Elements of an FCA Claim

1. Existence of a Claim

a) The Supreme Court held that reimbursement requests to a private corporation constitute FCA "claims" because the government provided a portion of the money sought.

A defendant is liable under the FCA if it "knowingly presents, or causes to be presented, a false or fraudulent *claim* for payment." 31 U.S.C. § 3729(a)(1) (emphasis added).

Whether a "request or demand" for money constitutes a "claim" under the FCA turns on whether it is presented to a federal employee or its agent (in which case it is a claim) or to a contractor, grantee, or "other recipient." *Wisconsin Bell, Inc. v. United States ex. rel. Heath,* 145 S.Ct. 498, 503 (2025) (citing 31 U.S.C. § 3729(b)(2)(A)).

If the latter, then a two-part test applies. 31 U.S.C. § 3729(b)(2)(A)(ii). The first part asks whether the money was "spent or used on the Government's behalf or to advance a Government program or interest," and the second part asks whether the government *"provides or has provided any portion* of the money . . . requested." *Id.* (emphasis added).[6]

Wisconsin Bell concerned whether reimbursement requests submitted to the FCC's E-Rate program constituted "claims" under the FCA. 145 S.Ct. at 501. The E-Rate program requires private telecommunications carriers to pay into a fund to subsidize internet and telecommunications services for schools and libraries. *Id.* Because the fund and any

[6] In addition to providing the money or any portion thereof, the second part of the test may be swapped for a showing that the government "will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(b)(2)(A)(ii)(II).

reimbursements are administered by a for-profit, non-government corporation established by Congress, the petitioner argued that reimbursement requests were not claims under the FCA.

But the government argued to the contrary because (1) the government effectively "provides" *all* monies in the E-Rate Program by mandating carriers to contribute to the fund; and (2) the government had provided at least *some* monies to the fund because the Treasury had also deposited more than $100 million—delinquent contributions the FCC and Treasury had collected from telecommunication services as well civil settlements and criminal restitution payments the DOJ collected through enforcement activities related to E-Rate program wrongdoing. *Id.* at 505–06.

A circuit split existed as to the first argument, as the Seventh Circuit had found that the government *provided* the funds by mandating payments by private carriers into the fund, while the Fifth Circuit had found the FCC's regulatory supervision insufficient to show the government provided E-Rate funds. *Id.* at 505–06; *compare Wisconsin Bell v. Heath,* 92 F.4th 654, 666 (7th Cir. 2024) with *United States ex rel. Shupe v. Cisco Sys. Inc.,* 759 F.3d 379, 387–88 (5th Cir. 2014) *(per curiam)*.

A unanimous Court ruled affirmatively and narrowly on the second argument only, finding the Treasury's deposit of nearly $100 million collected from delinquent funds and DOJ activities meant the government provided a portion of the fund's money. *Id.* at 505–06. Writing for the Court, Justice Kagan rejected any notion that (1) the Treasury merely collected and redistributed funds; and (2) even if it had, that the argument somehow undercuts the government's *providing* of those funds because the definition of an FCA claim does not concern ownership of funds. *See id.* at 508.

The Court did not resolve the circuit split regarding the first theory. So, the question remains open whether a regulatory mandate for use of private funds towards a government

program constitutes the government's *"provid[ing]* of those funds" in the context of the FCA. *Id.* at 506, 508; *see also id.* at 509 (Thomas, J., concurring) ("[t]he Court saves for another day two more difficult questions: first, whether the Government 'provides' the money that it requires private carriers to contribute" and second "whether the E-rate program's administrator is an agent of the United States.").

2. Rule 9(b) Particularity

All actions brought under the FCA require the submission of a false or fraudulent claim. False or fraudulent claims are subject to Rule 9(b)'s heightened pleading standard, which requires a complaint to "state with particularity the circumstances constituting fraud." FED. R. CIV. P. 9(b). The heightened pleading standard serves to ensure that defendants receive adequate notice to prepare their defense and to deter relators from filing frivolous claims.

Generally, courts have interpreted the heightened pleading standard to mean, at a minimum, that a complaint must specify the "who, what, when, where, and how of the fraudulent scheme." Some appellate courts have established additional requirements to satisfy Rule 9(b) for FCA claims. In the first half of 2025, the Third, Sixth, and Eleventh Circuits rendered decisions highlighting a circuit split on the degree of specificity with which plaintiffs must plead the submission of a false claim to the government.

