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The False Claims Act Year in Review—Part I

By Stacy Brainin, Bill Morrison, Taryn McDonald, Neil Issar, Matthew Liptrot, Jonathan Keller, Ashley Koos, Léa Dickinson, and John Tanner*

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

I. INTRODUCTION

The False Claims Act (FCA) is the government's main civil enforcement tool for fighting fraud on the government. It was enacted during the Civil War in response to rampant fraud by private contractors billing the government for goods not delivered.

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

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

During fiscal year 2024, the government recovered $2.92 billion in settlements and judgements in FCA cases. This is an increase of $133 million

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compared to the recovery in 2023 and over $673 million more than 2022. Total recoveries since 1986—when Congress significantly strengthened the FCA—now exceed $78 billion.

DOJ further reported:

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

II. NOTABLE SETTLEMENTS

A. The Anti-Kickback Statute and the Stark Law

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

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

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

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

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

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

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

B. Pharmaceutical Manufacturers and Pharmacies

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

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

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

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

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

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

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

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

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

C. Procurement and Federal Grant Funding

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

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

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

D. Cybersecurity Requirements

Since 2021, when DOJ launched its Civil Cyber-Fraud Initiative, we have reported on settlements involving cyber-fraud and failures to safeguard person-

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

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

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

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

ally identifiable information (PII). In 2024, the government resolved a record number of cases under the initiative, confirming these types of cases remain an enforcement priority.

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

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

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

E. COVID-19 Program Fraud

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

One notable example involved a now-bankrupt lender that agreed to resolve two separate settlements by providing the government with an unsubordinated general unsecured claim for recovery of up to $120 million.[15] DOJ alleged the

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

[13] Release available at https://www.justice.gov/opa/pr/staffing-company-pay-27m-alleged-failure-provide-adequate-cybersecurity-covid19-contact.

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

[15] Release available at https://www.justice.gov/usao-ma/pr/kabbage-agrees-pay-120-million-

lender submitted thousands of false claims for loan forgiveness, loan guarantees, and processing fees to the Small Business Administration (SBA) as part of the PPP in violation of the FCA. Specifically, the lender allegedly inflated thousands of PPP loans, causing the SBA to guarantee and forgive loans in amounts that exceeded what borrowers were eligible to receive, and failed to implement appropriate fraud controls, including removing underwriting steps from its pre-PPP procedures so it could process a greater number of PPP loan applications and maximize processing fees.

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

III. UPDATE ON LEGISLATION AND ENFORCEMENT TRENDS AND POLICIES

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

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

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

The government also targeted various notable fraudulent schemes in the healthcare sector, including clinics offering unnecessary services to patients,

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resolve-allegations-it-defrauded-paycheckprotection.

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

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

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

unnecessary laboratory testing, and making false representations about COVID-19 treatment. These efforts particularly focused on defendants exploiting nursing home residents and other vulnerable populations.[19]

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

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

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

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

The government has already begun prosecuting FCA actions against healthcare providers in connection with the use of AI to suggest diagnosis codes or treatments. In one case, the government alleged scienter on the novel theory that defendants submitted false diagnoses based on a faulty data-mining algorithm despite an audit that revealed the algorithm's high error rate and unreliability.[23]

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

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

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

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

[23] https://www.justice.gov/opa/press-release/file/1444936/dl.

This case may be a preview of how the government will be poised to bring FCA enforcement actions against those who misuse AI as healthcare providers continue to experiment with how AI can change the healthcare landscape.[24]

C. Annual Inflation Adjustment to the Civil Monetary Penalty Amounts

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

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

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

IV. SIGNIFICANT JUDICIAL DECISIONS

A. Agency Deference

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

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

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

> (1) At Step 1, the court asks "whether Congress has directly spoken to the precise question at issue." If the meaning of the statute is "unambiguously expressed," then "that is the end of the matter" because the agency and court must adhere to that.
>
> (2) But "if the statute is silent or ambiguous with respect to the specific issue," then a court moves to Step 2 and asks "whether the agency's answer is based on a permissible construction of the statute."

The second step became known as "Chevron deference," as it called for courts to resist "simply impos[ing] their own construction of the statute" and

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

instead to defer to an agency's reasonable construction of a statute when the statute failed to clearly express Congress's intent.

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

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

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

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

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

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

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

In *United States ex rel. Kyer v. Thomas Health System, Inc.*, a nurse filed an FCA lawsuit against the hospital where she worked for allegedly compensating physicians based on referrals and in a manner that exceeded fair market value.

No. 2:20-cv-00732 (S.D. W.Va.). At issue was whether certain compensation relationships constituted indirect compensation arrangements in violation of the Stark law, and if so, whether those arrangements satisfied an exception. Both questions relied on regulations that have been promulgated through various rules issued by the Center for Medicare and Medicaid Services (CMS), since the Stark Law statute itself says very little.

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

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

B. Seal Requirement

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

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

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

1. Amended Complaints Do Not Need to Be Filed Under Seal

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

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

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

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

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

C. Initial Hurdles for an FCA Plaintiff

1. Pro Se Plaintiff Status

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

2. First-to-File Bar

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

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

a. The Ninth Circuit Overruled Its Precedent That the First-to-File Bar Is Jurisdictional

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

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

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

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

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

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

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

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

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

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

3. Public Disclosure Bar and Original Source Exception

The FCA's public disclosure bar prohibits qui tam suits if "substantially the same allegations or transactions" of fraud as alleged in the suit were previously disclosed in:

(i) A federal criminal, civil, or administrative hearing in which the government or its agent was a party;

(ii) A congressional, Government Accountability Office, or other federal report, hearing, audit, or investigation; or

(iii) The news media. 31 U.S.C. § 3730(e)(4)(A).

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

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

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

In 2024, the Eleventh Circuit affirmed the district court's public-disclosure dismissal of a relator's qui tam action alleging that a national bank forged mortgage loan promissory notes and submitted false reimbursement claims to the Federal National Mortgage Association (Fannie Mae) and the Federal Home

Loan Mortgage Corporation (Freddie Mac) for loan servicing costs. *See United States ex rel. Jacobs v. JP Morgan Chase Bank, N.A.*, 113 F.4th 1294, 1304 (11th Cir. 2024).

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Government Dismissal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Editor's note: This article will continue in the next issue of *Pratt's Government Contracting Law Report*.