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

The Sixth Circuit determined that broadly alleging misconduct is not enough. *See United States ex rel. VIB Partners v. LHC Grp., Inc.,* No. 24-5393, 2025 WL 1103997, at *3 (6th Cir. Apr. 14, 2025). Instead, a relator must identify one or more specific false claims that the defendants submitted to the government or details from which such submission can be strongly inferred. *See id.*

In *VIB Partners*, the relators alleged a home healthcare provider submitted false patient data to exaggerate patient needs, inflating its Medicare reimbursement rates. *Id.* at *1. The court found that the relator failed to meet the pleading requirement under Rule 9(b) by not specifying the details about the defendants' billing practices, specific dates in which alleged false claims were submitted, the alleged false claim amounts, or the individuals responsible for the submission.

Similarly, in *United States ex rel. Olsen v. Tenet Healthcare Corp.,* the Sixth Circuit found that while a single specific example of a false claim submitted to the government pursuant to the scheme would suffice, the relator failed to provide any specific information about the filing of the claims themselves. No. 24-1785, 2025 WL 1166894, at *5 (6th Cir. Ap. 22, 2025). Accordingly, the relator failed to satisfy the Rule 9(b) requirement, and the court affirmed the district court's decision to grant the defendant's motion to dismiss. *Id.* at *7.

The Eleventh Circuit also requires that "to state a viable FCA claim, a relator must allege not just a scheme, but a scheme that actually led to false claims being submitted to the government—and he must do so with particularity." *Vargas v. Lincare, Inc.,* 134 F.4th 1150, 1157 (11th Cir. 2025). The court went on to state that "invoices, billing records, and reimbursement forms" are the most direct way to satisfy the requirement of identifying a specific claim submitted to the government. *Id.*

b) The Third Circuit only requires allegations about the details of a scheme to submit false claims plus indicia of reliability that false claims were actually submitted.

Unlike the Sixth Circuit, the Third Circuit does not require relators to identify a specific claim for payment. Instead, the Third Circuit only requires the plaintiff to allege "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *United States ex rel. Hunter v. Fillmore Cap. Partners, LLC,* No. 24-1606, 2025 WL 971668, at *2 (3rd Cir. Apr. 1, 2025). In *Hunter*, the plaintiff pleaded the details of the scheme but ultimately failed to establish a "reliable indicia of fraud sufficient to support a strong inference that claims were actually submitted." *Id.* Accordingly, the complaint failed to satisfy Rule 9(b). *Id.*

Similarly, in *United States ex rel. Collado v. Bracco USA, Inc.*, the Third Circuit determined that while the plaintiff alleged how the scheme could have been used to defraud the government, the plaintiff did "not plead with particularity any 'reliable' indicia'" that the Defendants actually submitted false claims. No. 24-1668, 2025 WL 1261779, at *2 (3d Cir. May 1, 2025). Thus, the court held that the complaint fell short of satisfying Rule 9(b). *Id.*

Note that the court clarified that Rule 9(b)'s pleading requirements may be relaxed when the "factual information at issue lies exclusively within the Defendant's knowledge or control" (as the Second Circuit held in *United States ex rel. Chorches v. Am. Med. Response, Inc.,* 865 F.3d 71, 82 (2d Cir. 2017), a case we have discussed in our previous False Claims Act Year in Review publications). However, in this case, the plaintiff failed to meet even this relaxed standard because "boilerplate and conclusory allegations will not suffice." *Id.*

3. Scienter

FCA liability requires that a defendant acted "knowingly." *See* 31 U.S.C. § 3729(a)(1). The FCA "is not intended to punish honest mistakes or incorrect claims submitted through mere

negligence." *United States ex rel. Skibo v. Greer Labs., Inc.,* 841 F. App'x 527, 531 (4th Cir. 2021) (citation omitted); *see also United States ex rel. Jacobs v. Walgreen Co.,* No. 21-20463, 2022 WL 613160, at *1 (5th Cir. Mar. 2, 2022) (allegations of fraud that do not amount to "anything more than innocent mistake or negligence" are insufficient).

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

a) The Fifth Circuit held that plaintiffs do not need to plead knowledge that the falsity of a claim was material.

In U*nited States ex rel. Montcrief v. Peripheral Vascular Assocs., P.A.,* the Fifth Circuit held a defendant satisfies the FCA's scienter requirement by knowingly submitting a false claim, regardless of whether they knew the claim was material. *United States ex rel. Montcrief v. Peripheral Vascular Assocs., P.A.,* 133 F.4th 395, 408 (5th Cir. 2025).

In *Montcrief,* physicians certified CMS-1500 forms despite being "conscious of a substantial and unjustifiable risk" that required steps had not been completed prior to billing. *Id.* at 406. Based on *Schutte,* the court concluded this was sufficient to satisfy the scienter element under the FCA. *Id.* at 408. The court weighed whether *Universal Health Servs., Inc. v. United States ex rel. Escobar,* 579 U.S. 176 (2016), which suggested the scienter requirement extends to the materiality element in some cases, or *Supervalu's* statement that "the scienter requirement of the FCA is plainly directed to the falsity of the claims submitted" controls. *Id.* at 407–08 (citing *Escobar,* 579 U.S. 176 *and Supervalu,* 598 U.S. at 751 n.4.). The Fifth Circuit determined that because *Montcrief*

involved false statements like *Supervalu,* not the misleading omissions at issue in *Escobar, Schutte* controls and the scienter element did not extend to materiality.

b) The Southern District of New York clarified when parent companies can be held liable for their subsidiaries' false claims.

Corporate parents may sometimes face liability for the submission of false claims by their subsidiaries. *See United States ex rel. Bassan v. Omnicare, Inc.,* No. 1:15 cv-04179, 2025 WL 1591609, at *1 (S.D.N.Y. June 5, 2025).

In *Bassan,* the government argued that the subsidiary defendant had a "long-standing and well-known practice of dispensing non-controlled prescription drugs at certain types of [long-term care] facilities without having obtained a valid prescription." *Id.* at 2. The government sought to hold the holding parent company liable because it assumed the obligation to ensure its subsidiary's prescription practices complied with the law but failed to do so. *Id.*

The court held that the parent could indeed be held liable for the subsidiary's violations. The court first noted that, where the corporate veil has not been pierced, a parent will not be liable solely because (1) it owned the subsidiary at fault, (2) had integrated the subsidiary into its corporate structure and operations, (3) "exercised they type of normal, ordinary course oversight over a subsidiary that one would expect a parent corporation to exercise," (4) or had signed a corporate integrity agreement to implement a general set of principles. *Id.* at 4–5.

In this case, however, the court found the parent was liable because it signed an agreement with the government to improve its subsidiary's compliance policies and procedures, including those governing its drug dispensing practice; was required to and did certify through its chief compliance officer that its operations were in compliance with applicable federal health care program requirements; and was aware that relevant compliance corrections were reversed for business reasons. *Id.* at 20–22. The court also emphasized that the parent's certifications that its subsidiary's dispensing systems complied with the law despite knowledge that material deficiencies in the system had not been remedied was "akin to the 'knowing ratification of [a subsidiary's] prior policy of submitting false claims by rejecting recommendations to bring the [the subsidiary] into regulatory compliance. *Id.* at 22–23 (quoting *United States ex rel. Martino-Fleming v. South Bay Mental Health Centers,* 5840 F. Supp. 3d 103, 130 (D. Mass, May 19, 2021)).

4. Materiality

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

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

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

Escobar listed three non-exclusive factors that courts can apply when assessing materiality: (1) whether the government expressly conditions payment on compliance with a particular regulation or provision, (2) whether noncompliance goes to the "essence of the bargain" between the government and recipient, and (3) whether the government has refused to pay in response to similar violations. *Id.* at 193–95. In 2024, the First, Third, Eighth, and Ninth Circuits rendered decisions that clarified their application of the *Escobar* factors. In the first half of 2025, the Fourth Circuit and Judge Stanton of the Southern District of New York clarified the application of materiality and the *Escobar* factors.

a) The Southern District of New York held that extension of a contract despite actual knowledge of contract requirement violations is evidence those requirements are not material.

In *United States ex rel. Foreman v. AECOM,* the federal district court for the Southern District of New York considered claims the defendant violated the FCA by submitting invoices to the government based on factually false timesheets, and by employing SAMS-E/IE software ("SAMS") personnel who were not properly certified or vetted. *See* No. 16 Civ. 1960 (LLS), 2025 WL 918810, at *1 (S.D.N.Y. Mar. 26, 2025) (pending appeal). The court applied the *Escobar* factors and held that neither alleged claim was materially false. *Id.* at 3.

With respect to the alleged timesheet billing practices, the court found that none of the *Escobar* factors were satisfied. While the relator identified an array of faulty practices that were identified in a Defense Contract Audit Agency audit, the government was well aware of the audit findings and still extended the contract multiple times. *Id.* at 4. Citing *Escobar*, the court reasoned that if the government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is strong evidence that those requirements were not material. *Id.*

Regarding the improperly certified SAMS personnel allegations, the court noted the binding contract documents did not contain explicit certification or vetting requirements and that external regulatory requirements regarding qualifications for SAMS personnel did not make the lapse material. *Id.* at *4–5. The court relied on the Second Circuit's prior holding in this case, where the court found that "generic and routine appeals to the importance of a multitude of regulatory requirements" did not put a contractor "on notice of the importance of a given requirement to the government's payment decision, particularly where, as here, the government has not expressly designated compliance with that requirement as a condition of payment." *Id.* at 5 (quoting *United States ex rel. Foreman v. AECOM,* 19 F.4th 85, 111 (2d Cir. 2021)).

b) The Fourth Circuit held attempts to conceal noncompliance with requirements is evidence those requirements were material.

In *United States ex rel. Wheeler v. Acadia Healthcare Co., Inc,* the Fourth Circuit emphasized that actions taken by a government contractor to conceal its failure to comply with requirements demonstrated that the company viewed those requirements as material. 127 F.4th 472, 491 (4th Cir. 2025). The relator, a former assistant director at a clinic for healthcare companies that provided methadone-assisted treatment as part of their opioid treatment programs, alleged her employer had falsified notes for therapy sessions that did not actually occur to support fraudulent claims for reimbursement.

Drawing from the framework established in previous cases, the court found that compliance with federal methadone-assisted treatment regulations in *Wheeler* was "so central" that the government would not have paid the claims had it been aware of the violations. *Id.* Further, it is "common sense" that the government would not pay an opioid treatment clinic to provide methadone-assisted treatment unless it followed core methadone-assisted treatment regulations. *Id.* Additionally, the defendant falsified therapy records to indicate compliance with federal regulatory requirements to receive payments, and the court held that "the very act of falsifying records to feign compliance with requirements suggests that [the company]

itself thought that those requirements were material." *Id.* at 491 (quoting *United States v. Walgreens Co.,* 78 F.4th 81, 94 (4th Cir. 2023)).

C. 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 "obligation" as "an established duty, whether or not fixed, arising from" enumerated sources. 31 U.S.C. § 3729(b)(3). Simply put, reverse false claims generally consist of concealing or avoiding obligations to pay the government, as opposed to actively defrauding the government as is the case in a typical false claim scenario.

In the first half of 2025, the Second and Sixth Circuits considered the high pleading standard to establish the existence of an "obligation" for a reverse false claims suit.

1. The Second Circuit clarified that allegations of hypothetical or contingent obligations do not create an established obligation under the FCA.

In *United States ex rel. Billington v. HCL Techs. Ltd.,* the Second Circuit considered whether alleged obligations to pay higher payroll taxes and visa application fees constitute "obligations" under the FCA based on the visa applications actually submitted and the wages actually paid. 126 F.4th 799, 801 (2d Cir. 2025). The relators, former employees of the defendant information technology services company, brought a *qui tam* action alleging that the defendant defrauded the government by applying for and securing work visas for its foreign employees, but then avoiding or decreasing an obligation to pay the government in the form of (1) tax revenues when it underpaid its H-1B visa workers, and (2) visa application fees when it applied for less expensive L-1 and B-1 visas for workers who required more expensive H-1B visas.

In affirming the district court's dismissal of the case for failing to state a claim, the Second Circuit explained that, under the FCA's reverse false claims provision, liability requires an "established obligation" to pay money to the government—that is, the defendant's duty to pay must be established when it triggers an immediate and self-executing duty to pay. *Id.* With respect to relators' tax-based claim, the Second Circuit found that the defendant did not have an immediate and self-executing duty to pay higher payroll taxes because such taxes are only owed on wages *actually paid*, not hypothetical higher wages that were never paid to begin with.

Likewise, with respect to relators' visa fee-based claim, the Second Circuit found that the defendant did not have an established obligation to pay higher visa application fees for H-1B visas when the defendant never submitted H-1B visa applications for those employees, as the obligation to pay only arises when an application is actually submitted.

2. The Sixth Circuit held that relators must plead with specificity the necessary elements of a reverse false claim violation under the FCA.

In *United States ex rel. Michigan v. State Farm Mutual Automobile Ins. Co.*, the Sixth Circuit considered the amount of specificity required in asserting a reverse false claim under the FCA. No. 24-1379, 2025 WL 101639, at *3 (6th Cir. Jan. 15, 2025). *Qui tam* relators sued numerous private insurers, alleging that the defendants had knowingly made false records or statements and failed to properly report to and reimburse Medicare and Medicaid, constituting a reverse false claim.

Under the Medicare Secondary Payer Act, private insurers are the primary payers for certain medical expenses, with Medicare or Medicaid Advantage Organizations ("MAOs") acting as secondary payers. Insurers are required to report to the Centers for Medicare and Medicaid Services ("CMS") beneficiaries that may also be covered by Medicare. Here, the relators alleged the defendants knowingly made false statements or failed to report as required to avoid payments owed to the government or to MAOs.

The district court dismissed the case. The Sixth Circuit affirmed, holding that to state a reverse false claim violation under the FCA, relators must plead *with specificity* that the insurer (1) had an established duty to pay; (2) knew of this duty to pay; and (3) knowingly concealed or avoided the duty to pay. *Id.* The Sixth Circuit reasoned that the relators' complaint failed to provide sufficient details regarding when defendants incurred an obligation to pay, whether Medicare made conditional payments, or that defendants knew of such payments made by Medicare and their duty to reimburse Medicare.

D. Retaliation

The FCA's anti-retaliation provision protects whistleblowers by imposing 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 of the framework shifts the burden of proof to the employer to provide a legitimate, non-retaliatory explanation for its allegedly retaliatory action. *See id*. The third and final 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 *Chorches*, 865 F.3d at 95–98).

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 the first half of 2025, the First Circuit confirmed that FCA retaliation claims must satisfy a but-for causation threshold and that compliance employees face a heightened burden to demonstrate "protected activity."

1. The First Circuit held that FCA retaliation claims are subject to a "but-for" causation standard requiring plaintiffs to establish their protected activity was the determining factor in the adverse employment action.

In *Morgan-Lee v. Therapy Resources Mgmt., LLC,* the First Circuit considered whether the plaintiff's alleged "protected activity" was the but-for cause of her termination following a prior *qui tam* action filed by the plaintiff. 129 F.4th 93, 96 (1st Cir. 2025). The plaintiff was a former employee of the defendant healthcare and rehabilitation services company whose

responsibilities had included monitoring and supporting compliance with Medicare reimbursement. She brought an FCA retaliation action alleging that the defendant wrongfully discharged her for voicing claims of fraud or other wrongdoing. Following a bench trial, the district court ruled in favor of the defendant, finding that the plaintiff's protected activity was not the but-for cause of her termination. *Id.* at 95–96.

The First Circuit affirmed, agreeing with First and Tenth Circuit precedent that compliance employees like the plaintiff typically must do more than other employees to show that their employer knew of the protected activity. *Id.* at 97 (citing *United States ex rel. Reed v. KeyPoint Gov't Sols.,* 923 F.3d 729, 767 (10th Cir. 2019)); *see also Maturi v. McLaughlin Research Corp.,* 413 F.3d 166, 172–73 (1st Cir. 2005) (holding that "where an employee's job responsibilities involve overseeing government billings or payments, h[er] burden of proving that h[er] employer was on notice that [s]he was engaged in protected conduct should be heightened.").

In reviewing the district court's findings that the plaintiff was not terminated due to any retaliatory motive but rather was discharged due to repeated unexcused absences, her refusal to provide specifics about alleged fraudulent activity, and her pattern of erratic, confrontational, and insubordinate behavior, the First Circuit found no clear error in the district court's factual findings. Indeed, trial testimony and contemporaneous emails supported the defendant's position that the termination was for legitimate reasons and not due to any retaliatory animus. Consequently, the First Circuit concluded that the district court's findings were well supported by the record and affirmed the judgment in favor of the defendant.

E. The Anti-Kickback Statute

The FCA imposes liability for a claim that includes items and services "*resulting from* a violation of [the Anti-Kickback Statute ("AKS")]." 42 U.S.C. § 1320a-7b(g) (emphasis added). However, appellate courts have long diverged on the interpretation of the phrase "resulting from."

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

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

Some circuits have declined to clarify the standard. For example, in 2024, the Seventh Circuit refused to determine whether § 1320a-7b(g) requires a showing of but-for causation or something less since the facts at

hand would satisfy even the strictest causal test. *See Stop Illinois Health Care Fraud, LLC v. Sayeed*, 100 F.4th 899, 909 (7th Cir. 2024), *reh'g denied,* No. 22-3295, 2024 WL 2785312 (May 30, 2024).

1. The First Circuit adds to a circuit split on the causation standard that applies to AKS-premised FCA claims.

Most recently, the First Circuit joined the Sixth and Eight Circuits in adopting a "but-for" causation standard. *See United States v. Regeneron Pharm., Inc.*, 128 F.4th 324, 328 (1st Cir. 2025). The First Circuit reasoned that the phrase "resulting from" imposes a requirement of actual causality—which in ordinary course takes the form of but-for causation—unless the statute in question provides "textual or contextual indications" to the contrary. *Id.* Ultimately, the First Circuit concluded that, as to 42 U.S.C. § 1320a-7b(g), there is "no convincing 'textual or contextual' reason to deviate from the default presumption . . ." *Id*. at 336.

2. The Seventh Circuit clarifies what conduct constitutes an Illegal Referral

In *United States v. Sorensen*, the government sought to extend the AKS to treat as federal crimes a defendant's payments to advertising and marketing companies that worked with a manufacturer to sell orthopedic braces for Medicare patients. 134 F.4th 493, 496 (7th Cir. 2025). On appeal, the Seventh Circuit reversed the defendant's earlier conviction for insufficient evidence as the court distinguished "aggressive advertising efforts" from "unlawful referrals of patients." *Id.* at 504.

The AKS primarily targets payments to individuals with influence over or access to patients that let them control or influence the patients' choices about medical care—typically physicians. In less common cases involving payments to non-physicians, courts consider whether a payee leverages fluid, informal power and influence over healthcare decisions.

In the Seventh Circuit's view, there was "simply no evidence that the entities [the defendant] paid . . . leveraged any sort of informal power and influence over healthcare decisions." *Id.* at 501. Rather, the "physicians always had ultimate control over their patients' healthcare choices and applied independent judgment in exercising that control." *Id.* at 502. There were no allegations that any kickbacks were paid. *Id.* The court concluded that the defendant's payments "were made in exchange for ordinary and legal services—advertising, manufacturing, and shipping products—not for referrals." *Id.* at 504.

F. Defenses

1. The Eleventh Circuit affirmed that res judicata can bar relators from asserting FCA clams when they previously asserted related FCA retaliation claims.

The principle of *res judicata* prevents plaintiffs from bringing claims related to prior decisions, when the prior decision was (1) rendered by a court of competent jurisdiction, (2) was final, (3) involved the same parties or their privies, and (4) involved the same causes of action. *Rodemaker v. City of Valdosta Bd. of Educ.,* 110 F.4th 1318, 1324 (11th Cir. 2024). Under the FCA, a party asserting *res judicata* bears the burden of showing all of the factors are met. *Id.* at 1327.

In *Milner v. Baptist Health Montgomery*, the relator, a physician, alleged the hospital at which he worked was over-prescribing opioids and fraudulently billing the government for them. *Milner v. Baptist Health Montgomery*, 132 F.4th 1354, 1356 (11th Cir. 2025). In December 2019, he filed his first suit, alleging he was terminated as retaliation for whistleblowing, but the suit was dismissed for failure to state a claim. In April 2020, he filed a new *qui tam* action asserting the underlying violations and the district court granted dismissal on the basis of *res judicata*.

The Eleventh Circuit affirmed the dismissal. The court first analyzed the third element of the *res judicata* test: whether the cases involved the same parties. While the defendants were clearly the same, the key question was whether the relator was considered a party in the second case. *Id.* at 1358. The Fourth Circuit

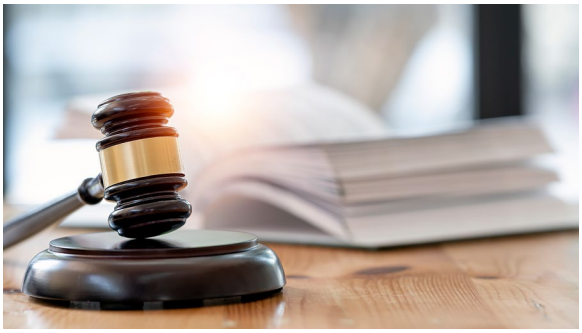
had previously reviewed the "mirror image" case—where the relator first filed a *qui tam* action before refiling an FCA retaliation action following dismissal of the first claim—and found the identity of parties element was met because relators' unrestricted participation in FCA *qui tam* actions renders them a party. *See Ragsdale v. Rubbermaid, Inc.,* 193 F.3d 1235 (11th Cir. 1999). The Eleventh Circuit followed the reasoning of *Ragsdale* and held the relator was indeed a party in the *qui tam* action, just as he was in his earlier retaliation action. *Id.*

The court next analyzed the fourth element of the *res judicata* test: whether the cases involved the same causes of action. The court again following *Ragsdale* and found that the FCA *qui tam* action and employment retaliation action both generally arose from the same nucleus of operative fact. *Id.* at 1362.

G. Constitutionality of the *Qui Tam* Provision

The possibility that the FCA's *qui tam* provision itself violates the Constitution has remained one of the hottest FCA topics in 2025. The "real party in interest" in a *qui tam* action is the government—not the relator. *United States ex rel. Eisenstein v. City of New York,* 556 U.S. 928, 930 (2009)). Thus, even where an FCA action is initiated by a private whistleblower, "the *qui tam* relator stands in the shoes of the government, which is the real party in interest." *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.,* 985 F.2d 1148, 1154 (2d Cir. 1993). Some have suggested, however, that even this is not enough to limit the relator's power.

In recent years, beginning with Justice Thomas's dissent in *United States ex rel. Polansky v. Exec. Health Res., Inc.,* 599 U.S. 419, 449–51 (2023), some have questioned whether the *qui tam* provision not only "inhabit[s] a constitutional twilight" but actually is unconstitutional. As we highlighted in our 2024 False Claims Act Year in Review publication, one district court emphatically adopted that position. In the months since, the appeal in that case has progressed and the district judge who issued the decision in that case has doubled down and furthered that holding in another case. Other courts also have wrestled with this issue.



1. Zafirov *is on appeal at the Eleventh Circuit—with strong amicus support on both sides.*

As highlighted in our 2024 False Claims Act Year in Review publication, a federal district court in Florida held last year for the first time that the FCA's *qui tam* provision is unconstitutional because, by allowing relators to "appoint[] themselves as the federal government's avatar in litigation," the FCA 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*, 751 F. Supp. 3d 1293, 1324 (M.D. Fla. 2024). This decision was issued over the strenuous objections of the relators' bar, several *amici* and the federal government.

Unsurprisingly, the government appealed this decision to the 11th Circuit. *United States ex rel. Zafirov v. Florida Med. Assocs., LLC*, Nos. 24-13581, 24-13583 (11th Cir. Oct. 29, 2024). The DOJ argued on appeal that the district court's decision should be reversed and the *qui tam* provision held constitutional. *Id.* at ECF No. 39. First, the government cited *Vermont Agency of Natural Resources v. United States ex rel. Stevens* for the proposition that the Supreme Court had already established that relators do not act as "agents of the United States," but rather as "partial assign[ees] of the government." 529 U.S. 765, 773 (2000).

The government also argued that relators are pursuing their own interests in these claims, similar to how private individuals act under statutes like Title VII. They noted the Appointments Clause applies to government employees, not private citizens, and relators do not fall within this category; and, based on

Cochise Consultancy v. United States ex rel. Hunt, relators conclusively have been deemed "private" actors. 587 U.S. 262, 1514 (2019). Thus, the government concluded that relators do not in fact exercise significant governmental authority, nor do they hold "continuing" positions like public officials. *Id.* Instead, the government framed the relator's role as "limited in time and scope" and driven by a personal interest, which is partially assigned by the government. *Id*.

The U.S. Chamber of Commerce filed an *amicus* brief arguing that the *qui tam* provision is indeed unconstitutional for violating the Vesting Clause, the Appointments Clause, and the Take Care Clause of Article II of the Constitution. The Chamber of Commerce also stressed that the historical practice of utilizing relators as an integral part of the FCA regime could not salvage the provisions' affront to Article II—unlike the conclusion the court reached in *United States v. 24th St., Inc.*, No. 18-cv-15446, 2024 WL 3272828 (D.N.J. June 30, 2024), which, as we discussed in last year's Year in Review, notes that third-party relators including *qui tam* relators are deeply entrenched in the U.S. legal system. But in the Chamber of Commerce's view, the historical pedigree of *qui tam* relators is irrelevant in the face of blatant constitutional violations.

On the flip side, several well-known and influential groups have filed briefs in support of the relator's position. *See, e.g., United States ex rel. Zafirov v. Florida Med. Assocs., LLC*, Nos. 24-13581, 24-13583, ECF Nos. 57 (American Association for Justice), 66 (Former Prosecutors), 67 (Leukemia & Lymphoma Society) (11th Cir.).

Oral argument has yet to be scheduled but, regardless of the outcome on appeal, it is likely that this case will reach the Supreme Court, potentially after *en banc* review.

2. The judge in Zafirov *doubled down on her holding that the* qui tam *provision is unconstitutional.*

In *United States ex rel. Gose v. Native Am. Serv. Corp.*, Judge Kathryn Mizelle reiterated that the *qui tam* provision was unconstitutional. No. 8:16-cv-03411, 2025 WL 1531137, at *4–5 (M.D. Fla. May 29, 2025).

In *Gose*, the relator alleged violations of Small Business Administration ownership and control regulations; however, the initial relator died while the case was pending, and his son stepped in as executor and took over the case. *Id*. at *1. Judge Mizelle ruled that this continuity demonstrated that a relator holds a continuing office, reinforcing the conclusion that the FCA's qui tam mechanism improperly vests executive authority in unsupervised private actors. *Id*. at *3–5.

The court emphasized that "[a] relator is allowed to self-appoint and then, after a state judge appoints a personal representative and a federal judge grants a motion to substitute, the

personal representative of the relator's estate takes office. That an FCA relator's replacement is dictated by a combination of state probate law and Federal Rule of Civil Procedure 25, rather than the Appointments Clause only, further confirms the unconstitutionality of the FCA's *qui tam* provision." *Id*. at *4. Notably, as discussed below, the DOJ intervened in *Gose* expressly for the purpose of defending the *qui tam* provision. *Id*. at *2.

3. Other courts have continued to reject arguments that the qui tam provision is unconstitutional.

Judge Mizelle aside, other courts have declined to follow *Zafirov* and deem the *qui tam* provision unconstitutional absent a proclamation to that effect from the U.S. Supreme Court—or at least from a circuit court of appeals.

In *United States ex rel. Publix Litig. P'ship, LLP v. Publix Super Markets, Inc*., a relator alleged that the defendant pharmaceutical company engaged in a company-wide scheme to illegally dispense controlled substances and seek reimbursement from federal programs, resulting in false claims. No. 8:22-cv-02361, 2025 WL 1381993, at *1 (M.D. Fla. May 13, 2025). The defendant moved to dismiss on the grounds that, among other things, the *qui tam* action was unconstitutional for the reasons outlined in *Zafirov. Id.* at *3.

The court denied the motion to dismiss and noted that though it "may be inclined to agree with certain aspects of the *Zafirov* decision, the overwhelming weight of the law is to the contrary at this time." *Id.* Other courts have reached the same conclusion, either disagreeing with *Zafirov* and its rationale or, at a minimum, finding that the decision cannot yet be followed until a binding court adopts its rationale. See, for example:

- *United States v. Sporn Co. Inc.*, No. 2:24-cv-00617, 2025 WL 1371272, at *17 (D. Vt. May 12, 2025) ("*Zafirov* is not binding, nor does this court find its reasoning persuasive. The court therefore denies Defendants' motion to dismiss the Amended Complaint because the FCA's qui tam provision is allegedly unconstitutional.").

- *United States v. Chattanooga Hamilton Cty. Hosp. Auth*., No. 1:21-cv-00084, 2024 WL 4784372, at *3 (E.D. Tenn. Nov. 7, 2024) ("The Court is bound by Sixth Circuit precedent, not a district-court opinion, or even a dissent or concurrence by a Supreme Court justice. . . . Furthermore, *Zafirov* is unpersuasive. Its holding relies chiefly on selections of dissents, concurrences, and law review articles.").

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

HAYNES BOONE

Austin
Charlotte
Chicago
Dallas
Dallas - North
Denver
Fort Worth
Houston
London
Mexico City
New York
Northern Virginia
Orange County
Palo Alto
San Antonio
San Francisco
Shanghai
The Woodlands
Washington, D.C.

haynesboone.com